NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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OF
NORTH CAROLINA

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

[1]Appointed 2 March 2020.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	Jerry R. Tillett	Manteo
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2	Wayland Sermons	Washington
3A	Marvin K. Blount, III	Greenville
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6A	Alma L. Hinton	Roanoke Rapids
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7A	Quentin T. Sumner	Rocky Mount
7BC	Walter H. Godwin, Jr.	Tarboro
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9	John Dunlow	Oxford
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14	Orlando F. Hudson, Jr.	Durham
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	Josephine Kerr Davis	Durham
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3B	Joshua W. Wiley	New Bern
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4	Charles H. Henry	Jacksonville
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5	Phyllis M. Gorham	Wilmington
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	Frank Jones	Wilmington
8A	Imelda J. Pate	Kinston
8B	William W. Bland	Goldsboro
13A	Douglas B. Sasser	Whiteville
13B	Jason C. Disbrow	Southport
16B	Robert F. Floyd, Jr.	Fairmont
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10	Paul C. Ridgeway	Raleigh
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	A. Graham Shirley	Raleigh
	Rebecca W. Holt	Raleigh
	Vinston M. Rozier	Raleigh
	Keith O. Gregory	Raleigh

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11A	C. Winston Gilchrist	Lillington
11B	Thomas H. Lock	Smithfield
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	Claire Hill	Fayetteville
	Gale M. Adams	Fayetteville
	Mary Ann Tally	Fayetteville
15A	D. Thomas Lambeth	Burlington
	Andy Hanford	Graham
16A	Stephan R. Futrell	Rockingham
	Dawn Layton	Rockingham
19B	Vance Bradford Long	Asheboro
	James P. Hill	Asheboro
19D	James M. Webb	Southern Pines
	Michael A. Stone	Laurinburg
20A	Kevin M. Bridges	Oakboro
20B	Jeffery K. Carpenter	Wadesboro
	N. Hunt Gwyn	Monroe
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15B	Carl R. Fox[1]	Chapel Hill
	R. Allen Baddour[2]	Chapel Hill
17A	Edwin Graves Wilson, Jr.	Eden
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17B	Angela B. Puckett	Westfield
18	John O. Craig, III	High Point
	R. Stuart Albright	Greensboro
	Susan Bray	Greensboro
	William Wood	Greensboro
	Lora C. Cubbage	Greensboro
19A	Martin B. McGee	Concord
19C	Anna Mills Wagoner	Salisbury
21	L. Todd Burke	Winston-Salem
	David L. Hall	Winston-Salem
	Eric C. Morgan	Kernersville
	Richard S. Gottlieb	Winston-Salem
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22B	Mark E. Klass	Lexington
	Lori Hamilton	Mocksville
23	Michael Duncan	Wilkesboro
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24	Gary Gavenus	Burnsville
	R. Gregory Horne	Boone
25A	Robert C. Ervin	Morganton
	Daniel A. Kuehnert	Morganton
25B	Nathaniel J. Poovey	Newton
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	Karen Eady-Williams	Charlotte
	Donnie Hoover	Charlotte
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	George Bell	Charlotte
27A	Jesse B. Caldwell, III	Gastonia
	David Phillips	Gastonia
27B	Forrest Donald Bridges	Shelby
	W. Todd Pomeroy	Lincolnton
28	Alan Z. Thornburg	Asheville
	Marvin Pope	Asheville
29A	J. Thomas Davis	Forest City
29B	Peter B. Knight	Hendersonville
30A	William H. Coward	Highlands
30B	Bradley B. Letts	Hazelwood

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Gregory P. McGuire	Raleigh
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[1]Retired 30 September 2020. [2]Became Senior Resident Judge 1 October 2020. [3]Resigned 3 August 2020. [4]Died 26 September 2020.

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1	Edgar L. Barnes (Chief)	Manteo
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	Clinton Rowe	New Bern
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	Michael C. Surles	Jacksonville
	Timothy W. Smith	Kenansville
	Christopher J. Welch	Jacksonville
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	Richard Russell Davis	Wilmington
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	Jeffrey Evan Noecker	Wilmington
	Chad Hogston	Wilmington
	Robin W. Robinson	Wilmington
	Lindsey L. McKee	Wilmington
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	W. Turner Stephenson, III	Roanoke Rapids
	Teresa R. Freeman	Roanoke Rapids
	Vershenia B. Moody	Windsor
7	William Charles Farris (Chief)	Wilson
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	Pell C. Cooper	Rocky Mount
	Anthony W. Brown	Spring Hope
	Wayne S. Boyette	Tarboro
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	Joseph E. Brown, III	Wilson

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8	Elizabeth A. Heath (Chief)	Kinston
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	Curtis Stackhouse	Goldsboro
	Annette W. Turik	Kinston
	Jonathon Sergeant	Kinston
9	John W. Davis (Chief)	Louisburg
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	John H. Stultz, III	Roxboro
	Adam S. Keith	Louisburg
	Caroline S. Burnette	Henderson
	Benjamin S. Hunter	Louisburg
	Sarah K. Burnette	Oxford
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	Debra Ann Smith Sasser (Chief)[2]	Raleigh
	Monica M. Bousman	Garner
	Kris D. Bailey	Cary
	Lori G. Christian	Raleigh
	Christine M. Walczyk	Raleigh
	Eric Craig Chasse	Raleigh
	Anna Elena Worley	Raleigh
	Ned Wilson Mangum	Raleigh
	Margaret Eagles	Raleigh
	Michael J. Denning	Raleigh
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	Jefferson G. Griffin	Raleigh
	Sam S. Hamadani	Raleigh
	Ashleigh P. Dunston	Raleigh
	J. Brian Ratledge	Raleigh
	David K. Baker, Sr.	Raleigh
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	O Henry Willis, Jr.	Dunn
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	Resson O. Faircloth, II	Erwin
	Paul A. Holcombe	Smithfield
	Caron H. Stewart	Smithfield
	Mary H. Wells	Smithfield
	Joy A. Jones	Smithfield
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	Willie Fred Gore	Whiteville
	C. Ashley Gore	Whiteville
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	Doretta Walker	Durham
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	Amanda L. Maris	Durham
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	Dave Hall	Durham
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	Steven H. Messick	Burlington
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15B	Joseph M. Buckner (Chief)[5]	Chapel Hill
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	David Sherrill	Greensboro

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	Brian K. Tomlin	Greensboro
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	Nathaniel E. Knust	Concord
	Juanita Boger-Allen	Concord
	Steve Grossman	Concord
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	Robert M. Wilkins	Asheboro
	Sarah N. Lanier	Asheboro
	J. Brooke Schmidly	Asheboro
19C	Charles E. Brown (Chief)	Salisbury
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	Roy Marshall Bickett, Jr.	Salisbury
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	Gordon A. Miller	Winston-Salem
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	Christy Townley Mann	Charlotte
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	Kimberly Y. Best-Staton	Charlotte
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	Sean Smith	Charlotte
	Matt Osman	Charlotte
	Gary Henderson	Charlotte
	David Strickland	Charlotte
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27A	John K. Greenlee (Chief)	Gastonia
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	James A. Jackson	Gastonia
	Michael K. Lands	Gastonia
	Richard Abernethy	Gastonia
	Pennie M. Thrower	Gastonia
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	Jeanette R. Reeves (Chief)[16]	Shelby
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	Michelle McEntire[17]	Graham
29B	Thomas M. Brittain, Jr. (Chief)	Mills River
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	Charles W. McKeller	Brevard
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30	Richard K. Walker (Chief)	Hayesville
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	Roy Wijewickrama	Waynesville
	Kristina L. Earwood	Waynesville
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Jerry Waddell	Bryson City
Fredrick B. Wilkins, Jr.	Reidsville

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Samuel Cathey	Charlotte
Ronald L. Chapman	Charlotte
Albert A. Corbett, Jr.	Smithfield
Linda Falls	Durham
Daniel Fredrick Finch	Oxford
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James R. Fullwood	Raleigh
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William K. Hunter	High Point
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J. Larry Senter	Raleigh
Margaret L. Sharpe	Greensboro
R. Dale Stubbs	Clayton
Leonard W. Thagard	Clinton
Charles M. Vincent	Greenville

[1]Retired 31 August 2020. [2]Became Chief District Court Judge 1 September 2020. [3]Retired on 31 July 2020. [4]Sworn in 1 September 2020. [5]Retired 31 July 2020. [6]Became Chief District Court Judge 1 August 2020. [7]Sworn in 3 July 2020. [8]Retired 31 July 2020. [9]Sworn in 1 October 2020. [10]Retired 31 July 2020. [11]Became Chief District Court Judge 1 August 2020. [12]Retired 31 March 2020. [13]Became Chief District Court Judge 1 April 2020. [14]Sworn in 30 September 2020. [15]Retired 31 July 2020. [16]Became Chief District Court Judge 1 August 2020. [17]Sworn in 1 September 2020. [18]Resigned 23 August 2020.

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Marsden Crawley
Regina Cucurullo
Amber Davis
Thomas Hill Davis
Adrian Dellinger
Torrey Dixon
Milind Dongre
Justin Eason
Brittany Edwards
Joseph E. Elder
Robert Ennis
Jonathan Evans
Forrest Fallanca
Thomas Felling
Lisa Finkelstein
Montgomery Fletcher
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Elizabeth Forrest
Heather H. Freeman
Terrence D. Friedman
Marilyn Fuller
Erin Gibbs
Norlan Graves
Deborah Greene
Benjamin Gurlitz
Heather Haney
Donna Hart
Kathryne Hathcock
Andrew Hayes
Jessica Helms
Michael Henry
Martin Hodgins
Matthew Holloway
Erin Hukka
Eric Hunt
Derek Hunter
Joseph Hyde
Elizabeth Jenkins
Erika Jones
Colin Justice
Alvin Keller
Jaren Kelly
Anne E. Kirby
Brent D. Kiziah
Lewis Lamar
Catherine Laney
Donald Laton
Leeanne Lawrence
Sherri Lawrence
Kyu Eun Lee
Rebecca E. Lem
Matthew Liles
Wendy Lindberg
Jeremy Lindsley
Grace Linthicum
Stephanie Lloyd
Liliana Lopez
Jessica Macari
William Maddrey
Munsahe Magarira
Katherine McCraw
Kindelle McCullen
Jarrett McGowan
Neal McHenry
Alan McInnes
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Christopher McLennan
Michael Shawn Maier
Mary Maloney
Lee Miller
Kelly Ann Moore
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James Wilson
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Kyla Wonder
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DISTRICT ATTORNEYS

District	District Attorney	Address
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2	Seth Edwards	Washington
3	Faris Dixon	Greenville
4	Scott Thomas	New Bern
5	Ernie Lee	Jacksonville
6	Ben David	Wilmington
7	Valerie Asbell	Winton
8	Robert Evans	Rocky Mount
9	Matt Delbridge	Goldsboro
10	Lorrin Freeman	Raleigh
11	Mike Waters	Oxford
12	Vernon Stewart	Lillington
13	Susan Doyle	Smithfield
14	Billy West	Fayetteville
15	Jon David	Bolivia
16	Satana Deberry	Durham
17	Sean Boone	Graham
18	Jim Woodall	Hillsborough
19	Kristy Newton	Raeford
20	Matt Scott	Lumberton
21	Reece Saunders	Rockingham
22	Jason Ramey	Wentworth
23	Ricky Bowman	Dobson
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27	Brandy Cook	Salisbury
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29	Maureen Krueger	Carthage
30	Trey Robison	Monroe
31	Jim O'Neill	Winston-Salem
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39	Mike Miller	Shelby
40	Todd Williams	Asheville
41	Ted Bell	Rutherfordton
42	Greg Newman	Hendersonville
43	Ashley Hornsby Welch	Franklin

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District	Public Defender	Address
1	Thomas P. Routten	Elizabeth City
2	Thomas P. Routten	Washington
3A	Robert C. Kemp, III	Greenville
3B	Daniel E. Potter	New Bern
5	Jennifer Harjo	Wilmington
10	Deonte L. Thomas	Raleigh
12	Cynthia Page Black	Fayetteville
14	Dawn Y. Baxton	Durham
15B	Susan Seahorn	Hillsborough
16A	Jonathan L. McInnis	Laurinburg
16B	Ronald H. Foxworth	Lumberton
18	John F. Nieman	Greensboro
21	Paul James	Winston-Salem
26	Kevin P. Tully	Charlotte
27A	Stuart C. Higdon	Gastonia
28	Samuel A. Snead	Asheville
29A	Laura A. Powell	Rutherfordton
29B	Beth W. Stang	Brevard

ORDERS

PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

BANYAN GW, LLC

v.

WAYNE PREPARATORY ACADEMY CHARTER SCHOOL, INC. AND ITS BOARD OF DIRECTORS; SHARON THOMPSON, CHAIR OF THE BOARD OF DIRECTORS; AND JOHN ANKENEY AND LUCIUS J. STANLEY, AS MEMBERS OF THE BOARD OF DIRECTORS; AND VERTEX III, LLC

No. 188A18-2

Filed 3 April 2020

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, No. COA18-378, 2019 WL 438327 (N.C. Ct. App. Feb. 5, 2019), affirming an order granting partial summary judgment in favor of plaintiff and denying defendant Wayne Preparatory Academy Charter School, Inc.'s motion for summary judgment entered on 6 November 2017 by Judge Carl R. Fox in Superior Court, Wake County. On 30 October 2019, the Supreme Court allowed defendant Wayne Preparatory Academy Charter School, Inc.'s petition for discretionary review of additional issues. Heard in the Supreme Court on 10 March 2020.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster, for plaintiff-appellee Banyan GW, LLC.

Haithcock, Barfield, Hulse & Kinsey, P.L.L.C., by Glenn A. Barfield, and Robinson Bradshaw & Hinson, by Richard A. Vinroot, for defendant-appellant Wayne Preparatory Academy Charter School, Inc.

No brief for defendant-appellees Board of Directors, Sharon Thompson, John Ankeney, Lucius J. Stanley, and Vertex III, LLC.

PER CURIAM.

As to the appeal of right based on the dissenting opinion, we affirm the majority decision of the Court of Appeals. We conclude that the petition for discretionary review as to additional issues was improvidently allowed. Therefore, the decision of the Court of Appeals as to these matters remains undisturbed.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

CABARRUS COUNTY BOARD OF EDUCATION
v.
BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM; DALE R. FOLWELL, STATE TREASURER, IN HIS OFFICIAL CAPACITY; STEVEN C. TOOLE, DIRECTOR, RETIREMENT SYSTEMS DIVISION, IN HIS OFFICIAL CAPACITY

No. 371PA18

Filed 3 April 2020

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA17-1019, 2018 WL 4441260 (N.C. Ct. App. Sept. 18, 2018), affirming a judgment entered on 30 May 2017 by Judge James E. Hardin, Jr., in Superior Court, Wake County. Heard in the Supreme Court on 9 December 2019.

Michael Crowell; and Tharrington Smith, LLP, by Deborah R. Stagner and Lindsay V. Smith, for petitioner-appellee.

Joshua H. Stein, Attorney General, by Matthew W. Sawchak, Solicitor General, Blake W. Thomas, Deputy General Counsel, and Ryan Y. Park, Deputy Solicitor General, for respondent-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Elizabeth L. Troutman and Jill R. Wilson; and Allison Brown Schafer for North Carolina School Boards Association, amicus curiae.

PER CURIAM.

For the reasons stated in *Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer*, No. 369PA18 (N.C. Apr. 3, 2020), the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice NEWBY dissents for the reasons stated in his dissenting opinion in *Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer*, No. 369PA18 (N.C. Apr. 3, 2020).

CABARRUS COUNTY BOARD OF EDUCATION
v.
DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; DALE R. FOLWELL, STATE TREASURER, IN HIS OFFICIAL CAPACITY; AND STEVEN C. TOOLE, DIRECTOR, RETIREMENT SYSTEMS DIVISION, IN HIS OFFICIAL CAPACITY

No. 369PA18

Filed 3 April 2020

Administrative Law—state employee retirement—contribution-based cap factor—exemption from Administrative Procedure Act—implicit

The adoption of a contribution-based cap factor by the Retirement Systems Division of the Department of the State Treasurer's Board of Trustees was subject to the rulemaking provisions of the Administrative Procedure Act (APA) where there was no indication that the General Assembly intended to implicitly exempt adoption of the cap factor from the APA. The cap factor adopted in this case was void for the Board's failure to utilize the provisions of the APA.

Justice NEWBY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, published decision of the Court of Appeals, 821 S.E.2d 196 (N.C. Ct. App. 2018), affirming a judgment entered on 30 May 2017 by Judge James E. Hardin, Jr., in Superior Court, Wake County. Heard in the Supreme Court on 9 December 2019.

Michael Crowell; and Tharrington Smith, LLP, by Deborah R. Stagner and Lindsay V. Smith, for petitioner-appellee.

Joshua H. Stein, by Matthew W. Sawchak, Solicitor General, Blake W. Thomas, Deputy General Counsel, Ryan Y. Park and James W. Doggett, Deputy Solicitors General, and Katherine A. Murphy, Assistant Attorney General, for respondent-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Elizabeth L. Troutman and Jill R. Wilson; and Allison Brown Schafer for North Carolina School Boards Association, amicus curiae.

ERVIN, Justice.

This case involves a dispute between petitioner Cabarrus County Board of Education and the Retirement Systems Division of the Department of the State Treasurer; State Treasurer Dale R. Folwell,[1] acting in his official capacity; and former executive director of the Retirement System, Steven C. Toole,[2] acting in his official capacity, concerning the manner in which the cost of pensions for certain retirees should be funded. Respondents manage the Teachers' and State Employees' Retirement System, which pays eligible retired state employees a fixed monthly pension based upon the retiree's four highest-earning consecutive years of state employment.

In 2014, the General Assembly enacted An Act to Enact Anti-Pension-Spiking Legislation by Establishing a Contribution-Based Benefit Cap, S.L. 2014-88, § 1, 2014 N.C. Sess. Laws 291, which is codified, in pertinent part, at N.C.G.S. § 135-5(a3). The Act establishes a retirement benefit cap applicable to certain employees with an average final compensation of $100,000 or more per year whose retirement benefit payment would otherwise be significantly greater than the contributions made by that retiree during the course of his or her employment with the State. *Id.* In order to calculate the benefit cap applicable to each retiree, the Act directs the Retirement System's Board of Trustees to "adopt a contribution-based benefit cap factor recommended by the actuary, based upon

1. At the time that the Board of Education initiated this proceeding, Janet Cowell served as State Treasurer. As a result of the fact that he became State Treasurer on 1 January 2017, Mr. Folwell was substituted as a named respondent in lieu of Ms. Cowell.

2. Mr. Toole was replaced as the executive director of the Retirement Systems Division by Interim Executive Director Thomas G. Causey in May 2019. Pursuant to N.C. R. App. P. 38(c), Mr. Causey is automatically substituted as a respondent for Mr. Toole. However, consistent with the custom of this Court, under which the caption of the case as it appeared in the trial court is deemed controlling, we continue to list Mr. Toole as a party-respondent.

actual experience, such that no more than three-quarters of one percent (0.75%) of retirement allowances are expected to be capped" and to calculate the contribution-based benefit cap for each retiring employee by converting the employee's total contributions to the Retirement System to a single life annuity and multiplying the cost of such an annuity by the cap factor. *Id.* In the event that the retiree's expected pension benefit exceeds the calculated contribution-based benefit cap, the Retirement System is required to "notify the [retiree] and the [retiree's] employer of the total additional amount the [retiree] would need to contribute in order to make the [retiree] not subject to the contribution-based benefit cap." N.C.G.S. § 135-4(jj) (2019). At that point, the retiree is afforded ninety days from the date upon which he or she received notice of the additional payment amount or the date of his or her retirement, "whichever is later, to submit a lump sum payment to the annuity savings fund in order for the [R]etirement [S]ystem to restore the retirement allowance to the uncapped amount." *Id.* The retiree's employer is entitled to "pay[ ] all or part of the . . . amount necessary to restore the [retiree's] retirement allowance to the pre-cap amount." *Id.*

According to N.C.G.S. § 135-6(*l*), "[t]he Board of Trustees shall designate an actuary who shall be the technical adviser of the Board of Trustees on matters regarding the operation of the funds created by the provisions of this Chapter." N.C.G.S. § 135-6(*l*) provides that "all the assumptions used by the [Retirement] System's actuary, including mortality tables, interest rates, annuity factors, and employer contribution rates, shall be set out in the actuary's periodic reports or other materials provided to the Board of Trustees," with the materials to be "accepted by the Board [of Trustees]," N.C.G.S. § 135-6(*l*), and adopted by the Board of Trustees by means of an informal board resolution memorialized in its minutes pursuant to the Administrative Code. *See* 20 N.C. Admin. Code 2B.0202(a) (1981) (stating that "[a]ctuarial tables and assumptions will be adopted by the [B]oard of [T]rustees after the presentation of the recommendations of the actuary by including the tables, rates, etc. in the minutes of the [B]oard [of Trustees] with the resolution adopting said tables, rates or assumptions").

The Board of Trustees hired Larry Langer and Michael Ribble of Buck Consultants to serve as the "[c]onsulting [a]ctuary." At a meeting held by the Board of Trustees on 23 October 2014, Mr. Langer and Mr. Ribble presented certain calculations and assumptions, including summaries of expected retirement patterns, based upon a 2012 valuation of the Retirement System's assets and liabilities. The actuary then recommended a cap factor of 4.8, which the Board of Trustees unanimously approved.

Prior to his retirement on 1 May 2015, Dr. Barry Shepherd served as the superintendent of Cabarrus County Schools. In light of his employment history, Dr. Shepherd was eligible to receive benefits from the Retirement System. At the time of his retirement, the Retirement System determined that Dr. Shepherd's pension benefits were subject to the contribution-based benefit cap and informed both Dr. Shepherd and the Board of Education that an additional contribution to the Retirement System in the amount of $208,405.81 would be required in order for Dr. Shepherd to receive the full retirement benefit to which he would have otherwise been entitled. Upon receiving this information, the Board of Education submitted the required amount on Dr. Shepherd's behalf.

On 18 October 2016, the Board of Education filed a request for a declaratory ruling asking that the invoice and the cap factor used to calculate the amount shown on the invoice be declared "void and of no effect because the [Board of Trustees] did not follow the rule making procedures of . . . the Administrative Procedure Act." According to the Board of Education, the cap factor was "not an actuarial assumption under 20 N.C. Admin. Code 02B.0202" and was not, for that reason, "exempt from the rule making procedures of the [Administrative Procedure Act]." On 17 November 2016, Mr. Toole denied the Board of Education's request on the grounds that the Board of Trustees "ha[d] statutory authority to adopt various recommendations of its actuary" and that its "adoption of a cap factor for the contribution-based benefit cap . . . based upon the recommendations of its actuary, [was] not void."

On 16 December 2016, the Board of Education filed a petition for judicial review in the Superior Court, Cabarrus County, in which it sought a declaratory ruling that (1) "the cap factor is a rule within the meaning of [N.C.]G.S. [§] 150B-2(8a) and that it may be adopted by the . . . Board of Trustees and implemented by the Retirement System [ ] . . . only by complying with the rule making procedures of Article 2A of the [Administrative Procedure Act]"; that (2) "the cap factor adopted by the . . . Board of Trustees . . . is void and of no effect because of the failure of the [Board of T]rustees to follow the rule making procedures of Article 2A of the [Administrative Procedure Act]"; that (3) "the respondents may not implement [N.C.]G.S. [§] 135-5(a3) until a cap factor is adopted in compliance with the rule making procedures of Article 2A of the [Administrative Procedure Act]"; and that (4) "the Retirement System['s] . . . assessment of $208,405.81 against [the Board of Education] is void because of the failure of respondents to adopt a cap factor lawfully." This case was subsequently transferred to the Superior Court, Wake County, by consent of the parties.

On 25 April 2017, the Board of Education moved for summary judgment in its favor. On 30 May 2017, the trial court entered an order granting summary judgment in favor of the Board of Education on the grounds that (1) "[t]he Board of Trustees' adoption of the cap factor in [N.C.]G.S. [§] 135-5(a3) is subject to rule making under the [Administrative Procedure Act]"; (2) "respondents' denial of petitioner's [r]equest for a [d]eclaratory [r]uling was in error as a matter of law"; and (3) "[t]he substantial rights of petitioner have been prejudiced by the respondents' decision." As a result, the trial court determined that the Board of Education was "entitled to have this Court declare that the Board of Trustees' adoption of the cap factor on October 23, 2014, and adoption of the new factor on October 22, 2015, are void and of no effect."[3] Respondents noted an appeal to the Court of Appeals from the trial court's order.

In seeking relief from the trial court's order before the Court of Appeals, respondents argued that the General Assembly had intended that the cap factor be adopted by the Board of Trustees by resolution, rather than by the use of Administrative Procedure Act-compliant rulemaking procedures. Respondents argued that the General Assembly had expressly delineated the functions that required the use of rulemaking procedures in Article 1, Chapter 135 of the General Statutes and that the list of functions contained in that chapter did not include the adoption of actuarial recommendations. In addition, respondents contended that the Administrative Procedure Act did not override the statutory provisions governing the operation of the Retirement System, which spell out specific administrative procedures that must be used in connection with the adoption of actuarial recommendations. Finally, respondents argued that the trial court had erred by failing to defer to the Retirement System's interpretation of the relevant statutory provisions and that the Retirement System had traditionally interpreted the relevant statutory provisions to allow for the adoption and approval of actuarial tables, rates, and assumptions by means of resolutions adopted by the Board of Trustees rather than through the promulgation of an Administrative Procedure Act-compliant rule.

In affirming the trial court's order, the Court of Appeals began by noting that respondents had not challenged the trial court's conclusion

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3. At a meeting held on 22 October 2015, the Board of Trustees discussed the establishment of a new cap factor. At that meeting, Mr. Langer and Mr. Ribble presented updated actuarial data. Based upon this data, the actuary proposed new assumptions and recommended a range of cap factors from 4.2 to 4.8. At the conclusion of the actuary's presentation, the Board of Trustees unanimously adopted a new cap factor of 4.5.

that "[t]he cap factor meets the [Administrative Procedure Act's] definition of a rule in that it is a regulation or standard adopted by the Board [of Trustees] . . . to implement [N.C.]G.S. [§] 135-5(a3)" and that respondents had, instead, argued that "[t]he General Assembly has distinguished functions that require rule[ ]making from functions that do not" and intended to exempt the cap factor determination from the coverage of the rulemaking provisions of the Administrative Procedure Act "by implication." *Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer*, 821 S.E.2d 196, 201 (N.C. Ct. App. 2018). The Court of Appeals rejected this aspect of respondents' position on the grounds that the General Assembly had not explicitly exempted the operations of the Board of Trustees or the adoption of the cap factor from the rulemaking provisions of the Administrative Procedure Act, as it had done with respect to various other agencies and administrative actions in N.C.G.S. § 150B-1(c) and (d). *Id.* (citing *Vass v. Board of Trustees*, 324 N.C. 402, 408, 379 S.E.2d 26, 29 (1989) (stating that, "[h]ad the General Assembly intended that [the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan] be excluded from the requirements of the [Administrative Procedure] Act, we must assume that it would have inserted a specific provision in some statute expressly stating this intent" (citing *Lemons v. Old Hickory Council*, 322 N.C. 271, 276–77, 367 S.E.2d 655, 658 (1988))); *N. Buncombe Ass'n of Concerned Citizens v. Rhodes*, 100 N.C. App. 24, 27–28, 394 S.E.2d 462, 465 (1990) (holding that "the trial court lacked subject matter jurisdiction . . . because the plaintiffs failed to exhaust their administrative remedies" under the Administrative Procedure Act given that the Department of Environment, Health, and Natural Resources "is not among those agencies which the [Administrative Procedure Act] specifically exempts from its provisions")).

In addition, the Court of Appeals declined to hold that the General Assembly had implicitly exempted the adoption of the cap factor from the ambit of the rulemaking provisions of the Administrative Procedure Act on the grounds that the only State agency whose operations had been deemed to be entitled to that status was the North Carolina State Bar. *Id.* at 203; *see also Bring v. N.C. State Bar*, 348 N.C. 655, 501 S.E.2d 907 (1998) (holding, by implication, that the rulemaking provisions of the Administrative Procedure Act do not apply to the State Bar); *N.C. State Bar v. Rogers*, 164 N.C. App. 648, 596 S.E.2d 337 (2004) (holding, by implication, that the adjudicatory provisions of the Administrative Procedure Act do not apply to the State Bar). In reaching this conclusion, the Court of Appeals noted that, in *Rogers*, it had "recognized that the General Assembly enacted a distinct, thorough, complete, and

self-contained disciplinary process by which the State Bar—through the [Disciplinary Hearing Commission]—was mandated to initiate and pursue investigations and hearings as required to police and regulate attorney conduct" and that the existence of this complete and self-contained process, which "include[d] procedural rules[,] . . . left no room for application of [Administrative Procedure Act] procedures." *Cabarrus Cty. Bd. of Educ.*, 821 S.E.2d at 205. Similarly, in addressing our decision in *Bring*, the Court of Appeals noted that "the organic statute at issue [in that case] . . . established a rule making procedure completely independent from that contained in the [Administrative Procedure Act,]" making it "clear that the specific rule making provisions enacted for proceedings governed by the State Bar controlled," especially given that the statutory provisions at issue in *Bring* contained "adequate procedural safeguards . . . to assure adherence to the legislative standards" and "a sufficient standard to guide the Board [of Law Examiners]" in exercising its rulemaking authority. *Id.* at 205–06 (quoting *Bring*, 348 N.C. at 659, 501 S.E.2d at 910). In view of the fact that Article 1, Chapter 135 of the General Statutes "includes nothing approaching the level of independent rule making mandated by the General Assembly for the State Bar," the Court of Appeals rejected respondents' contention that the applicability of the rulemaking procedures contained in the Administrative Procedure Act should be determined on a "line-by-line basis . . . by analyzing each individual sentence or clause of a statutory provision." *Id.* at 206 (emphasis omitted).

Furthermore, the Court of Appeals determined that "[t]he requirement that the actuary submit proposed cap factors to the Board [of Trustees] for adoption does not constitute a separate procedure for rule making purposes" sufficient to render the rulemaking provisions of the Administrative Procedure Act inapplicable. *Id.* at 207. Instead, the Court of Appeals concluded that "[t]his requirement merely insures that the cap factor adopted by the Board [of Trustees] is based upon professionally determined assumptions and projections, and that there will be sufficient documentation to satisfy the requirements of Chapter 135, the [Administrative Procedure Act], and the State Budget Act." *Id.* at 207–08. After noting that Article 1, Chapter 135 of the General Statutes does not define the term "adopt" and that the Administrative Procedure Act explicitly defined that term as meaning "to take final action to create, amend, or repeal *a rule*," the Court of Appeals held that "the word 'adopt' in N.C.G.S. § 135-5(a3) has the same meaning" that it does when it is used in the Administrative Procedure Act. *Id.* at 208. The Court of Appeals further held that, "any time the word 'adopt' is used, it expressly and necessarily *requires an associated rule*," citing N.C.G.S.

§ 150B-2(1b) (2017). *Id.* Similarly, after noting that Article 1, Chapter 135 of the General Statutes does not define the term "rule," the Court of Appeals held that "the cap factor falls within the [Administrative Procedure Act's] definition of a 'rule' " and that the General Assembly did not intend to modify or amend the Administrative Procedure Act by implication at the time that it prescribed the procedures to be utilized in connection with the adoption of a cap factor. *Id.*

The Court of Appeals also rejected respondents' related arguments that the Board of Trustees "understood the cap factor to be an actuarial assumption or rate, or that it adopted the cap factor pursuant to the provisions of 20 N.C. Admin. Code 2B.0202," and that the Board of Trustees' interpretation of the relevant statutory provisions to this effect should be given deference. *Id.* at 209 (citing *Wells v. Consol. Judicial Ret. Sys. of N.C.*, 354 N.C. 313, 319, 553 S.E.2d 877, 881 (2001) (stating that "it is ultimately the duty of courts to construe administrative statutes" and that "courts cannot defer that responsibility to the agency charged with administering those statutes" (citing *State ex rel. Utils. Comm'n v. Pub. Staff*, 309 N.C. 195, 306 S.E.2d 435 (1983))). The Court of Appeals was not persuaded by respondents' arguments that subjecting the adoption of a cap factor to formal rulemaking requirements would result in "unnecessar[y] inefficien[cies]" and serve no useful purpose on the grounds that the Court of Appeals "is not the proper entity to address those arguments" and that the "[w]eighing . . . [of] public policy considerations is in the province of our General Assembly" instead. *Id.* at 209–10 (quoting *Wynn v. United Health Servs./Two Rivers Health-Trent Campus*, 214 N.C. App. 69, 79, 716 S.E.2d 373, 382 (2011)). As a result, for all of these reasons, the Court of Appeals affirmed the trial court's order. On 27 March 2019, this Court allowed respondents' petition for discretionary review of the Court of Appeals' decision.

In seeking to persuade this Court to reverse the Court of Appeals' decision, respondents begin by arguing that the General Assembly had stated in N.C.G.S. § 135-5(a3) that actuarial decisions need not be made through the use of Administrative Procedure Act-compliant rulemaking procedures and that, on the contrary, the Board of Trustees had the authority to follow N.C.G.S. § 135-6(l) in making any required actuarial decisions. In support of this contention, respondents direct our attention to *Bring*, in which the Board of Law Examiners adopted a set of procedures for use in determining the identity of those persons eligible to take the bar examination and a list of law schools that had been approved by the American Bar Association that it presented to the State Bar Council and the Chief Justice for approval in reliance upon N.C.G.S.

§ 84-24 (providing that "[t]he Board of Law Examiners, subject to the approval of the [State Bar] Council shall by majority vote, from time to time, make, alter and amend such rules and regulations for admission to the [State] Bar as in their judgment shall promote the welfare of the State and the profession") despite the fact that nothing in the relevant statutory provisions explicitly displaced the Administrative Procedure Act. *Bring*, 348 N.C. at 657–60, 501 S.E.2d at 908–10. In determining that the statutorily established procedural requirements contained in Chapter 84 of the General Statutes superseded the rulemaking procedures required by the Administrative Procedure Act, this Court recognized that the Board of Law Examiners was an expert body with specialized knowledge that was better equipped to make decisions concerning the suitability of applicants to take the bar examination than the General Assembly. *Id.* at 659, 501 S.E.2d at 910. Similarly, respondents assert that the actuary in this case provided the Board of Trustees with an analysis of the relevant information and a recommendation pursuant to N.C.G.S. § 135-6(*l*) and that the Board of Trustees had accepted the information and recommendations provided by the actuary, recorded its action in the meeting minutes, and begun implementing the cap factor. As a result, respondents contend that our decision in *Bring* necessitates a conclusion that the Board of Trustees was not required to utilize the rulemaking procedures specified in the Administrative Procedure Act in adopting the cap factor.

Secondly, respondents contend that the Court of Appeals erred by holding that specific procedural statutes, such as N.C.G.S. § 135-6(*l*), only supersede the rulemaking provisions of the Administrative Procedure Act in the event that they "left no room" for the application of those procedures, citing *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 322, 735 S.E.2d 300, 305 (2012) (stating that, "when two statutes arguably address the same issue, one in specific terms and the other generally, the specific statute controls" (citing *State ex rel. Utils. Comm'n v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 193 (1977))), and decisions from federal courts. As additional support for this contention, respondents assert that "the Court of Appeals allowed a generic statute to displace a specialized statute written for a specific kind of agency action" contrary to this Court's decision in *Nat'l Food Stores v. N.C. Bd. of Alcoholic Control*, 268 N.C. 624, 151 S.E.2d 582 (1966), in which we held that a specific statutory provision governing the sale of alcohol to minors superseded a more generic statutory provision when the two statutory provisions conflicted with each other. According to respondents, requiring the Board of Trustees to disregard N.C.G.S. § 135-6(*l*) in favor of the rulemaking provisions of

the Administrative Procedure Act contravenes the General Assembly's intent, citing *LexisNexis Risk Data Mgmt. Inc. v. N.C. Admin. Office of the Courts*, 368 N.C. 180, 187, 775 S.E.2d 651, 656 (2015), and *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014). Respondents argue that "the rationale for applying the more specific statute is particularly strong when that statute was enacted after the generic one," citing *Nat'l Food Stores* (noting that the specific statute at issue in that case had been enacted ten years after the enactment of the general statute), as is the case in this instance given that the present Administrative Procedure Act rulemaking provisions were enacted in 1991, while N.C.G.S. § 135-6(*l*) was enacted in 2012. In addition, respondents contend that, contrary to the Court of Appeals' decision in this case, nothing requires that the specific statute be "distinct, thorough, complete, and self-contained" in order for it to implicitly supersede the Administrative Procedure Act, citing *Hughey v. Cloninger*, 297 N.C. 86, 89–92, 253 S.E.2d 898, 900–02 (1979), and *Piedmont Publ'g Co. v. City of Winston-Salem*, 334 N.C. 595, 434 S.E.2d 176 (1993), or that the specific statute be read *in pari materia* with the general statute, citing *High Rock Lake*, 366 N.C. at 320–22, 735 S.E.2d at 304–05. Simply put, respondents claim that the Court of Appeals' decision "cannot be reconciled with this Court's more-specific-statute jurisprudence," citing *High Rock Lake*, *Nat'l Food Stores*, and *Bring*, and that the logic upon which the Court of Appeals relied "would have produced the opposite result in *Bring*."

Furthermore, respondents contend that there is ample evidence indicating that the General Assembly did not intend that the cap factor be established using Administrative Procedure Act-compliant rulemaking procedures. More specifically, respondents note that, while "the legislature explicitly required the [Board of T]rustees to use rulemaking to define how the [R]etirement [S]ystem will report to employers on probable cases of pension spiking[,] . . . the section of the session law that describes setting the cap factor makes no mention of rulemaking." Respondents assert that this "drafting pattern[,] . . . [which] use[s] . . . key words in one place but not elsewhere[,] bars an interpretation that injects the key words where the legislature has omitted them," citing *Fid. Bank v. N.C. Dep't of Rev.*, 370 N.C. 10, 21–22, 803 S.E.2d 142, 150 (2017) and *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498 (1987). Respondents argue that, while the use of Administrative Procedure Act-compliant rulemaking makes sense in some circumstances, such as complying with the reporting requirement discussed in N.C.G.S. § 135-8(f)(2)(f), it "offers no value" in the setting of a cap factor, "has no proper role in a process that mandates deference to an expert actuary," and "cannot be a matter of public debate" given

the existence of a statutory requirement that the cap factor be recommended to the Board of Trustees by the actuary based upon actual experience, citing *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 3 (D.C. Cir. 2011) and N.C.G.S. § 135-5(a3). In addition, respondents contend that the lengthy rulemaking process required by the Administrative Procedure Act is incompatible with the relatively short timeline in which the Act had to be implemented—a mere twenty-two weeks pursuant to N.C.G.S. § 135-8(f)(2)(f). According to respondents, "the legislature cannot have intended for the agency" to reach the "nonsensical result" of "miss[ing] the explicit deadlines stated in the law" and, instead, "intended the [R]etirement [S]ystem to act swiftly to address the funding cap caused by pension spiking" by acting in accordance with N.C.G.S. § 135-6(*l*), instead of complying with the rulemaking procedures set out in the Administrative Procedure Act.[4]

Respondents cite *Lunsford*, 367 N.C. at 623, 766 S.E.2d at 301, in support of their argument that, when viewed "as a whole[,] . . . [t]hose statutes confirm that the legislature has consciously chosen to exclude actuarial recommendations from the [Administrative Procedure Act's] rulemaking requirements." According to respondents, twenty-six statutory provisions, including all fourteen of the provisions relating to actuarial matters, simply state that the Board of Trustees must merely "adopt" or "establish" certain measures without making any mention of the obligation to utilize Administrative Procedure Act-compliant rulemaking. In addition, respondents note that ten of the twelve provisions that deal with non-actuarial matters explicitly require the use of Administrative Procedure Act-compliant rulemaking.

Finally, respondents contend that "[t]he cases cited by the Court of Appeals do not hold that the [Administrative Procedure Act's] general rulemaking procedures override specific procedures in an agency statute." According to respondents, this case is distinguishable from *Vass* given that that case was decided at a time when the Administrative Procedure Act "appl[ied] to every agency . . . except to the extent and in the particulars that any statute . . . makes specific provisions to the contrary[,]" *see* N.C.G.S. § 150B-1(c) (1987), formerly codified as N.C.G.S. § 150A-1(a), which respondents describe as an "exclusivity requirement for rulemaking[,]" with this language having been deleted in 1991 and with the "current [version of the Administrative Procedure

4. Respondents note that, when the Board of Trustees later adopted a cap factor utilizing the Administrative Procedure Act's rulemaking procedures, it took the agency 364 days to do so.

Act] impos[ing] no parallel exclusivity provision for rulemaking." In addition, respondents distinguish this case from *Empire Power Co. v. N.C. Dep't of Env't, Health and Nat. Res.*, 337 N.C. 569, 447 S.E.2d 768 (1994) (holding that, in the event that an agency-specific statute and the Administrative Procedure Act can be read *in pari materia*, the Court "must give effect to both if possible"), which, in respondents' view, dealt exclusively with contested case provisions that are not at issue in this case and that "continue to be subject to the mandate that exemptions from the [Administrative Procedure Act] be express," citing N.C.G.S. § 150B-1(e). As a result, respondents argue that both *Empire Power* and *Bring* indicate that, "where the same question is answered by both the agency statute and the [Administrative Procedure Act], . . . the more-specific statute applies."

In seeking to persuade us to uphold the Court of Appeals' decision, the Board of Education argues that an exemption from the rulemaking provisions of the Administrative Procedure Act only exists in the event that the clear and unambiguous statutory language requires such a result. According to the Board of Education, the General Assembly explicitly created such an exemption for certain enumerated agencies, such as the North Carolina Utilities Commission, and for certain enumerated administrative actions, such as executions conducted by the North Carolina Department of Public Safety. The Board of Education asserts that the General Assembly's failure to explicitly exempt the Retirement System from the rulemaking requirements of the Administrative Procedure Act is sufficient to establish the non-existence of such an exemption, citing *Vass*. In addition, the Board of Education denies that any implied exemption from the rulemaking provisions of the Administrative Procedure Act exists in this situation. Although several attempts have been made in the General Assembly to obtain the enactment of legislation exempting the establishment of a cap factor from the rulemaking provisions contained in the Administrative Procedure Act, none of those efforts have been successful. Moreover, the existence of such proposed legislation shows that, in the event that the General Assembly wished to exempt the process of establishing a cap factor from the rulemaking provisions of the Administrative Procedure Act, it knows how to do so.

The Board of Education asserts that the facts of this case are distinguishable from those at issue in *Bring* and *Rogers*. According to the Board of Education, both *Bring* and *Rogers* recognize that the General Assembly had enacted a comprehensive set of statutes governing the operations of the State Bar that were clearly intended to supersede the relevant provisions of the Administrative Procedure Act. On the other

hand, the Board of Education contends that the same cannot be said for the statutes at issue in this case so that respondents are, in this instance, "asking the [C]ourt . . . to conjure an exemption out of vague statutes and a history that contradicts their explanation."

In the Board of Education's view, the legal principle that a specific statute does not supersede the provisions of the Administrative Procedure Act unless it leaves "no room for application of [Administrative Procedure Act-compliant rulemaking] procedures" does not represent the adoption of a new, more stringent legal standard; instead, the language to this effect utilized by the Court of Appeals is "simply a description of the facts in the *Rogers* case." Similarly, the Board of Education contends that respondents have mischaracterized this Court's decision in *Empire Power*, which, in its view, clearly indicates that the goal of the 1991 amendments to the Administrative Procedure Act, instead of "leav[ing] room for more exemptions," was "to further uniformity" in administrative rulemaking in accordance with the Administrative Procedure Act and to reduce the number of exempt agencies.

The Board of Education argues that, contrary to respondents' assertions, N.C.G.S. § 135-6(*l*) "does not address rulemaking" and "includes no specific provision at all comparable to what the [C]ourt considered in *Empire Power*." In addition, the Board of Education notes that respondents have not identified any "retirement statute that offers the same kind of explicit conflict with the [Administrative Procedure Act] as in *Empire Power*." The Board of Education points out that, prior to the initiation of this proceeding, respondents had not treated statutes requiring the Board of Trustees to "adopt" certain measures—including the statute at issue in this case—differently from statutes requiring the Board of Trustees to "adopt a rule" in order to address certain issues and asserts that "[i]t defies credibility for [respondents] to now argue that [they] understood all along a difference based on the use of 'adopt a rule' rather than 'adopt.' " The Board of Education cites a number of retirement statutes that make reference to rulemaking even though the Board of Trustees has never adopted the rules called for by those statutory provisions. On the other hand, the Board of Education cites statutes which would not, in respondents' view, require the use of the rulemaking procedures pursuant to the Administrative Procedure Act, in which rules have been adopted. As a result, the Board of Education contends that respondents have failed to distinguish between statutory provisions requiring them to "adopt" or "adopt a rule" in a meaningfully consistent manner.

According to the Board of Education, the fact that a cap factor must be based upon the actuary's recommendation does not compel a determination that the decision to establish a particular cap factor is controlled by N.C.G.S. § 135-6(*l*) or renders the rulemaking provisions of the Administrative Procedure Act inapplicable. In the Board of Education's view, "[w]hile the cap factor chosen by the Board of Trustees must be based on actuarial assumptions, it is not an actuarial assumption itself." On the contrary, the Board of Education describes the adoption of a cap factor as a "discretionary decision that results from consideration of the actuarial assumptions presented by the [R]etirement [S]ystem's actuary" and states that "[N.C.]G.S. [§] 135-6(*l*) requires the . . . [Board of T]rustees to include actuarial assumptions in the state retirement plan to satisfy the [Internal Revenue Service's] requirement that the employer not be able to alter the defined benefits to retirees." In essence, the Board of Education asserts that a cap factor "is of a different character than the tables, rates, and assumptions" governed by the Board of Trustees' rule concerning actuarial assumptions, citing 20 N.C. Admin. Code 2B.0202, and that the record is devoid of any indication that the Board of Trustees "ever considered the cap factor to be an actuarial assumption." As a result, the Board of Education argues that the mere fact that the actuary makes a recommendation concerning the cap factor to the Board of Trustees does not exempt the Retirement System from the rulemaking requirements of the Administrative Procedure Act, with "[t]here [being] nothing remarkable . . . about the use of such expertise in rulemaking."

The Board of Education contends that the Board of Trustees could have satisfied the five-month time frame within which it was required to establish a cap factor by adopting a temporary rule pursuant to N.C.G.S. § 150B-21.1. Although the statutory deadline for setting the cap factor was 1 January 2015, the Board of Education notes that no rulemaking proceeding was initiated until December 2017 and that no cap factor rule became effective until 21 March 2019. Even so, the Board of Education points out that the Retirement System sent numerous notices to the employers of affected retirees for the purpose of "seeking additional contributions . . . for retirements that occurred well before 21 March 2019," including the notice sent in this case, and that, when employers objected to the resulting invoices, the Retirement System "replied that it consider[ed] the new rule applicable to all retirements since 1 January 2015." For that reason, the Board of Education asserts that "[i]t would seem . . . that the [R]etirement [S]ystem [did] not really believe the 1 January 2015 effective date of the pension cap law established a deadline for rulemaking that could not be met."

Finally, the Board of Education contends that the significant public interests at stake in the establishment of the cap factor make it "exactly the kind of important administrative decision that should go through rulemaking." In support of this assertion, the Board of Education directs our attention to the "devastating sums of money" that school systems have been billed following the retirement of eligible employees, which the Board of Education describes as "liabilities the school boards were powerless to avoid" given that "the pension cap law applied to contracts and compensation decisions that had been entered [into] years before and that could not have been changed in response to the new law." In addition, the Board of Education notes that, when the Board of Trustees proposes a rule that will have a "substantial economic impact," which any rule prescribing a cap factor will necessarily have, the Administrative Procedure Act requires the agency to consider at least two alternatives and perform a fiscal analysis. *See* N.C.G.S. § 150B-19.1(f). According to the Board of Education, the use of the rulemaking procedures required by the Administrative Procedure Act would have the effect of "remind[ing the Board of Trustees] that the school board has no taxing authority," that the Board of Trustees would learn that local boards of education "would have to seek additional funding from the county commissioners," and that the Board of Trustees would be informed about "the number of teaching positions likely to be lost, the huge hole that would be created in capital funding, and the other consequences of their rulemaking" through the use of Administrative Procedure Act-compliant rulemaking to establish the cap factor.

According to well-established North Carolina law, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). An appellate court reviews a trial court's decision to grant or deny a motion for summary judgment de novo. *Meinck v. City of Gastonia*, 371 N.C. 497, 502, 819 S.E.2d 353, 357 (2018). We will now resolve the issue that has been presented for our consideration in this case in light of the applicable standard of review.

The sole issue for our consideration in this case is whether the General Assembly intended to relieve the Board of Trustees from the necessity for compliance with the rulemaking provisions contained in the Administrative Procedure Act in adopting a cap factor pursuant to N.C.G.S. § 135-5(a3). In view of the fact that respondents have not denied that the establishment of a cap factor falls within the scope of

the Administrative Procedure Act's definition of a "rule" and the fact that respondents acknowledge that the Board of Trustees is not explicitly exempt from the Administrative Procedure Act, the ultimate issue before us in this case is whether the establishment of a cap factor is implicitly exempt from the Administrative Procedure Act's rulemaking provisions. A careful analysis of our prior decisions concerning the extent to which particular agencies or decisions are deemed to be implicitly exempt from the necessity for compliance with the provisions of the Administrative Procedure Act makes it clear that such implicit exemptions are very much the exception, rather than the rule, and should only be recognized in the event that it is abundantly clear that the General Assembly intended such a result.

This Court's decision in *Empire Power* stemmed from a challenge by a property owner to a state agency's decision to award an air emissions permit to a utility company. *Empire Power Co.*, 337 N.C. at 574, 447 S.E.2d at 771–72. The property owner alleged that he would suffer injury to his health by virtue of the emissions that would result from the issuance of the permit. *Id.* The state agency contended, and the Court of Appeals agreed, that, pursuant to N.C.G.S. § 143-215.108(e), the right to challenge such permitting decisions was limited to the applicant. *Id.* at 573–74, 447 S.E.2d at 771. In considering whether the "organic statute amends, repeals, or makes an exception to the [Administrative Procedure Act,] so as to exclude [the property owner] from those entitled to" challenge the agency's permitting decision, we noted that (1) "the primary function of a court is to ensure that the purpose of the [l]egislature in enacting the law . . . is accomplished"; (2) "statutes *in pari materia*, and all parts thereof, should be construed together" and "reconciled with each other when possible"; and (3) "any irreconcilable ambiguity should be resolved so as to effectuate the true legislative intent." *Id.* at 591, 447 S.E.2d at 781 (quoting *Comm'r of Ins. v. Rate Bureau*, 300 N.C. 381, 399–400, 269 S.E.2d 547, 561 (1980) (citation omitted), *overruled on other grounds by In re Redmond*, 369 N.C. 490, 497, 797 S.E.2d 275, 280 (2017)). In addition, we stated that "implied amendments cannot arise merely out of supposed legislative intent in no way expressed, however necessary or proper it may seem to be," and that "[a]n intent to amend a statute will not be imputed to the legislature unless such intention is manifestly clear from the context of the legislation." *Id.* at 591, 447 S.E.2d at 781 (quoting *In re Halifax Paper Co.*, 259 N.C. 589, 594, 131 S.E.2d 441, 445 (1963)). We also held that an implied exemption to the relevant statutory provision will only be recognized "where the terms of a later statute are so repugnant to an earlier statute that they cannot stand together." *Id.* As long as there is "a fair and

reasonable construction of the organic statute that harmonizes it with the provisions of the [Administrative Procedure Act,] . . . it is our duty to adopt that construction." *Id.* at 593, 447 S.E.2d at 782 (citing *In re Miller*, 243 N.C. 509, 514, 91 S.E.2d 241, 245 (1956)). In view of the fact that the General Assembly "ha[d] not expressed or otherwise made manifestly clear an intent to [supplant the Administrative Procedure Act]" in the "organic" statute at issue in *Empire Power* and the fact that there was not "such repugnancy between the statutes [at issue in that case] as to create an implication of amendment or repeal 'to which we can consistently give effect under the rules of construction of statutes,' " we declined to recognize the existence of an implied exemption from the judicial review provisions of the Administrative Procedure Act sufficient to bar the landowner from seeking review of the challenged agency action. *Id.*

Similarly, *Bring* involved a challenge by an individual who had graduated from a law school that had not been approved for accreditation pursuant to N.C.G.S. § 84-24. In rejecting the individual's argument that the Board of Law Examiners was not required to have identified the law schools whose graduates were eligible to take the North Carolina bar examination, we stated, without further elaboration, that N.C.G.S. § 84-21 "[gave] specific directions as to how the Board [of Law Examiners] should adopt rules." *Id.* at 660, 501 S.E.2d at 910. As a result, we held that the existence of a specific statute prescribing the manner in which the Board of Law Examiners was required to adopt rules sufficed to render the rulemaking provisions of the Administrative Procedure Act inapplicable. *Id.* at 659, 501 S.E.2d at 910.

In *Vass*, an individual insured under a state medical plan filed an unsuccessful claim seeking the recovery of costs associated with laser vision correction surgery. *Vass*, 324 N.C. at 403–04, 379 S.E.2d at 27. Although the individual appealed to the medical plan's Board of Trustees, that body rejected his appeal on the grounds that the surgical procedure in question was not covered pursuant to N.C.G.S. § 135-40.6(6)(h) at that time. *Id.* In determining whether the individual's ability to seek further review of the Board of Trustees' decision was limited by N.C.G.S. § 135-39.7, which provided that the Board of Trustees had the authority to "make a binding decision on the matter in accordance with procedures established by the Executive Administrator and Board of Trustees," we noted that, at the time, the Administrative Procedure Act "clearly indicate[d]" that it "shall apply to every agency of the executive branch of State government, except to the extent and in the particulars that any statute 'makes *specific* provisions to the contrary,' " *id.* at 406, 379 S.E.2d

at 28 (quoting N.C.G.S. § 150B-1(c) (1987), previously codified as N.C.G.S. § 150A-1(a)), and that "[i]t is clear that the General Assembly intended only those agencies it expressly and unequivocally exempted from the provisions of the Administrative Procedure Act be excused in any way from the Act's requirements," with even such specific exemptions to "apply only to the extent specified by the General Assembly." *Id.* at 407, 379 S.E.2d at 29. In considering whether N.C.G.S. § 135-39.7 exempted the Board of Trustees' decision from further review pursuant to the Administrative Procedure Act, we noted that "the General Assembly has shown itself to be quite capable of specifically and expressly naming the particular agencies to be exempt from the provisions of the Act" and that the Board of Trustees had never "been expressly exempted from the Act's requirements." *Id.* As a result, "we conclude[d] that the [Board of Trustees'] decisions [were] subject to administrative review under the [Administrative Procedure Act]," stating that, "[h]ad the General Assembly intended that the [Board of Trustees] be excluded from the requirements of the [Administrative Procedure Act], we must assume that it would have inserted a specific provision in some statute expressly stating this intent." *Id.* at 407–08, 379 S.E.2d at 29 (citation omitted).

A collective analysis of these decisions, which encompass a range of different issues and varying present and now-repealed statutory provisions, demonstrates that this Court has consistently refused to recognize the existence of any implicit exemption from the provisions of the Administrative Procedure Act in the absence of a clearly-stated legislative intent to the contrary. A presumption that the rulemaking provisions of the Administrative Procedure Act apply to the formulation of rules, as that term is defined in N.C.G.S. § 150B-2(8a), in the absence of an explicit or implicit exemption, is fully consistent with the applicable statutory provisions and represents the most logical reading of them. *See* N.C.G.S. § 150B-1(a) (providing that "[t]his Chapter establishes a uniform system of administrative rule making and adjudicatory procedures for agencies"); N.C.G.S. § 150B-18 (providing that "[t]his Article applies to an agency's exercise of its authority to adopt a rule[,]" with "[a] rule [not being] valid unless it is adopted in substantial compliance with this Article"). For the following reasons, we are not persuaded that the General Assembly, in enacting the anti-pension-spiking legislation that is at issue in this case, intended to implicitly exempt the Board of Trustees from complying with the rulemaking provisions of the Administrative Procedure Act when establishing a cap factor.

As an initial matter, we are unable to conclude that N.C.G.S. § 135-5(a3) and N.C.G.S. § 135-6(*l*) are "so repugnant to [the Administrative Procedure

Act] that they cannot stand together." *Empire Power Co.*, 337 N.C. at 591, 447 S.E.2d at 781 (quoting *In re Halifax Paper Co.*, 259 N.C. at 594, 131 S.E.2d at 445). On the contrary, we have no difficulty in concluding that the relevant statutory provisions can be harmonized with the rulemaking requirements of the Administrative Procedure Act with relative ease. Simply put, we do not see anything in N.C.G.S. § 135-5(a3) or N.C.G.S. § 135-6(*l*) that suggests that the General Assembly intended to dispense with the necessity for compliance with the relevant provisions of the Administrative Procedure Act in establishing a cap factor.

A careful analysis of the relevant statutory provisions makes it clear that the adoption of a cap factor is not a ministerial act in which the Board of Trustees does nothing more than ratify the actuary's recommendation. According to N.C.G.S. § 135-5(a3), the Board of Trustees is required to "adopt a contribution-based benefit cap factor recommended by the actuary, based upon actual experience, such that no more than three-quarters of one percent (0.75%) of retirement allowances are expected to be capped." Although the remaining provisions of N.C.G.S. § 135-5(a3) prescribe, in considerable detail, what use is to be made of the cap factor once it has been adopted, the relevant statutory provisions do not prescribe any additional procedural steps that must be taken in connection with the adoption of the cap factor. In view of the fact that the actuary serves as "the technical adviser of the Board of Trustees on matters regarding the operation of the funds created by the provisions of this Chapter" and the fact that the cap factor is a substantive decision to be made by the Board of Trustees, rather than an "assumption[ ] used by the [Retirement System's] actuary," N.C.G.S. § 135-6(*l*), we are not persuaded that the cap factor is an actuarial assumption or that the Board of Trustees is required to simply rubber stamp the actuary's cap factor recommendation.[5] On the contrary, as is evidenced by the fact that the adopted cap factor cannot result in more than "three-quarters of one percent (0.75%) of retirement allowances being capped," N.C.G.S. § 135-5(a3), it is clear that the Board does, in fact, have a degree of discretion in determining an appropriate cap factor within the confines of the stated statutory parameters. In addition, the fact that an actuary must

5. Although the interpretation of the relevant statutory language adopted by an administrative agency is entitled to "great weight," *Frye Reg'l Med. Ctr. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citing *High Rock Lake Ass'n v. N.C. Envtl. Mgmt. Comm'n*, 51 N.C. App. 275, 279, 276 S.E.2d 472, 475 (1981)), we are not persuaded by respondents' interpretation of the relevant statutory provisions or satisfied that such a rule of construction has substantial bearing in situations in which an agency is seeking to avoid the constraints that would otherwise be imposed by the Administrative Procedure Act.

be involved in the process of establishing the cap factor does not suffice to provide affected persons with the sort of procedural protections that are inherent in Administrative Procedure Act-compliant rulemaking proceedings, obviate the importance of public input into the adoption of a cap factor, or reduce the importance of the additional analytical steps that administrative agencies must take in making decisions of the apparent magnitude of this one. *See*, *e.g.*, N.C.G.S. § 150B-21.4(b1)–(b2) (requiring that, where the aggregate financial impact of an administrative agency decision upon all affected persons exceeds $1 million during a twelve-month period, the agency must generate a fiscal note describing, among other things, "at least two alternatives to the proposed rule that were considered by the agency and the reason the alternatives were rejected")[6]. As a result, we conclude that the procedural requirements detailed in N.C.G.S. § 135-5(a3) and N.C.G.S. § 135-6(*l*), are not, unlike those at issue in *Bring*, sufficiently detailed to suggest that the General Assembly intended for the establishment of the cap factor to be implicitly exempt from the rulemaking provisions of the Administrative Procedure Act and we believe, instead, that the relevant statutory language contemplates that the cap factor will be established in a manner similar to that required when other administrative agencies are required to make discretionary decisions that are informed by agency staff expertise, as is the case with many, if not virtually all, administrative decisions.[7]

Although respondents suggest that the fact that the relevant statutory provisions use the term "adopt," rather than the expression "adopt a rule," indicates the existence of a clear distinction between circumstances in which Administrative Procedure Act-compliant rulemaking is required and those in which it is not, we conclude that this

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6. The fact that N.C.G.S. § 135-5(a3) prohibits the Board of Trustees from adopting a cap factor that results in more than "three-quarters of one percent (0.75%) of retirement allowances being capped" necessarily means that a range of cap factors are statutorily permissible, making it perfectly sensible for the agency to be required to consider multiple alternatives.

7. The descriptions of the cap factor decisions actually made by the Board of Trustees are fully consistent with the understanding set out in the text of this opinion. For example, at the time that the initial cap factor was established in 2014, the actuary, after recommending the adoption of a 4.8 cap factor, stated that, "[f]or the reasons previously stated, the Board [of Trustees] may consider a more conservative factor[.]" Similarly, at the time that the Board of Trustees established a new cap factor in the following year, the actuary stated that "the Board [of Trustees] may consider decreasing the factor[,]" that "the current factor [for the Teachers' and State Employees' Retirement System] is 4.8[,]" and that "the minimum allowable factor is 4.2[.]" As a result, the establishment of a cap factor does, in fact, involve the making of a discretionary decision that allows for the consideration of information other than purely actuarial considerations.

argument rests upon an exceedingly nuanced semantic distinction that does not appear to reflect the Board's actual practice. In addition, we are not persuaded that the distinction that respondents seek to draw between provisions couched in terms of "adopt," rather than "adopt a rule," is sufficient to overcome the presumption against the recognition of implicit exemptions from the requirements of the Administrative Procedure Act that is inherent in the relevant statutory provisions and this Court's practice of reading allegedly conflicting statutes in harmony whenever it is possible to do so. *Id.* at 593, 447 S.E.2d at 782 (citing *In re Halifax Paper Co.*, 259 N.C. at 595, 131 S.E.2d at 445; and *In re Miller*, 243 N.C. at 514, 91 S.E.2d at 245).

In addition, we are not convinced that the prior decisions of this Court upon which respondents rely provide significant support for the decision that they ask us to make. For example, we are not persuaded that our decision in *Fidelity Bank*, in which we held that an undefined term in the relevant statutory provision should be interpreted in accordance with its plain meaning and that, in the event that the General Assembly intended for the term in question to be used in a certain manner, it could have included such a definition in the relevant legislation, *see Fid. Bank*, 370 N.C. at 20, 803 S.E.2d at 149, provides any support for respondents' position given that respondents give the term "adopt" a somewhat technical meaning that lacks support in the remaining statutory language. In addition, our decision in *High Rock Lake Partners, LLC*, 366 N.C. at 322, 735 S.E.2d at 305, which rests upon the fact that the relevant statutory language was "clear and unambiguous," is of little moment in this case, given our belief that the relevant statutory provisions clearly do not exempt the establishment of the cap factor from the rulemaking provisions of the Administrative Procedure Act.

Similarly, our decision in *Hughey*, 297 N.C. at 92, 253 S.E.2d at 902, in which we held that a specific statute allowing the State Board of Education to disburse funds to severely learning disabled children superseded a more general statutory provision allowing county commissioners to disburse funds to the "physically or mentally handicapped," does not support respondents' position given that *Hughey* rested, at least in part, upon the fact that "the General Assembly has consistently delegated specific responsibility for the special education of learning disabled children to the State and local boards of education." Nothing in the present record suggests that the General Assembly has consistently exempted decisions by the Board of Trustees of a similar magnitude as the establishment of the cap factor from the rulemaking provisions of the Administrative Procedure Act.

In *Nat'l Food Stores*, which involved statutes governing the sale of alcohol to minors, our determination that a specific statute must be given effect over a more general statute hinged upon the fact that the relevant statutes directly conflicted with each other, with the specific statute requiring that the seller know that the buyer was a minor while the general statute contained no such knowledge requirement. 268 N.C. at 629, 151 S.E.2d at 586. In the same vein, we held in *Piedmont Publ'g Co.* that a specific statute prevailed over a general statute because any attempt to read the two in harmony with each other would produce an "illogical" result. 334 N.C. at 597, 434 S.E.2d at 177. For the reasons set forth in more detail above we do not see the sort of conflict present in these decisions in analyzing the rulemaking provisions of the Administrative Procedure Act, on the one hand, and N.C.G.S. § 135-5(a3) and N.C.G.S. § 135-6(*l*), on the other.

Finally, unlike the situation at issue in *Bring*, the statutory provisions upon which respondents rely in support of their argument for an implicit exemption lack the sort of substantive and procedural safeguards that are present in the rulemaking provisions of the Administrative Procedure Act. 348 N.C. at 659, 501 S.E.2d at 910. Instead, N.C.G.S. § 135-5(3a) and N.C.G.S. § 135-6(*l*) are devoid of the sort of procedural detail that persuaded us to recognize an implicit exemption from the rulemaking provisions of the Administrative Procedure Act in *Bring*. As a result, we are not persuaded by respondents' arguments in reliance upon our precedents.

Finally, we agree with the Board of Education that the public interests at stake in this case support, rather than undercut, the Board of Education's contention that the cap factor should be established by using the rulemaking provisions of the Administrative Procedure Act, which ensure the opportunity for adequate public input before a decision becomes final. As we have already demonstrated, the relevant statutory language clearly indicates that the establishment of a cap factor is a discretionary decision that must be made by the Board of Trustees, with the aid of an actuary, rather than a ministerial decision over which the Board of Trustees has little to no control. Moreover, as the Board of Education correctly notes, the relatively tight deadline within which the Board of Trustees was required to adopt an initial cap factor is entitled to very little weight in our analysis given that the Administrative Procedure Act allows for the adoption of temporary rules in the event that an agency is required to act while subject to significant time constraints. *See* N.C.G.S. § 150B-21.1(a)(2) (stating that "[a]n agency may adopt a temporary rule when it finds that adherence to the notice and

hearing requirements of [N.C.]G.S. [§] 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by . . . [t]he effective date of a recent act of the General Assembly"). Lastly, while the General Assembly is, of course, the ultimate arbiter of whether the adoption of a cap factor is implicitly exempt from the rulemaking provisions spelled out in the Administrative Procedure Act, the relevant statutory language, read in light of this Court's decisions construing the language of other statutes to determine if they supplanted the requirements of the Administrative Procedure Act, satisfies us that the General Assembly did not intend such a result. Thus, for all of these reasons, we agree with the Court of Appeals that the Board of Trustees was required to adopt the statutorily mandated cap factor utilizing the rulemaking procedures required by the Administrative Procedure Act and that the Retirement System erred by billing the Cabarrus County Board of Education an additional amount relating to Dr. Shepherd's pension, in light of the Board of Trustees' failure to adopt the necessary cap factor in an appropriate manner. As a result, the Court of Appeals' decision in this case is affirmed.[8]

AFFIRMED.

Justice NEWBY dissenting.

In 2014 the General Assembly addressed an imminent threat to the solvency of the entire State Retirement System: pension spiking. When it passed the pertinent anti-pension spiking provision, it required the Board of Trustees of the State Retirement System (the Board) to adopt a "cap factor" recommended by an actuary, and specifically described the procedures the Board must follow. That law was enacted against the backdrop that, since at least 1981, the Board has adopted actuarial recommendations by resolution. The Board expeditiously proceeded according to this process. Now the majority creates a five-year gap in this law's enforcement by holding that the procedures under the Administrative Procedure Act (APA) should apply. If, however, separate statutory provisions specifically describe the relevant agency's procedures, those provisions supersede those of the APA. In this case the General Assembly has given detailed directions to the Board on how to

8. Although the Retirement System ultimately adopted a cap factor using the rulemaking procedures specified in the Administrative Procedure Act, we do not believe that this fact renders this case moot, given that the Board of Education has sought to have the additional amount that it paid to have Dr. Sheppard's pension refunded.

adopt and implement regulations to limit pension spiking. The legislature determined that quick action by the Retirement System was necessary to keep the retirement fund solvent. Because I believe the majority mistakenly requires the Board to submit to the APA's rulemaking procedures when it adopts a cap factor, I respectfully dissent.

The Retirement System is funded by contributions by state employers and employees over the course of the employment. Under state law, a state employee's pension upon retirement is calculated based on the average salary the employee earns during the employee's four highest paying years of employment. It became evident that for a retiree who, for the last four years of employment, earned significantly higher salaries than in previous years, the calculated pension value was strikingly high compared to the amount contributed into the fund on the retiree's behalf. This practice was labeled "pension spiking." Pension spiking usually involves either early retirements or late-career pay raises that inflate the calculated pension amount. In the aggregate, pension spiking creates a dangerous deficit in the state retirement fund.

Seeing this threat to the solvency of the Retirement System, the General Assembly passed a law to limit pension spiking. An Act to Enact Anti-Pension-Spiking Legislation by Establishing a Contribution-Based Benefit Cap, S.L. 2014-88, § 1, 2014 N.C. Sess. Laws 291, 291–94. Under this law, which applies only to retirees who earned at least $100,000 per year during their four years of highest pay, the retiree's last employer must contribute additional funds into the Retirement System if the retiree's pension value significantly exceeds the annuitized value of the amount contributed on the retiree's behalf. N.C.G.S. § 135-5(a3) (2019). The employer must contribute additional funds if the ratio of the pension to the contributions exceeds the "cap factor." The cap factor is a ratio set by the Board. *Id*. Subsection 135-5(a3) specifically explains how a cap factor is to be set—an expert actuary must recommend the factor, and the cap factor must be of a value such that no more than three-quarters of one percent (0.75%) of retirees' plans will be capped by it. *Id*. Once the actuary recommends a cap factor, the provision states that the Board "shall adopt" it. *Id*. A plain reading of that provision shows that the Board has no discretion on this point; it must adopt the cap factor recommended by the actuary. The text of the Act provided that it would go into effect less than six months after its passage. An Act to Enact Anti-Pension-Spiking Legislation by Establishing a Contribution-Based Benefit Cap, S.L. 2014-88, § 1, 2014 N.C. Sess. Laws 291, 291–94. The General Assembly thus signaled in at least two ways that a cap factor should be established quickly: (1) by giving detailed instructions for how the Retirement System must adopt a cap factor to address the

problem and (2) by leaving a relatively short amount of time until the Act took effect.

The General Assembly has directed the Board to generally address actuarial calculations by accepting all documentation supporting actuarial recommendations and recording all such relevant information in its meeting minutes. N.C.G.S. § 135-6(l) (2019). In accordance with this statutory directive, it has been the Board's policy at least since 1981 to adopt actuarial recommendations by resolution and publication in meeting minutes, not by formal rulemaking procedures. 20 N.C. Admin. Code 2B.0202(a) (1981). In this case the Board followed these longstanding procedures and adopted a cap factor recommended by the actuary in compliance with subsection 135-5(a3).

Despite the detailed instructions the General Assembly gave the Board regarding the adoption of cap factors, the majority holds that the APA's rulemaking procedures, which require public notice and comment, also bind how the Board adopts cap factors. By doing so, it fails to properly apply the longstanding principle of statutory construction that the intent of the General Assembly controls. In accordance with legislative intent, the recent more specific statute relevant to the case should apply instead of the earlier more general statute; but the majority avoids this principle. It also ignores the appropriate consideration of the agency's longstanding practice regarding specialized and technical issues like the one in this case. The majority misses this straightforward analysis because it wrongly mines from dated case law a presumption that the APA's procedures should apply to all agency actions.

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998)). "The best indicia of that intent are the language of the statute[,] . . . the spirit of the act[,] and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citation omitted). In this case all of those indicia support the Board's adoption of cap factors by resolution instead of by the APA's rulemaking procedures. The statutory language directs that the Board "shall adopt" the cap factor recommended by the actuary; the General Assembly intended that the Board follow the specific procedures it provided, and nothing more. The General Assembly has given precise guidelines to the Retirement System directly, choosing a cap factor is extremely technical and requires unique expertise, and the Board historically has adopted actuarial recommendations through resolution and publication, not through formal rulemaking.

The Retirement System should be allowed to use its own specialized procedures because the statute governing the adoption of a cap factor is more specific than the relevant provisions of the APA. When two statutes address the same subject matter, the more specific statute controls—the statute that more directly addresses the activity in question. *See Nat'l Food Stores v. N.C. Bd. of Alcoholic Control*, 268 N.C. 624, 629 151 S.E.2d 582, 586 (1966). In *Bring v. N.C. State Bar*, this Court considered whether the North Carolina State Bar Council, in promulgating a rule, had to follow the APA's rulemaking procedures or whether it could use the procedures described in the statute governing the Board of Law Examiners. 348 N.C. 655, 659–60, 501 S.E.2d 907, 910 (1998). That statute provided that the Board of Law Examiners could make rules and regulations related to State Bar admission as long as the State Bar Council gave approval. *Id.* at 657, 501 S.E.2d at 908. This Court held that "[i]t was not necessary to adopt the rule in accordance with the requirements of the APA," because the statute that created the Board of Law Examiners "gives specific directions as to how the Board shall adopt rules. These directions must govern over the general rule-making provision of the APA." *Id.* at 660, 501 S.E.2d at 910.

Here, like in *Bring*, the relevant statute is more specific than the APA. It specifically governs the adoption of cap factors by the Board. Though the APA generally requires an opportunity for public notice and comment before an agency enacts a rule, *see* N.C.G.S. § 150B-21.2 (2017), subsection 135-5(a3) specifically provides that the Board "shall adopt a contribution-based benefit cap factor recommended by the actuary, based upon actual experience, such that no more than three-quarters of one percent (0.75%) of retirement allowances are expected to be capped." N.C.G.S. § 135-5(a3). The statute then goes into even more detail on how the cap factor must be used to determine certain pension payments. *Id.*

The best reading of this statute, alongside the APA, is that, even though the APA's procedural requirements might generally apply to rules made by the Retirement System, when adopting a cap factor the Board should follow the specific path of subsection 135-5(a3). This reading complies with the specific-general canon of statutory construction and gives reasonable effect to both the APA and subsection 135-5(a3).

The majority's position, however, fails to give full effect to subsection 135-5(a3). That provision requires that the Board adopt the cap factor recommended by the actuary and mandates that the cap factor must cap no more than three quarters of one percent of retirement allowances. N.C.G.S. § 135-5(a3). An additional requirement of public notice

and comment could pressure the Board to ignore the specific guidelines of subsection 135-5(a3). If the actuary recommends a certain cap factor that complies with the "three-quarters-of-one-percent" ceiling but, during the public notice and comment portion of the proceedings, the public presents evidence in favor of a different cap factor, what is the Board to do? Under subsection 135-5(a3), the Board should choose the cap factor recommended by the actuary. But, under the APA, the Board must give due consideration to the cap factor that the commenting public recommended. The Board could not adequately do both.[1] Quintessentially here, the more specific statute should control over the more general one. *See Nat'l Food Stores*, 268 N.C. at 629, 151 S.E.2d at 586 (explaining that, when multiple statutes that would apply to a set of facts cannot be reconciled, the more specific statute should control, especially when the more specific statute was enacted later in time).

The statutory analysis should control this case. When interpreting the APA and subsection 135-5(a3) on their own terms and in light of one another, it is clear that the Board need not follow the APA's rulemaking procedures. That conclusion should be the end of the matter. Still, multiple other reasons exist to properly consider the agency's interpretation.

We should respect the Board's procedures under subsection 135-5(a3) because the determination of a cap factor requires special and technical expertise. This Court respects an agency's interpretation of a statute when the agency decisionmakers have special expertise in the area covered by the statute. *Wells v. Consol. Judicial Ret. Sys. of N.C.*, 354 N.C. 313, 320, 553 S.E.2d 877, 881 (2001) (explaining that an administrative interpretation of a provision is given great weight when "the subject is a complex legislative scheme necessarily requiring expertise"); *see also Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (explaining that "[t]he interpretation of a statute given by the agency charged with carrying it out is entitled to great weight"). Establishing a cap factor can be quite complex. That reality may partially explain why the General Assembly gave such technical guidelines and assigned most of the work to the expert actuary. This issue is therefore

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1. Moreover, as the majority notes, the APA "requir[es] that, where the aggregate financial impact of an administrative agency decision upon all affected persons exceeds $1 million during a twelve-month period, the agency must generate a fiscal note describing, among other things, 'at least two alternatives to the proposed rule that were considered by the agency and the reason the alternatives were rejected,' " citing N.C.G.S. §§ 150B-21.4(b1)–(b2). I do not see how the Board could adopt only the cap factor recommended by the actuary, but also meaningfully consider at least two other alternatives. These provisions of the APA do not make sense when applied to the process of adopting cap factors.

not one for which additional public comment would likely be of much value. Indeed, when the Board did eventually adopt a cap factor through the APA's rulemaking procedures, it adopted an identical cap factor to the one it previously adopted under N.C.G.S. § 135-5(a3).

Plaintiff argues that because, in its view, school boards may not be able to handle the financial burden of making the payments required by the cap factor in some cases, the school boards and the public should have a say in the determination of the cap factor. The General Assembly, however, has already made a policy determination to address this issue. It mandated that a cap factor (1) shall be established, (2) based on the actuary's recommendation, (3) that applies only to those retirees earning an average of over $100,000 per year during their four highest paid years, and (4) that no more than three quarters of one percent of retirement plans could be affected by the cap factor.

Moreover, we should respect the Board's procedures because the Board has adopted actuarial recommendations through informal procedures for years without the General Assembly intervening to stop it. In construing administrative statutes, this Court gives "great weight to the administrative interpretation, especially when, as here, the agency's position has been long-standing and has been met with legislative acquiescence." *Wells*, 354 N.C. at 319–20, 553 S.E.2d at 881. At least since the latest version of its rule, which has been in effect since 1981, the Board has had the policy of adopting actuarial recommendations by resolution, not by formal rulemaking. 20 N.C. Admin. Code 2B.0202(a). The General Assembly has not stepped in to require it to do otherwise, so we may presume that the practice comports with legislative intent. *See Wells*, 354 N.C. at 319, 553 S.E.2d at 881 ("When the legislature chooses not to amend a statutory provision that has been interpreted in a specific way, we assume it is satisfied with the administrative interpretation."). Furthermore, the General Assembly affirmatively acted in the past to encourage this procedure. *See generally* N.C.G.S. § 135-6(l) (providing the process the Board is to utilize regarding actuarial assumptions). The General Assembly thus did not intend for the APA's procedures to apply.

The majority misses the preceding statutory analysis because it mistakenly mines from this Court's dated case law a presumption that the APA's procedures always control agency action unless a statute explicitly says otherwise. That blanket presumption applied under an older version of the APA, but it does not any more. Before 1991, the text of the APA explained that it would "apply to every agency . . . except to the extent and in the particulars that any statute . . . makes specific provisions to the contrary." *See* An Act to Improve the Administrative

Rule-Making Process, S.L. 1991-418, § 2, 1991 N.C. Sess. Laws 791 (removing the quoted language in 1991). This Court concluded when that text was in effect that "the General Assembly intended only those agencies it expressly and unequivocally exempted" from the APA to not be governed by it, and that any exempted agency is only exempted "to the extent specified by the General Assembly." *Vass v. Bd. of Trs. of Teachers' and State Emps.' Comprehensive Major Med. Plan*, 324 N.C. 402, 407, 379 S.E.2d 26, 29 (1989).

In 1991, however, the General Assembly amended the APA and removed that language. See An Act to Improve the Administrative Rule-Making Process, S.L. 1991-418, § 2, 1991 N.C. Sess. Laws 791. Now, the only provision containing similar language relates to "contested cases." *See* N.C.G.S. § 150B-1(e) (2017) ("The contested case provisions of this Chapter apply to all agencies and all proceedings not expressly exempted from the Chapter."). Rulemaking and other methods of adopting policies are not "contested cases."

Since the time the General Assembly amended the APA in that way, this Court has expressly presumed that the APA's procedures apply only when a "contested case" was central to the dispute. *See*, *e.g.*, *Empire Power Co. v. N.C. Dep't. of Env't, Health, and Nat. Res., Div. of Envtl. Mgmt.*, 337 N.C. 569, 573–74, 447 S.E.2d 768, 771 (1994). This Court has not held that the APA as amended presumptively applies to agency rulemaking or other policy enactments. I therefore disagree with the majority that the procedures found in the APA presumptively apply to the Board's adoption of a cap factor. If the majority is to recognize such a presumption, it must do so entirely based on an interpretation of the relevant statutes; our precedent does not demand it. Yet, as discussed above, a reasonable interpretation of the statutes does not support the majority's decision.

The specificity of the statute at hand, and its technical subject matter, rebuts any presumption that the APA's procedures apply. In subsection 135-5(a3), the General Assembly gave specific directions to the Retirement System about how to limit pension spiking, and those directions did not require formal rulemaking. That more detailed and targeted provision supplants the APA where the two provisions overlap. The Retirement System has long adopted the recommendations of actuaries, who have special expertise, through resolution of the Board and publication in the meeting minutes. The General Assembly intended these procedures to be sufficient.

I respectfully dissent.

IN RE B.C.B.

[374 N.C. 32 (2020)]

IN THE MATTER OF B.C.B.

No. 273A19

Filed 3 April 2020

1. Termination of Parental Rights—pleadings—sufficiency—failure to pay child support—willful abandonment

A mother's petition to terminate a father's parental rights was sufficient to survive the father's motion to dismiss. Contrary to the father's argument, the petition specifically alleged that his failure to pay child support and abandonment of his child were willful. Petitioner addressed at length the father's violation of child support orders and his failure to exercise visitation.

2. Termination of Parental Rights—grounds—willful abandonment—evidence and findings

The trial court appropriately found grounds to terminate a father's parental rights under N.C.G.S. § 7B-1111(a)(7) where the father argued that the evidence did not show willful abandonment. The trial court's findings demonstrated that respondent willfully withheld his love, care, and affection from his child during the determinative six-month period.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 22 April 2019 by Judge Kathryn Overby in District Court, Alamance County. This matter was calendared in the Supreme Court on 25 March 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

A.E., pro se, petitioner-appellee mother.

Mercedes O. Chut for respondent-appellant father.

NEWBY, Justice.

Respondent appeals from the trial court's order terminating his parental rights to B.C.B. (Brian).[1] We affirm.

Respondent and petitioner are the biological father and mother of Brian, who was born in 2015 during the parties' brief relationship. On

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

17 November 2016, petitioner filed a complaint for child custody and child support and requested the entry of an emergency ex parte temporary child custody order. The trial court granted petitioner temporary custody of Brian by ex parte order. On 30 November 2016, the parties entered into a Memorandum of Judgment which granted them joint legal custody of Brian and established a temporary custody schedule. A few months later, the parties entered into another Memorandum of Judgment which established a permanent child custody schedule. On 1 February 2017, petitioner obtained a domestic violence protection order (DVPO) against respondent based on incidents that occurred in November 2016.

In July 2017, respondent was arrested for driving while impaired. In September 2017, respondent was involved in an altercation with his pregnant girlfriend, which led to criminal charges and his girlfriend obtaining a DVPO against respondent. In October 2017, petitioner filed a motion for an ex parte order seeking sole custody of Brian. The trial court allowed the ex parte motion and suspended respondent's visitation until a hearing could be held. After a hearing, in November 2017, the trial court awarded petitioner sole custody of Brian and granted respondent supervised visitation once a week at Family Abuse Services.

On 6 December 2018, petitioner filed a complaint in the trial court which she intended to be a petition to terminate respondent's parental rights. Respondent was appointed counsel to represent him in the matter, and on 31 January 2019, counsel filed a motion to dismiss for lack of subject matter jurisdiction. On 21 February 2019, the trial court dismissed the petition for lack of subject matter jurisdiction because the petition was not properly verified.

Six days later, petitioner refiled her petition. Petitioner alleged respondent's parental rights to Brian should be terminated on the basis of willful abandonment and respondent's failure to pay child support. *See* N.C.G.S. § 7B-1111(a)(4), (7) (2019). On 26 March 2019, respondent moved to dismiss the petition under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *See* N.C.G.S. § 1A-1, Rule 12(b)(6) (2019). On the same day, respondent filed an answer denying many of the material allegations in the petition. A few weeks later, prior to the termination hearing, the trial court denied respondent's motion to dismiss the petition.

On 22 April 2019, the trial court entered an order in which it determined that grounds existed to terminate respondent's parental rights on the basis of willful abandonment. *See* N.C.G.S. § 7B-1111(a)(7). It also concluded that it was in Brian's best interest that respondent's

parental rights be terminated. The court thus terminated respondent's parental rights, and respondent appealed to this Court.

Respondent argues that the trial court erred (1) by denying his motion to dismiss the petition and (2) by terminating his parental rights on the basis of willful abandonment. We address each of these arguments in turn.

[1] First, respondent contends that petitioner failed to sufficiently allege grounds to terminate his parental rights under N.C.G.S. § 7B-1104 and, therefore, the trial court should have dismissed the petition for failure to state a claim upon which relief can be granted. Specifically, respondent claims that the petition contains allegations regarding the child support order and his failure to make payments under that order but fails to allege that respondent's failure to pay was willful. He also argues that although the petition cites N.C.G.S. § 7B-1111(a)(7) and references the requirements of the custody order, it neither alleges that he willfully failed to comply with the order nor alleges facts supporting the termination of his parental rights on the basis of willful abandonment. We disagree and hold that the petition was sufficient to survive respondent's motion to dismiss.

A petition seeking to terminate parental rights must state "[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist." N.C.G.S. § 7B-1104(6) (2019). We agree with the Court of Appeals that "[w]hile there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to what acts, omissions or conditions are at issue." *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002).

The petition here cited both N.C.G.S. § 7B-1111(a)(4) and (7) as grounds for termination and specifically alleged that respondent's failure to pay child support and his abandonment of Brian were willful. In support of these allegations, petitioner cited the trial court's custody and child support orders. Contrary to respondent's claims, petitioner addressed at length respondent's violation of the child custody orders, which she claimed show respondent's willful abandonment of Brian. Petitioner specifically alleged that since September 2017, respondent had declined to exercise visitation as permitted by the trial court. The petition thus contained more than a mere recitation of the statutory grounds for termination and gave respondent sufficient notice of the "acts, omissions or conditions . . . at issue." *In re Hardesty*, 150 N.C. App. at 384, 563 S.E.2d at 82. Therefore, we hold that the trial court's denial of respondent's motion to dismiss was appropriate.

[2] Second, respondent contends that the trial court erred by terminating his parental rights on the basis of willful abandonment. Specifically, he challenges several of the trial court's findings of fact and argues that record evidence does not show that he willfully abandoned Brian. We disagree and hold that the trial court's determination that grounds existed to terminate respondent's parental rights was supported by its findings of fact and that those findings are supported by clear, cogent, and convincing evidence.

A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under subsection 7B-1111(a). N.C.G.S. § 7B-1109(f) (2019). When reviewing a trial court's determination that grounds existed to terminate parental rights, we ask "whether the [trial court's] findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. at 111, 316 S.E.2d at 253 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). If the petitioner meets her burden during the adjudicatory stage, "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, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110). In this case respondent only challenges the trial court's determination at the adjudicatory stage that statutory grounds existed to terminate his parental rights.

A trial court may terminate a parent's parental rights when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." N.C.G.S. § 7B-1111(a)(7). "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. at 251, 485 S.E.2d at 617 (citation omitted). "[I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962) (citation omitted). "Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *In re Adoption of Searle*, 82 N.C. App. 273, 276, 346 S.E.2d 511, 514 (1986).

"[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re N.D.A.*, 373 N.C. 71, 77, 833 S.E.2d 768, 773 (2019) (citation omitted).

The relevant six-month period in this case is from 27 August 2018 to 27 February 2019. The trial court made the following pertinent findings of fact:

> 25. The petitioner filed a motion for [an] ex parte order in 16 CVD 2098 on October 2, 2017. Judge Messick allowed that ex parte order on October 4, 2017 suspending the respondent father's visitation until a hearing could be held.
>
> 26. On November 7, 2017 Judge Messick had a hearing on the return on the ex parte order. He granted the petitioner sole legal custody of the minor child. Judge Messick allowed the respondent father visitation with the minor child once a week at Family Abuse Services (FAS) supervised visitation center.
>
> 27. The petitioner went shortly thereafter to sign up for her portion of the supervised visitation agreement. The respondent father spoke to his attorney about going to FAS for visits in December 2017, but he did not contact FAS for supervised visitation until February 15, 2019, some fifteen months after being ordered to do so by Judge Messick. When he did set up visitation at FAS, the respondent father requested weekends, however he forgot that he was to be incarcerated on weekends in March and April for a Driving While Impaired split sentence. He also forgot to show up for that first jail weekend, resulting in his serving seven days straight in the Alamance County Jail. The weekend jail schedule was set on February 7, 2019.
>
> 28. The respondent father then followed up at FAS on March 29, 2019 about his visits with the minor child, some six weeks after his first contact with FAS.
>
> 29. The respondent father indicated that it took from December 2017 to February 2018[2] to go contact FAS for

2. This date appears to be a clerical error. The correct date was in February 2019.

visits with the minor child because he had so much going on. The Court does not find this to be credible.

30. During the ex parte hearing on November 7, 2017 the petitioner's attorney argued for the respondent father to attend the domestic violence prevention program (DVPP) before exercising visitation with the minor child. Neither in his oral rendition of the order in open court on November 7, 2017 nor in his written order did Judge Messick order such a requirement. Rather Judge Messick allowed the respondent father visitation at FAS once a week with no prerequisites.

31. The respondent father was in Court when Judge Messick rendered his order orally. He testified that he never received a copy in the mail of the written order. However, the respondent father never came to the court house and requested a copy of the order. Nor did he update his address with the clerk's office to receive information in a timely fashion. His attorney argued that it was the petitioner's attorney's responsibility to make sure that the respondent father received a copy of the Court's order. The Court finds this to be over burdensome on the attorney. The burden sits firmly with the party and they have the responsibility to update the clerk with any and all address changes.

32. The respondent father testified that he did not exercise his visitation with the minor child nor did he reach out to the petitioner from November 2017 through January 2018 because he thought he had to enroll in and complete DVPP before visitation could begin. This was an erroneous assumption. Even if he was correct in his assumption, he did not communicate with the petitioner about the well-being of the minor child during this time frame. He did not send any cards, letter or presents to the minor child during this time frame.

33. The petitioner's parents have lived in the same residence for over twenty-eight (28) years. The respondent father has been to that residence multiple times with the petitioner. Yet the respondent father never made any contact with the petitioner's parents to inquire about the well-being of the minor child or to leave gifts . . . for the minor child.

. . . .

37. On January 16, 2018 Judge Messick renewed the DVPO for two additional years with the modification that the respondent father was to have no contact with the petitioner. There is no constraint on the respondent father's ability to contact the minor child.

. . . .

42. Even though it was ordered in November 2017 the respondent father did not begin DVPP until February 22, 2018. He was unsuccessfully terminated from the DVPP on July 13, 2018 for missing four sessions, not for non-payment.

. . . .

58. The respondent father has willfully chosen not to see or inquire about the minor child since September 2017.

"Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citation omitted). We review only those findings necessary to support the trial court's conclusion that grounds existed to terminate respondent's parental rights on the basis of willful abandonment. *Id.* at 407, 831 S.E.2d at 58–59 (citing *In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133).

Respondent challenges findings of fact 26, 27, 28, 30, 32, 33, 37 and 58. He first contends that Finding of Fact No. 26 wrongly states that he was allowed visitation with Brian because Judge Messick did not immediately institute supervised visits. Respondent claims that, instead, Family Abuse Services imposed requirements on both parties that were to be completed before visits could be arranged. We disagree. The child custody order shows that respondent was granted supervised visitation with Brian and that the only prerequisite was that both parties were required to complete an intake session with Family Abuse Services within two weeks of the trial court's order. Petitioner attended an intake session on 8 November 2017, the day after the custody hearing. Had respondent attended an intake session as ordered, he could have exercised visitation immediately. We conclude that there is sufficient evidence in the record to support Finding of Fact No. 26.

Respondent next challenges findings of fact 27, 28 and 30. Respondent argues that the evidence ultimately does not show that he

had the ability to complete the intake session and attend visitation with Brian before February 2019. He also argues that the trial court's findings that he, in essence, willfully ignored the trial court's order granting him supervised visitation are not supported by the evidence. We disagree.

Petitioner testified at the termination hearing that in open court respondent was granted supervised visitation through Family Abuse Services with no prerequisites. Respondent, however, testified that he believed he had to complete the domestic violence prevention program courses before he could exercise visitation. After hearing the testimony of both petitioner and respondent and evaluating their credibility, the trial court determined that there was no such requirement. This Court is not in a position to question that determination. *See In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68 (stating that the trial judge has the duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom); *see also Scott v. Scott*, 157 N.C. App. 382, 388, 579 S.E.2d 431, 435 (2003) (stating that when the trial court sits as fact-finder, it is the sole judge of the credibility and weight to be given to the evidence, and the appellate courts should not substitute their judgment for the trial court's judgment). We thus conclude that sufficient record evidence supports findings of fact 27, 28, and 30.

The trial court's findings of fact regarding respondent's failure to contact Family Abuse Services about visitation privileges until March 2019, including findings of fact 28 and 29, are further supported by the record. Respondent contends that he did not complete the intake session and attend visitation because he was incarcerated three times during the relevant period. He further asserts that he did not testify at the termination hearing that he failed to arrange visits because "he had so much going on." We are unpersuaded. Although respondent was incarcerated for portions of the relevant six-month period, he was not incarcerated for its entirety. Respondent was incarcerated when he was served with petitioner's first petition to terminate his parental rights, but he was released from custody soon thereafter. Respondent was not incarcerated in January 2019 or during the period before respondent filed the petition to terminate his parental rights on 27 February 2019. Respondent further testified that after he was served with the initial, improperly verified petition to terminate his parental rights, he discussed with his attorney that he could go to Family Abuse Services to begin the process of setting up visitation with Brian, but nevertheless failed to do so. He also explained that he failed to go to Family Abuse Services in January 2019 because he had "so much going

on at one time." Thus, the trial court's findings of fact are supported by clear, cogent, and convincing evidence.

Respondent challenges the trial court's factual finding stating that he was represented by counsel at the 7 November 2017 hearing. We agree that this portion of the trial court's finding of fact was erroneous. Respondent's testimony and the child custody order from the hearing show that respondent was acting as his own counsel. We thus disregard this portion of the trial court's factual finding.

Respondent next argues that portions of findings of fact 32, 33, and 37 are erroneous. He claims the record contains no evidence that he had any way to contact Brian during the relevant six-month time period immediately preceding the filing of the petition to terminate his parental rights. He argues that he was prevented from contacting Brian due to the DVPO and because he did not have petitioner's contact information. We disagree. Though respondent may have been prevented from contacting petitioner during the six months immediately preceding the filing of the petition because of the DVPO, the order did not prohibit respondent from contacting Brian or petitioner's parents. Petitioner also testified that respondent knew her parents and their address but neither made an effort to contact her parents to inquire about Brian's welfare nor left any cards or gifts for Brian. The record contains sufficient evidence to support the relevant portions of findings of fact 32, 33, and 37.

Respondent next challenges Finding of Fact No. 58, in which the trial court found that he willfully chose not to see Brian. He argues that the evidence does not show that respondent made a "willful determination to forego all parental duties and relinquish all parental claims" to Brian. We disagree. The Court of Appeals has correctly stated that a parent "will not be excused from showing interest in [a] child's welfare by whatever means available[,]" even if "his options for showing affection [were] greatly limited." *See In re R.R.*, 180 N.C. App. 628, 634, 638 S.E.2d 502, 506 (2006) (citation omitted) (rejecting respondent-father's argument that "he did not willfully abandon the child because he was not given the opportunity to participate in the child's life").

The trial court's findings of fact establish that respondent made no effort whatsoever during the statutory period to participate in Brian's life. These findings are supported by clear, cogent, and convincing evidence. Petitioner filed her initial petition to terminate respondent's parental rights in December 2018, which was dismissed and subsequently refiled by petitioner in February 2019. After respondent was served with the first petition to terminate his parental rights in December

2018, he discussed with his attorney that he could go to Family Abuse Services to set up visitation with Brian. Nonetheless, respondent never went to Family Abuse Services to do so. Respondent was released from custody in December 2018, so, contrary to respondent's argument, his incarceration would not have hindered visitation. Though respondent was out of jail and fully aware that he could exercise visitation rights, he did not visit Brian. Thus, after being made aware that petitioner was seeking to initiate proceedings to terminate his parental rights, and after being given a second chance to prioritize his responsibility to care for Brian, respondent took no action because he had "so much going on at one time." Additionally, respondent neither sent Brian any gifts or cards nor inquired about Brian's welfare despite having petitioner's parents' address. Respondent also was not prohibited from contacting them. The trial court properly determined that respondent willfully chose not to see Brian.

The trial court's findings of fact demonstrate that respondent "willfully withheld his love, care, and affection from [Brian] and that his conduct during the determinative six-month period constituted willful abandonment." *In re C.B.C.*, 373 N.C. 16, 23, 832 S.E.2d 692, 697 (2019) (citation omitted). The trial court appropriately found grounds to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(7). We affirm.

AFFIRMED.

IN RE C.J.C.

[374 N.C. 42 (2020)]

IN THE MATTER OF C.J.C.

No. 259A19

Filed 3 April 2020

1. Termination of Parental Rights—guardian ad litem—attorney advocate—failure to check box on AOC form—clerical error

On appeal from the termination of a father's parental rights to his child in a private termination action between the two parents, the Supreme Court rejected the father's argument that the trial court erred by failing to appoint a guardian ad litem (GAL) for the child. The attorney advocate was appointed to serve as both GAL and attorney advocate for the child, and the trial court's failure to check the box for "Attorney Advocate is also acting as [GAL]" on the appropriate form was a mere clerical error. Further, the attorney advocate competently fulfilled his role as GAL.

2. Termination of Parental Rights—best interests of the child—private termination action—likelihood of adoption—dispositional factors

In a private termination of parental rights action between a child's two parents, the trial court did not abuse its discretion by concluding that the child's best interests would be served by termination of the father's parental rights. The mother's relationship with her boyfriend was not sufficiently relevant to require findings on the potential for future adoption, and the trial court properly balanced the factors in N.C.G.S. § 7B-1110(a), including the child's young age, lack of any bond with the father, and need for consistency.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 4 April 2019 by Judge Wesley W. Barkley in District Court, Burke County. This matter was calendared for argument in the Supreme Court on 25 March 2020, but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief for petitioner-appellee mother.

David A. Perez for respondent-appellant father.

MORGAN, Justice.

This appeal arises from a private termination of parental rights action between a child's two parents. Respondent, the natural father of C.J.C. (Caleb),[1] appeals from the trial court's order terminating respondent's parental rights to the child. We affirm the determination of the trial court.

At the time of Caleb's birth in September 2014, petitioner—Caleb's mother—and respondent were living together. They were not married. The parents ended their relationship in November 2015, after which Caleb resided with petitioner.

Following her separation from respondent, petitioner filed a custody action in District Court, Burke County. In an order entered on 21 March 2016, the trial court incorporated the terms of the parties' Parenting Agreement, and in accordance with the agreement, granted primary physical and legal custody of Caleb to petitioner, with respondent exercising specific visitation rights. Respondent was ordered to pay child support in the sum of $50 per week in an order entered on 16 May 2016.

On 8 March 2017, petitioner and respondent entered into a Consent Order in which respondent was relieved of ongoing child support payments. Petitioner continued to have primary legal and physical custody of Caleb, and respondent was granted visitation with Caleb "as the parties mutually agree."

On 8 October 2018, petitioner filed a petition to terminate respondent's parental rights on the grounds that Caleb was born out of wedlock, and that respondent failed to provide substantial financial support or consistent care with respect to Caleb and petitioner; and that respondent had willfully abandoned Caleb. N.C.G.S. § 7B-1111(a)(5)(d), (7) (2019). Respondent filed an answer on 31 October 2018, denying that grounds existed to terminate his parental rights.

After multiple continuances, the trial court held a hearing on the petition on 21 March 2019. On 4 April 2019, the trial court entered an order concluding that grounds existed to terminate respondent's parental rights based on willful abandonment and that termination of respondent's parental rights was in Caleb's best interests.[2] Accordingly, the trial court terminated respondent's parental rights. Respondent appealed.

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1. A pseudonym is used to protect the juvenile's identity and to facilitate the ease of reading.

2. The phrases "best interest" and "best interests" are utilized interchangeably by legal sources which are cited in this opinion. In order to harmonize the usage of this phrase throughout this opinion and in light of the lack of any substantive difference in the

[1] Respondent first argues that the trial court erred in failing to appoint a guardian ad litem (GAL) for Caleb. Respondent contends that while an attorney advocate was appointed in the matter, nonetheless, this attorney was not appointed in the capacity of GAL, and that the trial court's failure to appoint a GAL in this case is prejudicial error requiring reversal. We reject respondent's argument and conclude that the attorney at issue was appointed to serve as both GAL and attorney advocate for Caleb.

The record here contains the Administrative Office of the Courts Form AOC-J-207—"ORDER TO APPOINT OR RELEASE GUARDIAN AD LITEM AND ATTORNEY ADVOCATE"—filed on 11 December 2018. The preprinted portions of this form note that appointments which appear in the form are made pursuant to N.C.G.S. §§ 7B-601[3] (abuse, neglect, and dependency petitions) and 7B-1108 (termination of parental rights). In termination of parental rights (TPR) proceedings, N.C.G.S. § 7B-1108(b) *requires* the appointment of a GAL for the juvenile where a respondent parent denies material allegations in the TPR petition. N.C.G.S. § 7B-1108(b) (2017) ("If an answer or response denies any material allegation of the petition or motion, the court shall appoint a guardian ad litem for the juvenile to represent the best interests of the juvenile . . . ."). In addition, this subsection provides that "[a] licensed attorney shall be appointed to assist those guardians ad litem *who are not attorneys licensed to practice in North Carolina*." *Id.* § 7B-1108(b) (emphasis added). In other words, where a respondent parent files an answer denying material allegations in the petition as Caleb's father has done in the present case, the trial court (1) must appoint a GAL for the juvenile, and (2) must appoint a licensed attorney (or "attorney advocate") if the appointed GAL is not an attorney licensed to practice in this state. In conformance with these statutory provisions, there are sections on Form AOC-J-207 to designate a GAL and to designate an attorney advocate. In the space where an attorney advocate's name is to appear, there is a box to be checked if "Attorney Advocate is also acting as Guardian ad Litem."

In the instant case, the information entered on the Form AOC-J-207 displays the name "Steve Cheuvront" in the space to designate an

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terminology, the phrase "best interests" will be employed, even if a quoted source used the alternative terminology.

3. Pursuant to N.C.G.S. § 7B-607, a GAL for the juvenile *must* be appointed in abuse and neglect cases and *may* be appointed in dependency matters. N.C.G.S. § 7B-601(a) (2017). The instant matter does not fall under section 7B-607.

"Attorney Advocate" and leaves blank the document's section for a GAL. The district court judge who signed the form failed to check the box denoting that the designated attorney advocate Cheuvront was also acting as the guardian ad litem. However, a review of the other documents and transcripts in the record on appeal plainly indicates that this failure of the district court judge to check the GAL box was merely a clerical error, not a prejudicial substantive or procedural error. *See In re A.D.L.*, 169 N.C. App. 701, 707, 612 S.E.2d 639, 643 (stating that where "the [GAL] carried out her respective duties, failure of the record to disclose [GAL] appointment papers does not necessitate reversal of the district court's decision"), *disc. review denied*, 359 N.C. 852, 619 S.E.2d 402 (2005). For example, Cheuvront is referred to as "the Guardian ad Litem," both in the written adjudication and disposition order, as well as on the cover page of both the hearing and trial transcripts. The transcript contains an exchange on 13 December 2018 between the trial court and respondent's trial counsel during which counsel explained the need to continue a hearing because "Mr. Cheuvront was appointed as guardian ad litem yesterday." On 10 January 2019, the transcript shows that there was a discussion among the parties and the trial court about another continuance in which respondent's trial counsel mentioned that "the guardian ad litem" had not yet been able to meet with him.

At the hearing on the TPR petition when the trial court called the matter on 21 March 2019, it noted, "All parties are present. We have Mr. Cheuvront, who's guardian ad litem in this matter. Anything before we begin the hearing from the petitioner?" Neither respondent nor his counsel expressed any concerns or raised any issues regarding Cheuvront's role as GAL during the TPR hearing. After the parties presented their evidence, the trial court asked Cheuvront, "[a]s guardian ad litem in this matter," if Cheuvront had anything to add to assist the trial court in making its decision. Cheuvront then provided an account of his interactions with the parties and with Caleb. Again, neither respondent nor his trial counsel registered any question or matter about Cheuvront's role as GAL in the case. It is clear from the record and transcript that the trial court did, in fact, appoint Cheuvront as GAL for Caleb. Respondent's contention to the contrary, based on an apparent clerical error, is without merit.

Respondent also contends that Cheuvront did not fulfill the duties of a GAL because Cheuvront failed to "offer evidence and examine witnesses at adjudication" and "explore options with the court at the dispositional hearing." N.C.G.S. § 7B-601 (2019). Section 7B-601(a) of our General Statutes provides that

> [t]he duties of the guardian ad litem program shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to facilitate, when appropriate, the settlement of disputed issues; to offer evidence and examine witnesses at adjudication; to explore options with the court at the dispositional hearing; to conduct follow-up investigations to insure that the orders of the court are being properly executed; to report to the court when the needs of the juvenile are not being met; and to protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court.

N.C.G.S. § 7B-601(a). "[I]f the GAL is an attorney, that person can perform the duties of both the GAL and the attorney advocate." *In re J.H.K.*, 365 N.C. 171, 175, 711 S.E.2d 118, 120 (2011). Here, Cheuvront investigated the case prior to the termination hearing by contacting the parties, visiting the child Caleb at petitioner's home, and going to petitioner's workplace. As noted above, Cheuvront reported his observations to the trial court at the TPR hearing. Cheuvront competently fulfilled his role as guardian ad litem—a status which was unquestioned and unchallenged upon repeated references to Cheuvront's role in this regard—and the trial court's clerical oversight in its execution of Form AOC-J-207 regarding its failure to check the GAL designation box for the person whom it properly designated on the same form to serve as Attorney Advocate was not prejudicial error. Consequently, we are not persuaded by this argument.

[2] In his second contention, respondent asserts that the trial court abused its discretion by concluding that it would be in Caleb's best interests to terminate respondent's parental rights. Specifically, respondent claims that the trial court failed to make sufficient findings regarding the factors set forth in N.C.G.S. § 7B-1110(a) and did not properly balance those factors.

Once the trial court finds that at least one ground exists to terminate parental rights pursuant to N.C.G.S. § 7B-1111(a), it proceeds to the dispositional stage where it must "determine whether terminating the parent's rights is in the juvenile's best interest[s]" based on the following factors:

(1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

(3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2019).

"The district court's assessment of a juvenile's best interest at the dispositional stage is reviewed only for abuse of discretion. Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re A.R.A.*, 373 N.C. 190, 199, 835 S.E.2d 417, 423 (2019) (internal citation, quotation marks, and brackets omitted).

Here, the trial court made the following findings of fact in determining that termination of respondent's parental rights was in Caleb's best interests:

> 1. That the [c]ourt has the authority to terminate the parental rights of the Respondent pursuant to the findings of fact and conclusions of law. As to best interests, the [c]ourt has previously found grounds for termination exist and as to this portion, the [c]ourt has considered all those factors that are under the statute, particularly focusing on the age of [Caleb] . . . [who is] 4½ years old. He's been in one family care unit his entire life, with that particularly being with the mother. For the last two years he's only known one parent caretaker, that being the Petitioner/mother. As found with grounds, the Respondent/father has been minimally involved even prior to the filing of this Petition. Therefore, he essentially has no bond at all with the child. If there is a bond it is very tenuous, particularly the fact that he's had no contact with the child directly since 2017. He's also provided, as indicated, no maintenance, love, support, affection. He's made a couple of contacts with the mother.
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> 2. Certainly the [c]ourt does find that the family of the father is concerned for the child and does show some

> genuine care for the child. However, essentially the [c]ourt is looking at the child's best interest[s] in regards to the father and his situation and, while [respondent's attorney] does make a point that termination essentially doesn't change what's happening as we sit here today, the [c]ourt is going to find that it's in the best interest[s] due to the fact that this young child does need some consistency and needs to as the statute requires develop a bond of significance. I agree that we are not in a position to anticipate adoption given where we are right now; however, the lack of any bond with the father, the young age of the child, and the fact that a termination of parental rights would assist in achieving a consistency along with the factors that were found in the adjudication, the [c]ourt will grant the order of termination and find that termination of the Respondent's rights are in [Caleb's] best interests.

Respondent has not challenged these findings, and therefore, they are binding on appeal. *In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 54 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). On the other hand, respondent argues that the trial court failed to make sufficient findings regarding the factors set forth in N.C.G.S. § 7B-1110(a). Specifically, he contends that the trial court failed to make findings addressing petitioner's relationship with her boyfriend, Clayton Dennis[4], and the quality of Caleb's relationship with petitioner's boyfriend.

Although the trial court must consider all of the factors in N.C.G.S. § 7B-1110(a), it "is only required to make written findings regarding those factors that are relevant." *In re A.R.A.*, 373 N.C. at 199, 835 S.E.2d at 424. "[A] factor is relevant if there is conflicting evidence concerning the factor, such that it is placed in issue by virtue of the evidence presented before the [district] court[.]" *Id.* (citation and internal quotation marks omitted) (second and third alteration in original).

There was no conflict in the evidence regarding either petitioner's or Caleb's relationship with Clayton Dennis that would require the trial court to make specific findings. Both petitioner and Dennis testified that although they were not engaged to be married at the time of the hearing, they had been dating for two years and planned to get married. Dennis testified that his relationship with Caleb was "awesome" and that Caleb

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4. A pseudonym is again employed to protect the juvenile's identity due to the relationship of "Clayton Dennis" with the juvenile's mother.

"just wants to be around [him]"; petitioner testified that Caleb has benefitted from his relationship with Dennis. Both petitioner and Dennis offered testimony that Dennis was like a father figure for Caleb and did "what a father figure should do." Respondent reasons that if the plan was for Dennis to adopt Caleb in the future, then the trial court failed to make any findings regarding how termination of parental rights would aid such a plan. Aside from the fact that the private nature of this termination proceeding means that there is no permanent plan as that term is used in N.C.G.S. § 7B-1110(a)(3), respondent acknowledges in his brief that the trial court observed that it could not anticipate adoption at the time of the hearing, since petitioner and her boyfriend Dennis had not set a wedding date. Consequently, the factor of petitioner's relationship with Clayton Dennis was not sufficiently relevant to require the trial court to make findings concerning the impact of said relationship on termination of respondent's parental rights or on the adoption of Caleb.

Finally, respondent argues that the trial court improperly balanced the factors set forth in N.C.G.S. § 7B-1110(a) and abused its discretion in determining that termination of respondent's parental rights was in Caleb's best interests. He deduces that since the trial court found that it was "not in a position to anticipate adoption given where we are right now[,]" it therefore implicitly found that there was not a likelihood of adoption in the future. Respondent further asserts that because Dennis was not in a position to adopt Caleb, termination of respondent's parental rights "accomplished *nothing* except to make another child fatherless[,]" and that termination "legally destroyed" valuable relationships with paternal family members without creating a new paternal relationship. In our view, the trial court's findings demonstrate that it considered the factors set forth in N.C.G.S. § 7B-1110(a) and determined that Caleb's young age, the child's lack of any bond with respondent, and the child's need for consistency—combined with respondent's lack of involvement with the child—supported a finding that termination of respondent's parental rights was in Caleb's best interests. Although the trial court found that it was "not in a position to anticipate adoption[,]" this is only one factor which the trial court must consider. This factor becomes more relevant in a TPR case in which a child is in the custody of a Department of Social Services agency and termination of the parent's rights leaves the child as a ward of the State. The present case, however, involves a private termination of parental rights initiated by the child's mother, who had full custody of the child at the time of the TPR hearing. Therefore, the likelihood of Caleb's potential adoption under this set of circumstances is not a sufficiently relevant factor as respondent depicts it in determining whether termination of respondent's parental rights was in Caleb's best interests.

Based on the foregoing analysis, this Court is satisfied that the trial court's conclusion that termination of respondent's parental rights was in Caleb's best interests was neither arbitrary nor manifestly unsupported by reason. Therefore, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF K.N.K.

No. 231A19

Filed 3 April 2020

1. Termination of Parental Rights—grounds—willful abandonment—determinative time period—no contact or financial support

In a termination of parental rights action between a child's two parents, the trial court's findings supported its adjudication of willful abandonment where, during the determinative time period, the father had no contact with the child and provided no financial support for her.

2. Termination of Parental Rights—grounds—willful abandonment—challenged findings—outside determinative time period

In an appeal from the trial court's order terminating a father's parental rights on the grounds of willful abandonment, any error in the trial court's findings challenged by the father were harmless where those challenged findings concerned his actions outside the six-month determinative time period preceding the filing of the petition.

3. Termination of Parental Rights—best interests of the child—dispositional factors—private termination action—intention of mother's husband to adopt child

The trial court did not abuse its discretion in concluding that a child's best interests would be served by the termination of her father's parental rights in an action between her two parents, where the trial court demonstrated careful consideration of the dispositional factors of N.C.G.S. § 7B-1110(a), including the strong bond between the child and the mother's husband, his intention

to adopt her, and the loving environment in the home of the mother and her husband.

4. Termination of Parental Rights—best interests of the child—constitutionally protected status as parent—forfeiture—willful abandonment

A father lost his constitutionally protected paramount right to the custody, care, and control of his child when the trial court determined that he had willfully abandoned her under N.C.G.S. § 7B-1111(a)(7), and the trial court thereafter properly considered whether the child's best interests would be served by the termination of her father's parental rights—without regard for his constitutionally protected status.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 18 March 2019 by Judge Ward D. Scott in District Court, Buncombe County. This matter was calendared in the Supreme Court on 25 March 2020 and determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief for petitioner-appellee mother.

Leslie Rawls for respondent-appellant father.

NEWBY, Justice.

Respondent, father of the minor child K.N.K. (Kathy),[1] appeals from the trial court's order granting the petition filed by the child's mother (petitioner) for the termination of respondent-father's parental rights. We affirm.

Petitioner and respondent were involved in a relationship from 2010 to 2012 but never married. Kathy was born in December 2011 and has lived with petitioner in Buncombe County, North Carolina since birth. On 25 August 2014, respondent filed a complaint against petitioner with the District Court in Buncombe County, seeking joint legal custody of Kathy and visitation. Petitioner obtained a domestic violence protective order (DVPO) against respondent on 27 August 2014 that continued through 12 May 2018; since 12 May 2015, that order has included Kathy

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

as well, excepting only court ordered supervised visitation with respondent.[2] Petitioner filed an answer in the custody matter on 28 October 2014, requesting sole custody of Kathy and attorney's fees.

On the morning of the custody hearing, respondent advised the court he was abandoning his claim for joint custody of Kathy. On 1 June 2015, the trial court awarded petitioner "sole care, custody and control" of Kathy, finding that respondent "failed to take his role and responsibility as a parent of the minor child seriously." The court granted respondent twice monthly supervised visitation with Kathy at the Mediation Center through its Family Visitation Program and invited respondent to "file the appropriate motion before this Court" to modify the order once he "demonstrated the ability to be consistent with the visits" and "demonstrate[d] that he is stable and operating at a higher maturity level . . . ." Respondent was also ordered to pay $4,915.70 in attorney's fees to petitioner's counsel.

On 11 September 2017, petitioner filed a petition to terminate respondent's parental rights. *See* N.C.G.S. §§ 7B-1100, -1104 (2019). After hearing evidence over four dates between 9 July 2018 and 14 November 2018, the trial court entered an order terminating respondent's parental rights on 18 March 2019. In doing so, the court concluded respondent had willfully abandoned Kathy within the meaning of N.C.G.S. § 7B-1111(a)(7) (2019), and such abandonment justified termination. Based on its adjudication, the court proceeded to the dispositional stage of the proceeding under N.C.G.S. § 7B-1110(a) (2019) and determined it was in Kathy's best interest to terminate respondent's parental rights. Respondent appealed. *See* N.C.G.S. § 7B-1001(a1)(1) (2019).

Respondent claims the trial court's findings do not support its adjudication under N.C.G.S. § 7B-1111(a)(7), which authorizes the termination of parental rights if "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition." Respondent also claims the trial court abused its discretion

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2. Before being served with the custody action, petitioner obtained an *ex parte* DVPO against respondent on 27 August 2014 based on respondent's threatening Facebook posts about petitioner. Respondent then unsuccessfully sought an *ex parte* DVPO against petitioner on 3 September 2014. On 11 September 2014, the trial court transferred the parties' DVPO actions to family court and consolidated them with the custody proceeding. Following a series of continuances, the trial court held a hearing in the consolidated action on 12 May 2015. On 12 May 2015, the trial court granted petitioner a DVPO forbidding respondent to be in the presence of petitioner or Kathy unless otherwise allowed by the court's visitation order in the case. The court subsequently renewed the one-year DVPO for two additional years until 12 May 2018. The court dismissed respondent's DVPO action against petitioner.

at the dispositional stage of the proceeding by concluding Kathy's best interest would be served by terminating his parental rights.

"We review a trial court's adjudication under N.C.G.S. § 7B-1111 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)); *see also* N.C.G.S. § 7B-1109(f) (2019). Unchallenged findings are deemed to be supported by the evidence and are "binding on appeal." *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 65 (2019). "Moreover, we review only those [challenged] findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58–59 (2019); *accord In re A.R.A.*, 373 N.C. 190, 195, 835 S.E.2d 417, 421 (2019) (reviewing only the challenged findings necessary to support the trial court's determination that grounds for termination existed).

[1] A court may terminate parental rights if "[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).

> "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, 485 S.E.2d [612,] 617 [1997] (citation omitted). "[I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962) (citation omitted).

In re N.D.A., 373 N.C. 71, 77, 833 S.E.2d 768, 773 (2019) (alteration in original). The willfulness of a parent's actions is a question of fact for the trial court. *See Pratt*, 257 N.C. at 501, 126 S.E.2d at 608; *see also Stancill v. Stancill*, 241 N.C. App. 529, 531, 773 S.E.2d 890, 892 (2015) ("Where the trial court sits as the finder of fact, and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial court." (quoting *Brandon v. Brandon*, 132 N.C. App. 646, 651–52, 513 S.E.2d 589, 593 (1999))). " 'Intent' and 'wilful[l]ness' are mental emotions and attitudes and are seldom capable of direct proof; they must ordinarily be proven by circumstances from which they may be inferred . . . ." *State v. Arnold*,

264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965). "[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re N.D.A.*, 373 N.C. at 77, 833 S.E.2d at 773 (quoting *In re D.E.M.*, 257 N.C. App. 618, 619, 810 S.E.2d 375, 378 (2018)).

Here petitioner filed her petition in this case on 11 September 2017. Therefore, respondent's conduct toward Kathy in the period from 11 March 2017 to 11 September 2017 is at issue. *See Young*, 346 N.C. at 251, 485 S.E.2d at 617. The trial court found that, during the determinative period, respondent "has withheld his presence, his love and care, and foregone his opportunities to display his filial affection for the minor child since 2014," and respondent "did have the settled intent to forego all parental responsibility and in fact did forego all of those responsibilities since at least 2014." In concluding respondent "has abandoned the minor child for at least six (6) months preceding the filing of the Petition in this matter consistent with N.C.G.S. § 7B-1111(a)(7)," the court also expressly found respondent's "conduct was intentional and willful and evinced a settled purpose to forego all parental duties and relinquish all claims to the minor child." This ultimate, dispositive finding must be supported by the evidence and by the evidentiary facts found by the trial court. *See In re N.D.A.*, 373 N.C. at 76–77, 833 S.E.2d at 773.

The trial court's adjudicatory findings show that, from 2014 until the petition's filing date, respondent had no contact or communication of any kind with Kathy; provided no financial support for Kathy;[3] sent Kathy no cards, gifts, or letters; and neither attended nor attempted to attend any of Kathy's medical appointments, educational functions, or extracurricular activities. Moreover, despite having been awarded twice

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3. Though evidentiary support exists for the finding, respondent objects to the trial court's reliance on the fact that he failed to provide any financial support for Kathy during the relevant period as a basis to conclude he willfully abandoned the child. Because he received Social Security Disability Income (SSDI) benefits, respondent contends the court's finding improperly "suggests" he could provide support for Kathy.

Notwithstanding respondent's disability, the trial court could consider that he contributed nothing toward Kathy's support and maintenance since 2014, despite having at least some income. Respondent testified that he earned additional income in 2016 and 2017 playing semi-professional football, that he declined a professional football contract worth $524,000.00 in 2018 to remain close to Kathy, and that he had been working full-time since June 2018, all while collecting SSDI benefits. Even without this finding, we conclude that the court would have reached the same conclusion about respondent's willful abandonment of Kathy.

monthly visitation in the 1 June 2016 custody order, respondent did not attend a single visit during the determinative time period; nor did respondent return to court to attempt to modify the terms of the custody order. The trial court also found that respondent "has always had the ability to visit the minor child, and knowingly and willing[ly] chose not to visit the minor child" and "not to have any contact with the minor child."

The trial court's findings show respondent's complete lack of involvement with Kathy, not only during the determinative six-month period, but dating back to 2014. We hold these facts support the court's ultimate findings that respondent acted willfully and with an intention to forego his parental responsibilities to Kathy. Having reviewed the trial court's evidentiary findings, we find no merit to respondent's arguments challenging the court's ultimate findings and conclusion that, by withholding his presence, love, care, and filial affection from Kathy, he willfully abandoned the minor child during the six months preceding petitioner's filing of the petition. Respondent's actions both prior to and during the determinative six-month period support a reasonable inference of willfulness for purposes of N.C.G.S. § 7B-1111(a)(7). *See In re E.H.P.*, 372 N.C. at 394, 831 S.E.2d at 53.

[2] While respondent challenges several of the court's evidentiary findings, each of these contested findings concern his actions outside the six-month period from 11 March 2017 to 11 September 2017. The evidence shows respondent began attending visitations at the Mediation Center on 6 January 2018, well outside the relevant time period. After his second hour-long visit with Kathy on 20 January 2018, respondent "discontinued" his participation in the Family Visitation Program and did not resume visitations until 28 April 2018.[4] Respondent's 28 April

4. Respondent informed the visitation monitor that he "w[ould] be out of town for several months starting 2/1/2018." Respondent testified that he was unable to visit Kathy during that period because he was pursuing a professional football career with the Miami Dolphins. The trial court made detailed findings to explain why it found respondent's testimony about his football career, and his whereabouts from January to May 2018, not credible. The Mediation Center's Client Services Coordinator confirmed to respondent by letter dated 24 January 2018 "that supervised visitation services between you and your minor child at the Family Visitation Program were discontinued effective January 20, 2018 . . . . at your request."

Respondent asserts the trial court erroneously implied a connection between an "incident" which occurred at his second visit with Kathy on 20 January 2018 and his decision to discontinue visitations from 20 January 2018 until 28 April 2018. The Mediation Center's records show no incident during this visit. The report from the 20 January 2018 visit shows only that respondent asked the staff to record that Kathy was transported to and from the visitation by petitioner's husband rather than petitioner. At respondent's

2018 visitation was cancelled because he attempted to bring his twelve-year-old daughter to the visit without permission. Thereafter and up to the time of the termination hearing, respondent attended all but two of his scheduled visitations, except for two visits cancelled by petitioner during this period. Respondent challenges the trial court's findings that the totality of his behavior with regard to visitations in 2018 "clearly demonstrate[s] to this Court his entire lack of interest in parenting [Kathy]" and "is entirely contrary to his testimony before this Court how pained he has been by not seeing the minor child" during the several preceding years.

There exists an evidentiary basis for the trial court's assessment that respondent's actions in 2018 did not demonstrate a commitment to parenting Kathy or an equivalent focus on the needs and well-being of the minor child. While the record shows respondent's visits with six-year-old Kathy were affectionate and positive, their activities together did not progress beyond playing video or board games. Regardless, any error in these findings is harmless and had no impact on the court's adjudication because they occurred in 2018 after the petition was filed and well outside the determinative time period. *See In re Beck*, 109 N.C. App. 539, 548, 428 S.E.2d 232, 238 (1993) (upholding trial court's adjudication of grounds to terminate parental rights for neglect where, "[i]f the erroneous finding is deleted, there remains an abundance of clear, cogent, and convincing evidence to support the finding of neglect").

Finally, respondent contends the trial court's mistaken reference to abandoned custody "claims" on 12 May 2015 erroneously suggests he also abandoned his claim for visitation with Kathy along with his custody claim. *See generally Clark v. Clark*, 294 N.C. 554, 575–76, 243 S.E.2d 129, 142 (1978) ("Visitation privileges are but a lesser degree of custody."). The trial court understood respondent's request for visitation. The termination order quotes the portion of the 1 June 2015 custody order that recognized respondent's visitation request and granted respondent twice monthly supervised visitation with Kathy. As discussed above, the trial court clearly based its adjudication decision on the fact that respondent "did not exercise his court ordered visitation with the minor a single time prior to the petition" being filed on 11 September 2017 rather than the custody proceedings in 2015.

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next scheduled visit on 28 April 2018, however, police were called to the Mediation Center after respondent refused to leave the premises and tried to enter an unauthorized area to locate Kathy. Regardless, the trial court could reasonably infer from defendant's prolonged absence from 20 January 2018 to 28 April 2018 that defendant willfully discontinued his twice monthly visitation rights.

[3] Having concluded that the trial court did not err in its adjudicatory findings and conclusions, we next consider respondent's contentions regarding the dispositional stage. At the dispositional stage, we review the trial court's conclusion that terminating a respondent's parental rights is in the child's best interest only for abuse of discretion. *In re L.M.T.*, 367 N.C. 165, 171, 752 S.E.2d 453, 457 (2013). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998). The trial court's dispositional findings of fact are reviewed under a "competent evidence" standard. *See In re A.H.*, 250 N.C. App. 546, 565–66, 794 S.E.2d 866, 879–80 (2016), *disc. rev. denied*, 369 N.C. 562, 798 S.E.2d 749 (2017); *cf. Stephens v. Stephens*, 213 N.C App. 495, 503, 715 S.E.2d 168, 174 (2011) ("As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion." (quoting *Metz v. Metz*, 138 N.C. App. 538, 541, 530 S.E.2d 79, 81 (2000)).

In determining a juvenile's best interest under N.C.G.S. § 7B-1110(a),

> [t]he court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a)(1)–(6).

The trial court made detailed dispositional findings addressing each of the factors in subsection 7B-1110(a). In addition to recounting

respondent's abandonment of Kathy "for years preceding the petition in this matter[,]" the findings describe the six-year-old child's resulting lack of bond with respondent as well as her strong bond with petitioner's husband, who has raised Kathy as his own child and hopes to adopt her. The court's findings portray Kathy as happy, well-loved, and thriving in her current home with petitioner, her husband, and their two-year-old son. The findings also note the opinion of Kathy's guardian *ad litem* (GAL) that it is in Kathy's best interest that respondent's rights be terminated. To the extent respondent does not contest these findings, he is bound thereby. *In re Z.L.W.*, 372 N.C. at 435–36, 831 S.E.2d at 65.

Respondent challenges the following dispositional findings as unsupported by competent evidence:

> c. . . . [T]he minor child is not certain who the Respondent Father is to her and does not consider him a part of her family.
>
> . . . .
>
> e. There is no bond between the juvenile and the Respondent Father.
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> . . . .
>
> m. While the minor child indicated that she likes the visits with "Tony[,"] the competent evidence is that the minor child plays games with the Respondent Father during her visits, is a content and settled child, but has no bond with the Respondent Father.
>
> o. The conduct of the Respondent Father, as found above, demonstrates that said Respondent will not promote the minor child's physical and emotional well-being.

We agree with respondent that a certain degree of conflict may exist between the finding that Kathy does not view him as part of her family and the GAL's report that Kathy described respondent as "part of her family," even though she did not know how she was related to him. Petitioner testified Kathy had no memory of respondent when their visitations began in January 2018. Thereafter, Kathy told petitioner she liked the games she played during visits but had not otherwise expressed any feelings about respondent. Although the Mediation Center's records show that Kathy told petitioner she "got to see daddy" following her initial visit with respondent on 6 January 2018, the visitation monitor had referred to respondent as "[y]our dad" to Kathy at the beginning of

this visit. Records from subsequent visits show Kathy calling respondent by his first name, "Tony," despite respondent referring to himself as her "daddy" during the visits. After each of their two most recent visits on 26 September 2018 and 10 October 2018, respondent voiced his concern to the visitation monitor that Kathy continued to call him by his first name.

While the trial court found the lack of *any* bond between respondent and Kathy, the evidence supports a finding of no *parent-child* bond between them. The GAL's written report to the trial court, the visitation records of the Mediation Center, and petitioner's testimony largely support the contested findings. We find significant Kathy's statement to the GAL that "she had only one father[,]" petitioner's husband.

Competent evidence also supports the trial court's finding that respondent's conduct indicates he "will not promote [Kathy's] physical and emotional well-being" should he retain his parental rights. As the trier of fact, the trial court could reasonably draw this inference based on respondent's abandonment of his daughter over a period of several years before petitioner filed her petition to terminate his rights and his irregular attendance at visitations in response to petitioner's filing. As made plain in its findings, the court considered respondent's testimony about his prior conduct toward Kathy demonstrably false and self-serving. Based on this evidence, the court found respondent's averments "as to his future intentions with this minor child . . . not credible."

We hold the trial court did not abuse its discretion in concluding that Kathy's best interest would be served by the termination of respondent's parental rights. The court's findings demonstrate its careful consideration of the dispositional factors prescribed in N.C.G.S. § 7B-1110(a), including the strong bond between Kathy and petitioner's husband, his intention to adopt Kathy, and the loving home environment petitioner and her husband created for Kathy and their young son. That assessment accords with the GAL's recommendation that respondent's rights be terminated.

[4] Lastly, respondent cites a series of cases recognizing a presumption in favor of the child's biological parents in matters related to child custody. *See, e.g.*, *Petersen v. Rogers*, 337 N.C. 397, 403–04, 445 S.E.2d 901, 905 (1994). Nonetheless, this reliance on *Petersen* and like cases in which the parents were not shown to have acted inconsistently with their constitutionally-protected status is unavailing. While this Court has long recognized "the constitutionally-protected paramount right of parents to custody, care, and control of their children," *id.* at 406, 445 S.E.2d at 905, it is also well-established, however, that "[a] parent loses

this paramount interest if he or she is found to be unfit or acts inconsistently 'with his or her constitutionally protected status,' " *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 503 (2010) (quoting *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005)). Once a parent has forfeited his constitutionally protected status, issues related to child custody are determined based purely on the child's best interests. *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534–35 (1997).

An adjudication of grounds for terminating parental rights under N.C.G.S. § 7B-1111(a) constitutes a determination by the trial court that the respondent-parent is unfit or has acted inconsistently with his constitutionally protected status with regard to the subject juvenile. *See Owenby v. Young*, 357 N.C. 142, 145, 579 S.E.2d 264, 267 (2003) (identifying an adjudication under N.C.G.S. § 7B-1111(a) as one of "at least two methods a court may use to find that a natural parent has forfeited his or her constitutionally protected status"). The dispositional statute thus provides that only "[*a*]*fter an adjudication that one or more grounds for terminating a parent's rights exist*, the court shall determine whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (emphasis added).

Having adjudicated respondent's willful abandonment of Kathy under N.C.G.S. § 7B-1111(a)(7), the trial court was obliged by N.C.G.S. § 7B-1110(a) to determine whether it was in Kathy's best interests to terminate respondent's parental rights, and to do so without regard to any competing interest of respondent. *Cf. Owenby*, 357 N.C. at 146, 579 S.E.2d at 267 ("Once a court determines that a parent has actually engaged in conduct inconsistent with the protected status, the 'best interest of the child test' may be applied without offending the Due Process Clause."). The court undertook the appropriate statutory inquiry and reached a reasoned decision about Kathy's best interest based on the evidence. The trial court's order is affirmed.

AFFIRMED.

IN RE N.P.

[374 N.C. 61 (2020)]

IN THE MATTER OF N.P.

No. 227A19

Filed 3 April 2020

Termination of Parental Rights—grounds for termination—neglect—findings

The trial court did not err by determining that grounds existed under N.C.G.S. § 7B-1111(a)(1) to terminate the parental rights of a father who had numerous convictions for sex offenses against a child. Despite the father's claims to the contrary, the district court expressly made a specific ultimate finding that there was a high probability that repetition of neglect would occur in the future if the child were placed with his father. The trial court's findings were supported by clear, cogent, and convincing evidence.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 13 March 2019 by Judge Christopher B. McLendon, in District Court, Pitt County. This matter was calendared in the Supreme Court on 25 March 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

The Graham.Nuckols.Conner.Law Firm, PLLC, by Timothy E. Heinle, for petitioner-appellee Pitt County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Thomas N. Griffin III, for respondent-appellee Guardian ad Litem.

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

MORGAN, Justice.

Respondent-father appeals from the district court's order terminating his parental rights to N.P. (Nick).[1] After careful consideration of

1. The minor child N.P. will be referenced throughout this opinion as "Nick," which is a pseudonym used to protect the identity of the child and to facilitate the ease of reading the opinion.

respondent's challenges to the district court's conclusion that grounds existed to terminate his parental rights, we affirm.

On 19 September 2016, the Pitt County Department of Social Services ("DSS") obtained non-secure custody of Nick and filed a petition alleging that he was a neglected and dependent juvenile. In the petition, DSS alleged that Nick tested positive for cocaine at birth and that his mother failed to bond with him. *In re N.J.P.*, No. COA17-532, 2017 WL 5147343 *1 (N.C. Ct. App. 2017) (unpublished). DSS further alleged that respondent "had a 'co-dependent relationship' with [the mother] and had 'served time in prison for Statutory Rape/Sex Offense and Sexual Exploitation of a Minor.' " *Id.* On 23 February 2017, the district court adjudicated Nick to be a neglected and dependent juvenile. *Id.* The Court of Appeals affirmed the adjudications of neglect and dependency, but reversed the disposition in part. *Id.* at *8–9.

On 27 November 2018, DSS filed a petition to terminate the parental rights of both respondent and Nick's mother. DSS alleged grounds to terminate respondent's parental rights to Nick based on neglect, willfully leaving Nick in foster care for more than 12 months without making reasonable progress to correct the conditions that led to Nick's removal, willfully failing to pay a reasonable portion of the cost of care for Nick during his placement in DSS custody, and dependency. *See* N.C.G.S. § 7B-1111(a)(1)–(3), (6) (2019). On 13 March 2019, the district court entered an order concluding that grounds existed to terminate respondent's parental rights based on all of the grounds alleged in the petition. On the same date, the district court entered a separate order in which it concluded that termination of respondent's parental rights was in Nick's best interests.[2] Respondent appeals.

Before this Court, respondent argues that the district court erred by concluding that grounds existed to terminate his parental rights. We disagree.

A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under N.C.G.S. § 7B-1111(a) of our General Statutes. N.C.G.S. § 7B-1109(e), (f) (2019). We review a district court's adjudication

2. The district court order also terminated the parental rights of Nick's mother, but she did not appeal and is not a party to the proceedings before this Court.

"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. at 111, 316 S.E.2d at 253 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). If the petitioner meets its burden during the adjudicatory stage, "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, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110).

N.C.G.S. § 7B-1111(a)(1) (2019) provides for termination of parental rights based upon a finding that "[t]he parent has . . . neglected the juvenile" within the meaning of N.C.G.S. § 7B-101. A neglected juvenile, in turn, is statutorily defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare[.]" N.C.G.S. § 7B-101(15) (2019).

Generally, when termination of parental rights is based on neglect, "if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984)). "When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212, 835 S.E.2d 425, 430 (2019) (citing *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)).

Here, in the order terminating respondent's parental rights, the district court found as fact that Nick was adjudicated neglected on 5 January 2017. The district court then made more than ninety findings of fact relevant to its adjudication of grounds to terminate respondent's parental rights on grounds of neglect pursuant to N.C.G.S. § 7B-1111(a)(1). For example, the district court found that, at the time of the adjudication, respondent: (1) had never acknowledged any responsibility for his May 2001 convictions on fourteen counts of sex offenses against a child and had not received sex-offender-specific treatment following those convictions; (2) did not timely complete a court-ordered Sex Offender Specific Evaluation, and when the SOSE was completed a year after Nick's initial adjudication as a neglected juvenile, did not complete the recommended therapy and training; (3) was evaluated in the SOSE as exhibiting paranoia and actively exhibited paranoia and lack of commitment in his therapy sessions with two counselors, leading to an unscheduled

discontinuation of both; (4) accused Sheriff Paula Dance of sexually abusing and kidnapping his other children, accused former Chief District Court Judge Gwen Hilburn of being mentally ill, and claimed "all parties involved in this proceeding have falsified documents"; (5) lacked stable housing as required by the district court in that one of the two residential options that respondent proposed would cause Nick and respondent to live with a registered sex offender and the second option would involve a prospective roommate for whom respondent was not able to provide any background information; (6) planned for said prospective roommate to be a caretaker for Nick and did not express an understanding of the "safety risk associated with inviting strangers into his home as potential babysitters," later "filed for a civil no-contact order against the roommate after an argument," and was eventually evicted from the residence; and (7) had repeatedly complained to DSS that Nick was suffering from physical and mental ailments from which Nick did not appear to be suffering and had contacted law enforcement during a supervised visit to report that DSS social workers were threatening respondent's life and Nick's life. The district court also found that:

> 69. The Respondent Father's history of instability, lack of being forthcoming about housing, poor housing and roommate decisions, and the fact that he waited until so long into the case and so soon to this TPR causes the [c]ourt not to find that he has stable housing now.
>
> 70. The Respondent Father has not had and does not now have stable housing. The Respondent Father's frequent relocating, his history of dishonesty and vague responses to questions about his housing, and his refusal or inability to properly vet roommates, contribute to this instability.
>
> . . .
>
> 91. The Respondent Father['s] inability to consistently follow court orders or work to resolve the issues which brought his child into DSS custody, as well as his history of poor decision-making, demonstrates that he is unable to maintain the juvenile's health and safety should the juvenile be placed in his care.
>
> 92. To place the juvenile with the Respondent Father would place the juvenile in an injurious environment as there have been no changes to the Respondent Father's mental health issues.

Overall, respondent does not make specific challenges to the district court's findings of fact, instead lodging a broadside exception that the evidentiary findings relating to the ground of neglect are not supported by the record. Such broadside exceptions, however, are ineffectual, and findings of fact not specifically challenged by a respondent are presumed to be supported by competent evidence and binding on appeal. *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) ("Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." (citations omitted)). Moreover, we review only those findings necessary to support the district court's conclusion that grounds existed to terminate respondent's parental rights for neglect. *Id.* at 407, 831 S.E.2d at 58–59 (citing *In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133).

Of the findings of fact generally and noteworthily referenced above, the only findings specifically challenged by respondent which are relevant to the ground of neglect are Findings of Fact 69 and 70, which relate to respondent's history of unstable housing. Respondent contends that these findings of fact were based on events occurring in the past and do not reflect his status as of the date of the termination hearing. We disagree, noting that respondent does not challenge any of the findings which describe his history of unstable housing and poor decisions regarding housing and roommates. The district court has the responsibility of making all reasonable inferences from the evidence presented. *See In re D.L.W.*, 368 N.C. at 788 S.E.2d at167–68 (stating that it is the district court judge's duty to consider all of the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom). The district court could reasonably infer from the evidence that respondent could not maintain safe housing for any appreciable period of time and that he lacked the ability to do so in the future. *See*, *e.g.*, *In re Wilkerson*, 57 N.C. App. 63, 68, 291 S.E.2d 182, 185 (1982) (rejecting respondents' argument that they had corrected the conditions which led to the removal for neglect, indicating that at the time of the termination hearing they were no longer living in a rat-infested trailer but in a clean five-room apartment, but ignoring the preponderance of the evidence that they had lived in filthy and unsanitary conditions until shortly before the termination hearing).

Respondent generally contends that the trial court erred by finding and concluding that he neglected Nick and that such neglect was likely to reoccur. Respondent also asserts that he had alleviated the conditions of neglect that led to Nick's removal. He further claims that the district

court failed to make a specific finding regarding the probability of repetition of neglect. We are not persuaded.

The district court's undisputed findings of fact demonstrate that respondent was convicted for sexually abusing children and denied responsibility for those convictions; had persistent and serious mental health issues that affected his ability to parent Nick; and suffers from serious paranoia, impulsivity, and erratic behavior. The district court further determined that these issues impeded and impacted respondent's ability to parent Nick, and that placing Nick with respondent would put Nick in an injurious environment. Although respondent attempts to portray his behavior as being protective of Nick, the district court, which had repeated opportunities to observe respondent, rejected that depiction, and it is not the role of this Court to substitute its judgment for that of the trier of fact. *See*, *e.g.*, *Scott v. Scott*, 157 N.C. App. 382, 388, 579 S.E.2d 431, 435 (2003) (stating that when the trial court sits as fact-finder, it is the sole judge of the credibility and weight to be given to the evidence, and it is not the role of the appellate court to substitute its judgment for that of the trial court). Additionally, it is clear that respondent lacked stable housing until shortly before the termination hearing. Furthermore, despite respondent's claims to the contrary, the district court expressly made a specific ultimate finding that "there is a high probability that a repetition of neglect would occur in the future if [Nick] were to be placed with the Respondent Father." The district court's findings on this issue are supported by clear, cogent, and convincing evidence; as a result, we hold that the district court did not err by determining that grounds existed under N.C.G.S. § 7B-1111(a)(1) to terminate respondent's parental rights.

The district court's conclusion that a ground for termination existed pursuant to N.C.G.S. § 7B-1111(a)(1) is sufficient in and of itself to support termination of respondent's parental rights. *In re T.N.H.*, 372 N.C. at 413, 831 S.E.2d at 62. Furthermore, respondent does not challenge the trial court's conclusion that termination of his parental rights was in the child Nick's best interests. *See* N.C.G.S. § 7B-1110(a) (2019). Accordingly, we affirm the district court's order terminating respondent's parental rights.

AFFIRMED.

IN RE S.D.

[374 N.C. 67 (2020)]

IN THE MATTER OF S.D.

No. 150A19

Filed 3 April 2020

Termination of Parental Rights—grounds—neglect—findings—conclusions

In a proceeding to terminate a father's parental rights based on neglect, the trial court made detailed findings of fact, supported by competent evidence, that the child was previously adjudicated neglected and that the father had not made sufficient progress toward completing the requirements of his case plan to enable reunification to occur. The findings were sufficient to support the trial court's conclusion that the child was neglected in the past and that there was a likelihood of repetition of neglect given the father's history of criminal activity and substance abuse, his lack of progress in correcting the barriers to reunification, and his inability to provide care for his child at the time of the termination hearing.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 2 January 2019 by Judge Louis A. Trosch in District Court, Mecklenburg County. This matter was calendared for argument in the Supreme Court on 25 March 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Gretchen L. Caldwell, Associate County Attorney, for petitioner-appellee Mecklenburg County Department of Social Services, Youth & Family Services Division.

K&L Gates, LLP, by Sophie Goodman, for Guardian ad Litem.

Mercedes O. Chut for respondent-appellant father.

ERVIN, Justice.

Respondent-father Jonathan K. appeals from an order entered by the trial court terminating his parental rights in his minor child, S.D.[1] After careful consideration of respondent-father's challenges to the trial

1. S.D. will be referred to throughout the remainder of this opinion as "Sarah," which is a pseudonym used to protect the identity of the juvenile and for ease of reading.

court's termination order in light of the record and the applicable law, we conclude that the trial court's termination order should be affirmed.

In September 2016, the Mecklenburg County Department of Social Services, Youth and Family Services Division assumed responsibility for addressing concerns that Sarah might be a neglected juvenile from the Gaston County Department of Social Services. At that time, Sarah was in a kinship placement with a maternal great-aunt as the result of substance abuse and mental health problems involving her mother and her mother's boyfriend. After Sarah's mother tested positive for methamphetamines at the time that she gave birth to Sarah's half sibling on 30 November 2016, YFS filed a juvenile petition alleging that Sarah was a neglected and dependent juvenile and obtained nonsecure custody of her on 2 December 2016.[2] Sarah's placement with her great-aunt continued after she was taken into YFS custody.

At the time that YFS filed the juvenile petition and obtained nonsecure custody of Sarah, respondent-father was incarcerated in the custody of the Division of Adult Correction based upon convictions for possession of a firearm by a felon and felony drug-related offenses. Although YFS noted that respondent-father was Sarah's father in the juvenile petition, it also alleged that "[p]aternity ha[d] not been established" and that "[respondent-father] ha[d] never seen [Sarah] nor ha[d] he provided any financial or emotional support to her." When a YFS social worker visited respondent-father in prison on 31 January 2017, respondent-father acknowledged that he had a history of substance abuse, requested paternity testing, and expressed a willingness to enter into a case plan and participate in remedial services in the event that he was determined to be Sarah's biological father. In the aftermath of this meeting, YFS proposed an initial Out-of-Home Family Services Agreement, pursuant to which respondent-father would be required, among other things, to complete an assessment through the Families in Recovery Stay Together program, maintain sobriety, follow any recommendations resulting from the FIRST assessment, maintain consistent contact with YFS and Sarah's guardian ad litem, complete parenting education, and demonstrate the skills that he had learned during parenting education in the course of his interactions with Sarah.

The juvenile petition came on for hearing before Judge David H. Strickland on 15 February 2017. Paternity of Sarah had not been established by the time of the hearing. In light of an agreement between the

2. The juvenile petition also addressed the status of Sarah's newborn half sibling, who is not respondent-father's child.

parties, which included stipulations to the existence of certain facts and indicated that "[respondent-father] ha[d] never seen [Sarah] nor ha[d] he provided any financial or emotional support to her[,]" Judge Strickland entered an order on 27 February 2017 in which he adjudicated Sarah to be a neglected and dependent juvenile, ordered that Sarah remain in YFS custody, and established reunification as the primary permanent plan, with adoption and guardianship being the concurrent secondary plan.

On 28 February 2017, respondent-father submitted to DNA testing. In addition, respondent-father was present for the first permanency planning review hearing on 11 May 2017 despite his continued incarceration. In the review hearing order that resulted from the 11 May 2017 hearing, Judge Strickland determined that respondent-father was Sarah's biological father based upon the results of the DNA test; ordered that respondent-father contact YFS immediately after his release in September 2017 so that he could begin working on his case plan; authorized respondent-father to send mail or gifts to Sarah through YFS, and noted that Sarah's great-aunt had authorized respondent-father to call her for the purpose of inquiring about Sarah's well-being.

Respondent-father sent a birthday card to Sarah prior to the next review hearing, which was held on 25 August 2017. In a review order entered on 18 September 2017, Judge Strickland established a plan under which respondent-father was allowed to visit with Sarah for two hours each week following his release from his incarceration in the event that he had demonstrated his ability to maintain sobriety by providing a clean drug screen to YFS. In addition, Judge Strickland changed Sarah's permanent plan to a primary plan of adoption and a concurrent secondary plan of legal guardianship and reunification on the grounds, among others, that respondent-mother had failed to make progress in satisfying the requirements of her case plan and the fact that respondent-father had remained incarcerated since the filing of the juvenile petition.

Respondent-father was released from prison on 21 September 2017. Between the date of his release and the next review hearing on 20 December 2017, respondent-father contacted YFS for the purpose of setting up a meeting to develop his case plan and to initiate a visitation program. However, respondent-father failed to appear on four scheduled meeting dates in October before finally meeting with a YFS representative on 21 November 2017. Although respondent-father expressed hesitation about participating in the case plan process, he agreed to complete a FIRST assessment. In spite of this agreement, respondent-father failed to complete the required FIRST assessment prior to the 20 December 2017 review hearing and had no further contact with YFS

in advance of that hearing aside from a text message that he transmitted to a social worker on the date of the hearing indicating that he would be unable to attend. Similarly, even though respondent-father had contacted the maternal great-aunt on three separate occasions to set up a visit with Sarah, he never actually visited with his daughter.

In the order entered following the 20 December 2017 review hearing on 26 January 2018, the trial court ordered respondent-father to comply with the case plan that had been proposed by YFS, to obtain stable housing and employment, and to consistently visit with Sarah. In spite of the fact that it determined that respondent-father had failed to make significant progress toward complying with the provisions of his case plan, the trial court concluded that the initiation of a termination of parental rights proceeding at that time would not be in Sarah's best interests and determined that respondent-father should be afforded "one more short review period to demonstrate significant progress . . . towards reunification." As a result, the trial court ordered respondent-father to "immediately demonstrate his commitment to reunifying with [Sarah] by taking affirmative action to comply with his case plan."

Although respondent-father visited with Sarah shortly after the 20 December 2017 review hearing, he otherwise failed to make significant progress toward satisfying the requirements of his case plan prior to the next review hearing, which was set for 20 February 2018. On the contrary, respondent-father was arrested for an alleged parole violation on 7 February 2018 and remained in custody until 12 February 2018. In view of the fact that respondent-father had failed to make significant progress in satisfying the provisions of his case plan by the time of the 20 February 2018 review hearing, the trial court concluded in the resulting order that termination of respondent-father's parental rights would be in Sarah's best interests and ordered YFS to make a filing seeking the termination of his parental rights in Sarah within the next sixty days. On the other hand, the trial court did not suspend efforts to reunify Sarah with respondent-father and allowed respondent-father to continue to visit with Sarah on the condition that, prior to his next visit, he provide a clean drug screen and meet with YFS for the purpose of discussing the provisions of his case plan. On 30 April 2018, YFS filed a motion seeking to have respondent-father's parental rights in Sarah terminated on the grounds of neglect and willfully leaving her in foster care or a placement outside the home for more than twelve months without making reasonable progress toward correcting the conditions that had led to her removal from the home. N.C.G.S. § 7B-1111(a)(1) and (2) (2019).[3]

3. The YFS filing also sought to terminate the mother's parental rights in Sarah and the parental rights of the mother and the mother's boyfriend in Sarah's half sibling.

On 14 May 2018, respondent-father was arrested for possession of heroin, possession of methamphetamine, and possession of drug paraphernalia. In addition, respondent-father was charged with violating the terms and conditions of his parole on 15 May 2018 as a result of the fact that these new criminal charges had been lodged against him. Respondent-father remained incarcerated in connection with these new charges until he entered a plea of guilty to them on 5 September 2018, received a suspended sentence, and was released on probation.

After a continuance from a 25 July 2018 hearing date resulting from respondent-father's incarceration, another review hearing was held on 12 September 2018. On 21 November 2018, the trial court entered a review order finding that respondent-father had failed to make sustained efforts to comply with the provisions of his case plan or to make significant progress toward reunification with Sarah. In view of his failure to satisfy the requirements that had been established as a prerequisite for the reinstatement of visitation, respondent-father had not had any additional visits with Sarah as of that date.

The motion to terminate respondent-father's parental rights came on for hearing before the trial court on 12 December 2018.[4] On 2 January 2019, the trial court entered an order terminating respondent-father's parental rights in Sarah on both of the grounds alleged in the termination motion. The trial court further concluded that the termination of respondent-father's parental rights in Sarah would be in the child's best interests. Respondent-father noted an appeal to the Court of Appeals from the trial court's order.[5]

In seeking relief from the trial court's termination order before this Court, respondent-father argues that the trial court erred by determining

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4. Although the motion that YFS had filed sought to terminate the rights of the parents in both Sarah and her half sibling, the 12 December 2018 hearing was limited to a consideration of the issue of whether respondent-father's parental rights in Sarah should be terminated. The hearing concerning the termination of the mother's rights in Sarah was continued after the mother executed a relinquishment of her parental rights in Sarah on 7 December 2018, *see* N.C.G.S. §§ 48-3-701, 48-3-706 (2017), with this aspect of the termination proceeding being subsequently dismissed after the time within which the mother was entitled to revoke the relinquishment of her parental rights in Sarah had expired. The termination proceeding regarding Sarah's half sibling was dismissed by YFS after a guardian had been appointed for Sarah's half sibling.

5. Although respondent-father's notice of appeal specifies that his appeal had been noted to the Court of Appeals, rather than to this Court, we elect, in the exercise of our discretion, to issue a writ of certiorari authorizing review of respondent-father's challenges to the trial court's termination order on the merits in the exercise of our discretion given the seriousness of the issues that are implicated by the trial court's termination order. *In re N.D.A.*, 373 N.C. 71, 73–74, 833 S.E.2d 768, 771 (2019).

that his parental rights in Sarah were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(1) and (2). According to well-established North Carolina law, termination of parental rights proceedings are conducted utilizing a two-stage process. 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 grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6, 832 S.E.2d 698, 700 (2019) (quoting N.C.G.S. § 7B-1109(f) (2017)). "If [the trial court] determines that one or more grounds 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, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110). "This Court reviews a trial court's adjudication decision pursuant to N.C.G.S. § 7B-1109 'in order to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law,' with the trial court's conclusions of law being subject to de novo review on appeal." *In re N.D.A.*, 373 N.C. 71, 73, 833 S.E.2d 768, 771 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (citation omitted)). Findings of fact that are not challenged on appeal on the grounds that they lack sufficient evidentiary support are binding for purposes of appellate review. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

In his initial challenge to the trial court's termination order, respondent-father argues that the trial court erred by concluding that his parental rights in Sarah were subject to termination on the grounds of neglect.

> According to N.C.G.S. § 7B-1111(a)(1), a trial court has the authority to terminate a parent's parental rights in a child in the event that the parent has neglected the child as that term is defined in N.C.G.S. § 7B-101, which provides that a neglected juvenile is, among other things, a juvenile who "does not [receive] proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned."

In re N.D.A., 373 N.C. at 79–80, 833 S.E.2d at 774–75 (quoting N.C.G.S. § 7B-101(15)). As the Court of Appeals has recognized, "[n]eglect is more than a parent's failure to provide physical necessities and can include the total failure to provide love, support, affection, and personal contact."

In re C.L.S., 245 N.C. App. 75, 78, 781 S.E.2d 680, 682 (citation omitted), *aff'd per curiam*, 369 N.C. 58, 791 S.E.2d 457 (2016).

> "[I]n 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 the event that "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, 'requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible.' " In such circumstances, the trial court may find that a parent's parental rights in a child are subject to termination on the grounds of neglect in the event that the petitioner makes "a showing of past neglect and a likelihood of future neglect by the parent."

In re N.D.A., 373 N.C. at 80, 833 S.E.2d at 775 (citations omitted). "If past neglect is shown, the trial court also must then consider evidence of changed circumstances." *In re M.A.W.*, 370 N.C. 149, 152, 804 S.E.2d 513, 516 (2017) (citing *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)). "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232.

After noting that it had received its orders in the underlying neglect and dependency case into evidence without objection, the trial court made detailed findings of fact based upon those orders and the testimony that had been received at the termination hearing. Among other things, the trial court found in Finding of Fact No. 15 that Sarah had been adjudicated to be a neglected and dependent juvenile on 15 February 2017 and determined in Finding of Fact No. 16 that YFS had proposed an initial case plan for the purpose of addressing the barriers to reunification between respondent-father and Sarah which, in the trial court's opinion, consisted of substance abuse, mental health, and respondent-father's lack of stable housing and employment. In Finding of Fact Nos. 17 through 56, the trial court delineated respondent-father's progress, or lack thereof, in addressing those barriers to reunification between the date upon which Sarah had been adjudicated to be a neglected and dependent juvenile and the date of the final review hearing, which had been held on 12 September 2018. In Finding of Fact Nos. 57 through 73, the trial court addressed the extent to which respondent-father had addressed the barriers to reunification between the date of

the 12 September 2018 review hearing and the date of the 12 December 2018 termination hearing. According to the trial court's findings of fact, respondent-father (1) never made significant, sustained progress toward addressing the barriers to his reunification with Sarah; (2) had not established a relationship with Sarah; and (3) only desired to have contact and visit with Sarah instead of obtaining custody of her.

Based upon these findings of fact, the trial court concluded that respondent-father's parental rights in Sarah were subject to termination for neglect. *See* N.C.G.S. § 7B-1111(a)(1). More specifically, the trial court determined in Conclusion of Law No. 8 that, "[p]ursuant to N.C.G.S. §[ ]7B-1111(a)(1), [respondent-father] has neglected the juvenile as that term is defined in N.C.G.S. §[ ]7B-101(15) in that he has failed to provide proper care, supervision or discipline for the juvenile" and further determined in Conclusion of Law No. 9 "that the likelihood of ongoing or continued neglect in the future is significantly high if the juvenile is returned to [respondent-father's] care." The trial court explained the rationale underlying the second of these two determinations in Conclusion of Law No. 9, stating that:

> [Respondent-father] has made almost no effort to establish a relationship with [Sarah], even in the 14 months since he was released from prison. He has continued to engage in criminal activity since his release from prison, resulting in incarceration and unavailability to [Sarah]. Additionally, even when not incarcerated, [respondent-father] hasn't complied with his case plan services specifically identified to address the barriers to reunification . . . .

In challenging the trial court's determination that his parental rights in Sarah were subject to termination on the grounds of neglect, respondent-father begins by asserting that many of the trial court's findings of fact lacked sufficient evidentiary support or were otherwise erroneous. More specifically, respondent-father contends that a number of the trial court's findings were inaccurate and misleading given that he was not responsible for the conditions that led to Sarah's placement in YFS custody; that he lacked sufficient time to make adequate progress in complying with his case plan given that he had been incarcerated for fourteen months of the two-year interval between the date upon which Sarah was taken into YFS custody and the date of the termination hearing; and that YFS had failed to make adequate efforts to assist him in addressing the problems that he faced during the relevant time period. In addition, respondent-father has identified various findings of fact that he claims to be erroneous on the grounds that they fail to

account for the progress that he had made in addressing the obstacles to his reunification with Sarah prior to the date of the termination hearing. We are not persuaded by any of respondent-father's challenges to the trial court's findings of fact.

As an initial matter, we note that respondent-father's contention that the trial court erred by finding that his parental rights were subject to termination on the grounds of neglect because he was not responsible for the conditions that resulted in Sarah's placement in YFS custody is devoid of merit. Simply put, there is no requirement that the parent whose rights are subject to termination on the grounds of neglect be responsible for the prior adjudication of neglect. As we have previously explained, "[i]n determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *In re M.A.W.*, 370 N.C. at 154, 804 S.E.2d at 517 (quoting *In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252). In light of that fact, we held in *In re M.A.W.* that a prior adjudication of neglect based upon a mother's substance abuse and mental health problems was "appropriately considered" by the trial court as "relevant evidence" in determining whether the parental rights of a father who had been incarcerated at the time of the initial adjudication should be terminated. *Id.* at 150–54, 804 S.E.2d at 515–17; *see also In re C.L.S.*, 245 N.C. App. at 78–79, 781 S.E.2d at 682–83 (affirming the termination of a father's parental rights on the grounds of neglect even though the father had been incarcerated and paternity had not been established at the time that the juvenile was adjudicated to be neglected based, in part, upon the mother's substance abuse problems). Moreover, we note that the determination that Sarah was a neglected and dependent juvenile rested, in part, upon findings that respondent-father's "[p]aternity ha[d] not been established" and that "[respondent-father] ha[d] never seen [Sarah] nor ha[d] he provided any financial or emotional support to her."

Respondent-father's contention that he had not been given an adequate opportunity to satisfy the requirements of his case plan prior to the termination of his parental rights in Sarah because he had been in prison for approximately fourteen months of the two-year period during which Sarah had been in YFS custody is equally unpersuasive. This Court and the Court of Appeals have both emphasized that "[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision[,]" *In re T.N.H.*, 372 N.C. 403, 412, 831 S.E.2d 54, 62 (2019) (quoting *In re M.A.W.*, 370 N.C. at 153, 804 S.E.2d at 517), and that incarceration

> "does not negate a father's neglect of his child" because "[t]he sacrifices which parenthood often requires are not forfeited when the parent is in custody." Thus, while incarceration may limit a parent's ability "to show affection, it is not an excuse for [a parent's] failure to show interest in [a child's] welfare by whatever means available . . . ."

In re C.L.S., 245 N.C. App. at 78, 781 S.E.2d at 682 (quoting *Whittington v. Hendren*, 156 N.C. App. 364, 368, 576 S.E.2d 372, 376 (2003)). As the record reflects, respondent-father had been incarcerated for approximately ten months between the time that YFS obtained nonsecure custody of Sarah on 2 December 2016 and the date of his release on 21 September 2017, which, in turn, occurred approximately fourteen months prior to the date of the 12 December 2018 termination hearing. In addition, respondent-father had been incarcerated for a brief period of time in February 2018 based upon an alleged parole violation and for the period between 14 May 2018 and 6 September 2018 as the result of the fact that he had been charged with committing new drug-related offenses. The evidentiary record developed in this case shows that respondent-father made minimal efforts to show interest in Sarah while incarcerated, sending just a single birthday card to her after the trial court advised him that "he may send any mail or gifts to [Sarah] through the social worker" and after YFS encouraged him to do so. Moreover, even though respondent-father had been unable to engage in the full range of remedial services required by his case plan during the first of these multiple periods of incarceration,[6] his own conduct led to this aspect of his inability to attempt to satisfy the requirements of his case plan in 2018. As the trial court recognized in Conclusion of Law No. 9, respondent-father's continued criminal activity and the resulting separation from Sarah justifies, rather than undercuts, the trial court's determination that there was a significant likelihood that Sarah would be neglected in the event that she was returned to respondent-father's

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6. Although respondent-father asserts that he made progress toward satisfying the requirements of his case plan while incarcerated because, "during his first incarceration, [he] earned his high school equivalency diploma and completed a college course in computer technology[, which] furthered his case plan goal of obtaining gainful employment after incarceration," the trial court specifically found that "[those] courses were completed prior to [Sarah] entering YFS custody[ ] and were not related to his case plan objectives." In view of the fact that respondent-father has not challenged this finding of fact as lacking sufficient evidentiary support, it is binding upon this Court for purposes of appellate review. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

care. As a result, the trial court did not err in the manner in which it addressed respondent-father's incarceration and the extent of his ability to satisfy the requirements of his case plan in the process of finding that his parental rights in Sarah were subject to termination on the basis of neglect.

Finally, respondent-father faults YFS for not doing enough to assist him in satisfying the requirements of his case plan. More specifically, respondent-father argues that YFS did not maintain contact with him, failed to recommend specific services that would be of assistance to him in addressing the problems that prevented his reunification with Sarah, and made minimal attempts to assess his progress in satisfying the requirements of his case plan after his release from incarceration on 6 September 2018. The evidentiary record developed in this case undercuts the validity of this aspect of respondent-father's argument.

In each of the review orders entered while Sarah was in YFS custody, the trial court found, as required by N.C.G.S. § 7B-906.2(c), that YFS had made reasonable efforts to eliminate the conditions that had led to Sarah's removal from the family home. In addition, the record, as reflected in the trial court's findings of fact, establishes that respondent-father, rather than YFS, was responsible for his failure to satisfy the requirements of his case plan. According to the record evidence, a representative of YFS met with respondent-father for the purpose of discussing his case plan on at least four separate occasions while he was in prison and met with him on one other occasion following his release from incarceration in September 2017. During those meetings, the YFS representative emphasized the importance of respondent-father's case plan and the need for respondent-father to complete a FIRST assessment in order to ensure the development of an appropriate case plan. In spite of these admonitions, respondent-father never obtained the required FIRST assessment.

In addition, respondent-father failed to immediately contact YFS upon his release from incarceration in September 2018, despite having been instructed to do so and his commitment to YFS representatives that he would comply with this instruction. Respondent-father missed or canceled numerous meetings with YFS representatives throughout the time that Sarah was in YFS custody and provided minimal verification of the claim that he made at the termination hearing to have been making progress toward complying with the requirements of his case plan. Although respondent-father argues that the trial court placed an undue emphasis upon the importance of the requirement that he complete a

FIRST assessment,[7] the evidentiary record and the trial court's findings establish that the FIRST assessment was an integral component of respondent-father's case plan that was intended to identify the barriers to his reunification with Sarah, including his difficulties with substance abuse, mental health, physical health, and parenting skills, and to allow YFS to recommend suitable services to assist respondent-father in addressing those barriers to reunification with Sarah. As a result, the trial court's determination in Finding of Fact No. 65 that respondent-father's "failure to consistently respond to, or engage with, [YFS] and recommended services limited [YFS's] ability to assist him" is supported by ample record evidence and precludes acceptance of respondent-father's argument that YFS failed to make reasonable efforts to assist him in overcoming the barriers to reunification that he needed to address.

Aside from these more generalized complaints, respondent-father asserts that Finding of Fact Nos. 33–35, 37, 41–44, 46, 48, 53–55, and 58–73 are erroneous or misleading. As a general proposition, respondent-father refrains from asserting that these findings of fact lack sufficient evidentiary support, an argument that would be unavailing given that they are clearly based upon these review orders and the evidentiary record developed at the termination hearing. Instead, respondent-father advances challenges to these findings on a collective rather than an individual basis,[8] arguing, primarily, that the findings fail to account for the progress that he had made in completing the requirements of his case plan during the period immediately preceding the 12 December 2018 termination hearing. In reviewing respondent-father's challenges to the trial court's findings of fact, we will focus upon those findings that are necessary to support the trial court's determination that respondent-father's parental rights in Sarah are subject to termination on the grounds of neglect, *see In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58–59,

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7. The arguments made by respondent-father with respect to the FIRST assessment strike us as being inconsistent. At various points, respondent-father claimed that he did not need to complete the FIRST assessment because he did not have a substance abuse problem, that the FIRST assessment was unnecessary because he had enrolled in substance abuse treatment, and that the FIRST assessment was part of the parenting education component of his case plan.

8. For example, respondent-father asserts that "nearly all" of Finding of Fact Nos. 58–73 are erroneous because they "recite the same themes: [respondent-father] made no progress on his case plan; he failed to engage in his case plan and work with YFS or the [guardian ad litem]; he failed to communicate with YFS and the [guardian ad litem] for long periods; he never demonstrated any commitment to Sarah or any genuine interest in reuniting with her; he only attended Cornerstone [Treatment Program] because he was court-ordered and never successfully completed it; he refused substance abuse treatment because he never obtained a FIRST assessment."

while remaining mindful that this Court's role is to determine whether the trial court's findings are supported by clear, cogent, and convincing evidence, *see In re N.D.A.*, 373 N.C. at 74, 833 S.E.2d at 771, and that we should avoid any sort of appellate reweighing of the evidence.

According to the trial court, it was likely that Sarah would be neglected if she was returned to respondent-father's care because respondent-father had "made almost no effort to establish a relationship with [Sarah], even in the 14 months since he was released from prison." In support of this determination, the trial court found as a fact that:

> 70. Since [Sarah] entered YFS custody, [respondent-father] has not made himself available to the child to provide the care, personal contact, love, and affection that inheres in the parental relationship.
>
> 71. [Respondent-father] has only attended two visits with [Sarah] over the life of this case, despite visitation arrangements being in place and the father being encouraged to set them up with [the maternal great-aunt]. Prior to [Sarah] entering custody, [respondent-father] had not had any contact with [Sarah].
>
> 72. [Respondent-father] has not provided any gifts to [Sarah] over the life of this case. He sent one birthday card to [Sarah] through [YFS] in 2017.
>
> 73. The first step for any parent towards reunification with their child is to acknowledge that they are ready and willing to reunify with the juvenile. Over the life of this case, [respondent-father] has never indicated his willingness, ability, and intention to reunify with [Sarah]. He has clearly and consistently stated that he does not want full custody of [Sarah]. . . . [Respondent-father] has stated that he would like the maternal great[-]aunt to be granted guardianship of [Sarah]. [Respondent-father] has never identified any alternative placement options for [Sarah].

Respondent-father's contentions to the contrary notwithstanding, each of these findings has ample evidentiary support and accurately depicts the relevant record evidence.

As far as Finding of Fact No. 71, which addresses the issue of visitation, is concerned, the record evidence shows that, prior to his initial release from incarceration, respondent-father was authorized to

visit with Sarah on the condition that he provide a clean drug screen. According to the order entered following the 20 December 2017 review hearing and the testimony elicited at the termination hearing, respondent-father did not visit with Sarah until shortly after the 20 December 2017 review hearing, even though such visits had been authorized on 21 November 2017 after he provided two negative drug screens. In spite of respondent-father's suggestion that YFS had failed for over a month after his visits with Sarah had been approved to arrange for his first visit with Sarah, the record evidence shows that respondent-father had been advised to contact the maternal great-aunt directly in order to schedule visits and that respondent-father had failed to follow up with the great-aunt for the purpose of making the necessary arrangements after an initial exchange of text messages. In addition, the record contains evidence tending to show that, even though respondent-father's visitation plan was still in place at the time of the 20 February 2018 review hearing, which was held after respondent-father had been arrested for violating the terms and conditions of his parole, his visitation with Sarah had been suspended until respondent-father provided a negative drug screen and met with representatives of YFS. Moreover, the record reflects that respondent-father's visits with Sarah were not reinstated until his case plan was updated on 29 November 2018. Respondent-father had a second visit with Sarah on 1 December 2018. In confirmation of this evidence, respondent-father testified at the termination hearing that he had had two visits with Sarah since his release from incarceration in September 2017. As a result, we have no difficulty in holding that Finding of Fact No. 71 has ample record support.

The record also provides adequate support for Finding of Fact No. 72. Finding of Fact No. 72 is supported by unchallenged Finding of Fact Nos. 20 and 22, which provide that "[t]he [c]ourt advised [respondent-father at the 11 May 2017 review hearing] that he may send any mail or gifts to [Sarah] through the social worker," that "[his social worker] encouraged [him] to do so[,]" and that respondent-father had "sent [Sarah] a birthday card [prior to the 25 August 2017 review hearing]." In spite of the fact that respondent-father claimed to have sent a money order to the maternal great-aunt in November 2018 and that he was planning to send another money order to the great-aunt and Christmas gifts to Sarah in December 2018, there is no evidence in the record confirming that respondent-father sent the initial money order nor any indication that respondent-father had sent the other money order and gifts prior to the termination hearing. As a result, we are unable to accept respondent-father's challenge to the sufficiency of the record support for Finding of Fact No. 72.

Finding of Fact No. 73 has ample evidentiary support, as well. In spite of respondent-father's expressed desire to have contact with, and visit with Sarah, the findings of fact contained in the review orders and the testimony delivered by the social workers at the termination hearing demonstrate that respondent-father initially expressed uncertainty concerning the extent to which he wished to attempt to comply with a case plan, that he was worried about being accused of misconduct in the event that he cared for Sarah by himself, and that he was uncertain about his ability to care for Sarah without "an old lady" to help. Subsequently, respondent-father stated that he wanted the maternal great-aunt to have legal guardianship of Sarah. Finally, the social worker with responsibility for this matter at the time of the termination hearing testified that, since she had been assigned to work with Sarah on 24 September 2018, respondent-father had never asked that Sarah be placed in his care and had, instead, indicated that "he does not want custody of [Sarah]" and "just wants to remain in her life and have visits with her." As a result, for all of these reasons, we hold that Finding of Fact Nos. 71 through 73 are supported by clear, cogent, and convincing evidence and buttress the trial court's ultimate finding that respondent-father "ha[d] not made himself available to the child to provide the care, personal contact, love, and affection that inheres in the parental relationship."

In addition, the trial court determined that there was a likelihood of future neglect in the event that Sarah was returned to respondent-father's care because respondent-father "ha[d] continued to engage in criminal activity since his release from prison, resulting in incarceration and unavailability to [Sarah]." The trial court found in Finding of Fact No. 43 that respondent-father had been incarcerated from 7 February 2018 to 12 February 2018 for a parole violation and found in Finding of Fact Nos. 50, 53, and 54 that respondent-father had been arrested and held in pretrial detention based upon new drug-related charges, for which he was ultimately convicted, from 14 May 2018 to 6 September 2018. Although respondent-father challenged the validity of these findings of fact, the only argument that he has advanced in support of this contention rests upon the assertion that the trial court had erroneously described the sentence that had been imposed upon him in connection with these convictions for the three new drug-related charges.

According to Finding of Fact Nos. 53 and 54, respondent-father entered pleas of guilty to and was convicted of possession of heroin, possession of methamphetamine, and possession of drug paraphernalia on 5 September 2018; was sentenced to a suspended term of six to seventeen months imprisonment and placed on supervised probation for a period

of thirty months on the condition that he complete the Cornerstone Treatment Program; was released from jail on 6 September 2018 into the custody of the Cornerstone Treatment Program in accordance with the terms and conditions of his probation; and failed to contact YFS prior to the 12 September 2018 review hearing. Although the judgment that was entered based upon respondent-father's drug-related convictions was not admitted into evidence, respondent-father testified that he had pleaded guilty to the drug-related charges identified in Finding of Fact No. 53 on 5 September 2018 and had received a six to seventeen month suspended sentence. In spite of the fact that respondent-father claimed that he had "chose[n] to go" to the Cornerstone Treatment Program and expressed uncertainty about whether he had been ordered to enroll in and complete that program, he also testified that he "was court-ordered to stay [at the Cornerstone Treatment Program]" and had been "ordered only to be released to the Cornerstone Treatment Program." Thus, we hold that the record contains sufficient evidence to support the trial court's essential findings concerning the nature of defendant's drug-related convictions and the sentence that was imposed upon him in light of those convictions.

Finally, the trial court determined that there was a likelihood of future neglect in the event that Sarah was returned to respondent-father's care on the grounds that, "even when not incarcerated, [respondent-father] hasn't complied with his case plan services specifically identified to address the barriers to reunification." The trial court's conclusion to this effect is supported by Finding of Fact Nos. 66 and 69, which state that, "[a]t the time of the [termination h]earing, [Sarah] ha[d] remained in YFS custody for a period of two years"; that respondent-father "ha[d] not made significant progress on any portion of his case plan"; and that respondent-father "ha[d] not demonstrated that he ha[d] the ability or willingness to establish a safe home for [Sarah]."

As further support for the determinations contained in Finding of Fact Nos. 66 and 69, the trial court found as a fact that:

> 63. There is no evidence before the [c]ourt that [respondent-father] has maintained long-term sobriety.
>
> . . . .
>
> 67. [Respondent-father] has not maintained stable housing or employment. Since his discharge from the Cornerstone [Treatment Program] halfway house, it is unknown where he is currently residing. He has never provided verification of employment or income over the life of the case. He

> has not completed a parenting education program. He has not maintained consistent contact with [Sarah] through visits. He has significant medical and mental health issues but did not cooperate with YFS and the FIRST Program to assess and treat those conditions, and he has not provided any evidence to the [c]ourt of how he is appropriately managing those conditions.
>
> 68. The only case plan progress [that respondent-father] has made has occurred within the past 30–60 days, and occurred pursuant to his recent court-ordered supervised probation. Until entering the Cornerstone [Treatment P]rogram in September 2018, [respondent-father] remained adamant that he did not need or intend to engage with the FIRST Program which would have assessed his need for substance abuse treatment services, along with mental health and parenting education services.

In response, respondent-father asserts that these findings are in error to the extent that they indicate he had made no progress toward satisfying the requirements of his case plan and fail to account for the record evidence tending to show that he had recently made progress toward satisfying the requirements of his case plan in advance of the termination hearing.

Admittedly, the trial court did state in Finding of Fact No. 44 that, as of the 20 February 2018 review hearing, respondent-father "had made no progress towards reunification." To the extent that Finding of Fact No. 44 fails to reflect the undisputed evidence concerning respondent-father's visit with Sarah shortly after the 20 December 2017 review hearing or the irregular contact that respondent-father had with YFS representatives following his release from prison, it does overstate the degree of respondent-father's noncompliance with the provisions of his case plan. For that reason, we will refrain from taking that portion of the trial court's termination order into consideration in determining whether it should be affirmed or reversed on appeal. *See In re T.N.H.*, 372 N.C. at 411, 831 S.E.2d at 61 (noting that, even if a finding lacks sufficient evidentiary support, the remaining findings more than sufficed to support the challenged termination order).

A careful review of the remaining findings reveals that they either detail respondent-father's progress in addressing specific components of his case plan during the relevant review periods or indicate that respondent-father had not made "adequate progress" toward completing

the requirements of his case plan or "significant progress" toward reunification. The review orders entered throughout the pendency of the underlying neglect and dependency proceeding and the social workers' testimony concerning respondent-father's actions during the relevant review periods amply support the trial court's determination that respondent-father had not made adequate progress toward satisfying the requirements of his case plan or significant progress toward reunification prior to the 12 September 2018 review hearing.

In addition, the trial court made Finding of Fact Nos. 58 through 62 for the purpose of addressing the extent to which respondent-father had made progress toward satisfying the requirements of his case plan after the 12 September 2018 review hearing. In Finding of Fact Nos. 58 through 61, the trial court found that respondent-father's case plan had been updated over the telephone on 29 November 2018 after the cancellation of a scheduled 8 November 2018 meeting between YFS representatives and respondent-father; respondent-father's visitation with Sarah had been reinstated after respondent-father provided proof of negative drug screens from September and October 2018 to YFS; respondent-father had visited with Sarah on 1 December 2018; and respondent-father had completed a thirty-hour substance abuse program through the Restorative Justice Center in October 2018. In Finding of Fact Nos. 61 and 62, the trial court found that, while respondent-father had participated in the Cornerstone Treatment Program, he had failed to present evidence concerning the extent of his treatment needs, the nature of his treatment goals, and the content of the services that Cornerstone had recommended for him. In addition, the trial court found that respondent-father had not been engaged in any substance abuse treatment following his discharge from the Cornerstone Treatment Program on 9 December 2018 after he failed to return to the facility by the designated time. A careful examination of the record reveals that each of these findings are supported by the social worker's testimony during the termination hearing.

Respondent-father's challenge to the adequacy of the trial court's findings concerning his progress between the 12 September 2018 review hearing and the 12 December 2018 termination hearing rests primarily upon respondent-father's contentions concerning findings that the trial court did not make. According to respondent-father, the trial court's findings fail to take into account his testimony about his recent employment, his treatment for medical problems, his completion of the Cornerstone Treatment Program, the extent of his substance abuse treatment, his negative drug screens in November and December 2018, the money order that he had sent to the maternal great-aunt, the money order that

he planned to send to the great-aunt and the gifts that he planned to send to Sarah in December 2018, and his application for housing at Oxford House. The record clearly reflects, however, that the trial court adequately considered respondent-father's testimony. In fact, during the termination hearing, the trial court requested that respondent-father's trial counsel refrain from asking repetitive questions on the grounds that they had been "asked and answered" and that it had heard respondent-father's earlier testimony. In addition, the record clearly reflects that the trial court simply failed to credit the portions of respondent-father's testimony upon which this argument relies, given the absence of any verification for respondent-father's assertions. Aside from the fact that the social workers who testified at the termination hearing repeatedly stated that respondent-father had not provided proof in support of his claims to have recently made progress toward eliminating the barriers to his reunification with Sarah, respondent-father acknowledged that he had failed to provide supporting documentation for these claims and defended his failure to provide such documentation on the grounds that he did not know that he needed to provide such evidence and was not "about to provide something that [he] wasn't asked for." As further evidence of the trial court's unwillingness to find respondent-father's unsupported testimony credible in the absence of supporting documentation, Finding of Fact No. 62 states that, despite his testimony that he had tested negative for the presence of drugs in November and December 2018, respondent-father had "failed to provide any evidence of [the] negative drug screens."[9] Similarly, in Finding of Fact No. 67, the trial court noted that "[respondent-father had] never provided verification of employment or income over the life of the case." Thus, the record clearly establishes that the trial court simply did not find respondent-father's testimony concerning his recent efforts to comply with the requirements of his case plan to be credible, which is a determination that it is entitled to make without fear of appellate reversal in light of the applicable standard of review. *See In re T.N.H.*, 372 N.C. at 411, 831 S.E.2d at 61; *see also In re D.L.W.*, 368 N.C. at 844, 788 S.E.2d at 168. As a result, we conclude that there is ample evidentiary support for the trial court's findings that respondent-father had failed to make adequate

9. Although defendant claims to have attempted to introduce evidence concerning the allegedly negative November and December drug screens and asserts that his efforts to do so were unsuccessful because the trial court sustained an objection to the admission of the evidence in question, the portion of the transcript to which respondent-father directs our attention in support of this contention shows, instead, that the trial court sustained a YFS objection to the admission of evidence concerning the drug screens for September and October 2018, which the trial court found to have been negative in Finding of Fact No. 58.

progress toward achieving long-term sobriety, stable housing, and employment; had not maintained consistent contact with Sarah; had not completed a FIRST assessment or a parenting education program; and had only made progress toward satisfying some of the requirements of his case plan in order to avoid violating the terms and conditions of his probation and that the trial court did not err by stating in Finding of Fact Nos. 66 and 69 that respondent-father "ha[d] not made significant progress on any portion of his case plan" and "ha[d] not demonstrated that he ha[d] the ability or willingness to establish a safe home for [Sarah]."

Having determined that the trial court's findings of fact have adequate evidentiary support, we next consider whether the trial court's findings support its determination that respondent-father's parental rights in Sarah were subject to termination on the grounds of neglect. *See* N.C.G.S. § 7B-1111(a)(1); *see also In re N.D.A.*, 373 N.C. at 79–80, 833 S.E.2d at 775. We addressed a similar set of circumstances in *In re M.A.W.*, in which a child had been adjudicated to be a neglected juvenile based upon the mother's substance abuse and mental health problems while the father was incarcerated and in which "the trial court made an independent determination that neglect sufficient to justify termination of [the father's] parental rights existed at the time of the termination hearing and that a likelihood of repetition of neglect also existed." 370 N.C. at 153–54, 804 S.E.2d at 517 (citation omitted). In reversing a decision of the Court of Appeals overturning the trial court's termination order, *see In re M.A.W.*, 248 N.C. App. 52, 787 S.E.2d 461 (2016), *rev'd*, 370 N.C. 149, 804 S.E.2d 513 (2017), this Court held that the "trial court . . . appropriately considered the prior adjudication of neglect as relevant evidence during the termination hearing" and that the trial court's findings supported its determination that there was a likelihood that the neglect to which the juvenile had been subjected would be repeated if the child was to be placed in his care, given that the father "had a long history of criminal activity and substance abuse" and that, even though the father had "initially indicated his desire to be involved in [the juvenile's] life," he had, "after his release, failed to follow through consistently with the court's directives and recommendations." *In re M.A.W.*, 370 N.C. at 153, 154, 804 S.E.2d at 517. We reached this result on the grounds that, "[a]lthough [the father] completed a parenting course, attended Alcoholics Anonymous meetings, and completed his General Educational Development (GED) program while incarcerated, the trial court made numerous relevant findings of fact supporting termination that illuminated respondent's behavior following his release and which established a likelihood of repetition of neglect," *id.* at 154, 804 S.E.2d at 517, including findings that the father had not

complied with the recommendations made during his substance abuse assessment; that the regularity of the father's visits with the juvenile had diminished over time; that the father had not provided proof that he had completed the parenting course that he had taken while incarcerated; that the father denied social workers access to the residence of his mother, in which he allegedly lived; that the father's testimony that he was self-employed lacked credibility; that the father did not comply with clinical assessments; and that the father had not provided any care, discipline, or supervision to the juvenile since his release from incarceration approximately nine months earlier. *Id.* at 155, 804 S.E.2d at 518.

The trial court's findings of fact in this case are similar to those deemed sufficient to support the trial court's termination decision in *In re M.A.W.* In addition to finding that Sarah had been adjudicated to be a neglected and dependent juvenile on 15 February 2017, the trial court found that respondent-father had a history of criminal activity and substance abuse; that respondent-father had continued to engage in criminal activity during the pendency of the underlying neglect and dependency proceeding that resulted in his reincarceration and created additional limitations upon his ability to be available to Sarah; that respondent-father had not established a relationship with Sarah prior to the time that she was removed from the mother's care and had only visited with Sarah twice following his initial release from incarceration; that respondent-father had not developed a relationship with or demonstrated the ability to care for Sarah since his release from incarceration; and that respondent-father had not made significant progress toward correcting the barriers to reunification that were identified by the trial court, including addressing issues relating to employment, housing, substance abuse, mental health, and parenting skills. Thus, as was the case in *In re M.A.W.*, we hold that "[t]he trial court properly found that past neglect was established by [YFS] and that there was a likelihood of repetition of neglect[,]" 370 N.C. at 156, 804 S.E.2d at 518, given that the trial court's findings provide ample justification for its conclusion that respondent-father was unable to properly care for Sarah at the time of the termination hearing, *see In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232 (explaining that the trial court must consider evidence of changed circumstances in addition to evidence of the prior adjudication of neglect, with the determinative factors being the best interests of the child and the parent's fitness to care for the child at the time of the termination hearing).

In light of this determination, we hold that the trial court did not err by concluding that respondent-father's parental rights in Sarah were

subject to termination on the grounds of neglect pursuant to N.C.G.S. § 7B-1111(a)(1). Moreover, given that "a finding by the trial court that any one of the grounds for termination enumerated in N.C.G.S. § 7B-1111(a) exists is sufficient to support a termination order[,]" *In re B.O.A.*, 372 N.C. 372, 380, 831 S.E.2d 305, 311 (2019) (citations omitted), we need not address respondent-father's challenge to the trial court's determination that his parental rights in Sarah were subject to termination based upon his willful failure to make reasonable progress toward correcting the conditions that led to Sarah's removal from the family home pursuant to N.C.G.S. § 7B-1111(a)(2). As a result, in light of the fact that respondent-father has not advanced any challenge to the trial court's dispositional decision in his brief before this Court, the trial court's termination order is affirmed.

AFFIRMED.

IN THE MATTER OF Z.A.M. AND E.B.M.

No. 212A19

Filed 3 April 2020

1. Termination of Parental Rights—grounds for termination—neglect—failure to make reasonable progress—sufficiency of findings

In a termination of parental rights case, the findings supported the conclusion that grounds existed to terminate for neglect and failure to make reasonable progress. The trial court found that defendant continued to use alcohol, and the father's three-month period of sobriety did not occur after the permanency planning hearing. Further, the trial court correctly determined that the father's three-month period of sobriety was outweighed by his continuous pattern of relapse.

2. Termination of Parental Rights—best interests of the child—abuse of discretion standard

The standard for reviewing the best interests of the child determination in a termination of parental rights proceeding is abuse of discretion. The trial court, which is involved in the case from the beginning and hears the evidence, is in the best position to assess and weigh the evidence, find the facts, and reach conclusions.

3. Termination of Parental Rights—best interests of the child—bond with parents—no abuse of discretion

The trial court did not err in a termination of parental rights proceeding by determining that the best interests of the children were served by termination despite the children's bond with the parents. The trial court considered the statutory factors and performed a reasoned analysis. The trial court's determination was not unsupported by reason or so arbitrary that it could not be the result of a reasoned decision.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered 6 March 2019 by Judge Wesley W. Barkley in District Court, Caldwell County. This matter was calendared in the Supreme Court on 25 March 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Staff Attorney Lucy R. McCarl for petitioner-appellee Caldwell County Department of Social Services.

Womble Bond Dickinson (US) LLP, by Lawrence Matthews and Erin Epley, for appellee Guardian ad Litem.

Rebekah W. Davis for respondent-appellant father.

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

NEWBY, Justice.

Respondent-father and respondent-mother appeal from an order entered by the trial court terminating their parental rights to their children, Z.A.M. (Zane) and E.B.M. (Ethan).[1] Upon careful consideration of respondents' arguments, we affirm the trial court order terminating respondents' parental rights.

Caldwell County Department of Social Services (DSS) has a history of involvement with these respondent-parents. The juveniles, Ethan and Zane, have been the subject of eight Child Protective Services (CPS) reports, four of which resulted in determinations that services were

1. Pseudonyms are used to protect the identity of the juveniles and for ease of reading.

appropriate due to parental abuse and domestic violence between respondents. The children's half-siblings also have an extensive history with CPS and have been raised by relatives. Respondents have a long history of substance abuse; criminal charges related to respondent-father's alcohol abuse date back to 1987, and criminal charges related to respondent-mother's substance abuse date back to 2007.

In February 2017, DSS became involved with the juveniles again due to respondent-parents' alcohol and substance abuse, and due to repeated domestic violence between respondent-parents. Once DSS became involved, respondent-mother took the juveniles to live with their maternal grandparents, with whom the juveniles had previously lived for over a year. While the juveniles resided with their grandparents, respondent-father admitted that he consumed alcohol, and respondent-mother admitted that she regularly used crack cocaine and opiates and engaged in criminal activity to support her drug habit. Though respondent-father called in weekly to check on the children, he was typically inebriated during the calls. Neither parent attempted to visit the children or offered any financial support.

After several incidents of domestic violence between respondents, on 11 July 2017, DSS filed juvenile petitions alleging Zane and Ethan were neglected and dependent. After a hearing, on 6 September 2017, the trial court entered adjudication and disposition orders concluding that the children were neglected and dependent. It awarded DSS custody of the children, and DSS determined that the juveniles should continue to reside with their maternal grandparents.

The trial court issued a case plan requiring respondents to, *inter alia*, complete clinical assessments with substance abuse components and comply with recommendations; execute consents for release of information to allow DSS to follow up with service providers; submit to random drug and alcohol screens; complete domestic violence assessments, comply with recommendations, and refrain from acts of violence; refrain from illegal drug and alcohol use; comply with the visitation plan; maintain appropriate housing and employment; and cooperate with the children's therapists. Respondents were allowed one hour of supervised visitation per week.

Respondents' efforts to address their substance and alcohol abuse varied. Respondent-mother completed sporadic detox programs but did not complete the rest of her required substance abuse treatment. Respondent-mother relapsed numerous times, missing and failing multiple drug tests. At one point, respondent-mother did find employment,

but she admitted to using her paycheck from the job to buy drugs. To further support her drug habit during relapses, respondent-mother committed various criminal acts resulting in multiple convictions and periods of criminal confinement while the children were out of the home. Furthermore, respondent-mother had not completed her required domestic violence treatment classes. She continued her relationship with respondent-father, resulting in more instances of domestic violence. Specifically, in March 2018, respondent-mother reported that respondent-father was intoxicated and had become violent, and she locked herself in the bathroom until law enforcement responded and removed her from the home. Based on this and respondents' continuous substance abuse, in March 2018, the trial court ordered that respondent-parents could no longer visit the minor children until respondent-parents could each pass two consecutive negative drug screens.

While respondent-father had begun Substance Abuse Intensive Outpatient Treatment (SAIOP) at the end of 2017, during this treatment, on 27 April 2018, respondent-father admitted to relapsing. In June 2018, respondent-father passed two consecutive alcohol screening tests and was able to resume visitation privileges. Visitation continued until 24 August 2018, however, when respondent-father failed a breathalyzer test. Despite respondent-father's alcohol use, he completed SAIOP treatment at the end of August 2018, after having failed his breathalyzer test days earlier. He then failed another alcohol screen on 21 September 2018. Additionally, respondent-father refused to attend any form of inpatient treatment from the time the children were removed from the home until after he knew that DSS would be pursuing termination of parental rights. Beginning 16 December 2018, he attended an approximately three-week inpatient program, two months before the termination hearing.

Prior to the 17 October 2018 review hearing, the trial court had established the primary permanent plan for the children as reunification and the secondary plan as adoption. Following the October hearing, on 1 November 2018, the trial court issued an order finding that the issues that led to DSS involvement continued to exist and that further efforts for reunification of the children with respondents would be unsuccessful and inconsistent with the best interests, welfare, health, and safety of the children. Accordingly, the trial court ceased reunification efforts and changed the primary permanent plan for the children to adoption and the secondary plan to guardianship.

On 21 December 2018, DSS filed a motion to terminate respondents' parental rights on grounds of neglect and willfully leaving the children in foster care for more than twelve months without making reasonable

progress to correct the conditions that led to their removal. *See* N.C.G.S. § 7B-1111(a)(1), (2) (2019).

On 20 February 2019, the trial court held a hearing on DSS's petition to terminate respondents' parental rights. After hearing and considering all of the evidence, the trial court made the following findings relevant to its adjudication of grounds to terminate respondents' parental rights under N.C.G.S. § 7B-1111(a)(1) and (2):

> 14. [On] September 6, 2017, the juveniles were adjudicated to be neglected and dependent juveniles pursuant to N.C.G.S. § 7B-101(5) and N.C.G.S. § 7B-101(9). Respondent parents each appeared at the hearing and stipulated to the allegations set forth in the juvenile petitions as modified in the written stipulation submitted to the court.
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> 15. The juveniles are neglected juveniles within the meaning of 7B-101(15) and such neglect by Respondent father continues as of today's hearing. Respondent father has failed to adequately address his issues of alcohol abuse which contributed to domestic violence in the home. Respondent father's issues with alcohol and domestic violence caused the need for a Comprehensive Clinical Assessment (CCA) and treatment. Respondent father has received extensive treatment for his abuse of alcohol, including the completion of 90 hours of Substance Abuse Intensive Outpatient (SAIOP) treatment. Despite receiving such intensive treatment, Respondent father continues to use alcohol. He has experienced one period of sobriety in excess of three (3) months during the twenty-two (22) months the juveniles have been placed out of the home of the Respondent parents. Respondent father has willfully failed to successfully address his issues of alcohol abuse. These issues will continue to exist in the foreseeable future such that the juveniles will be unable to safely return to the home of the Respondent father.
>
> 16. The Respondent father has willfully left the juveniles in foster care for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances have [sic] been made in correcting the conditions which led to the juveniles to be placed out of the home. Respondent father submitted to a breathalyzer screen conducted by law enforcement personnel on

August 24, 2018, and registered a blood alcohol level of 0.18. Respondent father failed another breathalyzer screen on September 21, 2018, with a blood alcohol level of 0.13. Respondent father also has a history of evading alcohol screens, refusing to submit to alcohol screens as ordered by the court, and admitting to use of alcohol. Respondent father's behavior constitutes a willful failure to successfully address his abuse of alcohol.

17. The juveniles are neglected juveniles within the meaning of 7B-101(15) and such neglect by Respondent mother continues as of today's hearing. Respondent mother has made sincere efforts to address her issues of substance abuse, including the use of cocaine, methamphetamines, and opiates. However, her continued use of illegal substances involves multiple relapses which led to criminal confinement and instances of domestic violence with Respondent father. Respondent mother completed a CCA and attended some treatment. She has not sought treatment for domestic violence. She has attended inpatient treatment while the juveniles have been out of the home and is presently seeking her third inpatient treatment due to her continued use of illegal substances. She remains in a relationship with respondent father.

18. Respondent mother has willfully left the juveniles in foster care 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 juveniles. Specifically, Respondent mother continues to willfully abuse substances despite participating in various treatment activities. She has relapsed several times over the past 12 months. She has engaged in criminal activities while under the influence of drugs and alcohol. Respondent mother has also failed to adequately address the issue of domestic violence. She did not complete domestic violence treatment classes and remains in a relationship with Respondent father. There is a reasonable probability that Respondent mother's issues of substance abuse will continue to exist in the foreseeable future such that the juveniles will be unable to safely return to the home of Respondent mother.

Based on these findings, the trial court concluded:

> 4. The juveniles are neglected juveniles as defined by N.C.G.S. § 7B-101(15) and such neglect continues as [of] the date of the hearing herein. There is a strong possibility that such neglect will be repeated in the future.
>
> 5. The juveniles have been willfully left in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the Court that outside of consideration of poverty, reasonable progress under the circumstances has been made correcting the conditions which led to the removal of the juvenile[s].
>
> 6. Grounds exist as hereinabove stated within the Findings of Fact to terminate the parental rights of . . . Respondent mother . . . and Respondent father . . . pursuant to N.C.G.S. § 7B-1111(a)(1) and (2).

Thus, the trial court also concluded it was in the best interests of the children to terminate respondents' parental rights, allowing the juveniles' maternal grandparents to pursue adoption. Respondents appeal.

On appeal respondent-father challenges the adjudication of grounds to terminate his parental rights and the trial court's best interests determination. Respondent-mother only challenges the trial court's best interests determination.

Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage. *See* N.C.G.S. §§ 7B-1109, -1110 (2019). The petitioner bears the burden at the adjudicatory stage 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. N.C.G.S. § 7B-1109(f) (2019). If the trial court adjudicates one or more grounds for termination, "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, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110)). "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 C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316

S.E.2d 246, 253 (1984)). "The trial court's assessment of a juvenile's best interest at the dispositional stage is reviewed only for abuse of discretion." *In re Z.L.W.*, 372 N.C. 432, 435, 831 S.E.2d 62, 64 (2019) (citing *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016)).

[1] We now turn to respondent-father's arguments. First, regarding grounds for termination, respondent-father argues the trial court's findings of fact are insufficient to support its conclusion that grounds exist to terminate his parental rights under N.C.G.S. § 7B-1111(a)(1) and (2).

The trial court may terminate a parent's parental rights if at least one of the statutory grounds enumerated in N.C.G.S. § 7B-1111(a) exists. Specifically, under N.C.G.S. § 7B-1111(a)(1) (2019), parental rights may be terminated if the trial court finds the parent has neglected his or her child such that the child is a "neglected juvenile" within the meaning of section 7B-101 of the North Carolina General Statutes. N.C.G.S. § 7B-1111(a)(1) (2019). A neglected juvenile is defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare . . . ." N.C.G.S. § 7B-101(15) (2019). When 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 D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984)). When determining whether future neglect is likely, the trial court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing. *In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232.

Under N.C.G.S. § 7B-1111(a)(2) (2019), the trial court may terminate parental rights if a 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) (2017). Termination under this ground requires the trial court to perform a two-step analysis where it must determine by clear, cogent, and convincing evidence whether (1) a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and (2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. *See In re O.C.*, 171

N.C. App. 457, 464–65, 615 S.E.2d 391, 396, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005).

Respondent-father largely asserts the same reasoning as to why the trial court erred in terminating his parental rights on both grounds. As for N.C.G.S. § 7B-1111(a)(1) (the neglect ground), respondent father asserts that the evidence does not support a finding that there is a strong possibility of future neglect. He also contends that the trial court failed to analyze evidence of changed conditions; respondent-father asserts that the trial court did not base its decision on any evidence after the October 2018 permanency planning hearing. Respondent-father cites the trial court's finding that he had one three-month period of sobriety during the twenty-two months that the juveniles were outside the home. Because the trial court did not provide dates for that three-month period, respondent-father asserts that the three months could have occurred after the October 2018 permanency planning hearing and before the termination hearing, showing changed circumstances that would weigh against terminating his parental rights. Thus, because respondent-father contends the trial court did not consider more recent circumstances leading up to the termination hearing, respondent-father argues that terminating his rights under the neglect ground was improper.

As for N.C.G.S. § 7B-1111(a)(2) (willfully leaving the child outside the home and failure to make reasonable progress), respondent-father asserts that his actions do not demonstrate a willful intent to leave the children outside the home. Respondent-father disagrees with the trial court's conclusion that he had not made reasonable progress to correct the conditions that led to the juveniles' removal. Because he need not make perfect progress in his case plan, respondent-father essentially argues that his progress was good enough to avoid having his parental rights terminated.

At the outset, however, we address respondent-father's argument that parts of the above findings are not actually findings of fact but are instead conclusions of law. Respondent-father specifically argues those portions of findings of fact 15 and 16 that find "[t]he juveniles are neglected juveniles within the meaning of 7B-101(15) and such neglect . . . continues as of today's hearing[,]" his "issues will continue to exist in the foreseeable future such that the juveniles will be unable to safely return to [his] home[,]" and "[he] has willfully left the juveniles in foster care for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstance [has] been made in correcting the conditions which led to the juveniles to be placed out of the home[,]" are conclusions of law rather than factual findings

given that they involve the exercise of judgment. This Court recently addressed a similar argument in *In re N.D.A.*, 373 N.C. 71, 76–77, 833 S.E.2d 768, 772–73 (N.C. 2019). In that case, this Court distinguished between factual findings, ultimate findings of fact, and conclusions of law:

> As the Supreme Court of the United States has stated, an "ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact" and should "be distinguished from the findings of primary, evidentiary, or circumstantial facts." *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491, 57 S. Ct. 569, 574, 81 L. Ed. 755, 762 (1937); *see also In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (stating that "[u]ltimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts" (citation omitted)). Regardless of whether statements like those contained in [the contested findings here] are classified as findings of ultimate facts or conclusions of law, that classification decision does not alter the fact that the trial court's determination concerning the extent to which a parent's parental rights in a child are subject to termination on the basis of a particular ground must have sufficient support in the trial court's factual findings. *See In re D.M.O.*, 250 N.C. App. 570, 573, 794 S.E.2d 858, 861 (2016) (stating that "a trial court must make adequate evidentiary findings to support its ultimate finding of willful intent" (citation omitted)).

Id. Accordingly, this Court reviews the termination order to determine whether the trial court made sufficient factual findings to support its ultimate findings of fact and conclusions of law, regardless of how they are classified in the order.

Upon review we reject respondent-father's arguments and conclude that clear, cogent, and convincing evidence supports the findings of fact underlying the trial court's decision to terminate his parental rights. Looking first at the neglect ground, it is evident that, contrary to respondent's argument, the trial court considered evidence after the October 2018 permanency planning hearing. Specifically, the trial court found that respondent-father continues to use alcohol, which is supported by respondent-father being admitted to an alcohol rehabilitation program on 16 December 2018, after the October 2018 permanency planning hearing. This fact also undermines respondent-father's argument that

his three-month period of sobriety may have occurred after the October 2018 permanency planning hearing and that the trial court did not consider any evidence leading up to the termination hearing. Notably, respondent-father was not released from the program until 7 January 2019, just over one month before the termination hearing. Based on the record evidence, the only three-month period of respondent-father's sobriety would have occurred between June 2018, after he passed two sobriety tests to regain visitation privileges he had lost, and August 2018, when respondent-father failed a breathalyzer despite completing his required SAIOP hours just a few days later.

Moreover, the trial court's findings clearly show that it evaluated respondent-father's history of alcohol abuse and his behavior over the entire twenty-two-month period during which the juveniles were outside the house, which showed a repeated pattern of returning to alcohol. Respondent-father failed and evaded numerous breathalyzer tests, admitted to relapsing several times during his outpatient treatment, and, notably, failed breathalyzer tests right before and after completing 90 hours of SAIOP. Given that respondent-father only maintained three months of sobriety in the twenty-two months during which the juveniles were living outside of the house, and given that there is evidence of respondent-father's alcohol abuse preceding the termination, it appears the trial court appropriately weighed all the evidence to conclude that there was a probability of repetition of neglect. *See Ballard*, 311 N.C. at 715–16, 319 S.E.2d at 232.

Because we conclude that the trial court properly terminated respondent-father's rights based on neglect, we need not determine whether termination is proper under N.C.G.S. § 7B-1111(a)(2) based on respondent-father willfully leaving the children outside the home and his failure to make reasonable progress. *See* N.C.G.S. § 7B-1111(a) (providing that the trial court may terminate a parent's rights if any ground for termination exists). Nonetheless, we note that N.C.G.S. § 7B-1111(a)(2) also supports the trial court's termination of respondent-father's parental rights based on the same reasoning that supported a termination based on neglect. When viewing the evidence as a whole, it appears that the trial court correctly concluded that respondent-father's three-month period of sobriety was outweighed by his continuous pattern of relapse, which occurred during the months he attended SAIOP.[2] As such, the trial

2. Respondent-father argues in part that although domestic violence was another reason why the children were removed from the home, respondent-father could not complete domestic violence counseling until after he had completed substance abuse treatment. Therefore, respondent-father argues that his failure to make progress in this area

court properly terminated respondent-father's rights on both statutorily alleged grounds.

[2] We now turn to the trial court's best interests determination. Respondents both contend that the trial court erred in determining that termination was in the juveniles' best interests. At the dispositional stage the trial court must "determine whether terminating the parent's rights is in the juvenile's best interest" based on the following criteria:

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

N.C.G.S. § 7B-1110(a) (2019). The trial court shall consider all of the factors and make written findings regarding those that are relevant. *Id.*

In her brief to this Court, respondent-mother does not contest any of the trial court's findings of fact; thus, they are binding on her appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citing *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962)). Respondent-mother recognizes the well-established abuse of discretion standard of review for evaluating a trial court's determination of a juvenile's best interests. Nonetheless, respondent-mother asserts that appellate courts should utilize a de novo standard of review on appeal and that under such review, it would be clear that terminating her parental rights is not in the children's best interests.

Having considered respondent-mother's arguments, we reaffirm our application of an abuse of discretion standard of review to the trial court's determination of "whether terminating the parent's rights is in the juvenile's best interest" under N.C.G.S. § 7B-1110(a). *See*, *e.g.*,

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should not be held against him. Even assuming this to be true, the trial court's decision to terminate respondent-father's rights is amply supported by evidence of respondent's continual failure to address his alcohol abuse.

Z.L.W., 372 N.C. at 435, 831 S.E.2d at 64; *In re L.M.T.*, 367 N.C. 165, 171, 752 S.E.2d 453, 457 (2013). Under this standard, we defer to the trial court's decision unless it is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998). Despite respondent-mother's arguments to the contrary, we reiterate that the trial court, which is involved in the case from the beginning and hears the evidence, is in the best position to assess and weigh the evidence, find the facts, and reach conclusions based thereon.

[3] As for the best interests determination itself, both respondents set forth similar arguments as to why they believe the trial court erred in concluding that termination would be in the children's best interests. Respondents both assert that the trial court did not give enough weight to the children's bond with them, nor did the court take into account the children's preferences. Respondents also assert that the trial court should have considered guardianship as an option so the parents could have the chance to regain custody of the children in the future. Finally, respondent-father argues that the court did not properly consider whether termination would aid in accomplishing a permanent placement for the children or any other relevant considerations.

Applying the proper standard of review here, we conclude that the trial court did not abuse its discretion when determining that terminating respondents' rights was in the juveniles' best interests. This Court recently addressed arguments similar to those that respondents assert in *In re Z.L.W.* In that case, this Court recognized that the trial court made findings concerning the strong bond between the juveniles and the respondent-parent, but explained that "the bond between parent and child is just one of the factors to be considered under N.C.G.S. § 7B-1110(a), and the trial court is permitted to give greater weight to other factors." *In re Z.L.W.*, 372 N.C. at 437, 831 S.E.2d at 66. Based on the trial court's consideration of the other factors, and given the respondent's lack of progress in his case plan, this Court concluded that "the trial court's determination that other factors outweighed [the] respondent's strong bond with [the juveniles] was not manifestly unsupported by reason." *Id.* at 438, 832 S.E.2d at 66. Furthermore, this Court rejected the respondent's argument that the trial court should have considered dispositional alternatives, such as granting guardianship or custody to the foster family. This Court explained that,

> [w]hile the stated policy of the Juvenile Code is to prevent "the unnecessary or inappropriate separation of juveniles from their parents," N.C.G.S. § 7B-100(4) (2017), we note

> that "the best interests of the juvenile are of paramount consideration by the court and . . . when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a *safe, permanent home within a reasonable amount of time*," *id.* § 7B-100(5) (2017) (emphasis added); *see also In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 251 (emphasizing that "the fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody [is] that the best interest of the child is the polar star").

Id. Thus, in *Z.L.W.*, we held the trial court did not abuse its discretion in determining termination was in the best interests of the juveniles. *Id.*

Just as in *In re Z.L.W.*, the trial court's findings in this case show that it considered the dispositional factors in N.C.G.S. § 7B-1110(a) and performed a reasoned analysis weighing those factors. In doing so, the trial court recognized the children's bond with respondents, but weighed that bond against its findings that adoption was previously ordered as the primary permanent plan; that termination was necessary to achieve the primary permanent plan; that the children have been placed in their potential adoptive home with their maternal grandparents since April 2017; that the potential adoptive home is a loving and stable home where the children's needs are being met; that the children have a very good relationship with the maternal grandparents and are well bonded; and that it is very likely the children will be adopted. Based on its weighing of the factors, the trial court ultimately determined the best interests of the children would be served by terminating respondents' parental rights despite the children's bond with them. Because the trial court made sufficient dispositional findings and performed the proper analysis of the dispositional factors, we are satisfied the trial court's best interests determination was not manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.

Because we conclude the trial court did not err in its decision, we affirm the trial court's termination of respondents' parental rights to Zane and Ethan.

AFFIRMED.

THE NEW HANOVER COUNTY BOARD OF EDUCATION
v.
JOSH STEIN, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA; AND NORTH CAROLINA COASTAL FEDERATION AND SOUND RIVERS, INC., INTERVENORS

No. 339A18

Filed 3 April 2020

1. Jurisdiction—standing—hog farm agreement—Board of Education

The New Hanover Board of Education lacked standing to challenge the authority of the Attorney General to enter an agreement with Smithfield Foods concerning hog waste lagoons. The mere fact that the Attorney General and Smithfield Farms entered the agreement did not harm the Board of Education; the Board was not a party to and did not have rights under the agreement; and the Board would not be entitled to have any money paid to the school fund if the agreement was unenforceable.

2. Civil Procedure—summary judgment—hog farm agreement—intention of parties

There was no issue of fact sufficient to preclude summary judgment in an action that involved the issue of whether monies from a hog farm agreement between the Attorney General and Smithfield Foods were civil penalties that should have gone to the schools. Each of the alleged factual issues focused on questions such as the subjective intent of the parties at the time the agreement was executed and the purpose sought to be achieved. There were no credibility determinations and no additional evidence to shed light on the substantive legal issue in dispute.

3. Schools and Education—civil penalty fund—hog farm agreement

The trial court correctly decided to enter summary judgment for the Attorney General in a case questioning whether monies from an agreement with Smithfield Foods concerning hog waste should have gone into the civil penalties fund to be distributed to schools. The payments contemplated by the agreement did not stem from an enforcement action, were not intended to punish or deter Smithfield, and did not constitute penalties.

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. 7A-30(2) from a divided panel of the Court of Appeals, 820 S.E.2d 89 (N.C. Ct. App. 2018), reversing and remanding an order entered on 12 October 2017 by Judge Paul C. Ridgeway in Superior Court, Wake County. On 30 January 2019, the Supreme Court allowed petitions for discretionary review as to additional issues filed by plaintiff, defendant, and intervenors. Heard in the Supreme Court on 19 November 2019 in session in the Whitted Building in the Town of Hillsborough pursuant to section 18B.8 of Chapter 57 of the 2017 North Carolina Session Laws.

Stam Law Firm, PLLC, by R. Daniel Gibson and Paul Stam, for plaintiff-appellee.

Joshua H. Stein, Attorney General, by Matthew W. Sawchak, Solicitor General, James W. Doggett, Deputy Solicitor General, and Marc Bernstein, Special Deputy Attorney General, for defendant-appellant Josh Stein.

The Southern Environmental Law Center, by Mary Maclean Asbill, Brooks Rainey Pearson, and Blakely E. Hildebrand, for intervenor-appellants North Carolina Coastal Federation and Sound Rivers, Inc.

Tharrington Smith, L.L.P., by Lindsay Vance Smith and Deborah R. Stagner; and Allison B. Schafer for North Carolina School Boards Association, amicus curiae.

ERVIN, Justice.

On 25 July 2000, following a five-year period during which ruptured or flooded hog waste lagoons spilled millions of gallons of waste into North Carolina's waterways, then-Attorney General Michael F. Easley entered into an agreement with Smithfield Foods, Inc., and several of its subsidiaries.[1] Pursuant to the agreement, Smithfield and its subsidiaries agreed to:

> (1) undertake immediate measures for enhanced environmental protection on Company-owned Farms and

1. The Smithfield subsidiaries that joined in the agreement include Brown's of Carolina, Inc.; Carroll's Foods, Inc.; Murphy Farms, Inc.; Carroll's Foods of Virginia, Inc.; and Quarter M Farms, Inc.

provide assistance to Contract Farmers in undertaking these same measures;

(2) commit $15 million for the development of Environmentally Superior Technologies for the management of swine waste and to facilitate the development, testing, and evaluation of potential technologies on Company-owned Farms;

(3) install Environmentally Superior Technologies on each Company-owned Farm in North Carolina and provide financial and technical assistance to Contract Farmers for the installation of these technologies;

(4) commit $ 50 million to environmental enhancement activities;

(5) cooperate fully with the Attorney General to ensure compliance with applicable laws, regulations, policies and standards; and

(6) in cooperation with the Attorney General and all other interested parties, take a leadership role in enhancing the effectiveness of the Albemarle-Pamlico National Estuary Program . . . .

In compliance with the provision of the agreement in which Smithfield and its subsidiaries agreed to commit $50 million to facilitate environmental enhancement activities, the entities in question promised to "pay each year for 25 years an amount equal to one dollar for each hog in which [Smithfield and its subsidiaries] . . . had any financial interest in North Carolina during the previous year, provided . . . that such amount shall not exceed $2 million in any year." The agreement further provided that the monies derived from these payments were to be deposited into an escrow account and "paid to such organizations or trusts as the Attorney General will designate . . . to enhance the environment of the State." In administering the grant program, the Attorney General was entitled to consult with the North Carolina Department of Environmental Quality[2] and "any other groups or individuals he deem[ed] appropriate and [to] appoint any advisory committees he deem[ed] appropriate." Finally, the agreement provided that, "in consideration of the commitments by

2. At the time that the agreement between the Attorney General and Smithfield and its subsidiaries was entered into, the North Carolina Department of Environmental Quality was known as the North Carolina Department of Environment and Natural Resources.

[Smithfield and its subsidiaries], the Attorney General agrees . . . [t]o use the full power and authority of his office to diligently pursue expeditious implementation of Environmentally Superior Technologies" on farms identified in the agreement; to "use his influence to expedite the permitting process"; and to refrain from "undertak[ing] any actions in conflict with" the agreement.

In January 2003, then-Attorney General Roy Cooper established the Environmental Enhancement Grants Program in order to "improve the air, water and land quality of North Carolina by funding environmental projects that address the goals of the agreement." On an annual basis, the grant program accepts applications from government agencies and nonprofit organizations. The submitted applications are reviewed by a panel consisting of representatives from the North Carolina Department of Justice, the Department of Environmental Quality, the North Carolina Department of Natural and Cultural Resources, academic institutions, and conservation-focused nonprofit organizations.

After completing the review process, the panel makes a recommendation to the Attorney General concerning the manner in which the available grant monies should be distributed. A representative of Smithfield and its subsidiaries is entitled to make a separate recommendation concerning the same subject. After considering the recommendation, the Attorney General selects the recipients to be awarded grants and determines the amount, up to a maximum of $500,000, to be awarded to each recipient. In the years since the agreement was executed, the Attorney General has awarded approximately $25 million in grants under the program.

On 18 October 2016, Francis X. De Luca filed a complaint alleging that payments made pursuant to the agreement were actually civil penalties for purposes of article IX, section 7 of the North Carolina Constitution, which states that:

> (a) Except as provided in subsection (b) of this section, all moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.
>
> (b) The General Assembly may place in a State fund the clear proceeds of all civil penalties, forfeitures, and fines

> which are collected by State agencies and which belong to the public schools pursuant to subsection (a) of this section. Moneys in such State fund shall be faithfully appropriated by the General Assembly, on a per pupil basis, to the counties, to be used exclusively for maintaining free public schools.

N.C. Const. art. IX, § 7. As a result, Mr. De Luca sought to have the Attorney General preliminarily and permanently enjoined from distributing monies received pursuant to the agreement to any recipient other than the Civil Penalty and Forfeiture Fund authorized by article IX, section 7(b) and N.C.G.S. §§ 115C-457.1–475.3 and requested that all monies distributed under the grant program within the last three years and all future payments received by the Attorney General be placed into the Civil Penalty and Forfeiture Fund.

On 19 December 2016, the Attorney General filed a motion to dismiss Mr. De Luca's complaint pursuant to Rules 12(b)(2) and 12(b)(6) of the North Carolina Rules of Civil Procedure. On 25 January 2017, Mr. De Luca filed an amended complaint adding the New Hanover County Board of Education as an additional party plaintiff and substituting current Attorney General Joshua H. Stein, in his official capacity, as the party defendant. The Attorney General then filed an amended dismissal motion. On 14 June 2017, plaintiffs filed a motion seeking the issuance of a preliminary injunction precluding the Attorney General from making any further disbursements under the grant program and requiring the Attorney General to initiate legal proceedings to recoup any funds that had been disbursed in accordance with the grant program since 2014. On 16 June 2017, plaintiffs filed a motion seeking the entry of summary judgment in their favor.

On 27 June 2017, Judge Robert H. Hobgood entered an order denying the Attorney General's amended dismissal motion and directing the Attorney General to answer the amended complaint and an additional order preliminarily enjoining the Attorney General from making disbursements under the agreement pending final resolution of this case. On 17 July 2017, the Attorney General filed an answer to plaintiffs' amended complaint in which he denied the material allegations contained in the amended complaint and asserted a number of affirmative defenses, including laches, waiver, failure of consideration, and equitable estoppel. On 21 July 2017, Judge Hobgood entered an amended preliminary injunction precluding the Attorney General from making any disbursements to recipients relating to grants awarded on or after 30 September 2016. On 21 August 2017, the North Carolina Coastal

Federation and Sound Rivers, Inc., filed a motion seeking leave to intervene in support of the Attorney General and a proposed answer to plaintiffs' amended complaint.

On 22 September 2017, the Attorney General filed a motion seeking the entry of summary judgment in his favor along with a number of attached affidavits from individuals with knowledge about the process that led to the execution of the agreement. In his affidavit, Alan S. Hirsch, a former Director of the Consumer Protection Division of the Department of Justice, stated that he had "led the negotiation and drafting" of the agreement on behalf of the Attorney General. Mr. Hirsch averred that, in his opinion, Smithfield and its subsidiaries had entered into the agreement in order to address a "long running problem of major public concern, to demonstrate good corporate citizenship[,] . . . and to further its public standing by making additional enhancements of North Carolina's environment" given that "[t]he image of the industry was under intense scrutiny." Mr. Hirsch indicated that the agreement was drafted in such a manner as to prevent it from being "read to limit or affect in any way the compliance responsibilities of [the Department of Environmental Quality]"; that the agreement did not "arise from," "address," or "settle" "any actual or alleged violations of law" that Smithfield and its subsidiaries might have committed in the past or might commit in the future or to resolve any cases in which a civil penalty "had been issued or might later be issued" against Smithfield and its subsidiaries; and that "[n]o penalties or punitive action of any sort was ever discussed or considered" during the negotiations of the agreement.

Daniel C. Oakley, a former Director of the Environmental Division of the Department of Justice, averred in his affidavit that he had been a "primary negotiator" of the agreement. According to Mr. Oakley, "the agreement was not reached in order to settle any cases in which a civil penalty had been assessed by [the Department of Environmental Quality]." In fact, Mr. Oakley "[knew] that no civil penalty being defended by attorneys in [his] [d]ivision was settled, compromised, or in any way impacted by the negotiation or execution of" the agreement. In addition, Mr. Oakley noted that, "[a]lthough there were Notices of Violation and Civil Penalty Assessments issued to various hog farms from 1995 to 2001, any Civil Penalty Assessments were resolved by other means and were not part of the [a]greement at issue in this case." Finally, Mr. Oakley stated that Roy Cooper took office as Attorney General and William G. Ross took office as Secretary of the Department of Environmental Quality in January 2001 and that these two individuals had "ensured that [the Department of Environmental Quality] continued its robust enforcement activity

against those of the State's hog farms that were not in compliance with laws and regulations for discharge and non-discharge operations."

Dennis Ramsey, a former Supervisor of the Non-Discharge Branch of the Division of Water Resources at the Department of Environmental Quality, stated in his affidavit that penalties for environmental noncompliance were assessed by the director of the Division of Water Quality from 1995 until 2001. Mr. Ramsey indicated that he had been responsible for making recommendations to the division director concerning the entities that should be penalized during that period. In addition, Mr. Ramsey averred that he was familiar with the process by which penalty assessments were settled and compromised. Mr. Ramsey stated that he had never been asked to modify any enforcement-related recommendation based upon the agreement and that, "[t]o the best of [his] knowledge," the agreement was "entirely separate from, and in no way related to, any pending or anticipated enforcement action by [the Department of Environmental Quality] against any of the signatories to the [a]greement."

Finally, Christine Lawson, the Program Manager for the Department of Environmental Quality's Animal Feeding Operations Program, executed an affidavit in which she provided information demonstrating that the Department of Environmental Quality had assessed approximately nineteen civil penalties against Smithfield and its subsidiaries during the year preceding the execution of the agreement and the year following the execution of the agreement. According to the information provided by Ms. Lawson, almost half of those penalties were assessed after the execution of the agreement and were based upon notices of violation that had been issued prior to the agreement's execution.

On 25 September 2017, the North Carolina School Boards Association filed a motion seeking leave to file an amicus curiae brief in support of plaintiffs' position. On 28 September 2017, plaintiffs filed a response in opposition to the intervention petition filed by the Coastal Federation and Sound Rivers and a renewed summary judgment motion in which they cited to (1) records showing a history of environmental violations by Smithfield and its subsidiaries, including several violations that had been noticed in the year prior to the execution of this agreement; (2) a letter written by counsel for Smithfield and its subsidiaries several months after the execution of the agreement stating that "Smithfield [and its subsidiaries] benefit[ ] [from the agreement] because it is an opportunity to avoid enforcement actions by correcting deficiencies before they become enforcement problems" and because it "gives both the State and Smithfield [and its subsidiaries] an opportunity to correct

deficiencies that might not be compliance problems now, but could lead to noncompliance in the future if not corrected"; and (3) statements that the Attorney General's Office had made in press releases issued in 2002 and 2013 referring to the agreement as a "settlement." In addition, plaintiffs asserted that the Attorney General lacked the authority to enter into the agreement.

On 12 October 2017, the trial court entered an ordering granting summary judgment in favor of the Attorney General. In reaching this conclusion, the trial court stated that the Attorney General had "presented sufficient evidence to establish its right to judgment as a matter of law that . . . the payments made by [Smithfield and its subsidiaries] under the [agreement] were not 'penalties,' 'forfeitures,' or 'fines' collected for 'any breach of the penal laws of the State' and thus [were] not within the scope of article IX, sec[tion] 7." According to the trial court, the facts in this case are distinguishable from those at issue in earlier penalty-related cases decided by this Court. The trial court determined that, even if Smithfield and its subsidiaries had entered into the agreement in the hope of avoiding future penalties, this "speculation[,] . . . even if true, would not be sufficient, as a matter of law, to recast the payments made under the [agreement] as 'penalties,' 'forfeitures' or 'fines' collected 'for any breach of the penal laws of the State' " for purposes of article IX, section 7. In other words, the trial court decided that "there is simply no proffer of competent evidence" that the agreement was entered into "to reduce, settle, remit or compromise any threatened or pending violation or to obtain forbearance by [the Department of Environmental Quality] of any anticipated enforcement action." Finally, the trial court noted that plaintiffs had not challenged the Attorney General's constitutional authority to enter into the agreement in the complaint and that, even if plaintiffs had pled such a claim, "it does not logically follow that the payments made under the [agreement], if made pursuant to an agreement in excess of the Attorney General's authority, would fall under the scope of article IX, sec[tion] 7." As a result, the trial court granted the Attorney General's motion for summary judgment, denied plaintiffs' summary judgment motion, dismissed plaintiffs' complaint, and dissolved the preliminary injunction. The trial court entered separate orders allowing the intervention petition filed by the Coastal Federation and Sound Rivers and the filing of the amicus curiae brief submitted by the School Boards Association. Plaintiffs noted an appeal from the trial court's orders to the Court of Appeals.

In seeking relief from the trial court's orders before the Court of Appeals, plaintiffs argued that the payments made pursuant to the

agreement constituted penalties for purposes of article IX, section 7 and that the Attorney General lacked the authority to enter into the agreement unless it was a settlement agreement subject to article IX, section 7. On 4 September 2018, the Court of Appeals filed an opinion reversing the trial court's summary judgment order and remanding this case to the Superior Court, Wake County, for trial.

The Court of Appeals began its analysis by addressing the issue of whether Mr. De Luca had standing to assert a claim against the Attorney General pursuant to article IX, section 7. *De Luca v. Stein*, 820 S.E.2d 89 (N.C. Ct. App. 2018). According to the Court of Appeals, Mr. De Luca had failed to allege that "(1) the payments at issue constitute an illegal or unconstitutional tax; (2) the [a]greement has caused him a personal, direct, and irreparable injury; or, (3) he is a member of a class prejudiced by the [a]greement," *id.* at 95 (citing *Texfi Indus., Inc. v. City of Fayetteville*, 44 N.C. App. 268, 270, 261 S.E.2d 21, 23 (1979), *aff'd*, 301 N.C. 1, 269 S.E.2d 142 (1980)), and had failed to file suit on behalf of any local board of education, make any demand upon an entity with standing to assert a claim such as the one at issue to in this case, or demonstrate that the making of such a demand would be futile. *Id.* On the other hand, the Court of Appeals held that the Board of Education did have standing to bring an action against the Attorney General pursuant to article IX, section 7 because it was an intended beneficiary of monies that were subject to the relevant constitutional provision and claimed to have been unconstitutionally deprived of monies to which it was entitled. *Id.*

Secondly, the Court of Appeals addressed plaintiffs' contention that payments made pursuant to the agreement constituted penalties for purposes of article IX, section 7. *Id.* at 96. In spite of the fact that "[t]he sworn attestations in the[ ] affidavits [submitted on behalf of the Attorney General] purport [that] the payments [Smithfield and its subsidiaries] undertook to pay under the [a]greement are not punitive because they did not resolve any past, present, or future violations of environmental laws," the Court of Appeals noted that "several factors in the record raise genuine issues of material fact regarding whether the payments were 'intended to penalize' [Smithfield and its subsidiaries] or were 'imposed to deter future violations and to extract retribution from' [Smithfield and its subsidiaries]." *Id.* at 97 (citing *Mussallam v. Mussallam*, 321 N.C. 504, 509, 364 S.E.2d 364, 367 (1988); *N.C. Sch. Bds. Ass'n v. Moore*, 358 N.C. 474, 496, 614 S.E.2d 504, 517 (2005)). More specifically, the Court of Appeals held that the record reflected the existence of genuine issues of material fact concerning whether

the agreement had been "instigated at the behest of and initiated by the Attorney General's office" rather than by Smithfield and its subsidiaries or the Department of Environmental Quality and why "the Attorney General retains sole authority over the disbursement of the funds" if the agreement was "sought or undertaken by [Smithfield and its subsidiaries] to 'demonstrate good corporate citizenship' and to 'improve the image' of the hog farming industry." *Id.* at 97–98. In addition, the Court of Appeals held that there was a genuine issue of material fact concerning whether "the basis, formula, and manner in which the amounts are calculated for [Smithfield and its subsidiaries] to pay each year under the [a]greement [rested more upon] penalties, or a 'head tax' calculation,' rather than [being] 'voluntary contributions' designed to enhance [Smithfield and its subsidiaries'] 'good corporate citizenship,' images or goodwill." *Id.* at 98. In other words, the Court of Appeals questioned why Smithfield and its subsidiaries "would agree to pay $1-per-hog over 25 years as opposed to a specific lump sum or stated contribution" if they were "purely motivated out of a desire to further their corporate image" given that "the per-hog payments specified under the agreement [bore] a resemblance to the per-cigarette payments [that] the General Assembly enacted in the late 1990s to implement the Master Settlement Agreement with tobacco manufacturers to settle lawsuits filed by several states' Attorneys General . . . over healthcare costs stemming from tobacco use." *Id.* Thus, the Court of Appeals held that "a genuine issue of material fact exist[ed concerning] whether the agreement was motivated by a desire by [Smithfield and its subsidiaries] to forestall, or forebear, any potential claims the Attorney General or [the Department of Environmental Quality] could have asserted against them" and "whether [Smithfield and its subsidiaries] would not have agreed to make the payments at issue, but for potential legal claims, and consequent civil penalties or fines, the Attorney General could have asserted against them." *Id.* at 99.

Similarly, the Court of Appeals held that the timing of enforcement actions taken against Smithfield and its subsidiaries raised a genuine issue of material fact as to whether the payments provided for in the agreement were intended to be punitive in nature. *Id.* In support of its decision, the Court of Appeals noted that, even though the Department of Environmental Quality had assessed nine penalties against Smithfield and its subsidiaries in the fourteen months preceding the signing of the agreement and an additional nine penalties in the eight months following the signing of the agreement, each of the penalties related to "notices of violations accrued or issued by [the Department of Environmental Quality] before the [a]greement was executed." *Id.* (emphasis omitted).

In addition, the Court of Appeals determined that the record "d[id] not demonstrate [that the Department of Environmental Quality had] issued any notices of violations to [Smithfield and its subsidiaries] after the [a]greement was signed." *Id.* (emphasis omitted). According to the Court of Appeals, the "apparent discrepancy between the number of notices of violations issued to [Smithfield and its subsidiaries] before and after the [a]greement was signed" raised a genuine issue of material fact concerning whether payments made pursuant to the agreement were made "in lieu of further enforcement actions[ ] and their related civil penalties." *Id.* (emphasis omitted).

Finally, the Court of Appeals held that "the express terms of the [a]greement" evidenced the existence of a genuine issue of material fact concerning whether the payments were intended to "penalize [Smithfield and its subsidiaries] for non-compliance with environmental standards or to induce forbearance on the part of the Attorney General, or [the Department of Environmental Quality], in bringing future enforcement actions." *Id.* at 99–100. In essence, the Court of Appeals asked "why [Smithfield and its subsidiaries] committed to undertake actions to remediate deficient conditions on their farms and operations, install equipment, and additionally pay up to $50 million" for environmental enhancement activities, particularly given that they had "relinquish[ed] any control over to whom and in what amounts the Attorney General distribute[d] the environmental grants." *Id.* at 100 (emphasis omitted). Similarly, the Court of Appeals noted that the Attorney General had described the agreement as a "settlement" in press releases issued in 2002 and 2013 and concluded that these descriptions of the agreement raised a genuine issue of material fact concerning the extent to which the payments provided for in the agreement were intended to be penalties. *Id.* As a result, given that the Court of Appeals determined that the record disclosed the existence of genuine issues of material fact and that "[t]he record . . . is not sufficiently developed for [the Court of Appeals] to make the de novo determination of whether the payments undertaken by [Smithfield and its subsidiaries] under the [a]greement were, as a matter of law, 'penalties' within the scope of [article IX, section 7]," the Court of Appeals reversed the trial court's order and remanded this case to the Superior Court, Wake County, "to determine whether the payments in the [a]greement were intended to constitute penalties, payment in lieu of penalties, forbearance for potential or future enforcement actions, or were not penalties." *Id.* (emphasis omitted).

In dissenting from the majority's decision, Judge Bryant stated that "the record on appeal is sufficient to make a determination as a matter

of law on the question before this Court" and opined that the trial court had not erred by concluding as a matter of law that funds paid pursuant to the agreement were not penalties subject to article IX, section 7. *Id.* at 101. According to Judge Bryant, the majority erroneously created an argument that had not been advanced by any party in the course of concluding that the record disclosed the existence of genuine issues of material fact necessitating a trial on the merits. *Id.* Instead, Judge Bryant "would [have] reach[ed] the main legal issue that is before us—which is the same issue that was before the trial court—[and would have held] that the trial court properly applied the law to the undisputed material facts of this case, and affirm the judgment of the trial court." *Id.*

The Attorney General and the Coastal Federation and Sound Rivers filed notices of appeal seeking review of the Court of Appeals' decision based upon Judge Bryant's dissent. In addition, each party filed a petition seeking discretionary review of additional issues pursuant to N.C.G.S. § 7A-31 to ensure that each of the issues that had been properly raised in this case before the lower courts were properly before this Court.[3] The Court allowed each party's discretionary review petition.

In seeking to persuade us to overturn the Court of Appeals' decision, the Attorney General[4] argues that, unlike this Court's earlier decisions holding that payments relating to the violation of environmental standards constituted civil penalties for purposes of article IX, section 7, this case did not involve the replacement of, or a reduction in, a previously assessed civil penalty resulting from violations of environmental standards. As a result, the Attorney General contends that the Court of Appeals erred by failing to hold that the payments made in compliance with the agreement fell outside the scope of article IX, section 7.

In addition, the Attorney General contends that the Court of Appeals failed to base its decision upon the analytical framework that appellate courts are required to utilize in evaluating the validity of a trial court's decision to grant or deny a summary judgment motion. The Attorney General argues that, after affidavits tending to show that payments made

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3. Although the Board of Education expressed disagreement with the Court of Appeals' determination that Mr. De Luca lacked standing to challenge the Attorney General's failure to pay monies received under the agreement to the Civil Penalty and Forfeiture Fund, Mr. De Luca refrained from seeking review of the Court of Appeals' standing-related decision because the Board of Education could adequately present plaintiffs' challenge to the agreement before this Court.

4. The brief filed by the Coastal Federation and Sound Rivers adopted the arguments advanced by the Attorney General.

pursuant to the agreement should not be treated as penalties had been submitted, the burden shifted to plaintiffs to rebut that evidence. *See* N.C.G.S. § 1A-1, Rule 56(c), (e); *Charlotte-Mecklenburg Hosp. Auth. v. Talford*, 366 N.C. 43, 50–51, 727 S.E.2d 866, 871–72 (2012) (affirming the trial court's decision to grant summary judgment in the plaintiff's favor in a case in which the plaintiff presented "minimally sufficient" evidence to satisfy its burden and the responsive evidence offered by the defendant "failed to demonstrate that an issue of material fact remained"); *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976) (holding that, where the party seeking summary judgment has produced sufficient evidence to demonstrate that he or she is entitled to prevail as a matter of law, "the rule requires the party opposing a motion for summary judgment—notwithstanding a general denial in his pleadings—to show that he [or she] has, or will have, evidence sufficient to raise an issue of fact"). The Attorney General contends, instead, that the Court of Appeals developed a number of unsupported and speculative theories for the purpose of showing that the record did, in fact, disclose the existence of disputed factual issues. As a result, the Attorney General contends that the Court of Appeals' conclusion that there are genuine issues of material fact should be reversed as well.

In seeking to persuade us to reverse the decision of the Court of Appeals, the Board of Education argues that there is no genuine issue of material fact in this case and that the only question that we should address and resolve is the extent to which a payment made pursuant to the agreement constitutes a settlement of penalty claims, so that the payments required by the agreement must be remitted to the Civil Penalty and Forfeiture Fund. The Board of Education argues that it "provided many examples of [Smithfield and its subsidiaries'] violations and assessed penalties, press releases, and other documents" that "prove[d that] the [a]greement is a settlement agreement and is subject to article IX, section 7." However, instead of resolving the substantive issue that both parties agree was before the Court of Appeals, the Board of Education contends that the Court of Appeals erred by holding that the parties' subjective intent in entering into the agreement "would be determinative" and by concluding that there existed a genuine issue of material fact as to the parties' subjective intent.

Next, the Board of Education asserts that the agreement is a settlement, with this contention being based upon record evidence that, in its opinion, demonstrates that (1) the payments made pursuant to the agreement were designed to deter noncompliance on the part of Smithfield and its subsidiaries and are, for that reason, the functional equivalent of

penalties; (2) the payments made pursuant to the agreement are punitive rather than remedial in nature; and (3) the Attorney General's references to the agreement as a settlement in 2002 and 2013 demonstrate that the Attorney General understood the agreement to be a settlement. As a result, the Board of Education contends that this Court should hold that the payments made pursuant to the agreement constitute penalties subject to article IX, section 7 and should, for that reason, be remitted to the Civil Penalty and Forfeiture Fund.

We review appeals from trial court summary judgment orders using a de novo standard of review. *Daughtridge v. Tanager Land, LLC*, 835 S.E.2d 411, 415 (N.C. 2019) (citing *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 334–35, 777 S.E.2d 272, 278 (2015)). "The purpose of summary judgment can be summarized as being a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971) (citing 2 McIntosh, *N.C. Practice and Procedure* § 1660.5 (2d Ed., Phillips' Supp. 1970); 3 Barron and Holtzoff, *Federal Practice and Procedure* § 1234 (Wright ed., 1958)). Summary judgment is appropriate in two instances: "(a) [t]hose where a claim or defense is utterly baseless in fact, and (b) those where only a question of law on the indisputable facts is in controversy and it can be appropriately decided without full exposure of trial." *Id.*

"Summary judgment is proper if 'there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law.' " *Daughtridge*, 835 S.E.2d at 415 (citing N.C.G.S. § 1A-1, Rule 56(c) (2017)). "The movant is entitled to summary judgment . . . when only a question of law arises based on undisputed facts." *Id.* In determining whether the entry of summary judgment is or is not appropriate, the trial court must take "[a]ll facts asserted by the [nonmoving] party . . . as true" and view the evidence "in the light most favorable to that party." *Id.* (quoting *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)). Summary judgment involves a two-step process: first, "[t]he party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact," *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citing *Nicholson v. Am. Safety Util. Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997)), and then, "[o]nce the moving party satisfies these tests, the burden shifts to the nonmoving party to 'produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial.' " *Id.* at 681–82, 565 S.E.2d at 146 (quoting *Collingwood*

v. Gen. Elec. Real Estate Equities, Inc., 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)).

[1] As an initial matter, we note that the Board of Education argued, among other things, that the payments contemplated in the agreement could only have been a penalty given that the Attorney General lacked the authority to enter into the agreement unless it involved the settlement of a notice of violation. In support of this assertion, the Board of Education argued that, at the time that the agreement was entered into, the only authority granted to the Attorney General was that delineated in N.C.G.S. §§ 114-1.1 and 114-2, neither of which give the Attorney General the power to enter into an agreement such as the one at issue in this case, and that the agreement must have been a settlement for that reason.[5] The Attorney General, on the other hand, argued that, as the State's chief legal officer, he possessed the common law authority to manage the legal affairs of the State, including the authority to accept gifts on behalf of the State such as the grant funding embodied in the agreement. Although the question of the extent to which the Attorney General had the authority to enter into the agreement is an interesting one, we do not believe that it is before us in this case.

Generally speaking, the only persons entitled to "call into question the validity of a statute [are those] who have been injuriously affected thereby in their persons, property or constitutional rights." *Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962) (citing *Leonard v. Maxwell*, 216 N.C. 89, 98, 3 S.E.2d 316 (1939); and *St. George v. Hardie*, 147 N.C. 88, 98, 60 S.E. 920 (1908)); *see also Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 SE.2d 279, 282 (2008) (stating that "the 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation[s] of issues upon which the court so largely depends for illumination of difficult constitutional questions' " (quoting *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973))). In this instance, the mere fact that the Attorney General and Smithfield and its subsidiaries entered into the agreement did no harm to the Board of Education in light of the fact that it was not a party to the agreement, did not have any rights under the agreement, and would not be entitled to have any monies paid into the Civil Penalty and Forfeiture Fund in the event that the agreement was determined to be

5. As an aside, we note that the Board of Education never argued before this Court that the Attorney General lacked the authority to enter into the agreement at all and, in fact, expressly disclaimed any intention of doing so.

unenforceable. For that reason, while the Board of Education did have standing to assert that the payments made pursuant to the agreement constituted penalties for purposes of article IX, section 7, it lacks standing to assert that the Attorney General lacked the authority to enter into the agreement at all and appropriately made no such argument.

Moreover, the ultimate issue before us in this case is not whether the Attorney General had the authority to enter into the agreement. Instead, the question that we are called upon to decide in this instance is whether, taking the existence of the agreement as a given, payments made pursuant to the agreement constitute penalties that must be turned over to the Civil Penalty and Forfeiture Fund or something else. As a result, for all of these reasons, we express no opinion concerning the extent, if any, to which the Attorney General had the right to enter into the agreement or what status any relevant party would occupy in the event that the agreement was determined to be invalid.

[2] The first issue that we do have to address is whether, as the Court of Appeals determined, one or more genuine issues of material fact exist in this case or whether this case involves "only a question of law on the indisputable facts . . . in controversy [that] can be appropriately decided without full exposure of trial." *Kessing*, 278 N.C. at 533, 180 S.E.2d at 829. As we have already noted, all of the parties to this case are, and the trial court was, of the opinion that no such factual issue arose upon the present record. Although the Court of Appeals concluded that issues of fact that needed to be resolved at trial existed in this case, each of the allegedly factual issues delineated in the Court of Appeals' opinion focuses upon the subjective intentions with which either the Attorney General or Smithfield and its subsidiaries acted at the time that the agreement was executed, the purposes that Smithfield and its subsidiaries sought to achieve by entering into the agreement, and other similar questions. We do not believe that any of the "issues" upon which the Court of Appeals' decision was predicated suffice to preclude an award of summary judgment on behalf of one party or the other to this case.

We begin by noting that the Court of Appeals did not point to any conflicts in the evidence about which credibility determinations needed to be made. *See Kessing*, 278 N.C. at 535, 180 S.E.2d at 830. Moreover, none of the parties indicated that additional evidence existed that might shed light upon the substantive legal issue that is in dispute between the parties. On the other hand, a number of the issues that the Court of Appeals believed to require further factual development involve the manner in which the undisputed evidence should be evaluated in light of the applicable legal standard, rather than disputed issues of fact about

which further factual development would be appropriate. As this Court has previously stated, "the presence of important or difficult questions of law is no barrier to the granting of summary judgment," id. at 534, 180 S.E.2d at 830 (citing *Ammons v. Franklin Life Ins.*, 348 F. 2d 414 (5th Cir. 1965); *Palmer v. Chamberlin*, 191 F.2d 532, 27 A.L.R.2d 416 (5th Cir. 1951); *Crowder v. United States*, 255 F. Supp. 873 (N.D. Cal. 1964), aff'd, 362 F.2d 1011 (9th Cir. 1966); 3 Barron and Holtzoff, *supra* § 1234, pp. 126–27 (Wright ed. 1958); 6 *Moore's Federal Practice* § 56.16 (2d ed. 1966)), and the record suggests that the questions that we have before us in this case are just such issues of law rather than disputed issues of material fact.

Secondly, and perhaps more importantly, the bulk of the "factual" issues upon which the Court of Appeals relied in remanding this case for trial focus upon the subjective intent of the parties at the time that they took certain actions. However, as has already been noted, the principal substantive issue that we are called upon to decide in this case is whether the payments that are received pursuant to the agreement are or are not penalties as that term is used in article IX, section 7. In making that determination, our focus must necessarily be upon what the payments actually are, rather than upon questions such as which party instigated the process that led to the execution of the agreement, why the agreement was structured the way that it was, or what each party subjectively and in isolation thought to be the purpose served by the payments contemplated under the agreement. For that reason, most of the issues of "fact" upon which the Court of Appeals' decision rests are simply irrelevant to the ultimate legal issue that the Court has been called upon to resolve in this case and pose no obstacle to a decision to grant summary judgment in favor of one party or the other. As a result, we hold (1) that the Court of Appeals erred by reversing the trial court's order and remanding this case to the Superior Court, Wake County, for trial on the merits and (2) that this case is ripe for resolution on the merits on the basis of the parties' cross motions for summary judgment.

[3] As we have already noted, article IX, section 7 provides, in pertinent part, that "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools." N.C. Const. art. IX, § 7. In making a determination as to whether a particular payment is a penalty for purposes of article IX, section 7, "the label attached to the money is not controlling." *Moore*, 359 N.C. at 487, 614 S.E.2d at 512 (citing *Cauble v. City of Asheville*,

301 N.C. 340, 271 S.E.2d 258 (1980); *State v. Rumfelt*, 241 N.C. 375, 85 S.E.2d 398 (1955); *Bd. of Sch. Dirs. v. City of Asheville*, 128 N.C. 249, 38 S.E. 874 (1901); and *Bd. of Educ. v. Town of Henderson*, 126 N.C. 689, 36 S.E. 158 (1900)). Instead, the "determinative" or "critical" question is whether the alleged " 'civil penalty' is punitive or remedial in nature" or, put another way, "whether the penalty mandated for violation of the statute is imposed as punishment to deter noncompliance or to measure the damages accruing to an individual or class of individuals resulting from the breach." *Id.* at 512–13, 614 S.E.2d at 488 (citing *Remedial*, *Black's Law Dictionary* (6th ed. 1990)). In applying this basic standard to funds collected relating to environmental enforcement, this Court has held that money paid to support a Supplemental Environmental Project as a full or partial substitute for an environmental noncompliance penalty was a penalty for purposes of article IX, section 7, given that

> [t]he payment would not have been made had [the Department of Environmental Quality] not assessed a civil penalty against [the violator] for violating a water quality law. To suggest that the payment was voluntary is euphemistic at best. Moreover, the money paid under the [Supplemental Environmental Project] did not remediate the specific harm or damage caused by the violation even though a nexus may exist between the violation and the program [funded by the payment]. The payment was still punitive in nature. Nor is the nature of the payment by the City of Kinston or any other violator altered by its being made to a third party pursuant to a policy promulgated by [the Department of Environmental Quality] in an attempt to circumvent the statutory and constitutional requirement that the clear proceeds of civil penalties be paid to the Civil Penalty and Forfeiture Fund.

Id. at 509, 614 S.E.2d at 525. Similarly, this Court held in *Craven Cty. Bd. of Educ. v. Boyles*, 343 N.C. 87, 92, 468 S.E.2d 50, 53 (1996), that monies paid to settle proceedings initiated for the purpose of enforcing environmental standards constituted penalties subject to article IX, section 7, stating that "it is not determinative that the monies were collected by virtue of a settlement agreement" or that the parties "stated that the payment [was] not [to] be construed as a penalty" given that "[t]he monies were paid to settle the assessments of a penalty for violations of environmental standards." As a result, the ultimate question before this Court is whether the payments made pursuant to the agreement, construed in realistic, rather than nominal terms, were intended to punish

Smithfield and its subsidiaries for committing one or more environmental violations or to serve some other purpose.

The language in which the agreement is couched clearly demonstrates that the payments at issue in this case were not intended to punish Smithfield and its subsidiaries for any specific environmental violation or to deter them from committing any future environmental violation. On the contrary, the agreement provides, in pertinent part, that:

> [Smithfield and its subsidiaries] have entered into this binding [a]greement freely for the purpose of memorializing the commitments they have voluntarily agreed to undertake . . . .
>
> [Smithfield and its subsidiaries] acknowledge that the Attorney General, in consultation with [the Department of Environmental Quality], will undertake a comprehensive review of the operation of the swine industry in North Carolina to ensure that [Smithfield and its subsidiaries] and other integrators and operators of swine facilities are taking all appropriate steps, and have adopted compliance assurance systems, to ensure that they remain at all times in compliance with the law . . . .
>
> Nothing in this [a]greement shall be construed to in any way limit State or private enforcement against [Smithfield and its subsidiaries] for past, present, or future violations of law . . . . This [a]greement shall not be construed as a settlement of any liability of [Smithfield and its subsidiaries] for penalties, fines, damages or other liability.
>
> . . . .
>
> Nothing in this [a]greement shall relieve [Smithfield and its subsidiaries] of their responsibility to comply with applicable law . . . .

Thus, the agreement specifically provides that the commitments made by Smithfield and its subsidiaries do not effect a settlement of any liability that might arise from any past environmental violation or have any effect upon any enforcement action that might be taken by the Department of Environmental Quality in the event that any environmental violation occurs in the future.[6]

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6. The fact that sections III.A.1.b and III.A.1.d of the agreement provide that Smithfield and its subsidiaries will submit plans that "identif[y] those Company-owned

Consistently with the general terms in which the agreement is couched, the specific payments at issue here, unlike those that the Court deemed to be penalties in *Moore* and *Boyles*, do not stem from an enforcement proceeding in which the Department of Environmental Quality or some other state agency attempted to assess a penalty for the purpose of punishing a past environmental violation or deterring future violations before accepting a payment from the alleged violator to either an agency of the State or some other entity in full or partial satisfaction of a civil penalty that would have otherwise become due and owing. On the contrary, the agreement was not, by its own terms, tied to any particular violations of the environmental laws. In addition, the undisputed evidence forecast by the Attorney General tends to show that no existing settlement actions were disposed of as a result of the decision of Smithfield and its subsidiaries to enter into the agreement and that no State agency or official, including the Department of Environmental Quality or the Attorney General, has refrained from seeking the imposition of a penalty for any environmental violation that occurred after the date upon which the agreement was entered into. In light of the language in which the agreement is couched, there is no evidence in the present record tending to show that Smithfield and its subsidiaries made the payments contemplated under the agreement in lieu of paying a penalty for specific violations of an environmental standard.

In seeking to persuade us that the payments contemplated under the agreement were, in fact, the functional equivalent of a civil penalty, the Board of Education advances a number of arguments, none of which we find persuasive. For example, the Board of Education argues that an examination of the Department of Environmental Quality's enforcement records relating to Smithfield and its subsidiaries indicates that the Department of Environmental Quality began "going light" on them after the agreement was entered into and that this information permits a reasonable inference that the agreement did, in fact, serve as a substitute for penalties that would have been assessed against Smithfield

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Farms that have the potential to adversely impact water quality due to deficient site conditions or operating practices and a description (together with expeditious implementation schedules) of proposed measures to correct such deficiencies or operating practices" and "identif[y] all abandoned lagoons on Company-owned Farms and a description (together with expeditious implementation schedules) of proposed measures for closure of the lagoons on Company-owned Farms in accordance with current NRCS and [Department of Environmental Quality] standards and consistent with [the Department of Environmental Quality's] most current priority list" does nothing to undercut the conclusion set out in the text. Simply put, nothing in the record shows that the actions delineated in these provisions of the agreement, which are explicitly stated to be remedial in nature, involve the sanctioning of violations of legally-enforceable environmental standards.

and its subsidiaries. However, given that the Board of Education has not shown what level of enforcement would have been appropriate in light of the level of compliance with the environmental laws exhibited by Smithfield and its subsidiaries after the date upon which the agreement was executed, we are unable to say that the Board of Education's argument is anything more than an exercise in speculation or conjecture. *See Dickens v. Puryear*, 302 N.C. 437, 457, 276 S.E.2d 325, 337 (1981) (stating that, where the plaintiff "in essence relies on the allegations . . . in his complaint and possible speculation or conjecture[,]" such information "is not enough to survive [the defendant's] motion for summary judgment"). Such a deficiency in the record precludes reliance upon rhetorical questions asking what considerations might have motivated Smithfield and its subsidiaries to enter into the agreement if it was not intended to avoid or lessen future penalty payments.

Similarly, the Board of Education directs our attention to portions of a letter written by counsel for Smithfield and its subsidiaries following the execution of the agreement in which the benefits of the agreement to Smithfield and its subsidiaries are said to include the ability to proactively "correct[ ] deficiencies *before* they become enforcement problems." However, instead of suggesting that the agreement settled future enforcement actions by providing for a payment that constituted the functional equivalent of a penalty, the relevant portion of counsel's letter actually demonstrates that the agreement did not address or settle any environmental violations that had previously occurred and that the agreement was intended, instead, to help correct deficiencies that could lead to future enforcement actions. In other words, counsel's letter described the agreement as having a remedial and preventative, rather than a punitive, purpose.

In a related argument, the Board of Education directs our attention to the fact that the Attorney General referred to the agreement in two different press releases as a "settlement" and argues that the Attorney General's settlement authority is limited to compromising an enforcement action. However, we believe that the Board of Education puts more weight on this argument than it will reasonably bear. As we have previously stated, "it is neither 'the label attached to the money' nor 'the [collection] method employed,' but 'the nature of the offense committed' that determines whether the payment constitutes a penalty." *Boyles*, 343 N.C. at 92, 468 S.E.2d at 53 (quoting *Cauble*, 301 N.C. at 344, 271 S.E.2d at 260); *see also Moore*, 359 N.C. at 510, 614 S.E.2d at 526 (stating that "the terms and descriptions [that the Department of Environmental Quality] and a violator use to refer to a payment are not determinative"

(citing *Boyles*, 343 N.C. at 92, 468 S.E.2d at 53)). Regardless of whether the agreement represents a "settlement" or something else entirely, the relevant issue for purposes of this case is whether the payments provided for in the agreement constitute the functional equivalent of penalties, rather than the way in which the parties characterize them. In other words, the relevant issue for purposes of this case not whether the agreement involves a gift or a settlement; instead, the relevant issue is whether the payments at issue here constitute penalties. And, as we have previously indicated, the record does not contain any evidence tending to show that the payments made pursuant to the agreement have served to either settle any particular enforcement action or as the functional equivalent of a penalty and does contain a considerable amount of evidence pointing in the opposite direction.

Finally, the Board of Education's assertion that Smithfield and its subsidiaries had no incentive to enter into the agreement if acting in that fashion did not somehow offset some current or future liability rests upon a misunderstanding of the applicable legal test, which focuses upon the purpose for which the relevant payment was made rather than the subjective intentions of the persons or entities involved in the making of that payment. In order for a particular payment to constitute a "penalty" as that term is used in article IX, section 7, both the payor and the regulatory agency must understand that the payment in question is the functional equivalent of a penalty to which the payor would be exposed as a result of an environmental violation. In the absence of an express or implied agreement on the part of the regulatory agency that the payment will, in fact, be treated in that fashion, the mere fact that the payor subjectively hopes that its actions will have the effect of reducing the severity with which the regulatory agency views any violation that it might commit in the future is simply not sufficient to convert that payment into a penalty for purposes of article IX, section 7.

Thus, for all of these reasons, we hold that the Court of Appeals erred by determining that the record disclosed the existence of genuine issues of material fact that precluded the entry of summary judgment in favor of either party and remanding this case to the Superior Court, Wake County, for a trial on the merits. In addition, we hold that the trial court correctly decided to enter summary judgment in favor of the Attorney General on the grounds that the payments contemplated by the agreement did not constitute penalties for purposes of article IX, section 7.[7] As a result, we reverse the decision of the Court of Appeals and remand

7. Any argument that the agreement is invalid because it rests upon a violation of article I, section 6 of the North Carolina Constitution (providing that "[t]he legislative,

this case to the Court of Appeals for any additional proceedings not inconsistent with this opinion.[8]

REVERSED AND REMANDED.

Justice NEWBY dissenting.

According to the Attorney General, the multi-million-dollar agreement reached with Smithfield is not a settlement, even though it references regulatory deficiencies for which the State presumably could have held Smithfield responsible. We are asked to believe instead that Smithfield regarded its potential payments totaling $50 million over twenty-five years as nothing more than a gift that the Attorney General would use in his sole discretion to fund grants to environmental groups. The undisputed facts of this case, especially when viewed in light of controlling legal precedent, reveal that the $50 million is not a gift. The agreement is a settlement, drafted to circumvent the North Carolina Constitution's requirement that the money proceeds of fines and penalties go to the public schools. Furthermore, if the agreement is not a settlement, it violates our state constitution's separation-of-powers

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executive, and judicial powers of the State government shall be forever separate and distinct from each other") by impermissibly infringing upon the General Assembly's constitutional taxing authority is not properly before this Court. No such arguments were made before the trial court, the Court of Appeals, or this Court, and we decline to deviate from our long-standing refusal to address constitutional issues that were not presented to the lower court by reaching out to decide that issue in this case. *Dennis v. Duke Power Co.*, 341 N.C. 91, 103, 459 S.E.2d 707, 715 (1995) (stating that "[i]t is a well[-]established rule of this Court that it will not decide a constitutional question which was not raised or considered in the court below" (quoting *Johnson v. Highway Commission*, 259 N.C. 371, 373, 130 S.E.2d 544, 546 (1963))). As a result, we express no opinion concerning the merits of any separation of powers challenge that might be advanced in opposition to the lawfulness of the agreement that is before us in this case.

8. On 18 November 2019, Governor Roy Cooper signed 2019 N.C. Sess. Laws 250 into law. The relevant session law amended N.C.G.S. § 147-76.1 so as to provide, in pertinent part, that, "[e]xcept as otherwise specifically provided by law, all funds received by the State, including cash gifts and donations, shall be deposited into the State treasury," N.C.G.S. § 147-76.1(b), and that, "[e]xcept as otherwise provided by subsection (b) of this section, the terms of an instrument evidencing a cash gift or donation are a binding obligation of the State[, with] [n]othing in this section [to] be construed to supersede, or authorize a deviation from the terms of an instrument evidencing a gift or donation setting forth the purpose for which the funds may be used." N.C.G.S. § 147-76.1(c). Although 2019 N.C. Sess. Laws 250, § 5.7.(c) provided that newly-enacted N.C.G.S. § 147-76.1 became effective on 1 July 2019, and would be applicable to all funds received on or after that date, the parties agreed that the provisions of newly-enacted N.C.G.S. § 147-76.1 have no bearing upon the proper resolution of this case. As a result, we will refrain from attempting to construe N.C.G.S. § 147-76.1 or to apply its provisions to the facts of this case.

principle by invading the General Assembly's policymaking and budgetary prerogatives in a way that invites other constitutional officers to create and manage programs funded by "gifts" received from the very companies they police. Because this agreement is a settlement, not a gift, I respectfully dissent.

The circumstances leading to this agreement aid in understanding its true nature. Severe flooding of swine farms in the 1990s brought about environmental challenges. Ruptured and flooded swine waste lagoons spilled millions of gallons of waste into the State's waterways and groundwater. Smithfield was among the largest companies in the swine industry; in the late 1990s, it received at least forty-five notices of violation of environmental laws and regulations from the Department of Environmental Quality (DEQ, formerly the Department of Environment and Natural Resources).

On 25 July 2000 then-Attorney General Michael F. Easley made an agreement with Smithfield and some of its subsidiaries (collectively, Smithfield) in which Smithfield agreed to, among other things, immediately take measures to enhance environmental protection on its farms, commit $15 million towards the development of advanced technologies for dealing with environmental hazards like swine waste, install these technologies on its farms, and cooperate with the Attorney General to ensure compliance with environmental laws. The agreement established a timeline for Smithfield to address many of its environmental issues. For example, it allowed Smithfield until 15 October 2000 to submit a plan to correct "deficient site conditions or operating practices" at some of its farms and until 15 December 2000 to submit a plan to shut down its abandoned lagoons. Most significantly to this case, Smithfield promised to contribute up to $50 million over twenty-five years towards "environmental enhancement" activities administered at the discretion of the Attorney General. After the agreement was made, the Attorney General's office referred to it as a "settlement" multiple times in press releases.

The Attorney General, in his discretion, administers the $50 million fund as follows: Smithfield deposits the payments for environmental enhancement activities in an escrow account, from which funds are then paid out to organizations, at the direction of the Attorney General, for environmental projects. The Attorney General created the "Environmental Enhancement Grants Program." Governmental and nonprofit entities may apply for grants from the program and a panel made up of individuals from the Department of Justice, DEQ, the Department of Natural and Cultural Resources, and certain nongovernmental entities reviews the applications. The panel, as well as a Smithfield

representative, recommends to the Attorney General how grants should be dispersed, but the Attorney General makes the ultimate decision. Since the agreement was made, the Attorney General has awarded more than $25 million in grants through this program. The program continues to operate today, with millions of dollars more to be distributed.

The majority decides that the $50 million Smithfield promised to pay for the Attorney General's grant program is not a settlement payment for two primary reasons. First, one section of the agreement provides that the agreement has no effect on the Attorney General's ability to resolve current enforcement actions or bring new ones. Second, there is no evidence that Smithfield obtained the dismissal of any outstanding enforcement action brought against it as a result of the agreement. Certainly these considerations should factor into the analysis of the agreement's nature, but they do not capture the entire story.

The agreement must be viewed as a whole for its true effect, notwithstanding how the agreement's isolated provisions or the agreement's parties characterize it. *See Cauble v. City of Asheville*, 301 N.C. 340, 344, 271 S.E.2d 258, 260 (1980) (explaining that, as to the question about whether funds are derived from penalties and so reserved for education, this Court has "often stated that the label attached to the money does not control"). When viewed in its entirety, the agreement reveals that Smithfield promised millions of dollars to the Attorney General in exchange for leniency in enforcing State environmental laws and regulations. The $50 million is therefore a payment in lieu of penalties, subject to Article IX, Section 7's requirement that the funds go to the State's public schools. *See* N.C. Const. art. IX, § 7.[1] The agreement's provision explaining that it should not be viewed in this way does not change the agreement's substance.

This case is not unique. Indeed, our case law applying Article IX, Section 7 has developed over time in response to attempts by state and local governmental entities to circumvent the State constitutional requirement that proceeds from fines or penalties inure to benefit of public schools. In *Cauble* citizens of the City of Asheville paid funds for parking citations they received from the City. 301 N.C. at 342, 271 S.E.2d at 259. The City argued that the funds were not fines subject to Article IX, Section 7 because, among other things, the citizens paid the funds

1. Article IX, Section 7 of the North Carolina Constitution declares that "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, . . . shall be faithfully appropriated and used exclusively for maintaining free public schools."

"voluntarily" after receiving a citation; they were not assessed after a criminal conviction. *Id.* at 343–44, 271 S.E.2d at 260. The Court disagreed and held that the funds were subject to Article IX, Section 7. *Id.* at 345, 271 S.E.2d at 261. The central question in cases like that one, the Court said, is not "whether the monies are denominated 'fines' or 'penalties' " because "the label attached to the money does not control." *Id.* at 344, 271 S.E.2d at 260. It explained that "[t]he crux of the distinction lies in the nature of the offense committed, and not in the method employed by the municipality to collect fines for commission of the offense." *Id.*

In response to the Court's ruling in *Cauble*, the Department of Environment, Health and Natural Resources (DEHNR) ventured a different argument in *Craven County Board of Education v. Boyle*s, 343 N.C. 87, 468 S.E.2d 50 (1996). In that case, DEHNR assessed a penalty against a company for violating air pollution standards. *Id.* at 88, 468 S.E.2d at 51. DEHNR and the company eventually made a settlement agreement under which payments were not to "be construed as forfeitures, fines, penalties, or payments in lieu thereof." *Id.* at 89, 468 S.E.2d at 51. Despite the language of the agreement, the Court explained that because the payments arose from an environmental enforcement action against the payor, the funds were proceeds from penalties and thus subject to Article IX, Section 7. *Id.* at 92, 468 S.E.2d at 53.

In due course, the Department of Environment and Natural Resources (DENR), DEHNR's successor, tried another argument to avoid Article IX, Section 7 in *North Carolina School Boards Association v. Moore*, 359 N.C. 474, 614 S.E.2d 504 (2005). In that case, DENR assessed a penalty against the City of Kinston, but eventually remitted the penalty altogether. *See id.* at 509–10, 614 S.E.2d at 525. Instead, the parties made an agreement under which the City of Kinston paid money to the State's "Supplemental Environmental Project." *Id.* at 508, 614 S.E.2d at 524–25. Nonetheless, the Court held the payment was a settlement of penalties despite the State's assertion that the payments were voluntary and remedial in nature. *Id.* at 508–10, 614 S.E.2d at 524–26. Because the payment would not have been made had DENR not assessed a penalty against the City of Kinston, the Court stated it would be "euphemistic at best" to say the payment was voluntary. *Id.* at 509, 614 S.E.2d at 525.

This case represents perhaps the most creative effort yet to avoid Article IX, Section 7. The Attorney General argues that the agreement at issue falls outside that provision because it did not resolve any outstanding civil penalties assessed against Smithfield. Though the agreement resolved no such penalties, a fair reading of the document shows that, as consideration for its $50 million promise, Smithfield received time to

correct regulatory deficiencies that otherwise could have resulted in the imposition of further penalties. For example, in subsection III(A)(1)(b), the agreement gave Smithfield until 15 October 2000 to submit a plan to correct "deficient site conditions or operating practices" at some of its farms. "Deficient" sites indicate that those sites fell below the lawful standards. So, the agreement appears to have allowed Smithfield nearly three months to submit a plan to correct conditions for which the Attorney General presumably could have immediately brought an enforcement action. Similarly, subsection III(A)(1)(d) of the agreement allowed Smithfield until 15 December 2000 to submit a plan to shut down its abandoned lagoons; it thus granted Smithfield nearly five months to submit a plan to correct conditions for which the Attorney General could bring an enforcement action immediately, assuming the abandoned lagoons presented an unlawful environmental hazard.[2]

There simply is no good reason to believe that Smithfield would have entered into the agreement had the deficiency provisions not been part of the document. In support of his position, the Attorney General points to language near the end of the document which states that the agreement should not be interpreted to limit State enforcement "for past, present, or future violations of law . . . ." That language is no more dispositive than the provision in the *Boyles* settlement agreement that described the company's settlement payments as something other than a fine, penalty, or forfeiture. As this Court did in *Boyles*, we should refuse to take at face value a single settlement provision that is at odds with the plain intent of the parties and that appears designed to deny the public schools funds owed to them under Article IX, Section 7.

The Attorney General's effort to portray Smithfield's payments as a gift creates a Catch-22. At oral argument, when asked how the section under which Smithfield promised to pay money is enforceable, the Attorney General asserted that the funds are an enforceable charitable gift. It is, however, a longstanding principle of contract law that a gift is not generally enforceable unless it is given for consideration. *See*, *e.g.*, *Picot v. Sanderson*, 12 N.C. (1 Dev.) 309, 309 (1827) (explaining that a transaction was "a mere contract or agreement to give, which, being without consideration, cannot be enforced"). In other words, a "gift" is enforceable when the "giver" gets something in return—that is, when

2. Counsel for the Attorney General admitted at oral argument that much of the agreement functioned to help Smithfield come into compliance with State law. This statement presumes that some of Smithfield's facilities violated the law at the time the agreement was made. The agreement thus secured for Smithfield an alternative to the standard enforcement process.

the gift is not truly a gift at all. If the payments really are a gift, they are unenforceable. If they are not a gift, then they are part of a settlement agreement involving the enforcement of state law and therefore subject to Article IX, Section 7.

Because the best reading of the whole agreement shows that Smithfield secured favor from the Attorney General regarding Smithfield's noncompliant practices, the funds promised by Smithfield are not a gift. It does not matter that no outstanding enforcement action was dismissed by the Attorney General because of the agreement. The function of the agreement viewed objectively is to secure leniency by the regulators in favor of the regulated party, Smithfield. Because of the potential of future enforcement actions against Smithfield, it is, like it was in *Moore*, "euphemistic at best" to say that Smithfield voluntarily made a gift out of pure good will. The agreement appears artfully drafted based on this Court's precedent on penalties, but the substance of the agreement shows through nonetheless. Given the binary choice presented in this case—a gift or a settlement in lieu of penalties—the funds should be classified as a settlement and thus directed to the Civil Penalties and Forfeiture Fund. This classification is consistent with how the Attorney General's office has characterized the agreement.

Indeed, if the agreement with Smithfield is *not* a settlement, the Attorney General lacked authority to make the agreement. The majority states that this Court need not resolve the question of the Attorney General's authority in this case. I disagree.[3] The issue is not only critically important to the State's public interest and jurisprudence, but plaintiff also adequately presented it, arguing that the agreement *must*

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3. The majority asserts that plaintiff does not have standing to challenge the Attorney General's authority to make the agreement because the existence of the agreement does not harm plaintiff.

First, I do not think standing is a bar to considering this issue because plaintiff does not actually claim the agreement is invalid; it simply argues the agreed upon payments must be a settlement if the agreement is to be considered valid. This argument is not a separate claim for which a plaintiff must show standing. It is an additional argument supporting the central claim, which plaintiff has standing to assert.

Second, as to the substance of the standing issue, generally, any person may bring an action alleging a separation of powers violation if they can show any injury, even if the injury is the same as that suffered by the rest of the public. We have recognized causes of action arising directly under the North Carolina Constitution to vindicate rights secured by the Declaration of Rights. *Corum v. Univ. of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276, 290, *cert. denied*, 506 U.S. 985, 113 S. Ct. 493, 121 L. Ed. 2d 431 (1992). The Declaration of Rights provides, among many other things, that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each

involve settlement in lieu of penalties if the agreement is to be a valid exercise of the Attorney General's powers.

The General Assembly has decided that the Attorney General should have all the "powers of the Attorney General that existed at the common law, *that are not repugnant to or inconsistent with the Constitution* or laws of North Carolina." N.C.G.S. § 114-1.1 (2019) (emphasis added). Specifically, it gave the Attorney General the duty to represent the interests of the State in legal proceedings, N.C.G.S. § 114-2 (2019), and authority regarding settlements to which the State is a party, N.C.G.S. § 114-2.1, -2.4 (2019). The Attorney General thus appears to have the authority to settle legal claims that the State may have against private parties, or that private parties may have against the State.

The Attorney General's central argument in this case, however, is that the agreement is not a settlement. If that is true, as the majority concludes, then the Attorney General must find another basis for his authority to make such an agreement.

The Attorney General argues that he has special authority to make the agreement because he is the State's "chief legal advisor," and he has the authority to accept gifts on the State's behalf. The title of "chief legal advisor," he says, gives him the authority to manage all the State's legal affairs, which is not limited to litigation. Specifically, he claims, the Attorney General has "plenary authority to act in the interests

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other." N.C. Const. art. I, § 6. In this case, plaintiff may have been injured by a separation of powers violation by the Attorney General because one conceivable result of the Attorney General's actions is that money that could have been extracted as a penalty, and so directed to supporting education, is instead extracted as a "gift" for environmental enhancement.

This Court should consider the Attorney General's authority in this case. The result of the majority's decision that the agreement does not involve settlement payments in lieu of penalties means that both the agreement and the Attorney General's grant program remain intact and active. The Court thus allows a potentially invalid exercise of governmental power to go unchecked indefinitely. Furthermore, if, as the majority says, these payments are not in settlement of any wrongdoing, past or future, then what is the true nature of the agreement? The agreement at least appears to involve the Attorney General accepting gratuitous payments from entities against which the Attorney General should be enforcing regulations. Can a regulated party give gifts to the regulator without the public seeing the payments as being *for something*? By upholding such a scheme, the majority invites mischief, and the public has an interest in curtailing such mischief. In addition, Smithfield will continue to pay millions into the fund for at least the next five years. Because of the agreement, these substantial funds go into the Attorney General's preferred grant program rather than into any other public fund. The public thus has an interest in the extent of the Attorney General's powers. Because the Attorney General's authority and the nature of this State's separation of powers principle are critical to the public interest and to the State's jurisprudence, this Court should address those issues now.

of the public, including non-litigation efforts 'to enforce the state's statutes.' " (quoting 7 Am Jur. 2d *Attorney General* § 5, at 10 (2017)).

It is simply incorrect that the Attorney General has "plenary authority to act in the interests of the public." The separation of powers principle of the North Carolina Constitution makes that clear. The Attorney General should act in the public interest, but he may not exercise legislative power to do so. And even if the Attorney General has the power to engage in "non-litigation efforts to enforce the state's statutes," that power is not broad enough to vindicate his actions here if the payments are not a settlement in lieu of penalties. Under the majority's and the Attorney General's view, neither the agreement nor the grant program "enforces" any State statute. The Attorney General in fact argues that the agreement was not a penalty or settlement resulting from any violation of the law. It is, instead, part of a policy initiative to conserve the State's natural environment. The initiative may be commendable, but it does not enforce the State's laws. If the agreement does not involve settlement of penalties, it involves legislative policy considerations, a role constitutionally reserved for the General Assembly.

Searching for statutory authority, the Attorney General also argues he has power to "accept gifts on behalf of the State" under N.C.G.S. § 138A-32(f)(5) (2019). Obviously intended as an anti-corruption measure, section 138A-32 imposes restrictions on the solicitation and receipt of gifts by certain state officials and employees. Subsection (f)(5) merely states that the statute's restrictions do not apply in the case of gifts "accepted on behalf of the State for use by the State or for the benefit of the State." The best reading of this provision is that, *if* a governmental official may otherwise accept a gift for the State, section 138A-32 does not prohibit the official from doing so. Subsection (f)(5) does not give the Attorney General or other officials authority they would not otherwise have to accept gifts on the State's behalf.

Moreover, under the agreement and grant program, the Attorney General does not simply accept the funds on the State's behalf, he accepts them for his separate fund, and decides precisely how the money should be used. He, in accordance with the agreement, has decided that the funds should be deposited into a specific escrow account, and he has the final say about who receives grants from that fund. The purpose of subsection (f)(5) is to enable public servants, legislators, or legislative employees to accept gifts for the good of the State without violating ethical rules. The General Assembly, in passing that provision, could not have intended those officials and employees to have the authority to unilaterally decide exactly how the State's gift should be used.

That is a strikingly broad power which falls squarely within the General Assembly's policymaking purview alone.

Without a specific statutory provision to grant the Attorney General the authority to fund and establish the grant program, the actions of the Attorney General in this case violate the separation of powers principle as well. The North Carolina Constitution provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. The legislative power belongs to the General Assembly. N.C. Const. art. II, § 1 ("The legislative power of the State shall be vested in the General Assembly . . . ."). No governmental entity other than the General Assembly may exercise a power that is uniquely legislative. Any usurpation of the legislative power by the executive branch, regardless of intent, is an exercise of powers in violation of the North Carolina Constitution.

By entering into this agreement and creating and operating the grant program the Attorney General has unconstitutionally exercised legislative power. The levying of funds received from private entities is a quintessentially legislative power. References to such power in the North Carolina Constitution refer to powers, or limitations of power, of the General Assembly. *See*, *e.g.*, N.C. Const. art. II, § 24(1)(k); N.C. Const. art. V, §§ 1, 2, and 5. The Constitution does not grant any similar power to the Attorney General or any other executive branch member. In fact, the Constitution specifically provides that the *General Assembly* may pass laws to allow other entities to appropriate funds for public purposes. *See* N.C. Const. art. V, § 7. Thus, any executive action extracting funds from private entities violates the separation of powers principle of this State unless authorized by the General Assembly. The Attorney General's agreement is unconstitutional if the payments constitute a gift instead of a settlement. The entering of the agreement and operating the grant program cannot, then, fall under the Attorney General's power, which extends only to those actions which are not "repugnant to or inconsistent with the Constitution or laws of North Carolina." N.C.G.S. § 114-1.1.

Under the Attorney General's argument, every Council of State member could "encourage" "gifts" from those entities that they regulate and redirect those gifts to each member's preferred recipients. In doing so, each member could effectively "tax" the regulated entities to fund the member's own policy initiatives, thereby circumventing the General Assembly. This usurpation of legislative authority would clearly be unconstitutional. Moreover, such governmental actions could suggest impropriety, inviting the onlooking public to question whether those

regulated entities that participate in the "gift" programs sponsored by regulators will be treated the same as those that do not.

The Attorney General's agreement with Smithfield is a settlement for purposes of Article IX, Section 7. The public schools are therefore entitled to the clear proceeds of Smithfield's settlement payments. If, as the Attorney General insists, the agreement is not a settlement, it constitutes an unauthorized and unconstitutional usurpation of powers that properly belong to the legislature. I therefore disagree with the majority's decision to let the agreement stand.

I respectfully dissent.

PHG ASHEVILLE, LLC, PETITIONER
v.
CITY OF ASHEVILLE, RESPONDENT

No. 434PA18

Filed 3 April 2020

1. Zoning—conditional use permit—denied by city council—standard of review by superior court

A trial court used the correct standards when reviewing a city council's denial of a conditional use permit for a hotel, including reviewing de novo the issue of whether the hotel developer made the necessary prima facie showing that it presented competent, material, and substantial evidence tending to satisfy the standards set forth in the city's unified development ordinance.

2. Zoning—conditional use permit—prima facie entitlement—sufficiency of evidence

A hotel developer seeking a conditional use permit presented competent, material, and substantial evidence tending to show it satisfied the standards set forth in the city's unified development ordinance by presenting three expert witnesses and their respective reports regarding the impact of the project on adjoining properties and traffic.

3. Zoning—conditional use permit—prima facie showing by applicant—authority of city to deny permit

Upon a prima facie showing by a hotel developer that it met its burden of production by presenting competent, material, and

substantial evidence tending to show it satisfied the standards set forth in the city's unified development ordinance, the city had no authority to deny the permit in the absence of a similar level of evidence in opposition. Although a city council may rely on special knowledge of local conditions, the questions raised in this case by council members were not sufficient to justify a finding that the developer had not met its burden.

4. Zoning—conditional use permit—unified development ordinance—city bound by standards

The Supreme Court rejected an argument by a city that its denial of a conditional use permit for a hotel was proper pursuant to *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1 (2002). In this case, the city council was bound by the standards set forth in the city's unified development ordinance, and an applicant that has presented competent, material, and substantial evidence that it has satisfied those standards has made a prima facie case that it is entitled to issuance of a permit.

Justice EARLS dissenting.

Justice HUDSON joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 822 S.E.2d 79 (N.C. Ct. App. 2018), affirming an order entered on 2 November 2017 by Judge William H. Coward in Superior Court, Buncombe County. Heard in the Supreme Court on 6 January 2020.

Fox Rothschild LLP, by Kip D. Nelson and Thomas E. Terrell, Jr., for petitioner-appellee.

Poyner Spruill LLP, by Andrew H. Erteschik, Chad W. Essick, Nicolas E. Tosco, Colin R. McGrath, and N. Cosmo Zinkow, for respondent-appellant.

ERVIN, Justice.

The question before us in this case is whether the City of Asheville properly denied an application for the issuance of a conditional use permit submitted by PHG Asheville, LLC, seeking authorization to construct a hotel in downtown Asheville. The trial court and the Court of

Appeals both held that the City had improperly concluded that PHG had failed to present competent, material, and substantial evidence tending to show that the proposed hotel satisfied the standards for the issuance of a conditional use permit set out in the City's unified development ordinance. In seeking relief before this Court, the City argues that the Court of Appeals ignored this Court's precedents concerning the manner in which applications for the issuance of conditional use permits should be evaluated, incorrectly applied the applicable standard of review, and erroneously disregarded the City's findings of fact. After carefully reviewing the record, briefs, and arguments of the parties, we conclude that PHG presented competent, material, and substantial evidence that the proposed hotel satisfied the relevant conditional use permit standards set out in the City's unified development ordinance and that the record did not contain any competent, material, and substantial evidence tending to establish that the proposed development failed to satisfy the applicable ordinance standards. Therefore, the City lacked the authority to deny the requested conditional use permit. As a result, we affirm the Court of Appeals' decision.

On 27 July 2016, PHG submitted a conditional use permit application to the City's planning department in which it requested authorization to construct an eight-story, 185-room, 178,412 square-foot hotel and an adjoining structure containing 200 parking spaces on a tract of real property located at 192 Haywood Street. The 2.05-acre tract upon which the proposed hotel was to be located was contained in the Patton/River Gateway portion of the "Central Business District," which is outside the "Traditional Downtown Core." According to the Downtown Master Plan that the City had adopted in March 2009, the Patton/River Gateway area "should . . . accommodate significant residential and extended-stay hotel development," with "some [of this development to occur] in taller buildings."

As a result of the size of the proposed development and its presence in the Downtown Design Review Overlay portion of the Central Business District, section 7-5-9.1 of the City's unified development ordinance required PHG to undertake a Level III site plan review of the project. The Level III site plan review process required the holding of a pre-application conference involving area representatives; staff review of the application; and review by the Technical Review Committee, the Downtown Commission, and the Planning and Zoning Commission prior to final review by the Asheville City Council. The Technical Review Committee and the Downtown Commission each recommended approval of the project subject to variances to be approved by the Planning and Zoning

Commission and the making of certain modifications to the project by PHG. The Planning and Zoning Commission granted two variances relating to the project that modified the proposed lot frontage and the height of the street wall before unanimously recommending approval of the conditional use permit to the City Council.

On 24 January 2017, PHG's application for a conditional use permit came before the Asheville City Council for a quasi-judicial public hearing. According to Section 7-16-2 of the City's unified development ordinance:

> (c) *Conditional use standards.* The Asheville City Council shall not approve the conditional use application and site plan unless and until it makes the following findings, based on the evidence and testimony received at the public hearing or otherwise appearing in the record of the case:
>
> (1) That the proposed use or development of the land will not materially endanger the public health or safety;
>
> (2) That the proposed use or development of the land is reasonably compatible with significant natural and topographic features on the site and within the immediate vicinity of the site given the proposed site design and any mitigation techniques or measures proposed by the applicant;
>
> (3) That the proposed use or development of the land will not substantially injure the value of adjoining or abutting property;
>
> (4) That the proposed use or development of the land will be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which it is located;
>
> (5) That the proposed use or development of the land will generally conform with the comprehensive plan, smart growth policies, sustainable economic development strategic plan, and other official plans adopted by the city;
>
> (6) That the proposed use is appropriately located with respect to transportation facilities, water

> supply, fire and police protection, waste disposal, and similar facilities; and
>
> (7) That the proposed use will not cause undue traffic congestion or create a traffic hazard.

At the hearing before the City Council, PHG presented the testimony of three expert witnesses, including Tommy Crozier, a licensed real estate appraiser with over fifteen years' experience in conducting property appraisals, and Kevin Dean, a registered professional engineer.

In his testimony, Mr. Crozier addressed the third standard set out in the City's ordinance, which required consideration of whether the proposed hotel would significantly injure the value of adjoining or abutting properties. Mr. Crozier testified that three properties adjoined the tract upon which the proposed hotel would be located, including an apartment building, a church, and a multi-center office building. According to Mr. Crozier, "the three adjoining properties are valued for tax purposes under $3 million," while the construction of the hotel would cost about $25 million. Mr. Crozier described the situation at issue in this case as a textbook example of the principle of progression, in which "lower valued properties are enhanced by the value of higher value[d] properties." On the basis of his examination of recent land sale transactions in the vicinity of the proposed hotel, Mr. Crozier opined that "values have increased substantially over the last few years" as a result of the construction of other hotels in the area. As a result, Mr. Crozier concluded that "[t]he proposed subject hotel will not impair the value of adjoining or abutting property" and "should meaningfully enhance the values of surrounding properties."

At the conclusion of Mr. Crozier's testimony, Vice Mayor Gwen Wisler asked Mr. Crozier whether he had considered comparable sales data involving transactions in other cities in which two hotels had been located within a quarter mile from a new hotel. After acknowledging that he had not included data of that nature in his report, Mr. Crozier stated that "there is so much demand for new hotel rooms in the market that [this new hotel] will not impact the value negatively of any of the hotels around here" in light of the fact that downtown hotel occupancy in Asheville is around 80 to 85 percent even though occupancy rates in an efficient market at equilibrium would be approximately 65 percent. For example, Mr. Crozier testified that, following the opening of the Hyatt Place in downtown Asheville, the business of the adjoining Hotel Indigo had increased by about ten percent.

In his testimony, Mr. Dean addressed the issue of whether construction and operation of the proposed hotel would result in any undue traffic congestion or create a traffic hazard. Mr. Dean testified that he had consulted with the City's traffic engineer, who had informed him that he only needed to provide a trip generation table and the anticipated distribution of those trips in order to satisfy the relevant ordinance requirement. Based upon the industry standards applicable to traffic studies, Mr. Dean determined that new traffic at nearby intersections resulting from the construction and operation of the proposed hotel would represent less than five percent of the total traffic that passed through that intersection and would only increase the overall traffic delay at nearby intersections by approximately four seconds. In order to make these determinations, Mr. Dean testified that he had "collected peak hour traffic counts on November 10th of [2016]" and "performed a trip generation for the site based on [the] Institute of Transportation Engineer[s'] data" and information generated by appropriate software. As a result, Mr. Dean concluded that "the proposed use will not cause undue traffic congestion or create a traffic hazard."

At the conclusion of Mr. Dean's testimony on direct examination, Councilman Cecil Bothwell asked Mr. Dean why he had based his analysis upon conditions experienced on November 10th, which was a Thursday, rather than conditions in the summer or in September or October, when Asheville experiences higher tourist-related traffic levels. In response, Mr. Dean testified that "traffic [studies] are only supposed to be counted between Tuesdays and Thursdays to get a typical weekday condition that's not affected by a Monday or Friday variation," that the use of this approach is "industry standard," and that traffic engineers are generally required to only conduct traffic assessments on Tuesdays through Thursdays. In addition, Councilman Bothwell questioned Mr. Dean about the queuing that already occurs at intersections near the hotel and whether the new entrance to the hotel would exacerbate existing conditions. After acknowledging that he could not argue with the Councilman Bothwell's "anecdotal stories," Mr. Dean stated that "the amount of traffic that's going to be added is only supposed to be [a] negligible increase to any [queues] that you would see" and will not "cause any undue additional issues."

Vice Mayor Wisler asked further questions about the time of day upon which Mr. Dean's study focused, about whether Mr. Dean had taken the times at which people check into and out of a hotel into account, and whether Mr. Dean had studied conditions in the summer, during which the City experienced its highest levels of traffic. In response, Mr. Dean

stated that he had collected the data upon which his study was based on "a typical weekday in November" by measuring traffic from 7:00 a.m. to 9:00 a.m. and from 4:00 p.m. to 6:00 p.m., periods which "generally represent[ ] the peak hour" of the streets that were at issue in his study. At that point, Vice Mayor Wisler asked whether Mr. Dean had taken Mr. Crozier's appraisal, which mentioned certain hotels and apartments that were either planned to be built or had just been added, into account in conducting his study. Mr. Dean replied by stating that he had not considered the information to which Vice Mayor Wisler alluded and that he had, instead, examined the impact of the proposed hotel upon existing traffic conditions. In addition, Mr. Dean stated that, if there is a higher amount of traffic near the hotel originating from sources other than the hotel itself than was contemplated in his study, the traffic resulting from the construction and operation of the hotel would constitute a smaller percentage of the overall traffic and have a smaller percentage impact upon overall traffic conditions.

Three members of the public spoke in favor of the approval of the conditional use permit. Another member of the public asked a procedural question without supporting or opposing the issuance of the permit. Charles Rawls, a native of Asheville and resident of the nearby Montford community, expressed uncertainty concerning whether he opposed the project and posed certain questions about traffic-related issues. With respect to the extent to which traffic would be entering and exiting the proposed parking deck onto North French Broad Road, Mr. Rawls commented that, "heading south on French Broad, there is a hill there that is a blind hill" that might create an issue for persons who lacked familiarity with the area. In addition, Mr. Rawls asked "how much of the traffic coming and going to that parking garage would be happening at peak hours so that it might affect the safety of the public" and whether Mr. Dean had observed the angle and sight limitations relating to that hill. In response, Mr. Dean stated that he had not seen that hill and that "[w]e did not conduct a sight distance check, which is typically what's required." According to Mr. Dean, the North Carolina Department of Transportation "typically requires driveways to meet certain sight distance requirements" and that he had not conducted the "check" in question because his firm had not been involved in designing the site. No one presented any evidence in opposition to the approval of the proposed conditional use permit.

After Mayor Esther Manheimer closed the evidentiary hearing, Vice Mayor Wisler immediately moved that PHG's conditional use permit application be denied on the grounds that the applicant had failed to

meet the first, second, third, fourth, fifth, and seventh standards set out in the City's unified development ordinance and Councilman Keith Young seconded the motion. At that point, Councilman Bothwell expressed agreement with the assertion that PHG had failed to satisfy the traffic-related standard and thanked Mr. Rawls for "discover[ing] the lack of the sight distance examination." At that point, the City Council voted unanimously to deny the conditional use permit application.

On 14 February 2017, the City entered a written order that contained forty-four findings of fact in support of its decision to deny the issuance of the requested conditional use permit on the basis of its failure to satisfy six of the seven standards set out in the City's unified development ordinance. Among other things, the City Council found as a fact that:

> 18. An appraiser, Tommy Crozier, testified on behalf of the Applicant and presented an "Expert Report," which purported to show that CUP Standard 3 was met, *i.e.*, that the development of the Hotel would "not substantially injure the value of adjoining or abutting property." However, Mr. Crozier's testimony and the Expert Report do not contain facts and data sufficient to prove that there would not be a substantial adverse impact on such values following construction of the Hotel.
>
> 19. Mr. Crozier's testimony and the Expert Report state generally, and the Council accepts as fact, that the values of property in this area of Asheville (northwest downtown) have been increasing in recent years, and that recent sales prices exceed the assessed tax values of properties in the area. There was, however, no evidence to establish the date of the tax appraisals or evidence that would indicate how these tax values would have any relevance to CUP Standard 3. There was no evidence, through facts and data, to indicate how the Hotel would affect or impact such an increase in value (assuming such an increase would continue) on the adjacent and adjoining properties.
>
> 20. There was no sales data presented and there are no comparable sales in the Expert Report, which provide information about the sale prices of properties adjacent to hotels in Asheville, or elsewhere, before and after a hotel was constructed on the tract in question. In fact, there was no data through, e.g., comparable sales, that

could show the before and after value of properties adjacent to any hotels in the City, even though the Expert Report indicates there have been multiple hotels constructed in the City in recent years, and at least two in the immediate area.

21. That property values are increasing in the area generally over time does not establish the impact of this Hotel on the adjoining and adjacent tracts, nor whether the value of those particular tracts would suffer an adverse impact if the Hotel is constructed.

22. There was no data or comparable sales to substantiate Mr. Crozier's claim that the Hotel Indigo was in part, the reason for the recent increase in property values in this area of downtown Asheville, or to show such increases were higher or lower than in other parts of the City during the same time period.

23. There was no evidence or data that could show the impact on the value of adjacent properties, when the proposed Hotel would be the third hotel in a several block radius. It appears that additional hotels could increase the value of other nearby hotels, but no facts or data were provided that could establish that property with other uses would not be substantially diminished.

24. The Expert Report also contains the following statements, which brings the reliability of the Expert Report into question:

> a. "The information contained in the Report or upon which the Report is based has been gathered from sources the Appraiser assumes to be reliable and accurate. The owner of the Property may have provided some of such information. Neither the Appraiser nor C&W [Cushman & Wakefield] shall be responsible for the accuracy or completeness of such information, including the correctness of estimates, opinions, dimensions, sketches, exhibits and factual matters. . . . . [sic]"
>
> b. "This report assumes that the subject will secure an affiliation with Embassy Suites or a similar chain. If the subject does not maintain a

similar affiliation, it could have a negative impact on the subject's market value."

c. "Our financial analyses are based on estimates and assumptions which were developed in connection with this appraisal engagement. It is, however, inevitable that some assumptions will not materialize and that unanticipated events may occur which will cause actual achieved operating results to differ from the financial analyses contained in the report, and these difference[s] may be material. It should be further noted that we are not responsible for the effectiveness of future management and marketing efforts upon which the projected results contained in this report may depend."

25. The CUP application does not request that the Hotel be only an Embassy Suites hotel or a "similar chain."

26. The methodologies employed, and data provided, by the Applicant's witness, Mr. Crozier, were inadequate to allow Council to find that the Hotel would not substantially injure the value of adjoining properties.

27. There is significant traffic in downtown Asheville near and around the Property in September and October, and in the summer months. The vehicular traffic in the area will increase if the Hotel is constructed.

28. The Applicant presented the testimony of a traffic engineer, Kevin Dean, as well as Mr. Dean's written "Traffic Assessment." The Traffic Assessment did not provide any facts or data which could show the level of traffic or traffic counts for any time of the year, except during a four hour period during the day on November 10, 2016, which was a Thursday. The level of traffic in this area is much higher at other times of the year, particularly the summer months; however, there were no traffic counts or any traffic data provided for any date other than November 10.

29. Mr. Dean was not aware of the environmental conditions on November 10, 2016, or whether such conditions could have affected traffic volumes on that date.

30. The Applicant's traffic counts were done on November 10, 2016 between the hours of 7 a.m. and 9 a.m., and between the hours of 4 p.m. and 6 p.m. Under industry standards, this is apparently "assumed" to be the time of highest traffic on nearby streets, but there was no evidence which could establish this would be the case for this area of Asheville.

31. The number of trips generated from the Hotel in the Traffic Assessment was also derived from an industry standard, and not the actual trips expected from this Hotel at this location. Hotels in downtown Asheville have an occupancy rate in excess of 85%, but the general rate for an efficient market is 65%. The Traffic Assessment did not take this expected higher occupancy of the Asheville market into account.

32. The Applicant did not submit any traffic data for Friday through Sunday, even though those are typically the days that tourists visit the City and traffic volumes are higher.

33. The estimated traffic counts used for the Traffic Assessment and Mr. Dean's opinion, were also these on a "typical weekday." There was no weekend data collected, even though this is the time that most tourists visit the Asheville downtown.

34. Without accurate traffic counts for any days other than Thursday November 10, there is no data or evidence to determine whether the additional trips generated by the Hotel (as well [as] those from the other tourists which the Hotel will attract but who do not stay at the hotel) would not decrease the existing level of service to an unacceptable level. The Level of Service Summary in the Traffic Assessment was not based on complete information or data.

35. There was no data or evidence presented that could show what the level of traffic would be with three hotels (Indigo, Hyatt and Embassy Suites) located within a several block area for Friday, Saturday and Sunday during the summer months or other high traffic periods.

36. The Traffic Assessment did not account for traffic that will be generated by future hotels and apartments in

> the downtown area that are planned and approved, but which are not yet fully constructed and operational.
>
> 37. The proposed Hotel includes a twenty-foot wide driveway, which provides street access to and from the parking structure and North French Broad Avenue.
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> 38. There is a blind hill with limited visibility in the vicinity of the Hotel's parking deck[ ] entrance and exit onto North French Broad Avenue. To determine whether the addition of that entrance/exit would cause a safety issue would require a "sight distance check." A sight distance check was not a part of the Traffic Assessment and no other evidence was presented to show the parking deck entrance or exit would not endanger driver or pedestrian safety. The Traffic Assessment did no analysis relating to traffic safety as it relates to vehicles entering and exiting this driveway.

Based upon these findings of fact, the City Council concluded that PHG had failed to produce competent, material, and substantial evidence that the hotel (1) "will not materially endanger the public health or safety;" (2) "is reasonably compatible with significant natural and topographic features of the site and within the immediate vicinity of the site given the proposed site design and any mitigation techniques or measures proposed by the applicant;" (3) "will not substantially injure the value of the adjoining or abutting property;" (4) "will be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which it is located and, moreover, the evidence instead showed the Hotel would not be in harmony with the scale, bulk, coverage and character of the area and neighborhood;" (5) "will generally conform to the comprehensive plan, smart growth policies, sustainable economic development strategic plan and other official plans adopted by the City and, moreover, the evidence instead showed the Hotel would not generally conform to the City's 2036 Vision Plan;" and (6) "will not cause undue traffic congestion or create a traffic hazard."

On 16 March 2017, PHG filed a petition seeking the issuance of a writ of certiorari pursuant to N.C.G.S. § 160A-393 authorizing judicial review of the City Council's decision to deny its permit application in which PHG alleged that the City Council had (1) "erred as a matter of law by not accepting PHG's evidence as competent, material, and substantial evidence entitling PHG to a permit;" (2) made findings of fact not supported by substantial evidence; and (3) made findings of fact that

were arbitrary and capricious.[1] On the same day, the requested writ of certiorari was issued. The issues raised by PHG's petition were heard before the trial court at the 2 October 2017 civil session of Superior Court, Buncombe County. On 2 November 2017, the trial court entered an order determining that PHG was entitled to the issuance of the requested conditional use permit and ordered that this matter be "remanded to the City of Asheville City Council with the directive that it grant PHG's application and issue it a Conditional Use Permit at its next regularly scheduled meeting."

In support of this decision, the trial court concluded that, contrary to the City Council's decision, the evidence submitted in support of PHG's request for the issuance of a conditional use permit "was competent, material and substantial and sufficient to establish a *prima facie* case of entitlement to a conditional use permit" and that, "[i]n deciding otherwise, the Council [had] made an error of law." In addition, the trial court concluded that "the [C]ity's decision was not supported by substantial evidence appearing in the record" and was, instead, "arbitrary and capricious." The trial court further determined that the testimony of Mr. Rawls concerning traffic safety-related issues was "incompetent as a matter of law" and that the City Council had failed to recognize that "PHG had only a burden of production, and not a burden of persuasion" at the first stage of this proceeding. The City noted an appeal to the Court of Appeals from the trial court's order.

In seeking relief from the trial court's order before the Court of Appeals, the City argued that the trial court had applied an incorrect standard of review when it "expressly and erroneously applied *de novo* review in evaluating whether the evidence was 'sufficient.' " In addition, the City contended that the trial court had erred by concluding that PHG had met its burden of eliciting competent, material, and substantial evidence tending to show that the hotel would not substantially injure the value of adjoining or abutting properties; cause undue traffic congestion or a traffic hazard; or be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which the proposed hotel was intended to be located.[2] Finally, the City contended that the

1. PHG also alleged that the City Council had violated its due process rights by prejudging the permit request. However, the trial court did not agree, and this issue was not appealed.

2. The City failed to argue before the Court of Appeals that the trial court had erred by concluding that PHG had satisfied its burden of producing competent, material, and substantial evidence addressing the three ordinance criteria that are not discussed in the text of this opinion, thereby abandoning its right to challenge the trial court's decision

trial court had erred by considering the recommendations that had been made by various City committees and advisory boards and by holding that the City Council's decision was arbitrary and capricious.

In rejecting the City's challenge to the trial court's order, the Court of Appeals began by concluding that the trial court had correctly applied the appropriate standard of review. *PHG Asheville, LLC v. City of Asheville*, 822 S.E.2d 79, 86 (N.C. Ct. App. 2018) (stating that "[t]he superior court's order shows it did not weigh evidence, but properly applied *de novo* review to determine the initial legal issue of whether Petitioner had presented competent, material, and substantial evidence"). According to the Court of Appeals, "[t]he City Council's 44 findings of fact were unnecessary, improper, and irrelevant" because "[n]o competent, material, and substantial evidence was presented to rebut Petitioner's *prima facie* case, and no conflicts in the evidence required the City Council to make findings to resolve any disputed issues of fact." *Id.* The Court of Appeals reached this conclusion based upon N.C.G.S. § 160A-393(l)(2), which provides that "findings of fact are not necessary when the record sufficiently reveals the basis for the decision below or *when the material facts are undisputed and the case presents only an issue of law*." *Id.* (cleaned up) (quoting N.C.G.S. § 160A-393(l)(2) (2017)). For that reason, the Court of Appeals held that any "whole record" review that the trial court might have conducted had been rendered unnecessary in light of its determination that PHG had presented competent, material, and substantial evidence that sufficed to establish the existence of a *prima facie* case of entitlement to the issuance of the permit and that no competent, material, and substantial evidence had been presented in opposition to PHG's request. *Id.* at 87. More specifically, the Court of Appeals held that Mr. Crozier's report and related testimony "constitute[d] material, as well as competent and substantial, evidence to show *prima facie* compliance with criteria 3," *id.* at 90, and that "[n]o competent, material, and substantial expert evidence contra was presented at the hearing to show [that] Crozier's analysis was unsound or utilized an improper methodology." *Id.* at 89 (stating that "[t]he City Council's lay notion that Crozier's analysis is based upon an inadequate methodology does not constitute competent evidence under the statute to rebut his expert testimony and report"). Similarly, the Court of Appeals concluded that "[n]o competent, material, and substantial evidence was presented to refute Dean's traffic analysis," that Mr. "Dean [had] testified [that] his

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with respect to those criteria on appeal. *See* N.C.R. App. P. 28(a) (stating that "[i]ssues not presented and discussed in a party's brief are deemed abandoned").

study was conducted in accordance with industry standards and used standard industry data and methods," and that "[t]he speculations of lay members of the public and unsubstantiated opinions of City Council members do not constitute competent evidence contra under the statutes and precedents to rebut Dean's traffic analysis." *Id.* at 91. As a result, for all of these reasons, the Court of Appeals affirmed the trial court's order. On 9 May 2019, this Court allowed the City's discretionary review petition.

In seeking to persuade us to overturn the Court of Appeals' decision, the City argues that, pursuant to this Court's holding in *Mann Media*, "a local government may deny a conditional use permit if, at the permit hearing, the developer is unable to definitively address whether the proposed development presents a safety risk" and "that this rule applies even when the safety risk is raised by members of the public whose testimony is ultimately inadmissible," citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 16–17, 565 S.E.2d 9, 19 (2002). In the City's view, "there is no meaningful difference between *Mann Media* and this case" given that, in *Mann Media*, members of the public raised concerns about ice falling from a tower while, in this case, a member of the public raised a safety issue concerning the presence of a blind hill near a parking garage. The City argues, that, just like in *Mann Media*, "PHG's witness could not state with certainty—much less 'satisfactorily . . . prove' or '*guarantee*'—that the proposed development would not create a 'safety risk' " and that PHG's failure to adequately address this safety issue necessitated denial of PHG's permit, quoting *Mann Media*, 356 N.C. at 17, 565 S.E.2d at 19. In addition, the City argues that, "when the local government assesses the evidence at the permit hearing, the local government may rely on its knowledge of the local community," citing *Humble Oil & Refining Co. v. Bd. of Aldermen*, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974). The City contends that, "instead of allowing local knowledge to inform local permitting decisions, the Court of Appeals expressly constrained local governments from considering that local knowledge." As a result, the City contends that the Court of Appeals' decision conflicts with our decisions in *Mann Media* and *Humble Oil* and that, "[i]f left undisturbed[, it] would usher in a new era of perfunctory, rubber-stamp review" of conditional use permits by local governing bodies.

Secondly, the City argues that "the Court of Appeals erred in its treatment of the City Council's factual findings." In the City's view, the City Council's findings of fact concerning traffic congestion and

traffic hazards and its findings of fact concerning the effect of the proposed hotel upon the value of surrounding properties had ample record support.[3]

In seeking to convince us to affirm the Court of Appeals' decision, PHG argues that "an applicant is entitled to a conditional use permit if the applicant meets its prima facie burden" of producing competent, material, and substantial evidence in support of each condition set out in the applicable land use ordinance. According to PHG, "the applicant only has a burden of production" rather than a burden of persuasion, with this burden of production having been "deliberately and appropriately [set at a] low [level] in conditional use permit cases because [the City] has already legislatively determined that the proposed use is an acceptable use at the location, subject to meeting the standards of a [conditional use permit]." For that reason, PHG contends that the issue of whether an applicant has met its initial burden to produce competent, material, and substantial evidence is a legal question subject to *de novo* review and that a reviewing court "is not bound by a municipality's factual findings" in making that decision. As a result, PHG asserts that "the City Council erred in denying the conditional use permit" because it met its burden of production regarding both traffic and property values and because "[t]he City Council's findings were not based on competent, material, and substantial evidence."

As this Court said just over forty years ago, "[t]he granting of a special exception is apparently not too generally understood." *Woodhouse v. Bd. of Comm'rs*, 299 N.C. 211, 218, 261 S.E.2d 882, 887 (1980) (quoting *Syosset Holding Corp. v. Schlimm*, 159 N.Y.S.2d 88, 89 (N.Y. Sup. Ct. 1956), *modified and aff'd*, 164 N.Y.S.2d 890 (N.Y. App. Div. 1957)). "A conditional use permit 'is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist.' " *Id.* at 215–16, 261 S.E.2d at 886 (quoting *Humble Oil*, 284 N.C. at 467, 202 S.E.2d at 135).

By the time that a case arising from an application for the issuance of a conditional use permit reaches this Court, the proceeding in

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3. The City has abandoned the contention that it advanced before the Court of Appeals that the trial court had erred by reversing the City Council's determination that PHG failed to meet its burden of producing competent, material, and substantial evidence that the development of the hotel would be in harmony with the scale, bulk, coverage, density and character of the area or neighborhood in which it is located by failing to bring that contention forward for our consideration in its new brief before this Court. *See* N.C.R. App. P. 28(a)

question has been subject to several levels of examination and review. As an initial matter, the application must be considered by the applicable local governmental body. *See* N.C.G.S. § 160A-388(a), (c) (2019). In the event that the local governmental body denies the application, the applicant has the right to seek judicial review of that decision by the superior court. *See id.* §§ 160A-388(e2)(2), -393. At the conclusion of that process, a disappointed litigant is entitled to seek appellate review of the trial court's decision in accordance with the relevant statutory provisions and the North Carolina Rules of Appellate Procedure.

At each step in this multi-level process, a distinct legal standard is applicable. According to well-established North Carolina law, the local governing board "must follow a two-step decision-making process in granting or denying an application for a [conditional] use permit." *Mann Media*, 356 N.C. at 12, 565 S.E.2d at 16. As an initial matter, the local governmental body must determine whether "an applicant has produced competent, material, and substantial evidence *tending to establish* the existence of the facts and conditions which the ordinance requires for the issuance of a [conditional] use permit." *Humble Oil*, 284 N.C. at 468, 202 S.E.2d at 136 (emphasis added). In the event that the applicant satisfies this initial burden of production, then "*prima facie* he is entitled to" the issuance of the requested permit. *Id.* At that point, any decision to deny the application "should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record," *id.*, with the local governmental body lacking the authority to "deny a permit on grounds not expressly stated in the ordinance" given that "it must employ specific statutory criteria which are relevant." *Woodhouse*, 299 N.C. at 218–19, 261 S.E.2d at 887.

The superior court " 'sits in the posture of an appellate court' and 'does not review the sufficiency of evidence presented to it but reviews that evidence presented to the town board.' " *Mann Media*, 356 N.C. at 12–13, 565 S.E.2d at 17 (quoting *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 626–27, 265 S.E.2d 379, 383 (1980)). In reviewing the local governmental body's decision, the superior court is charged with:

> (1) Reviewing the record for errors in law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

> (4) Insuring that decisions of town boards are supported by competent, material[,] and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

Id. at 13, 565 S.E.2d at 17 (quoting *Coastal Ready-Mix*, 299 N.C. at 626, 265 S.E.2d at 383); *see also* N.C.G.S. § 160A-393(k)(1)(b) (2019) (providing that the superior court should insure that the local governmental body's decision concerning a conditional use permit was not "[i]n excess of the statutory authority conferred upon the city, including preemption, or the authority conferred upon the decision-making board by ordinance").

The exact nature of the standard of review to be utilized by the superior court in any particular case "depends upon the particular issues presented on appeal." *Mann Media*, 356 N.C. at 13, 565 S.E.2d at 17 (quoting *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)). In the event that the petitioner asserts that the local governmental body has committed an error of law, then that contention is subject to *de novo* review. *Id.* Under the well-established *de novo* standard of review, "the superior court 'considers the matter anew and freely substitutes its own judgment for the [local governing board's] judgment.' " *Mann Media*, 356 N.C. at 13–14, 565 S.E.2d at 17 (cleaned up) (quoting *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999)). The extent to which "the record contains competent, material, and substantial evidence is a conclusion of law, reviewable de novo." N.C.G.S. § 160A-393(k)(2) (2019).[4] In the event that the petitioner contends that the local governmental body's decision was either (1) arbitrary or capricious or (2) not supported by competent, material, or substantial evidence, the superior court is required to conduct a whole

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4. PHG filed a motion seeking to have the City's appeal dismissed on the grounds that it had been rendered moot as a result of the enactment of Session Law 2019-111 on 28 June 2019, which added the language quoted in the text to N.C.G.S. § 160A-393(k)(2). *See* An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State, S.L. 2019-111, § 1.9, https://perma.cc/G86W-WPR6. In PHG's view, the enactment of this legislation "definitively answered the principal question presented in this appeal: what is the appropriate standard of review for whether an applicant has met its prima facie burden of producing competent, material, and substantial evidence?" We are not persuaded by this argument. As an initial matter, S.L. 2019-111 states that it "clarif[ies] and restate[s] the intent of existing law and appl[ies] to ordinances adopted before, on, and after the effective date." *Id.* at § 3.1. In addition, the content of the applicable standard of review is not determinative in this instance. As a result, we deny PHG's motion to dismiss the City's appeal.

record review. *Mann Media*, 356 N.C. at 13, 565 S.E.2d at 17. In conducting a whole record review, the reviewing court "must 'examine all competent evidence' (the 'whole record') in order to determine whether the [local governing body's] decision is supported by 'substantial evidence.' " *Id.* at 14, 565 S.E.2d at 17 (quoting *ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392). Under the whole record test, the reviewing court is not allowed "to replace the board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Id.* at 14, 565 S.E.2d at 17–18 (quoting *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)). Any order that the superior court enters in the course of reviewing a local governmental board's decision relating to the issuance of a conditional use permit "must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." *Id.* at 13, 565 S.E.2d at 17 (citation omitted).

In the event that appellate review of the superior court's order is requested, the appellate court "examines the trial court's order for error[s] of law," with that "process ha[ving] been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Id.* at 14, 565 S.E.2d at 18 (quoting *ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392). In the event that the case under consideration reaches this Court after a decision by the Court of Appeals, the issue before this Court is whether the Court of Appeals committed any errors of law. N.C.R. App. P. 16(a). For that reason, this Court is required to make the same inquiry that the Court of Appeals was called upon to undertake in reviewing the trial court's order. As a result, we will now examine whether the trial court utilized the appropriate standard of review and, if so, whether it did so properly.

[1] As the record that is before us in this case clearly reflects, the trial court appropriately engaged in both *de novo* and whole record review. *Mann Media*, 356 N.C. at 15, 565 S.E.2d at 18 (stating that a "court may properly employ both standards of review in a specific case" as long as "the standards are to be applied separately to discrete issues" and the trial court "identif[ies] which standard(s) it applied to which issues" (citations omitted)). In addressing the issue of whether PHG adduced sufficient evidence to satisfy the applicable burden of production, the trial court stated that:

> Exercising de novo review, the Court concludes as a matter of law that the evidence presented by PHG and other

> supporting witnesses was competent, material and substantial and sufficient to establish a *prima facie* case of entitlement to a conditional use permit. In deciding otherwise, the Council made an error of law. A court reviews "de novo the initial issue of whether the evidence presented by a petitioner met the requirement of being competent, material, and substantial." *Blair Investments, LLC. v. Roanoke Rapids City Council*, 231 N.C. App. 318, 321, 752 S.E.2d 524, 527 (2013).

Thus, the trial court engaged in *de novo* review in analyzing PHG's challenge to the City Council's determination that PHG had failed to make the necessary *prima facie* showing of entitlement to the issuance of the requested conditional use permit.

As this Court has clearly held, the extent to which an applicant has presented competent, material, and substantial evidence tending to satisfy the standards set out in the applicable ordinance for the issuance of a conditional use permit is a question directed toward the sufficiency of the evidence presented by the applicant and involves the making of a legal, rather than a factual, determination. *See Styers v. Phillips*, 277 N.C. 460, 464, 178 S.E.2d 583, 586 (1971) (stating that "[w]hether there is enough evidence to support a material issue is always a question of law for the court"). For that reason, we have previously analogized an applicant's burden of producing competent, material, and substantial evidence to support the issuance of a conditional use permit to the making of the showing necessary to overcome a directed verdict motion during a jury trial. *Humble Oil*, 284 N.C. at 470–71, 202 S.E.2d at 137 (stating that "[s]ubstantial evidence is more than a mere scintilla" and "must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury" (citation omitted)).

In concluding that PHG presented sufficient evidence to support the issuance of the requested conditional use permit, the trial court recognized that "PHG submitted a large volume of evidence that its hotel project met all ordinance standards" and that the evidence that PHG elicited "included [testimony from] five witnesses [three of whom] were received as experts, without objection, and who presented live testimony and ample reports, also received without objection." In addition, the trial court noted that "no competent evidence opposing the . . . application appear[ed] in the record." The Court of Appeals held that "[t]he superior court's order shows it did not weigh evidence, but properly applied *de novo* review to determine the initial legal issue of

whether Petitioner had presented competent, material, and substantial evidence." *PHG Asheville*, 822 S.E.2d at 86. We agree with the Court of Appeals that the trial court utilized the appropriate standard of review with respect to this issue and did so properly.[5]

[2] As the record reflects, PHG presented the testimony of two architects, an appraiser, a traffic engineer, a certified planner, and the Vice President of PHG who, between them, presented evidence concerning each of the standards enunciated in the relevant portion of the City's land use ordinance. Mr. Crozier and Mr. Dean, whose testimony is at issue in the case as it has been presented to us, were each qualified as experts in their respective fields. Both Mr. Crozier and Mr. Dean submitted voluminous reports that contained extensive data detailing the basis for their conclusions. Mr. Crozier's appraisal report and testimony provided ample support for PHG's contention that the proposed hotel would not substantially injure the value of adjoining or abutting properties by

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5. This Court did hold in *Mann Media* that, "[u]nder the whole record test, in light of petitioners' inability satisfactorily to prove that the proposed use would not materially endanger public safety, we are not permitted to substitute our judgment for that of [the governing board]" and "hold that petitioners failed to meet their burden of proving this first requirement and did not establish a *prima facie* case." *Mann Medi*a, 356 N.C. at 17, 565 S.E.2d at 19. The Court engaged in whole record review in *Mann Media* because the wording of the superior court's order "suggest[ed] that the superior court applied both [*de novo* and whole record review] simultaneously in several instances," a fact that left us "unable to conclude that the superior court consistently exercised the appropriate scope of review." *Id.* at 15, 565 S.E.2d at 18. Even so, we concluded that no remand was necessary "because the central issue presented by [the governing board] and argued by both parties on appeal is whether there was competent, material, and substantial evidence to support [the governing board's] denial of a [conditional] use permit," with "[r]esolution of this issue involv[ing] evaluation of evidence used by [the governing board] to deny the application" and with "the entire record of the hearing [being] before us." *Id.* As a result, the Court applied the whole record test in *Mann Media* "in the interests of judicial economy," *id.* at 16, 565 S.E.2d at 19, rather than because it was fundamentally altering the existing process for judicially reviewing challenges to the denial of conditional use permits and implicitly overruling decisions discussed in the text and cited without exception in *Mann Media* for the purposes for which we have cited them in this opinion, such as *Humble Oil*. *Id.* at 12, 565 S.E.2d at 16. In view of the fact that the trial court appropriately separated the issue of whether PHG had established the required *prima facie* case from the other issues that were before it at that time, there was no need for either the Court of Appeals or this Court to refrain from utilizing the ordinarily applicable standard of review, which *Mann Media* did nothing to change. In addition, the City has not cited any statutory provision or decision of this Court that in any way suggests that the manner in which its conditional use permit ordinance is couched has any effect upon the manner in which a decision refusing to issue a conditional use permit should be reviewed by either the trial or appellate courts. As a result, the issue of whether the applicant for a conditional use permit made out the necessary *prima facie* case does not involve determining whether the applicant met a burden of persuasion, as compared to a burden of production, and is subject to *de novo*, rather than whole record, review during the judicial review process.

detailing recent land sales in the area near the proposed hotel development and applying the principle of progression before concluding that the construction and operation of the proposed hotel would not injure the value of adjoining or abutting properties and would, instead, cause their values to increase. Similarly, Mr. Dean's traffic study and testimony provided ample support for PHG's contention that the proposed hotel would not cause undue traffic congestion or create a traffic hazard in light of the City staff's statement that "all we needed to provide was the trip generation table . . . as well as our anticipated distribution of those trips." Mr. Dean's analysis, which was performed in accordance with industry standards and utilized rates and equations developed by the Institute of Traffic Engineers, concluded that the traffic caused by the proposed development would result in only a "minimal impact" and would "only increase the overall delay at [nearby] intersections by about four seconds." We agree with the trial court and the Court of Appeals that the evidence that PHG presented before the City Council sufficed to satisfy its burden of producing competent, material, and substantial evidence tending to show that it satisfied the relevant ordinance standards.

[3] In light of the fact that PHG had made a sufficient showing to survive what amounted to a directed verdict motion and the City does not contend that the record contains any "evidence contra," the City Council's inquiry should have ended at this point. *See* N.C.G.S. § 160A-388(e2)(1) (2019) (stating that "[t]he board shall determine contested facts and make its decision within a reasonable time" by entering an order that "reflect[s] the board's determination of contested facts and their application to the applicable standards"); *see also id.* § 160A-393(l)(2) (stating that "findings of fact are not necessary when the record sufficiently reveals the basis for the decision below or when the material facts are undisputed and the case presents only an issue of law"). Instead, however, the City Council concluded that PHG had failed to make the necessary *prima facie* showing and attempted to support this determination with a series of findings of fact that rested upon incompetent testimony and questioned the credibility of the testimony provided by PHG's witnesses.

In defense of the approach that it took in considering PHG's application, the City argues that the Court of Appeals disregarded the findings of fact that are contained in its order and argues that the effect of the Court of Appeals' decision was that, "if no one shows up to oppose a project and introduce evidence in opposition, every new development would be a fait accompli." However, the basis upon which the City seeks

to have its decision upheld rests upon a misapprehension of the applicable law, under which "[a] denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record." *Humble Oil*, 284 N.C. at 468, 202 S.E.2d at 136. In other words, given that PHG elicited sufficient evidence to satisfy its burden of production to show an entitlement to the issuance of the requested conditional use permit, the City Council did, in fact, lack the authority to deny PHG's application in the absence of competent, material, and substantial evidence tending to support a different outcome.

The findings of fact contained in the City's order are simply inadequate to support the result that the City Council ultimately reached. As an initial matter, we note that the City Council's findings concerning property values and traffic-related issues lack any support in the admissible and competent evidence. Simply put, given the absence of any evidence that tended to conflict with Mr. Crozier's appraisal study, there were no factual issues relating to the property value issue which the City Council needed to resolve. Instead, the City Council's findings of fact fault Mr. Crozier for failing to include information that he had no reason, based upon an examination of the relevant ordinance language, to conclude would be needed or even relevant. For example, the City Council states in Finding of Fact No. 19 that "[t]here was no evidence, through facts and data, to indicate how the Hotel would affect or impact such an increase in value" despite the fact that the City's unified development ordinance merely required PHG to produce evidence tending to establish that the proposed development would not substantially injure the value of adjoining or abutting properties without making any mention of a requirement that the applicant establish the amount by which the proposed development would affect the value of surrounding properties. Similarly, in Finding of Fact No. 20, the City Council faulted Mr. Crozier for failing to present comparable sales data relating to properties in other parts of Asheville or in entirely different cities. The fundamental problem with the City Council's justifications for refusing to credit the testimony of Mr. Crozier is that it held PHG to a burden that is simply not reflected in or supported by the relevant ordinance provisions. *See Woodhouse*, 299 N.C. at 219, 261 S.E.2d at 887–88 (stating that "[t]o hold that an applicant must first anticipate and then prove or disprove each and every general consideration would impose an intolerable, if not impossible, burden on an applicant for a conditional use permit," with an applicant not being required to "negate every possible objection to the proposed use").

The same deficiencies are present in the City Council's findings concerning traffic-related issues. Once again, no competent, material, or substantial evidence was presented in opposition to the conclusions drawn in Mr. Dean's analysis. In spite of the fact that Mr. Dean's uncontested testimony established that his traffic study had been performed in accordance with industry standards, the City Council questioned the credibility of the results reached in his study on the grounds that he had failed to base his study upon conditions specific to Asheville. Among other things, the City Council criticized Mr. Dean for failing to base his traffic study upon data relating to conditions on the weekend or during the summer or fall seasons when tourist-related traffic in Asheville is at its height. Once again, the City Council's findings reflect an insistence upon the presentation of evidence that is never mentioned in the City's land use ordinance, which is a standard to which the applicant cannot lawfully be held. In addition, the City Council's findings also rested upon the testimony of Mr. Rawls, who raised questions about limitations upon the ability of persons exiting the hotel's parking garage to see up and down an adjoining street in spite of the fact that the General Assembly had determined that lay testimony concerning traffic conditions is not competent in conditional use permit proceedings. *See* N.C.G.S. § 160A-393(k)(3)(b) (2019) (stating that "[t]he term 'competent evidence,' as used in this subsection, shall, regardless of the lack of a timely objection, not be deemed to include the opinion testimony of lay witnesses as to . . . [t]he increase in vehicular traffic resulting from a proposed development [which] would pose a danger to the public safety"). As a result, the City Council's traffic-related findings do not justify a decision to reject Mr. Dean's analysis of the impact of the proposed hotel on traffic in the surrounding area.

A city council is, of course, entitled to rely upon the special knowledge of its members concerning conditions in the locality which they serve. However, this principle does not justify the City Council's decision to deny PHG's permit application in this case. In *Humble Oil*, a town alderman opposed the issuance of a conditional use permit for a filling station in Chapel Hill, stating that the intersection near the proposed station "had been dangerous for twenty-eight years." *Humble Oil*, 284 N.C. at 469, 202 S.E.2d at 136. Before holding that this statement and others like it were nothing more than "conclusions unsupported by factual data or background" so as to be "incompetent and insufficient to support the Aldermen's findings," *id.*, we stated that

> [i]f there be facts within the special knowledge of the members of a Board of Aldermen or acquired by their personal

> inspection of the premises, they are properly considered. However, they must be revealed at the public hearing and made a part of the record so that the applicant will have an opportunity to meet them by evidence or argument and the reviewing court may judge their competency and materiality.

Id. at 468, 202 S.E.2d at 136.

As we have already noted, several members of the City Council mentioned facts within their special knowledge about the city that they represented during the quasi-judicial hearing held for the purpose of considering PHG's application. Among other things, various members of the City Council questioned Mr. Dean concerning the manner in which he conducted his traffic study, with their questions raising issues about the extent to which his study should have been based upon conditions existing at a different date and time. Aside from the fact that Mr. Dean was able to answer and provide reasonable explanations for his answers, nothing in the relevant ordinance provision required Mr. Dean to have anticipated these questions and to have conducted his study in the manner that these questions seemed to believe to have been appropriate without sufficient advance notice to have permitted him to present any necessary rebuttal evidence. As a result, nothing in the special facts known to the members of the City Council in this case justified the making of a decision that PHG had failed to satisfy its burden of production or to reject PHG's permit application.

[4] Finally, the City argues that this Court's decision in *Mann Media* requires a decision in its favor. In *Mann Media*, the Randolph County Planning Board denied an application for the issuance of a conditional use permit authorizing the construction and operation of a broadcast tower based upon concerns that ice would fall from the necessary support beams. *Mann Media*, 356 N.C. at 3–5, 565 S.E.2d at 11–12. After determining that the evidence presented in opposition to the issuance of the proposed permit constituted incompetent "anecdotal hearsay," *id.* at 17, 565 S.E.2d at 19, this Court held that "petitioners [had] failed to carry their burden of proving that the potential of ice falling from support wires of the proposed tower was not a safety risk" in light of the fact that the applicant had "candidly acknowledged his inability to state with certainty that ice would not travel a greater distance in the event of wind or storm," *id.*, and that, for that reason, "petitioners [had] failed to meet their burden of proving this first requirement [that the proposed tower would not materially endanger public safety] and did not establish a *prima facie* case." *Id.* The same result would not be appropriate

in this case given that nothing in the relevant ordinance provision, particularly given the advice that Mr. Dean received from the City staff, set forth any requirement that the sort of sight distance study that the City Council wanted to have been conducted was required in order to obtain the issuance of the requested conditional use permit. If Department of Transportation regulations do require a sight distance survey, it is not the City Council's role to enforce those regulations in the guise of implementing the City's ordinances relating to conditional use permits.

Thus, we hold that the Asheville City Council made a legislative decision to allow certain uses by right in specified zones "upon proof that certain facts and conditions detailed in the ordinance exist." *Woodhouse*, 299 N.C. at 215–16, 261 S.E.2d at 886 (quoting *Humble Oil*, 284 N.C. at 467, 202 S.E.2d at 135). The effect of the making of this decision was to bind the Asheville City Council to the use of quasi-judicial procedures and to exclusive reliance upon the substantive standards enunciated in the relevant provisions of its land use ordinance in determining whether conditional use permit applications should be granted or denied. *See id.* at 219, 261 S.E.2d at 887 (stating that, "[w]here a zoning ordinance specifies standards to apply in determining whether to grant a [conditional] use permit and the applicant fully complies with the specified standards, a denial of the permit is arbitrary as a matter of law" (quoting *Hay v. Township of Grow*, 206 N.W.2d 19, 22 (Minn. 1973)). As a result, in the event that an applicant for the issuance of a conditional use permit presents competent, material, and substantial evidence tending to show that it has satisfied the applicable ordinance standards, it has made out a *prima facie* case of entitlement to the issuance of the conditional use permit, with any decision to deny the permit application being required to rest upon contrary findings of fact that have adequate evidentiary support. In view of the fact that PHG presented competent, material, and substantial evidence that its proposed hotel satisfied the relevant ordinance standards and the fact that no competent, material, and substantial evidence was presented in opposition to PHG's showing, the City simply lacked the legal authority to deny PHG's application. As a result, subject to the modified logic set forth in this opinion, we affirm the Court of Appeals' decision.

MODIFIED AND AFFIRMED.

Justice EARLS dissenting.

Here the majority overrules this Court's decision in *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, in which the Court held that the

question of whether a petitioner meets its burden of establishing a prima facie case for a conditional use permit is reviewed—not de novo—but rather under the whole record test, pursuant to which "we are not permitted to substitute our judgment for that of" the local government. 356 N.C. 1, 17, 565 S.E.2d 9, 19 (2002) ("Under the whole record test, in light of petitioners' inability satisfactorily to prove that the proposed use would not materially endanger public safety, we are not permitted to substitute our judgment for that of respondent. Accordingly, we hold that petitioners failed to meet their burden of proving this first requirement and did not establish a *prima facie* case."). In my view, under the whole record test, the Asheville City Council's determination that PHG Asheville, LLC (PHG), failed to meet its burden of establishing that the proposed use would not cause undue traffic congestion or a traffic hazard was not arbitrary or capricious. I would therefore reverse the decision of the Court of Appeals, which affirmed the superior court's reversal of the City Council's denial of PHG's application. Accordingly, I respectfully dissent.

While "[z]oning ordinances list uses that are automatically permitted in a particular zoning district," which "are . . . referred to as 'uses by right,' " "[m]any zoning ordinances also allow additional uses in each district that are permitted only if specific standards are met; these are what are known as *special* and *conditional* uses." David. W. Owens, *Land Use Law in North Carolina*, at 159 (2d ed. 2011). As the majority notes, "[a] conditional use permit 'is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist.' " *Woodhouse v. Bd. of Comm'rs of Nags Head*, 299 N.C. 211, 215–16, 261 S.E.2d 882, 886 (1980) (quoting *Refining Co. v. Bd. of Aldermen*, 284 N.C. 458, 467, 202 S.E. 2d 129, 135 (1974)). Notably, "[t]he standards underlying such permits include those that require application of some degree of judgment and discretion, as opposed to permitted uses where only objective standards are applied." Owens, *Land Use Law in North Carolina*, at 159.

When determining whether to grant a conditional use permit, the local government's authorized board[1] "operates as the finder of fact" and "must follow a two-step decision-making process" in making its determination:

> If "an applicant has produced competent, material, and substantial evidence tending to establish the existence

1. "North Carolina law allows the final decision on a special or conditional use permit to be assigned to the governing board, the board of adjustment, or the planning board." Owens, *Land Use Law in North Carolina*, at 160.

> of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it." If a prima facie case is established, "[a] denial of the permit [then] should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record."

Mann Media, 356 N.C. at 12, 565 S.E.2d at 17 (alterations in original) (quoting *Humble Oil & Ref. Co. v. Bd. of Aldermen of Chapel Hill*, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974)). The "board sits in a quasi-judicial capacity" and

> must insure that an applicant is afforded a right to cross-examine witnesses, is given a right to present evidence, is provided a right to inspect documentary evidence presented against him and is afforded all the procedural steps set out in the pertinent ordinance or statute. Any decision of the town board has to be based on competent, material, and substantial evidence that is introduced at a public hearing.

Id. at 12, 565 S.E.2d at 16–17 (quoting *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Nags Head*, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980)). The board "is 'without power to deny a permit on grounds not expressly stated in the ordinance' and it must employ specific statutory criteria which are relevant." *Id.* at 12, 565 S.E.2d at 16–17 (quoting *Woodhouse*, 299 N.C. at 218–19, 261 S.E.2d at 887); *see also* Owens, *Land Use Law in North Carolina*, at 160 n.8 ("While the standards for the permit involve application of a degree of discretion, the applicant is entitled to the permit upon establishing that the standards will be met.").

This Court addressed the standard of review applicable to the denial of a conditional or special use permit in *Mann Media*. There, the petitioners sought a special use permit to construct a broadcast tower in an area of Randolph County zoned for residential and agricultural use. *Mann Media*, 356 N.C. at 2, 565 S.E.2d at 11. Randolph County's zoning ordinance provided that a special use permit may be granted for public utilities, including broadcast towers, to be built in residential/agricultural areas, but required Randolph County's Planning Board (the Planning Board) to find four factors before granting the permit:

> (1) that the use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved;
>
> (2) that the use meets all required conditions and specifications;

> (3) that the use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity; and
>
> (4) that the location and character of the use if developed according to the plan as submitted and approved will be in harmony with the area in which it is to be located and in general conformity with the Land Development Plan for Randolph County.

Id. at 11, 565 S.E.2d at 16. After hearing the petitioners' evidence, the Planning Board found, *inter alia*, that "ice has formed and fallen from the other towers within the county's zoning jurisdiction causing damage and is likely to do so from the proposed tower." *Id.* at 3, 565 S.E.2d at 12. The Planning Board denied the permit, determining that the proposed use would materially endanger the public safety, would substantially injure the value of adjoining or abutting property, and would not be in harmony with the surrounding area. *Id.* at 4, 565 S.E.2d at 12. On appeal, the superior court reversed, concluding that the Planning Board's decision was not supported by competent, material, and substantial evidence. *Id.* at 7–8, 565 S.E.2d at 14. In particular, the superior court determined that any evidence presented to the Planning Board concerning ice damage at other towers was incompetent, and therefore the Board's reliance on such evidence was arbitrary and capricious. *Id.* at 7–8, 565 S.E.2d at 14. A majority panel at the Court of Appeals affirmed the superior court, and the petitioners sought further review in this Court. *Id.* at 9, 565 S.E.2d at 15.

This Court stated that in appeals from denials of conditional use permits, the "superior court 'sits in the posture of an appellate court' and 'does not review the sufficiency of evidence presented to it but reviews that evidence presented to the town board.' " *Mann Media*, 356 N.C. at 12–13, 565 S.E.2d at 17 (quoting *Coastal Ready-Mix Concrete Co.*, 299 N.C. at 626–27, 265 S.E.2d at 383). The superior court's role consists of:

> (1) Reviewing the record for errors in law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

(4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and

(5) Insuring that decisions are not arbitrary and capricious.

Id. at 13, 565 S.E.2d at 17 (quoting *Coastal Ready-Mix Concrete Co.*, 299 N.C. at 626, 265 S.E.2d at 383). The Court explained that the applicable standard of "judicial review 'depends upon the particular issues presented on appeal.' " *Id.* at 13, 565 S.E.2d at 17 (quoting *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)). Specifically, "[w]hen the petitioner 'questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the 'whole record' test.' " *Id.* at 13, 565 S.E.2d at 17 (quoting *ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392). On the other hand, "[i]f a petitioner contends the [b]oard's decision was based on an error of law, 'de novo' review is proper." *Id.* at 13, 565 S.E.2d at 17 (quoting *Sun Suites Holdings, LLC v. Bd. of Aldermen of Garner*, 139 N.C. App. 269, 272, 533 S.E.2d 525, 527–28 (2000)). The Court stressed that "[t]hese standards of review are distinct," explaining:

> Under a *de novo* review, the superior court "consider[s] the matter anew[ ] and freely substitut[es] its own judgment for the agency's judgment." When utilizing the whole record test, however, the reviewing court must " 'examine all competent evidence (the "whole record") in order to determine whether the agency decision is supported by "substantial evidence." ' " "The 'whole record' test does not allow the reviewing court to replace the [b]oard's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo."

Mann Media, 356 N.C. at 13–14, 565 S.E.2d at 17–18 (alterations in original) (citations omitted). The Court further elaborated that under the whole record test, a "finding must stand unless it is arbitrary and capricious," and that in making this determination

> the reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law.
>
> The "arbitrary or capricious" standard is a difficult one to meet. Administrative agency decisions may be reversed as

> arbitrary or capricious if they are "patently in bad faith," or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate [ ]any course of reasoning and the exercise of judgment.[ ]"

Id. at 16, 565 S.E.2d at 19 (alterations in original) (citations omitted).

Applying these standards, the Court first examined the Planning Board's finding that the proposed broadcast tower would "materially endanger the public safety" due to the risk of ice falling from the tower. *Id.* at 16, 565 S.E.2d at 19. The Court stated:

> In this finding, respondent cited evidence of ice building up and falling from other towers. Our review of the record indicates that this evidence, consisting principally of ice brought before respondent in a cooler and anecdotal hearsay, was not competent. Even so, the record also indicates that petitioners failed to carry their burden of proving that the potential of ice falling from support wires of the proposed tower was not a safety risk. Petitioner Mann testified that while the tower itself would have deicing equipment, the support wires would not. Although he opined that any ice forming on the wires would slide down the wires, he candidly acknowledged his inability to state with certainty that ice would not travel a greater distance in the event of wind or storm. While Mann argued that the prevailing winds at the site are from a direction that would blow any ice away from nearby buildings and dwellings, he could not guarantee that falling ice would not be a risk. Other evidence in the record shows that numerous permanent structures lie in close proximity to the proposed tower site.
>
> Respondent's finding that petitioners failed to establish that there would be no danger to the public from falling ice is neither whimsical, nor patently in bad faith, and it is not indicative of a lack of any course of reasoning or exercise of judgment. The burden is on petitioners to meet the four requirements of the Ordinance before finding that a *prima facie* case has been established, and respondent did not state in its written order that petitioners made a *prima facie* case. Under the whole record test, in light of petitioners' inability satisfactorily to prove that the proposed use would not materially endanger public

> safety, we are not permitted to substitute our judgment for that of respondent. Accordingly, we hold that petitioners failed to meet their burden of proving this first requirement and did not establish a *prima facie* case.

Id. at 17, 565 S.E.2d at 19. The Court ultimately[2] reversed the decision of the Court of Appeals and remanded for further remand with directions for the superior court to enter judgment affirming the Planning Board's denial of the special use permit. *Id.* at 19, 565 S.E.2d at 21.

Here, Asheville's ordinance provides that the "City Council *shall not* approve the conditional use application . . . *unless and until it makes the following findings*," including, *inter alia*, "[t]hat the proposed use will not cause undue traffic congestion or create a traffic hazard." (Emphases added.) Thus, as was the case in *Mann Media*, in order to establish a "*prima facie* case" for the conditional use permit under Asheville's ordinance, an applicant must not only meet a burden of production—evidence from which the fact-finder *could* make the requisite findings—but also a burden of persuasion—evidence from which the fact-finder *does* make the requisite findings.[3] *See Mann Media*, 356 N.C. at 17, 565

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2. Having concluded that the Planning Board's finding that the petitioners failed to establish a prima facie case with respect to the ordinance's first requirement was not arbitrary or capricious under the whole record test, the Court was "not obligated to address the remaining three requirements under the Ordinance." *Mann Media*, 356 N.C. at 17, 565 S.E.2d at 19 (citing *Coastal Ready-Mix*, 299 N.C. at 632–33, 265 S.E.2d at 386). Nonetheless, "in the interests of completeness," the Court addressed the third requirement ("that the use will not substantially injure the value of adjoining or abutting property") and because the petitioners' expert failed to address "*adjoining or abutting* properties," the Court held that "under the whole record test, . . . petitioners failed to meet the Ordinance's third requirement." *Id.* at 18, 565 S.E.2d at 20. The Court also addressed the fourth requirement ("that the location and character of the use if developed according to the plan as submitted and approved will be in harmony with the area in which it is to be located and in general conformity with the Land Development Plan for Randolph County") and determined that the superior court properly applied *de novo* review to this issue because it agreed with the Court of Appeals that, as a matter of law, "[t]he inclusion of a use as a conditional use in a particular zoning district establishes a prima facie case that the permitted use is in harmony with the general zoning plan." *Id.* at 19, 565 S.E.2d at 20 (quoting *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 142 N.C. App. 137, 139, 542 S.E.2d 253, 255 (2001)). Yet, because the Court determined that the petitioners failed to establish a *prima facie* case as to the first and third requirements of the ordinance, it was unnecessary to address whether sufficient evidence was presented to rebut the petitioners' *prima facie* showing with respect to the fourth requirement. *Id.* at 19, 565 S.E.2d at 20.

3. Admittedly, a "*prima facie* case" is typically synonymous with a burden of production. Nonetheless, regardless of terminology, it is clear under *Mann Media* that when an ordinance specifically requires the local board to in fact make necessary findings before a permit may permissibly be granted, the applicant must meet more than the burden of production before "*prima facie* he is entitled to" the permit. *Mann Media*, 356 N.C. at 12, 565 S.E.2d at 167.

S.E.2d at 19 (stating that where the ordinance required the Planning Board to find four factors before granting the permit, "[t]he burden is on petitioners to meet the four requirements of the Ordinance before finding that a *prima facie* case has been established, and respondent did not state in its written order that petitioners made a *prima facie* case," and "hold[ing] that petitioners failed to meet their burden of proving this first requirement and did not establish a *prima facie* case."); Owens, *Land Use Law in North Carolina*, at 163 (stating that "the ordinance standards" at issue in *Mann Media* "required a finding that the use 'will not endanger the public health or safety" and that "[t]he [C]ourt upheld the permit denial based on a failure of the petitioner to meet the *burden of proof*[4] on this general standard" (emphasis added)); *see also*, *e.g.*, *Harding v. Bd. of Adjustment of Davie Cty.*, 170 N.C. App. 392, 394, 612 S.E.2d 431, 434 (2005) (holding that where Davie County's ordinance provided that a special use permit "shall not be granted unless" the Board of Adjustment made the requisite findings, the Board of Adjustment properly placed the burdens of production and persuasion on the applicant). Accordingly, the City Council properly noted in its order that "[t]he Applicant bears the burden of proving to the City Council, by competent, material and substantial evidence, that the proposed Hotel meets the seven CUP standards in the UDO."

Following the hearing, the City Council determined, *inter alia*, that PHG failed to prove that the proposed use "will not cause undue traffic congestion or create a traffic hazard," and made the following relevant findings:

> 8. The Property's primary frontage is along Haywood Street, which borders the Property's entire northern property line. The Property also has frontage along Carter Street, which borders the Property's entire western property line, and North French Broad Avenue, which is the only key pedestrian street which borders the Property. The Hotel is oriented towards Haywood Street.

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4. "The burden of proof includes both the burden of persuasion and the burden of production." Black's Law Dictionary 209 (11th ed. 2019); *see also*, *e.g.*, *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 729, 693 S.E.2d 640, 648 (2009) (Timmons-Goodson, J., dissenting) ("The burden of proof in any case includes both the burden of production and the burden of persuasion. The burden of production, also known in North Carolina as the 'duty of going forward,' is '[a] party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling' such as a directed verdict or a judgment notwithstanding the verdict[.] The burden of persuasion, meanwhile, is the 'party's duty to convince the fact-finder to view the facts in a way that favors that party.' . . . The burden of persuasion is also often 'loosely termed [the] burden of proof.' " (citations omitted)).

. . . .

11. Ninety percent of the existing improvements in the area are one and two story structures and approximately 72 percent of those structures are less than 10,000 square feet. The Hotel would constitute the third hotel within a several block radius (approximately ¼ mile). The addition of this third hotel would change the visual character of the area, and would create a cluster of hotels in the immediate vicinity, where there were previously smaller buildings and more diverse uses.

. . . .

16. There is a significant amount of pedestrian traffic in the area near and around the Carter Street Driveway.

17. The Carter Street Driveway is 28 feet wide, which is wider than the 24 foot driveway width allowed by City Standards. The Applicant obtained a modification from the City's Transportation Department Director to allow for the wider driveway. The Transportation Department Director's written decision to allow the modification, however, does not address the impact of the wider driveway on the public health and safety and there was no evidence presented that would indicate the wider driveway would provide the same level of protection to the public, particularly pedestrians, as a driveway which would comply with City requirements.

. . . .

27. There is significant traffic in downtown Asheville near and around the Property in September and October, and in the summer months. The vehicular traffic in the area will increase if the Hotel is constructed.

28. The Applicant presented the testimony of a traffic engineer, Kevin Dean, as well as Mr. Dean's written "Traffic Assessment." The Traffic Assessment did not provide any facts or data which could show the level of traffic or traffic counts for any time of the year, except during a four hour period during the day on November 10, 2016, which was a Thursday. The level of traffic in this area is much higher at other times of the year, particularly the summer

months; however, there were no traffic counts or any traffic data provided for any date other than November 10.

29. Mr. Dean was not aware of the environmental conditions on November 10, 2016, or whether such conditions could have affected traffic volumes on that date.

30. The Applicant's traffic counts were done on November 10, 2016 between the hours of 7 a.m. and 9 a.m., and between the hours of 4 p.m. and 6 p.m. Under industry standards, this is apparently "assumed" to be the time of highest traffic on nearby streets, but there was no evidence which could establish this would be the case for this area of Asheville.

31. The number of trips generated from the Hotel in the Traffic Assessment was also derived from an industry standard, and not the actual trips expected from this Hotel at this location. Hotels in downtown Asheville have an occupancy rate in excess of 85%, but the general rate for an efficient market is 65%. The Traffic Assessment did not take this expected higher occupancy of the Asheville market into account.

32. The Applicant did not submit any traffic data for Friday through Sunday, even though those are typically the days that tourists visit the City and traffic volumes are higher.

33. The estimated traffic counts used for the Traffic Assessment and Mr. Dean's opinion, were also these on a "typical weekday." There was no weekend data collected, even though this is the time that most tourists visit the Asheville downtown.

34. Without accurate traffic counts for any days other than Thursday November 10, there is no data or evidence to determine whether the additional trips generated by the Hotel (as well those from the other tourists which the Hotel will attract but who do not stay at the hotel) would not decrease the existing level of service to an unacceptable level. The Level of Service Summary in the Traffic Assessment was not based on complete information or data.

35. There was no data or evidence presented that could show what the level of traffic would be with three hotels (Indigo, Hyatt and Embassy Suites) located within a several block area for Friday, Saturday and Sunday during the summer months or other high traffic periods.

36. The Traffic Assessment did not account for traffic that will be generated by future hotels and apartments in the downtown area that are planned and approved, but which are not yet fully constructed and operational.

37. The proposed Hotel includes a twenty-foot wide driveway, which provides street access to and from the parking structure and North French Broad Avenue.

38. There is a blind hill with limited visibility in the vicinity of the Hotel's parking deck's entrance and exit onto North French Broad Avenue. To determine whether the addition of that entrance/exit would cause a safety issue would require a "sight distance check." A sight distance check was not a part of the Traffic Assessment and no other evidence was presented to show the parking deck entrance or exit would not endanger driver or pedestrian safety. The Traffic Assessment did no analysis relating to traffic safety as it relates to vehicles entering and exiting this driveway.

39. The Hotel will have 5,000 square feet of meeting space, which would potentially attract visitors to the Hotel, other than guests staying at the Hotel. This meeting space use was not included in the Traffic Assessment nor included in the traffic analysis.

40. The Hotel would bring more than 50,000 new visitors to the City each year. Not all of these new visitors would be patrons of the Hotel, but would frequent downtown businesses and, therefore, add to the already dense downtown area. The Traffic Assessment did not account for any traffic caused by additional visitors, other than an estimate of trips by Hotel patrons and employees.

41. The Hotel parking deck would have 200 vehicular parking spaces. The Hotel contains 185 rooms and will have 75 employees. There are insufficient spaces in the proposed Hotel parking deck to accommodate this

> number of guests and employees, even if they all do not drive automobiles to the Hotel.
>
> 42. There is currently a shortage of public parking in downtown Asheville and there are often insufficient parking spaces to meet the demand. The development of the Hotel would exacerbate the parking shortages in the area, because of the limited number of parking spaces planned in the parking deck and the Applicant's failure to provide sufficient parking to accommodate all of its guests and employees.

As in *Mann Media*, we review the City Council's determination of whether PHG established a *prima facie* case and met its burden of proof under the ordinance under the whole record test, pursuant to which a finding "must stand unless it is arbitrary and capricious." *Mann Media*, 356 N.C. at 16, 565 S.E.2d at 19.

An examination of the record establishes that, at the hearing, PHG presented evidence noting that Asheville is not only "a tourist destination," but "is the hub of both commercial and tourist activity in Western North Carolina" and is "defined by its picturesque mountainous landscape." The report of PHG's real estate appraiser, Tommy Crozier, provided that the site of the proposed hotel "has an excellent location across from the Hotel Indigo and the new Hyatt Place hotel," and further that "[i]n the current market cycle, several large scale redevelopments downtown have been completed or are planned for near-term construction," including three recently opened hotels and six hotels currently in development among the "[n]otable projects." PHG acknowledged a concern with the proliferation of hotels in downtown Asheville, with its representatives stating that "[w]e know that there are questions about the overbuilding of hotels in downtown Asheville" and "[w]e do realize there's a lot of other hotels." PHG asserted that its proposed hotel is "a little bit different from some of the offerings at some of the other hotels" and addresses "an important niche in the hospitality of downtown Asheville" in that, in addition to its 185 rooms and its "detached, multilevel parking garage," it has "5000 square feet of meeting space, that will, hopefully, essentially will create its own demand." This meeting space would constitute "the second largest meeting space for hotels specifically in the downtown market area," according to PHG, and would "help [ ] to capture additional meetings and events that otherwise may move to Greenville or other cities." Crozier testified that "this hotel will generate somewhere north of 50,000 new visitors a year."

Additionally, PHG presented testimony from Kevin Dean, an engineer, who analyzed five intersections near the site of the proposed hotel and prepared a "traffic assessment" summarizing his findings. Dean's assessment "present[ed] trip generation, distribution, and traffic analyses of the existing and existing + site conditions" and states that "all of the study intersections are expected to continue to operate at acceptable levels of service with only minor increases in delay" and that "simulations show no queuing issues at any of the study intersections or on any of the I-240 ramps." At the hearing, Dean was asked about his decision to pick a Thursday in November to examine the potential for traffic congestion in downtown Asheville:

> COUNCILMAN BOTHWELL: My question, my first question is, why did you pick November 10th, a Thursday, to do your traffic study?
>
> MR. DEEN[5]: Traffic studies are -- traffic counts are only supposed to be counted between Tuesdays and Thursdays to get a typical weekday condition that's not affected by a Monday or Friday variation. So that's industry standard. We are required, typically, to only count on Tuesdays, Wednesdays, or Thursdays.
>
> . . . .
>
> COUNCILMAN BOTHWELL: I am wondering about the choice of November, too. I mean, we have, say, September and October, we have a lot of tourist traffic here. Summertime it's jammed all the time.
>
> MR. DEEN: Sure.
>
> COUNCILMAN BOTHWELL: And your report says there's no expectation of [queuing].
>
> MR. DEEN: Sure.
>
> COUNCILMAN BOTHWELL: But there is also [queuing] at where you turn off of Montford and then go to North French Broad, it sometimes backs up all the way across the bridge.
>
> MR. DEEN: Okay.

5. The transcript of the hearing misspells Mr. Dean's name as "Deen."

COUNCILMAN BOTHWELL: And, again, with traffic coming from the eastbound exit with -- when you get to that light and turn left into the hotel. --

MR. DEEN: Okay.

COUNCILMAN BOTHWELL: -- to the new entrance --

MR. DEEN: Sure.

COUNCILMAN BOTHWELL: -- won't that cause [queuing] on Haywood Street waiting to turn into the left?

MR. DEEN: So I can't argue with your anecdotal stories. What I can tell you is the amount of traffic that's going to be added is only supposed to be negligible increase to any cues that you would see. I mean, five seconds -- five percent of the intersection or less. I think it's closer to three percent at that intersection, which is very mild.

COUNCILMAN BOTHWELL: Okay

MR. DEEN: So I would just go to say that it's not going to cause any undue additional issues.

When asked whether his assessment took into account the current development in that area, including the "other hotels and other apartments, et cetera, that are either planned or just recently added," Dean stated "[w]e did not." According to Dean, any potential increase in traffic from other development in the area, though unaccounted for by his traffic assessment, would only lessen the impact of the proposed hotel. Dean testified:

MR. DEEN: . . . Now, like you said, there are other developments that would come in that would be growth that would be inherent to an area. But what I would argue would be that if we don't include that traffic, our site will appear to have a greater impact than it will at those times.

So if there's more traffic, if there's more traffic on the network, then our 70 trips will be a smaller percentage than they are today. Does that make sense?

. . . .

MR. DEEN: Okay. And I would argue that if the volumes were truly higher than our site, traffic would be an even smaller percent than it already was.

MAYOR MANHEIMER: That doesn't make sense.

A member of the public, Charles Rawls, raised the issue of a potential "blind hill" near the hotel's proposed parking garage, "turn[ing] from Haywood Street heading south on French Broad." Mr. Dean, when asked if he had studied whether the entrance and exit of the hotel's proposed two hundred space parking garage could adversely affect safety, stated:

> I have not. We did not conduct a sight distance check, which is typically what's required. But DOT typically requires driveways to meet certain sight distance requirements, whether vehicles are stopping or turning or making decisions, like you said, a vehicle entering a driveway. So DOT typically requires certain standards to be met. We didn't do that because we weren't involved in the actual design of the site.

The City Council also asked PHG about issues with parking, of which PHG acknowledged, "of course we're aware that there are parking issues in the area." In particular, the City Council asked about the capacity of the hotel's proposed parking deck:

> COUNCILMAN SMITH: How many spaces are there?
>
> MR. OAST: 200.
>
> COUNCILMAN SMITH: And 185 rooms and how many employees?
>
> MR. WALDEN:Roughly 75.
>
> COUNCILMAN SMITH: Where are the employees going to park?
>
> MR. WALDEN: In that general area.
>
> COUNCILMAN SMITH: Okay. So there will be an impact. That's another impact. That's helpful to know.
>
> . . . .
>
> COUNCILMAN YOUNG: And approximately 75 employees?
>
> MR. WALDEN: Yes, Sir.
>
> COUNCILMAN YOUNG: And the employees will probably park in the adjacent area?
>
> MR. WALDEN: Yes.

PHG, which also owns the recently opened "Hyatt Place" across the street from the proposed hotel, confirmed that some of the Hyatt Place's employees were using the site of the proposed hotel for parking:

> COUNCILWOMAN MAYFIELD: Where do your employees who work at this Hyatt Place park? Do they park in that hotel's deck?
>
> MR. WALDEN: They park on site here at Hyatt Place, and then they do use part of our -- our lot right now across the street, as well as the -- around the surrounding area.
>
> . . . .
>
> COUNCILMAN YOUNG: So when it's built, if it's built, the adjacent -- the parking that your employees use across the street now will go away.
>
> MR. WALDEN: Yes.
>
> COUNCILMAN YOUNG: And on top of that will go away, you would also incur parking from the current employees that will be employed by the Embassy now. So the people across the street parking would lose their parking now, and the current employees would also have to find parking.
>
> MR. WALDEN: Yes, sir, but in a very limited capacity.
>
> . . . .
>
> COUNCILWOMAN MAYFIELD: I'm not hearing you say directly that you will provide parking for all of you employees in that -- in that deck.
>
> And so the concern is that this -- this hotel would be adding to the -- would be bringing more people there on a daily basis, the workers who work at the hotel --
>
> MR. WALDEN: Right.
>
> COUNCILWOMAN MAYFIELD: -- and not provide them a place to park, which would make parking in that area even more difficult.
>
> MR. WALDEN: Sure.
>
> COUNCILWOMAN MAYFIELD: So that's a concern.

> MR. WALDEN: Sure.
>
> COUNCILWOMAN MAYFIELD: Is that a valid concern, or can you tell us that you[r] employees will have a place to park in that deck on a regular basis and will not be adding to the already overloaded shortage -- that's not -- adding to the shortage of parking that's already there.
>
> MR. WALDEN: I do not feel that our employees would add to that burden. I feel that it's sufficient within the amount of spaces that we have. With valet and a number of spots, I do not feel that it would add an additional burden to the parking situation.

In my view, the City Council's finding that PHG failed to establish that the proposed use "will not cause undue traffic congestion or create a traffic hazard" "is neither whimsical, nor patently in bad faith, and it is not indicative of a lack of any course of reasoning or exercise of judgment." *Mann Media*, 356 N.C. at 17, 565 S.E.2d at 19. Rather, the City Council's decision was based on legitimate concerns that were insufficiently addressed by PHG's evidence, including the exacerbation of the acknowledged parking issues in the area, the potential hazard created by the hotel's driveway, and the impact of recent and planned hotels and other developments on traffic congestion in the area, which was not considered in Mr. Dean's traffic assessment.

In that latter respect, Mr. Dean suggested that any traffic congestion unaccounted for in his assessment would only lessen the proposed hotel's impact on traffic because the hotel's impact would then amount to a smaller percentage of overall traffic in downtown Asheville. This assertion, however, does not address what is required by the ordinance. For example, it does not address whether Mr. Dean's earlier conclusions that "study intersections are expected to continue to operate at acceptable levels of service with only minor increases in delay" and that "simulations show no queuing issues at any of the study intersections" would be affected when the impact of the proposed hotel is assessed in conjunction with the realities of the traffic impact from the major developments not considered by Mr. Dean's assessment.

Moreover, Mr. Dean also failed to explain why it was appropriate to use a Thursday in November to examine the potential for traffic congestion in downtown Asheville, "the hub of . . . tourist activity in Western North Carolina." While the majority assigns some talismanic quality to Mr. Dean's assertion that this was an "industry standard," Mr. Dean never elaborated on the nature of this standard or, more importantly, explained

why this undefined "industry standard" was an appropriate method of addressing the specific requirement in *this* municipal ordinance—that is, whether the proposed hotel in downtown Asheville, along with its "detached, multi-level parking garage" and "5000 square feet of meeting space, that . . . will create its own demand," will cause undue traffic congestion or create a traffic hazard. Absent such an explanation, it was not arbitrary or capricious for the City Council to find unpersuasive the use of a weekday in November to assess potential traffic congestion in downtown Asheville.

The majority, noting that "[w]hen an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, [p]rima facie he is entitled to it," *Humble Oil*,[6] 284 N.C. at 468, 202 S.E.2d at 136, asserts that PHG was only required to meet a burden of production to establish a *prima facie* case. This ignores the plain language of Asheville's ordinance ("The Asheville City Council *shall not approve* the conditional use application . . . *unless and until it makes the following findings*" (emphases added)), which, like

6. In *Humble Oil*, the Court determined that the Board of Alderman's denial of the petitioner's permit application must be set aside because the Board did not refer the application to the Planning Board for review before acting on it, as required by the ordinance. *Humble Oil*, 284 N.C. at 466-68, 202 S.E.2d at 135–36. The Court did not address whether the petitioner met its prima facie burden and the Court's only references to "de novo" were in its statements that on remand the Board of Alderman must "consider Humble's application De novo." *Id.* at 471, 202 S.E.2d at 138. The Court did "deem it expedient" to also address on appeal the Board's finding that the proposed use "would materially increase the traffic hazard and danger to the public at this intersection" and to determine whether the finding "is arbitrary in that it is unsupported by competent, material, and substantial evidence." *Id.* at 468, 202 S.E.2d at 136. The Court determined that the anecdotal evidence purportedly supporting this finding was "unsupported by factual data or background," and therefore incompetent and insufficient to support the finding. *Id.* at 469, 202 S.E.2d at 136. Unlike the Asheville City Council's finding here that PHG did not meet its prima facie burden because it "failed to produce competent, material and substantial evidence that the Hotel *will not* cause undue traffic congestion or create a traffic hazard," which is based on the absence of evidence, the Board of Alderman's finding in *Humble Oil* is an affirmative finding ("*would materially increase* the traffic hazard and danger") purporting to be based on evidence in the record contrary to the petitioner. The significance of this distinction is illustrated in *Mann Media*, in which the Court held that the Planning Board's affirmative finding "that ice has formed and fallen *from the other towers* . . . and is likely to do so from the proposed tower, and *would therefore materially endanger* the public safety" was based on anecdotal hearsay and not supported by competent evidence; yet, the Court held that in light of the petitioners' inability to state with sufficient certainty that there was no danger from "the potential of ice falling *from support wires of the proposed tower*," under the whole record test, the Planning Board's "finding that petitioners failed to establish that there *would be no danger* to the public from falling ice is neither whimsical, nor patently in bad faith, and it is not indicative of a lack of any course of reasoning or exercise of judgment." *Mann Media*, 356 N.C. at 16–17, 565 S.E.2d at 19 (emphases added).

the ordinance in *Mann Media*, places the burden of persuasion on the applicant, requiring the applicant to prove to the fact-finder—here the City Council—each of the necessary standards. *See Mann Media*, 356 N.C. at 17, 565 S.E.2d at 19 (stating that "[t]he burden is on petitioners to meet the four requirements of the Ordinance before finding that a *prima facie* case has been established, and respondent did not state in its written order that petitioners made a *prima facie* case," and that "petitioners failed to meet their burden of proving this first requirement and did not establish a *prima facie* case"). In other words, "the facts and conditions which the ordinance requires for the issuance of" the permit are that the City Council specifically makes the seven relevant findings, including that "[t]hat the proposed use will not cause undue traffic congestion or create a traffic hazard."

Moreover, the majority ignores that under *Mann Media*, the City Council's determination of whether PHG established a *prima facie* case is reviewed under the whole record test, pursuant to which "we are not permitted to substitute our judgment for that of respondent." *Id.* at 17, 565 S.E.2d at 19; *see also id.* at 17, 565 S.E.2d at 19 (stating that "[u]nder the whole record test, [a] finding must stand unless it is arbitrary and capricious" and that the Planning Board's "finding that petitioners failed to establish that there would be no danger to the public from falling ice is neither whimsical, nor patently in bad faith, and it is not indicative of a lack of any course of reasoning or exercise of judgment."). Instead, the majority erroneously applies de novo[7] review and substitutes its own judgment for that of the City Council.

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7. Notably, the legislature recently amended N.C.G.S. § 160A-393(k), providing that "[w]hether the record contains competent, material, and substantial evidence is a conclusion of law, reviewable de novo." PHG contends that this "clarifying" amendment renders the appeal moot because it answers "[t]he central question" here of "what standard of review applies to a municipality's denial of a conditional use permit when the denial is based on an alleged failure to present a prima facie case." Yet, the question of "[w]hether the record contains" a sufficient quantum of evidence is an inquiry into a party's burden of production. Asheville's ordinance, like the ordinance in *Mann Media*, specifically requires the applicant to meet a burden of persuasion, mandating that the "City Council *shall not approve* the conditional use application . . . *unless and until it makes the following findings*." (Emphases added.) Thus, as in *Mann Media*, the "*prima facie* case" in this particular context requires an applicant to meet, not a burden of production (i.e. producing evidence from which the City Council *could* find that the proposed use will not cause undue traffic congestion), but a burden of persuasion (producing evidence from which the City Council *does* find that the proposed use will not cause undue traffic congestion). The City Council's finding in this respect is reviewed under the whole record test. *Mann Media*, 356 N.C. at 17–18; 565 S.E.2d at 20.

"The 'arbitrary or capricious' standard is a difficult one to meet." *Id.* at 16, 565 S.E.2d at 19. Because the City Council's finding that PHG failed to prove that the proposed use will not cause undue traffic congestion or create a traffic hazard "is neither whimsical, nor patently in bad faith, and it is not indicative of a lack of any course of reasoning or exercise of judgment," it is not arbitrary or capricious and therefore "must stand." *Id.* at 16, 565 S.E.2d at 19.[8] As such, the Court of Appeals and superior court should be reversed, and the decision of the City Council denying the conditional use permit should be affirmed. Accordingly, I dissent.

Justice HUDSON joins in this dissenting opinion.

DONNA J. PRESTON, ADMINISTRATOR OF THE ESTATE OF WILLIAM M. PRESTON
v.
ASSADOLLAH MOVAHED, M.D., DEEPAK JOSHI, M.D., AND PITT COUNTY MEMORIAL HOSPITAL, INCORPORATED, D/B/A VIDANT MEDICAL CENTER

No. 124PA19

Filed 3 April 2020

Medical Malpractice—pleadings—Rule 9(j) affidavit—sufficiency

The plaintiff in a medical malpractice action satisfied her responsibility under N.C.G.S. § 1A-1, Rule 9(j) by obtaining the opinion of a doctor whom she reasonably expected to meet the test for qualification on the question of whether defendant violated the standard of care for cardiologists in reading the decedent's exercise treadmill stress test and EKG recordings and communicating those results to the ordering physician. Taking the evidence in the light most favorable to the plaintiff, while it was reasonable to infer that the expert was unwilling to testify against defendant purely on the basis of the report, some of which the expert was not qualified to address, he was willing to testify that defendant's failure to submit the report or otherwise communicate the results was a breach of the standard of care. Furthermore, Rule 9(j) does not require that both the defendant and the testifying witness have exactly the same qualifications.

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8. Because PHG failed to prove this requirement of the ordinance, it is unnecessary to address the remaining requirements. *Mann Media*, 356 N.C. at 17, 565 S.E.2d at 19 (stating that "petitioners failed to meet their burden of proving this first requirement and did not establish a prima facie case," and that "[b]ecause of this holding, we are not obligated to address the remaining three requirements under the Ordinance").

Justice NEWBY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 825 S.E.2d 657 (N.C. Ct. App. 2019), affirming an order entered on 25 October 2017 by Judge Jeffery B. Foster in Superior Court, Pitt County. Heard in the Supreme Court on 7 January 2020.

Edwards Kirby, L.L.P., by John R. Edwards, David F. Kirby, and Mary Kathryn Kurth, and Laurie Armstrong Law, PLLC, by Laurie Armstrong, for plaintiff-appellant.

Smith Anderson Blount Dorsett Mitchell & Jernigan, LLP, by John D. Madden and Robert E. Desmond, for defendant-appellee Assadollah Movahed, M.D.

EARLS, Justice.

Plaintiff, Donna Preston, the widow and estate representative of William M. Preston, appealed the trial court's order granting the motion to dismiss of defendant, Dr. Assadolah Movahed,[1] on the basis that plaintiff's medical malpractice complaint failed to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. The Court of Appeals affirmed, holding that competent evidence supported the trial court's determination that the expert witness retained by plaintiff to review Mr. Preston's medical care was unwilling to testify that defendant did not comply with the applicable standard of care, notwithstanding that the evidence would support findings to the contrary. *Preston v. Movahed*, 825 S.E.2d 657, 662–65 (N.C. Ct. App. 2019). Because we conclude that in the light most favorable to plaintiff the factual record demonstrates that at the time of the filing of the complaint plaintiff's expert was willing to testify that defendant breached the applicable standard of care and plaintiff reasonably expected him to qualify as an expert, we reverse the decision of the Court of Appeals and remand for further proceedings.

Background

The undisputed facts from the pleadings and evidence before the trial court tend to show that on the morning of 3 February 2014, 54-year-old

1. Defendants Deepak Joshi, M.D., and Pitt County Memorial Hospital, Incorporated, d/b/a Vidant Medical Center were parties in the original appeal but settled with plaintiff prior to the issuing of the Court of Appeals' opinion. They were not parties to the appeal here.

William Preston went to the emergency room at Vidant Medical Center complaining of shortness of breath and left-sided chest pain radiating to his left arm, symptoms that had begun twelve hours earlier. The intake physician noted Mr. Preston's risk factors for coronary artery disease, including hypertension, a history of smoking, and his age, and further noted that Mr. Preston's chest pain was relieved by nitroglycerin. Electrocardiograms (EKGs[2]) taken in the emergency room were abnormal, suggesting myocardial ischemia, a condition where the heart receives insufficient blood flow. After about two hours, Mr. Preston again complained of left arm pain, which was again relieved by nitroglycerin. Mr. Preston was admitted to the hospital for observation and the attending physician ordered further testing, including a "nuclear stress test."

In a nuclear stress test, an EKG is taken while the patient exercises on a treadmill. The "nuclear" aspect involves injecting the patient with a "radiotracer" dye and using gamma rays to produce images of the patient's heart. During Mr. Preston's test that took place on the following day, he reported severe "chest pain and left arm pain at a level of 10/10" and the test was terminated due to shortness of breath and fatigue.

Defendant, a nuclear cardiologist, was assigned to read and interpret the results of Mr. Preston's stress test. In his deposition, defendant explained that when interpreting the results of a nuclear stress test, he receives a document with the patient's information and medical history, EKG "tracings" from the exercise portion of the test, and the nuclear images. Defendant stated that he reviews this information "stage by stage," beginning with the patient's history and risk factors, then reviewing the EKG tracings, and then finally the nuclear images. According to defendant, he "complete[s] one study, finish[es] with the study," and moves to the next, making findings at each stage before making ultimate findings and preparing a report.

Here defendant received Mr. Preston's information sheet, which noted Mr. Preston's use of tobacco, his hypertension, of which there was a family history, and his chest pain. With respect to the EKG tracings, defendant's written report noted that there was "no definite significant additional diagnostic ST segment depression or ST segment elevation recorded during exercise and recovery." Regarding the nuclear images, defendant's report noted a perfusion defect in the heart, which he thought was likely due to "significant gas in the stomach" but could not rule out ischemia. His report stated that "one may consider coronary

2. The filings in the trial court and the parties' briefs refer to electrocardiograms interchangeably as EKGs and ECGs. We use only the term EKG for consistency.

CTA for further evaluation of coronary arteries in addition to aggressive risk factor modification."[3] Defendant gave an oral report of his interpretation of the results of the test to his first-year cardiology fellow, Dr. Deepak Joshi, who entered a "fellow note" into Mr. Preston's chart. The note stated: "[n]uclear stress test showed mild ischemia versus attenuation artifact in the inferolateral/inferior apical area. Discussed with Dr. Movahed, attending. Recommend outpatient cardiac CTA. Will arrange for the test and outpatient cardiology follow-up. Plan discussed with primary team."

Dr. Neha Doctor, a hospitalist, examined Mr. Preston after the nuclear stress test. Plaintiff alleges that she and Mr. Preston were informed that the cardiac tests had been negative and that Mr. Preston's left-sided pain was likely neurological, not heart-related. Dr. Doctor discharged Mr. Preston with instructions to follow up with his primary care physician about an MRI and to follow up with the CT angiogram (CTA) appointment made by the cardiology team. This outpatient cardiology follow-up was scheduled for sixteen days later on 20 February 2014.

Two days after being discharged, Mr. Preston saw his primary care physician, who referred him for an MRI of his spine. The MRI showed no neurological cause for Mr. Preston's continuing left arm pain.

On 13 February 2014, a week before his scheduled cardiac follow-up, Mr. Preston was at home when he called out to his wife. When plaintiff reached her husband, she found him collapsed on the floor and unresponsive. Responding to Plaintiff's 911 call, EMS found Mr. Preston pulseless and breathing about four times per minute, and therefore began resuscitation measures and transporting him to Vidant Medical Center. At Vidant's Emergency Department, further resuscitation efforts were unsuccessful and Mr. Preston was pronounced dead at 5:35 that afternoon. An autopsy revealed severe narrowing of the circumflex and right coronary arteries, acute and evolving myocardial infarction, and transmural rupture of the left ventricular wall of Mr. Preston's heart.

On 25 November 2015, plaintiff filed a wrongful death action (the First Complaint) naming multiple defendants involved in Mr. Preston's medical care, including Dr. Neha Doctor. In accordance with the special pleading requirements of section (j) (Medical malpractice) of Rule 9 (Pleading special matters) of the North Carolina Rules of Civil Procedure, plaintiff alleged in the complaint that the medical care and medical

3. Defendant testified that aggressive risk factor modification refers to activities like ceasing smoking, losing weight, exercising, and using a low-dose aspirin.

records pertaining to Mr. Preston's treatment had been reviewed by a person reasonably expected to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence and who was willing to testify that the medical care did not comply with the applicable standard of care. Dr. Stuart Toporoff, a cardiologist, submitted an affidavit (his First Affidavit) averring that he had reviewed the medical care and records and was willing to testify that the care provided failed to comply with the applicable standard of care. On 29 January 2016, Dr. Doctor filed an answer alleging that Dr. Movahed's written report of Mr. Preston's stress test was not available to her when she was treating Mr. Preston, and that the cardiology team had recommended and taken responsibility for scheduling Mr. Preston's outpatient follow-up CTA.

On 12 February 2016 plaintiff filed a second complaint (the Second Complaint) naming as defendants Dr. Movahed, Dr. Deepak Joshi, and Pitt County Memorial Hospital, Inc., d/b/a Vidant Medical Center (the Hospital). Plaintiff's Second Complaint, which again included her Rule 9(j) expert certification, alleged that defendant was negligent by, *inter alia*, failing to "accurately interpret and communicate the findings and significance of diagnostic tests performed on Mr. Preston," failing to "timely suggest and perform a full assessment and work-up to rule out life-threatening acute coronary artery disease for a patient at high risk for the disease, including but not limited to, cardiac catheterization," and failing "to recommend a cardiology consult for Mr. Preston prior to his discharge from Vidant Medical Center with acute chest pain." On the same day the Second Complaint was filed, Dr. Toporoff submitted a second affidavit (his Second Affidavit) stating that he had reviewed the medical care and records and was willing to testify that the care provided by the named defendants failed to comply with the applicable standard of care. Dr. Toporoff averred that the case materials were first provided to him in July of 2015 and that "[a]dditional materials were provided to [him] on October 12 and October 29, 2015 and on February 10, 2016." According to the affidavit, Dr. Toporoff's stated that based on his review of the medical records and his training and experience,

> [i]t is my opinion that medical care provided to William Preston during his admission to Vidant Medical Center on February 3–4, 2014 for chest pain failed to comply with the applicable standard of care for the evaluation of a patient with chest and arm pain who presented with Mr. Preston's signs, symptoms, and medical history. . . . I have expressed my willingness to testify to the above if called upon to do so.

By consent order filed 14 March 2016, the two actions were consolidated for discovery and trial.

During a subsequent deposition on 23 March 2017, Dr. Toporoff testified that he was critical of defendant's interpretation and communication of the results of the nuclear stress test. Dr. Toporoff stated that he had initially been unwilling to testify against defendant because he was not qualified to criticize defendant's interpretation of the nuclear images from the test and that he "refused to be a nuclear cardiologist against him." Dr. Toporoff confirmed, however, that at the time he submitted his Second Affidavit he was comfortable stating that defendant "failed to meet the standard of care as it applies to a cardiologist interpreting a treadmill stress test."

On 16 June 2017, defendant filed a motion to dismiss pursuant to Rules 12(b)(6), 9(j) and 41 of the North Carolina Rules of Civil Procedure. On 15 September 2017, Dr. Toporoff submitted a third affidavit (his Third Affidavit), stating that prior to the First Complaint he communicated to plaintiff's counsel that he did not have sufficient information to state that defendant and/or Dr. Joshi clearly violated any standards of care. However, Dr. Toporoff stated that following discovery answers served by Vidant Medical Center and Dr. Doctor regarding the communication of Mr. Preston's stress test results by defendant and Dr. Joshi, he learned "that Dr. Movahed's report was NOT made available to [Dr. Doctor] prior to Mr. Preston's discharge." Dr. Toporoff averred that he informed plaintiff's counsel on 12 February 2016 that he was willing to testify that defendant and Dr. Joshi breached the applicable standard of care by "fail[ing] to interpret, diagnose, document and communicate to the ordering physician the presence of chest pain and ST wave depression changes during Mr. Preston's nuclear stress test that were consistent with ischemia; and failure to recommend an immediate cardiology consult for Mr. Preston prior to his discharge." Dr. Toporoff stated that he held these opinions "[s]ince [his] review of the totality of these medical records and documents in February in 2016."

At the hearing on the motion to dismiss on 18 September 2017, defendant argued that plaintiff failed to comply with Rule 9(j) because Dr. Toporoff could not reasonably be expected to qualify as an expert witness and was not willing to testify that defendant breached the applicable standard of care. The trial court entered an order on 25 October 2016, in which it found, in pertinent part:

> 22. Dr. Toporoff . . . admitted that Dr. Movahed's involvement was limited to the interpretation of the nuclear stress test that was performed on Mr. Preston.

. . . .

> 24. Dr. Toporoff only agreed to testify in the Second Lawsuit if Plaintiff's counsel retained a nuclear cardiologist.
>
> . . . .
>
> 27. [A]s of the date the Second Lawsuit was filed, Plaintiff had no cardiologist competent or willing to testify against . . . Dr. Movahed.

The trial court also found that plaintiff could not have reasonably expected Dr. Toporoff to qualify as an expert witness. Accordingly, the trial court concluded that plaintiff failed to comply with Rule 9(j) and granted defendant's motion to dismiss. On 3 November 2017, a Consent Order was entered on the parties' Consent Motion to Sever the two cases for appeal. Plaintiff appealed this case to the Court of Appeals.

At the Court of Appeals,[4] plaintiff argued, *inter alia*, that the trial court's Findings 22, 24, and 27 were not supported by competent evidence and that the trial court erred in concluding that plaintiff failed to comply with Rule 9(j). The court disagreed, first stating that the standard of review was de novo and that:

> [w]here, as here, "a trial court determines a Rule 9(j) certification is not supported by the facts, 'the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination.' "

Preston, 825 S.E.2d at 662 (quoting *Estate v. Wooden ex rel. Jones v. Hillcrest Convalescent Ctr., Inc.*, 222 N.C. App. 396, 403 (2012)).

Applying this standard, the court first addressed plaintiff's challenge to Finding of Fact 22 and concluded that it was supported by the following exchange from Dr. Toporoff's deposition:

> Q. You know that Dr. Movahed's involvement in this case is the interpretation of the nuclear stress test that was performed on Mr. Preston? You understand that; correct?

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4. Plaintiff entered into settlement agreements with Dr. Joshi and the Hospital and on plaintiff's motions the Court of Appeals dismissed those parties from the appeal on 15 August 2018 and 13 September 2018, respectively.

A. Yes.

Id. at 662. While Plaintiff contended that "the nuclear stress test involves two parts: the exercise treadmill stress test and the nuclear heart images" and that "Dr. Toporoff was critical of Dr. Movahed's interpretation of the . . . exercise treadmill portion, which revealed issues with Mr. Preston's heart requiring immediate further testing," the court determined that plaintiff's explanation did not make the challenged finding erroneous because "[t]he well-established rule is that findings of fact by the trial court supported by competent evidence are binding on the appellate courts even if the evidence would support a contrary finding." *Id.* at 662 (quoting *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994)).

The court next addressed plaintiff's argument that Finding 24 was erroneous because Dr. Toporoff: (1) opined in his Rule 9(j) affidavits that Preston's medical care failed to comply with the standard of care and "expressed [his] willingness to testify to the above if called upon to do so"; and (2) testified when deposed that, at the time he signed his Second Affidavit prior to the filing of the Second Complaint, he "felt comfortable saying that Dr. Movahed failed to meet the standard of care as to the interpretation of the exercise treadmill test." *Id.* at 662. The court determined that Dr. Toporoff's deposition testimony, including his testimony that "he would not testify against Dr. Movahed unless [plaintiff] came up with a nuclear cardiologist" provided competent evidence directly supporting the trial court's challenged finding, even if Dr. Toporoff's Rule 9(j) affidavits or other deposition testimony could support a different finding. *Id.* at 663. Further, the court rejected plaintiff's efforts to distinguish between Dr. Toporoff's opinions of defendant's interpretation of the NST images as opposed to the results of the treadmill stress test. *See id.* ("Plaintiff emphasizes Dr. Toporoff's later deposition testimony in which he confirmed he "had opinions separate and apart from the NST images" and was "comfortable . . . when [he] did the 9(j) affidavit[ ] . . . saying that Dr. Movahed failed to meet the standard of care as it applies to a cardiologist interpreting a treadmill stress test[.]"). According to the court:

> Dr. Toporoff's statement that he "had opinions separate and apart from the NST images" was immediately followed by his confirmation that he "didn't feel as confident expressing those [opinions] until [he] had some kind . . . of support for the NST images as well." Moreover, merely having an opinion does not indicate one's willingness to testify as to that opinion. Additionally, Dr. Toporoff's confirmation that he was "comfortable . . . when [he] did the 9(j) affidavit

> . . . saying that Dr. Movahed failed to meet the standard of care as it applies to a cardiologist interpreting a treadmill stress test" was not an unequivocal assertion that he was "willing to testify" against Dr. Movahed. Regardless of whether Dr. Toporoff had opinions or was comfortable saying something about Dr. Movahed regarding the treadmill-stress-test component of interpreting the NST, Dr. Toporoff's testimony considered contextually establishes that his willingness to testify against Dr. Movahed in any capacity was conditioned upon having the support of a nuclear cardiologist who was competent and willing to testify against Dr. Movahed as to the nuclear-imaging component.

Id.

Next, the court addressed plaintiff's challenge to Finding 27. Having previously concluded that evidence supported the trial court's finding that Dr. Toporoff only agreed to testify if plaintiff retained a nuclear cardiologist, the court noted that the two nuclear cardiologists were consulted months after the Second Complaint was filed and after the statute of limitations had expired and concluded that Finding 27 was supported by competent evidence. *Id.* at 663–64.

Finally, the court reviewed whether the trial court's findings support its conclusions and its ultimate decision to dismiss plaintiff's complaint for substantive Rule 9(j) noncompliance. In light of the findings that Dr. Toporoff was plaintiff's only cardiologist who had reviewed Preston's care before the Second Complaint was filed, that Toporoff only agreed to testify if plaintiff hired a nuclear cardiologist, and that plaintiff failed to consult with the other nuclear cardiologists she retained until months after she filed the Second Complaint, the court determined that the trial court correctly concluded that plaintiff's Second Complaint failed to comply with Rule 9(j) because she had no cardiologist willing to testify against defendant at the time of filing. *Id.* at 665. In light of this conclusion, the court did not address the trial court's determination that plaintiff failed to substantively comply with Rule 9(j)'s requirement that it was reasonable for plaintiff to expect Dr. Toporoff to qualify as an expert witness against defendant. *Id.* at 665.

Plaintiff filed a petition for discretionary review on the general issues of the appropriate legal standard to apply to a motion to dismiss on Rule 9(j) grounds and whether the Court of Appeals erred in failing to conduct a *de novo* review of the trial court's order dismissing the

complaint. Defendant's response to the petition indicated their intent to present to this Court the further issue of whether Dr. Toporoff was qualified to testify against Dr. Movahed. This Court allowed the petition on 14 August 2019.

Analysis

After careful review of the record, we conclude that both of the lower courts erred in failing to view the evidence regarding Dr. Toporoff's willingness to testify under Rule 9(j) in the light most favorable to plaintiff and that the Court of Appeals, in its *de novo* review, erred by deferring entirely to the findings of the trial court.

"Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review *before* filing of the action." *Vaughan v. Mashburn*, 371 N.C. 428, 434, 817 S.E.2d 370, 375 (2018) (quoting *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012)). The rule provides, in pertinent part:

> Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;

N.C.G.S. § 1A-1, Rule 9(j) (2019).[5] Thus, the rule prevents frivolous claims "by precluding any filing in the first place by a plaintiff who is unable to procure an expert who both meets the appropriate qualifications and, after reviewing the medical care and available records, is

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5. The rule also provides that a complaint is in compliance if:

> (2) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or

willing to testify that the medical care at issue fell below the standard of care." *Vaughan*, 371 N.C. at 435, 817 S.E.2d at 375.

In *Moore v. Proper*, this Court addressed the manner in which a trial court should evaluate compliance with Rule 9(j), as well as the standard of review for a reviewing court on appeal. There, the plaintiff filed a medical malpractice complaint against the defendants alleging that the defendants were "negligent in the performance of her tooth extraction and in failing to provide follow-up care." *Moore*, 366 N.C. at 26, 726 S.E.2d at 814. Following a deposition of the plaintiff's Rule 9(j) certification expert, the defendants filed a motion for summary judgment pursuant to Rule 9(j). The trial court granted the defendants' motion and dismissed the plaintiff's case for noncompliance with Rule 9(j), stating: "no reasonable person would have expected [the plaintiff's expert] to qualify as an expert witness under Rule 702." *Id.* at 28, 726 S.E.2d at 815. Following a split decision in the Court of Appeals reversing the trial court, the defendants appealed to this Court.

The Court first addressed whether an expert must actually qualify under Rule 702 in order to satisfy Rule 9(j)'s requirement that the certification expert "is reasonably expected to qualify as an expert witness under Rule 702." The Court noted that "Rule 9(j) . . . operates as a preliminary qualifier to 'control pleadings' rather than to act as a general mechanism to exclude expert testimony." *Id.* at 31, 726 S.E.2d at 817. Moreover, because of the presumption "that that the legislature carefully chose each word used," and in order to "give every word of the statute effect," the Court concluded: "we must ensure that the two questions are not collapsed into one. *Id.* at 31, 726 S.E.2d at 817. Thus, while "[t]he trial court has wide discretion to allow or exclude testimony under" Rule 702, id. at 31, 726 S.E.2d at 817 (quoting *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984)), "the preliminary, gatekeeping question of whether a proffered expert witness is 'reasonably expected to qualify as an expert witness under Rule 702' is a different inquiry," *id.* at 31, 726 S.E.2d at 817 (citing N.C.G.S. § 1A-1, Rule 9(j)); *see also id.* at 31, 726 S.E.2d at 817 (stating that "a trial court must analyze whether a plaintiff complied with Rule 9(j) by including a certification complying with the Rule before the court reaches the ultimate determination of whether the proffered expert witness actually qualifies under Rule 702").

> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

N.C.G.S. 1A-1, Rule 9(j).

In addressing the Rule 9(j) inquiry, the Court explained that "[b]ecause Rule 9(j) requires certification at the time of filing that the necessary expert review has occurred, compliance or noncompliance with the Rule is determined at the time of filing." *Id.* at 31, 726 S.E.2d at 817 (citations omitted). The Court agreed with previous Court of Appeals precedent holding that "a court should look at 'the facts and circumstances known or those which should have been known to the pleader' at the time of filing," *id.* at 31, 726 S.E.2d at 817 (quoting *Trapp v. Maccioli*, 129 N.C. App. 237, 241, 497 S.E.2d 708, 711 (1998)), "as any reasonable belief must necessarily be based on the exercise of reasonable diligence under the circumstances," *id.* at 31, 726 S.E.2d at 817 (citing *Fort Worth & Denver City Ry. Co. v. Hegwood*, 198 N.C. 309, 317, 151 S.E. 641, 645 (1930)). Additionally, the Court noted that "a complaint facially valid under Rule 9(j) may be dismissed if subsequent discovery establishes that the certification is not supported by the facts, at least to the extent that the exercise of reasonable diligence would have led the party to the understanding that its expectation was unreasonable." *Id.* at 31–32, 726 S.E.2d at 817 (citing *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 255, 677 S.E.2d 465, 477 (2009); *Ford v. McCain*, 192 N.C. App. 667, 672, 666 S.E.2d 153, 157 (2008)). The Court further explained:

> Though the party is not necessarily required to know all the information produced during discovery at the time of filing, the trial court will be able to glean much of what the party knew or should have known from subsequent discovery materials. But to the extent there are *reasonable* disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage of determining whether the party *reasonably expected* the expert witness to qualify under Rule 702. When the trial court determines that reliance on disputed or ambiguous forecasted evidence was not reasonable, the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination. We note that because the trial court is not generally permitted to make factual findings at the summary judgment stage, a finding that reliance on a fact

> or inference is not reasonable will occur only in the rare case in which no reasonable person would so rely.

Id. at 32, 726 S.E.2d 817–18 (citations omitted).

Applying this standard, the *Moore* Court—construing all disputes or ambiguities in the factual record in favor of the plaintiff—determined that plaintiff's complaint complied with Rule 9(j) in that plaintiff reasonably expected her proffered expert to qualify under Rule 702. *Id.* at 35, 726 S.E.2d at 819–20. The Court expressed no opinion on whether the plaintiff's expert would actually qualify under Rule 702 and "note[d] that, having satisfied the Rule 9(j) pleading requirements, plaintiff has survived the pleadings stage of her lawsuit and may, at the trial court's discretion, be permitted to amend the pleadings and proffer another expert" in the event that her proffered expert later failed to qualify under Rule 702. *Id.* at 36, 726 S.E.2d at 820.

While the Rule 9(j) issue in *Moore* arose in the context of a motion for summary judgment and focused specifically on whether the plaintiff's expert was reasonably expected to qualify as an expert witness, we conclude that the analytical framework set forth in *Moore* applies equally to other Rule 9(j) issues in which "a complaint facially valid under Rule 9(j)" is challenged on the basis that "the certification is not supported by the facts." *Id.*, 366 at 31–32, 726 S.E.2d at 817 (citing *Barringer*, 197 N.C. App. at 255, 677 S.E.2d at 477). For instance, where, as here, a defendant files a motion to dismiss under Rule 12(b)(6) challenging a plaintiff's facially valid certification that the reviewing expert was willing to testify at the time of the filing of the complaint, the trial court must examine " 'the facts and circumstances known or those which should have been known to the pleader' at the time of filing," *id.* at 31, 726 S.E.2d at 817 (quoting *Trapp*, 129 N.C. App. at 241, 497 S.E.2d at 711), and "to the extent there are reasonable disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage," *id.* at 32, 726 S.E.2d 817–18 (citations omitted). "When the trial court determines that reliance on disputed or ambiguous forecasted evidence was not reasonable, the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence." *Id.* at 32, 726 S.E.2d at 818 (citations omitted).

We stress that Rule 9(j) is unique and that because the evidence must be taken in the light most favorable to the plaintiff, the nature of these "findings," and the "competent evidence" that will suffice to

support such findings, differs from situations where the trial court sits as a fact-finder. We do not view the legislature's enactment of Rule 9(j) as intending for the trial court to engage in credibility determinations and weigh competent evidence at this preliminary stage of the proceedings. *See id.* at 31, 726 S.E.2d at 817 (stating that Rule 9(j) "operates as a preliminary qualifier to 'control pleadings' rather than . . . as a general mechanism to exclude expert testimony" (citing *Thigpen*, 355 N.C. at 203–04, 558 S.E.2d at 166)); *see also State v. Dew*, 225 N.C. App. 750, 760, 738 S.E.2d 215, 222 (2013) ("[T]he credibility of and weight to be given to the expert's testimony is a question for the jury rather than the trial court." (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 460–61, 597 S.E.2d 674, 687–88 (2004))). Thus, it is erroneous to conclude, as the Court of Appeals did here with respect to the trial court's findings regarding Dr. Toporoff's willingness to testify, that a Rule 9(j) "finding" "supported by competent evidence [is] binding on the appellate courts even if the evidence would support a contrary finding." *Preston*, 825 S.E.2d at 662 (quoting *Scott*, 336 N.C. at 291, 442 S.E.2d at 497).

Defendant here agrees that *Moore* supplies the appropriate standard for evaluating plaintiff's compliance with Rule 9(j) but nevertheless contends that the factual record clearly demonstrates Dr. Toporoff's unwillingness to testify such that there is no *reasonable* dispute or ambiguity in the evidence. Defendant argues that the evidence establishes that Dr. Toporoff was not willing to testify unless plaintiff retained a nuclear cardiologist and that plaintiff did not retain a nuclear cardiologist at the time of the filing of the Second Complaint. Thus, defendant contends that the trial court's finding that Dr. Toporoff was not willing to testify at the time of filing was supported by the evidence and the trial court's conclusion that plaintiff's complaint failed to comply with Rule 9(j) was supported by the findings.

On the other hand, plaintiff argues that the trial court mistakenly interpreted evidence of Dr. Toporoff's unwillingness to testify against defendant at the time of the First Complaint as evidence that he was unwilling to testify against defendant at the time of the Second Complaint (in which defendant was added to the lawsuit) and also failed to apprehend that a "nuclear stress test" contains separate and distinct parts: (1) the EKG treadmill test, about which Dr. Toporoff is undisputedly qualified to testify; and (2) interpretation of the nuclear images. According to plaintiff, taking the evidence in the light most favorable to plaintiff, the factual record clearly demonstrates that after receiving new information in Dr. Doctor's Answer following the filing of the First Complaint, Dr. Toporoff was willing at the time of the filing of the Second Complaint to testify against defendant without the need for any nuclear cardiologist

on the basis that defendant failed to meet the standard of care as a cardiologist interpreting a treadmill stress test—specifically, by failing to accurately interpret and document the EKG treadmill test, failing to timely and effectively communicate the results to the hospitalist, and failing to recommend a cardiac consult prior to Mr. Preston's discharge.

We conclude that taking the evidence in the light most favorable to plaintiff, including Dr. Toporoff's affidavits and his deposition testimony, the factual record clearly supports a reasonable inference that at the time of the filing of the Second Complaint Dr. Toporoff was willing to testify that defendant failed to comply with the applicable standard of care as a cardiologist.

Here, plaintiff's compliance with Rule 9(j) is measured at the time of the filing of the Second Complaint on 12 February 2016, as that was when Dr. Movahed was added as a defendant in the action. *See Moore*, 366 N.C. at 31, 726 S.E.2d at 817 ("[C]ompliance or noncompliance with the Rule is determined at the time of filing." (citations omitted)). In his Second Affidavit, submitted at the time of the filing of the Second Complaint, Dr. Toporoff averred that:

> [I]t is my opinion that medical care provided to William Preston during his admission to Vidant Medical Center on February 3 – 4, 2014 for chest pain, failed to comply with the applicable standard of care for the evaluation of a patient with chest and arm pain who presented with Mr. Preston's signs, symptoms and medical history. I first expressed this opinion to Ms. Armstrong on August 1, 2015 and I provided additional opinion on September 20, 2015, on October 28, 2015 and on February 9, 2016. I have expressed my willingness to testify to the above if called upon to do so.

The ambiguity in Dr. Toporoff's willingness to testify involves his deposition testimony. In Dr. Toporoff's 23 March 2017 deposition, he had difficulty remembering when he formed his opinions of defendant. Dr. Toporoff testified that he had not formulated any opinions regarding defendant prior to the First Complaint in 2015, explaining that he told plaintiff he was unwilling to testify against defendant unless she retained a nuclear cardiologist:

> A: It's coming back to me. I think I had always been critical of Dr. Movahed and I told [plaintiff's counsel] that I did not feel competent in criticizing him because I knew what would happen in the sense that he would put up these images and I would look like a fool trying to interpret the images.

> And I believe I said to her I would not add him to my lawsuit unless she got another nuclear cardiologist to interpret the images. I did not want to get into an across-the-table where he is highly competent in that field on paper and I have no business criticizing his summaries.
>
> Q. Because you're not qualified as –
>
> A. Correct.
>
> Q. – a nuclear cardiologist?
>
> A. That's how his name got added later. I refused to be a nuclear cardiologist against him.
>
> Q. Sure.
>
> A. That, I think, is what happened.
>
> Q. Because you're not a nuclear cardiologist?
>
> A. Absolutely.
>
> Q. So it would be inappropriate for you to render any opinions –
>
> A. Right.
>
> Q. – regarding Dr. Movahed because of that.
>
> A. But that's why his name was left out the first time.

At different points later in the deposition, Dr. Toporoff testified:

> A. At the beginning, I just wanted to make it clear, because I remember a conversation I had with [Plaintiff's attorney], that I would not testify against Dr. Movahed unless she came up with a nuclear cardiologist because I did not want to be across from him where he's talking about nuclear images and I have to say, I know nothing. And once we agreed that she would get somebody else, then I felt I could handle myself clinically.
>
> . . . .
>
> Q. I think you said earlier that you initially did not feel competent to give testimony as to Dr. Movahed, but you told [plaintiff's counsel] that if she got a nuclear guy, then you would feel competent to give testimony and I'm not sure I understood why you said that.

> A. I anticipated that if it were just my testimony against [defendant], he would say I had no business in making any judgment about his readings and what he does with them, and he would be completely correct.
>
> But once I didn't have to worry about anything about looking at this doughnut hole [the nuclear images] and what do you think of it, then I felt much, much more comfortable because it was a clinical situation purely.
>
> Q. All Right. So you had opinions separate and apart from the NST images, but you didn't feel as confident expressing those until you had some kind –
>
> A. Correct.
>
> Q. -- of support for the NST images as well?
>
> A. Correct.

While this testimony is ambiguous as to whether Dr. Toporoff's condition that plaintiff retain a nuclear cardiologist continued beyond the time of the filing of the First Complaint, the testimony still appears to be focused on the time period prior to the filing of the First Complaint (i.e. "at the beginning") and in it Dr. Toporoff expressed his concern that his criticisms of defendant were not sufficiently distinct from defendant's interpretation of the nuclear images such that he was willing to testify against defendant as a "cardiologist" at that time—as Dr. Toporoff put it, he "refused to be a nuclear cardiologist against him." Significantly, we note that later in the deposition Dr. Toporoff testified as follows regarding the time of the filing of the Second Complaint when he submitted his Second Affidavit:

> Q. And going back [to] your testimony about your opinions about Dr. Movahed in this case, you explained to [defendant's counsel] on the record that you were not comfortable testifying as to the nuclear imaging interpretation by Dr. Movahed.
>
> Were you comfortable and do you remain comfortable at the time – *at this time when you did the 9(J) affidavit*, [emphasis added] were you comfortable saying that Dr. Movahed failed to meet the standard of care as it *applies to a cardiologist* [emphasis added] interpreting a treadmill stress test?
>
> A. Yes.

This "cardiologist" distinction is significant as a full reading of Dr. Toporoff's deposition, along with Dr. Toporoff's third affidavit, taken in the light most favorable to plaintiff clearly supports the inference urged by plaintiff—that the nature of Dr. Toporoff's opinions concerning defendant significantly changed when, following the filing of the First Complaint, he realized that Dr. Movahed's written report of the nuclear stress test, which had been included in the medical files that he previously reviewed, had not actually been included in Mr. Preston's medical chart—and therefore was not seen by Dr. Doctor—until after Mr. Preston was discharged from the hospital.

Dr. Toporoff testified that he first reviewed defendant's involvement in the case when he received the medical files in 2015 prior to the filing of the First Complaint, stating that "you couldn't not see it when you were reviewing the entire case" and that he "didn't understand why [defendant's] report had not commented on two important issues during the nuclear study, namely the fact that the man had chest pain on the treadmill and that there were EKG changes that were either ignored or not noticed." Thus, at the beginning Dr. Toporoff was critical of defendant's report as it related to Mr. Preston's chest pain and the EKG tracings from the exercise portion of the stress test. Dr. Toporoff noted that he "do[es] about 250 to 300 treadmills a year" and explained that two of the ways you can "flunk" a stress test are "if the test provokes chest pain" and if "EKG changes during the treadmill worsened . . . and fulfilled the criteria for a positive exercise treadmill test for myocardial ischemia." Dr. Toporoff was also critical of the report's suggestion that "one may consider a CTA," a type of angiogram he described as an outpatient procedure that in most cases is "a week or two down the line, as it was in this case." This was the "wrong test," according to Dr. Toporoff, as Mr. Preston needed an immediate "cardiologist consult," which "would have led to a cardiac catheterization which is the test that he really needed."

According to Dr. Toporoff, the plan from the physician ordering the test was that if the nuclear stress test was normal, Mr. Preston would be discharged, and in his view the "stress test was clearly not normal":

> A. The treadmill test was, in my judgment, completely abnormal and consistent with myocardial ischemia. And he thought -- he indicated in the exercise physiology portion that he didn't see any abnormality. I think he was wrong.
>
> Similarly, the chest pain on the treadmill is a very important clinical feature that he did not mention in his final impression.

However, Dr. Toporoff acknowledged that the phrase "chest pain during exercise" was included in the report, that the report did not rule out ischemia, and that the report did not characterize the test as "normal."

Significantly, much of Dr. Toporoff's criticism was reserved not for the report itself, but on the fact that this report was not made available until after Mr. Preston's discharge, and that in its place defendant failed to effectively communicate the significance of the results of the test to the attending doctor, Dr. Doctor. Dr. Toporoff testified that Mr. Preston's death was caused by a "breakdown of the whole system," that he "shouldn't have gone home," and that it started with defendant. According to Dr. Toporoff:

> A. Well, it starts off with that Dr. Joshi is in his second day as a nuclear cardiology fellow, ... And in this particular week or day he was assigned to Dr. Movahed.
>
> Of all the people who read nuclear cardiology tests, it appears that they either typed their own reports right into the electronic medical record.
>
> . . . . Dr. Movahed is the only one who dictated his report, which means the hospital has to hire a transcriptionist and that report does not appear in the chart until the following day.
>
> . . . . [H]e doesn't call the doctor. He assigns Dr. Joshi on his second day to explain the nuclear findings to, in this case, Dr. Doctor because she was the hospitalist of record.

Dr. Toporoff stated that the "report hit the chart February 5th at about 8:30 in the morning . . . and the patient was long gone," and that the "patient was discharged before the report was in the chart and I think [that] was instrumental in allowing Mr. Preston to die." Dr. Toporoff further explained:

> A. Let me amplify. If you're dealing with an outpatient procedure, the guy isn't that sick, he comes in. I'm not going to say that every one at our hospital is ready the same day. You can do it a day or two later. Maybe it's not great medicine, but it's nothing terrible. But when a guy comes in through the emergency room and you rule out MI and he's having chest discomfort, that report should be available that same day.

Q. And this is a report by a nuclear cardiologist?

A. Yes.

Q. Which you are not?

A. I don't think it matters whether I am or not. I know when a report should be due.

In Dr. Toporoff's view, given the information that defendant possessed, "especially since he knows when that report is going to be available on the computer, I think he should have picked up the telephone himself and called Dr. Doctor and said, You have a problem there. I would get the consulting service to see this patient." As Dr. Toporoff put it, "to have a nuclear cardiology report that's abnormal, you can't just dictate it and walk away. That's wrong."

Further, Dr. Toporoff opined that it would not have been appropriate to delegate such a task to Dr. Joshi, stating "[w]hen a test is that abnormal, I think the physician of record should take no chances and should speak to the doctor himself personally." In that respect, Dr. Toporoff noted that Dr. Joshi's note, which *was* added to the medical chart and received by Dr. Doctor before Mr. Preston's discharge, made no mention of the fact that Mr. Preston experienced chest pain during the treadmill test or of any ST abnormalities.

Thus, a significant portion of Dr. Toporoff's criticism of defendant's conduct was based not on the report that he received with the medical records back in 2015 but rather on the fact that the report was not made available to the attending hospitalist prior to Mr. Preston's discharge. As such, it reasonable to infer that while Dr. Toporoff was unwilling to testify against defendant purely on the basis of the report, part of which he acknowledged he was not qualified to address (the nuclear images) and other portions of which he was critical but also conceded did not characterize the nuclear stress test as normal, he was willing to testify that defendant's failure to submit the report or otherwise communicate the results of the test to the hospitalist was a breach of the standard of care as a cardiologist.

Dr. Toporoff clarified his opinions in his Third Affidavit submitted on 15 September 2017, in which he averred:

> 5) In November of 2015, I signed an Expert Witness Affidavit regarding the hospitalist physicians. Around that time, I communicated to [plaintiff's counsel] that I did not have sufficient information to say that Dr. Movahed and/or Dr. Joshi had clearly violated any standards of care.

> 6) In February of 2016, I again spoke with [plaintiff's counsel], who informed me that she had received additional information through discovery answers served by Vidant Medical Center and Dr. Neha Doctor[6] regarding the communication of Mr. Preston's stress tests results by Drs. Movahed and Joshi.
>
> 7) Based on the representation by Dr. Doctor in those documents of the following information: that Dr. Movahed's report was NOT available to her prior to Mr. Preston's discharge; that Dr. Movahed had specifically made recommendations to the hospitalists, and that Dr. Joshi communicated the results of the nuclear stress test with "cardiology's" recommendation for an outpatient CT angiogram, I informed Ms. Armstrong I was willing to testify that Dr. Movahed and Dr. Joshi violated standards of care in their collaboration and treatment of Mr. Preston.
>
> 8) My criticisms of Drs. Movahed and Joshi include: failures to interpret, diagnose, document and communicate to the ordering physician the presence of chest pain and ST wave depression changes during Mr. Preston's nuclear treadmill stress test that were consistent with ischemia, and failure to recommend an immediate cardiology consult for Mr. Preston prior to his discharge. These are violations of the standard of care.
>
> 9) Since my review of the totality of these medical records and documents in February of 2016, I have held these opinions. I expressed my willingness to testify regarding the standard of care that applied to Drs. Movahed and Joshi in their treatment and care of Mr. Preston to Ms. Armstrong in a phone call on February 12, 2016.

In viewing the evidence in the light most favorable to plaintiff, we conclude that the evidence does not support the trial court's findings that

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6. Dr. Doctor's answer stated:

> [I]t is admitted that the medical records of Mr. Preston contain a report of the nuclear stress test which appears to have been prepared by Dr. Movahed, that this is a written document, which speaks for itself and is the best evidence of what is contained in the report, but it is denied that this written report was available to this Defendant at the time she provided care to Mr. Preston.

"Dr. Toporoff only agreed to testify in the Second Lawsuit if Plaintiff's counsel retained a nuclear cardiologist" and that "as of the date the Second Lawsuit was filed, Plaintiff had no cardiologist competent or willing to testify against . . . Dr. Movahed."[7] Rather, the factual record demonstrates that Dr. Toporoff was willing to testify against defendant at the time of the filing of the Second Complaint. At a bare minimum, we are certain that any ambiguity in the evidence is not so unreasonable such that it should be resolved against plaintiff and result in a finding that plaintiff was unreasonable in her Rule 9(j) certification that Dr. Toporoff was willing to testify against defendant at the time of the filing of the Second Complaint. Thus, the trial court's conclusion that plaintiff failed to comply with the requirements of Rule 9(j) is unsupported by its findings to the extent that it is based on plaintiff's reviewing expert's purported unwillingness to testify against defendant.

The trial court also determined that plaintiff could not have reasonably expected that Dr. Toporoff would qualify as an expert witness, an issue the parties briefed in the Court of Appeals and before this Court. We hold that at the relevant time, again taking the evidence in the light most favorable to plaintiff, plaintiff's expectation that Dr. Toporoff would qualify as an expert to testify in this case was reasonable.

In that respect, we note that in declining to address whether plaintiff reasonably expected Toporoff to qualify under Rule 702, the language of the Court of Appeals suggested—though it is unclear—that the court was declining to address a question of whether Dr. Toporoff would *actually* qualify under Rule 702. *See Preston*, 825 S.E.2d at 664 (stating that "we need not address the sufficiency of evidence supporting that part of the finding as to whether Dr. Toporoff was competent to testify in any capacity against Dr. Movahed" and that Rule 9(j) prevents "any filing in the first place by a plaintiff who is unable to procure an expert who *both* meets the appropriate qualifications and . . . is willing to testify" (quoting *Vaughan*, 371 N.C. at 435 817 S.E.2d at 375)). We reiterate in the interest of clarity that under Rule 9(j) "the preliminary, gatekeeping question of whether a proffered expert witness is 'reasonably expected to qualify as an expert witness under Rule 702' is a different inquiry from whether the expert *will actually* qualify under Rule 702." *Moore*, 366 N.C. at 31,

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7. We conclude that the trial court's Finding 22 ("Dr. Toporoff . . . admitted that Dr. Movahed's involvement was limited to the interpretation of the nuclear stress test that was performed on Mr. Preston.") is supported by the evidence. In his deposition, Dr. Toporoff agreed with this statement; his opinion was that defendant, having been assigned to interpret the nuclear stress test, breached the standard of care by failing to accurately interpret it and communicate its results.

726 S.E.2d at 817 (citing N.C.G.S. § 1A-1, Rule 9(j)(1)). Further, "to the extent there are *reasonable* disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage of determining whether the party *reasonably expected* the expert witness to qualify under Rule 702," and "a finding that reliance on a fact or inference is not reasonable will occur only in the rare case in which no reasonable person would so rely." *Id.* at 32, 726 S.E.2d at 818 (citations omitted).

The standards articulated in *Moore* apply here. As summarized in that case, under Rule 702(b), there is a three-part test to qualify as an expert witness:

> (1) whether, during the year immediately preceding the incident, the proffered expert was in the same health profession as the party against whom or on whose behalf the testimony is offered; (2) whether the expert was engaged in active clinical practice during that time period; and (3) whether the majority of the expert's professional time was devoted to that active clinical practice.

Moore v. Proper, 366 N.C. at 33, 726 S.E.2d at 818 (footnote omitted). The record in this case establishes that like Dr. Movahed, Dr. Toporoff is board-certified in internal medicine and cardiovascular disease. During the relevant time period, and, in fact, for over forty years, Dr. Toporoff has practiced as a cardiologist, engaged in active clinical practice treating patients like Mr. Preston. As part of this clinical work, Dr. Toporoff interprets hundreds of treadmill tests every year, and the treadmill test is the portion of the stress test relevant to the opinions Dr. Toporoff would testify to at trial. There is no dispute that the majority of Dr. Toporoff's professional time was devoted to his active clinical practice. As such, this is not "the rare case" in which plaintiff's reliance was unreasonable. *Id.* at 31, 726 S.E.2d at 818.

Defendant takes the position that because Dr. Toporoff is not a nuclear cardiologist and Dr. Movahed does have that specialized expertise, Dr. Toporoff could not qualify to testify against Dr. Movahed. However, throughout the record as developed so far, Dr. Toporoff has been clear that he is not purporting to offer expert opinions about the nuclear imaging portion of the stress. The rule only requires that an expert witness have experience performing the procedure that is the subject of the complaint and treats similar patients, not that both the defendant and the testifying witness have the exact same professional qualifications. Just as a dentist can testify as an expert on the standards

of care relevant to extracting a tooth in a case where the procedure at issue was actually performed by an oral and maxillofacial surgeon, a cardiologist who annually interprets hundreds of treadmill tests can testify about the standards of care relevant to treadmill tests in a case where the treadmill test results were not properly handled by a nuclear cardiologist. *See, e.g.*, *Roush v. Kennon*, 188 N.C. App. 570, 575–76, 656 S.E.2d 603, 607 (2008). Rule 9(j) is intended as a gatekeeping rule to prevent the prosecution of frivolous malpractice claims, not an endless maze of impossible hurdles to bar juries from hearing meritorious cases. *Moore*, 366 N.C. at 31, 726 S.E.2d at 817.

Here plaintiff satisfied her Rule 9(j) responsibility by obtaining the opinion of a doctor who she reasonably expected to meet the three-part test for qualification under Rule 702(b) on the question of whether defendant violated the standard of care for cardiologists in reading Mr. Preston's exercise treadmill stress test and EKG recordings and communicating those results to Mr. Preston's ordering physicians.

Conclusion

In sum, we conclude that the trial court and the Court of Appeals erred in failing to view the factual record in the light most favorable to plaintiff. The trial court's findings that Dr. Toporoff was not willing to testify at the time of the filing of the Second Complaint are not supported by the evidence. The affidavits and Dr. Toporoff's deposition testimony demonstrate that after receiving new information in Dr. Doctor's answer, Dr. Toporoff was willing to testify at the time of the filing of the Second Complaint that defendant breached the standard of care. Further, it was reasonable for the plaintiff to conclude that Dr. Toporoff's clinical practice as a cardiologist likely qualified him under Rule 702(b) to express expert opinions concerning Mr. Preston's treadmill test. This complaint should not be dismissed on Rule 9(j) grounds. We reverse the Court of Appeals and remand for further proceedings.

REVERSED AND REMANDED.

Justice NEWBY dissenting.

The issue in this case is the standard by which an appellate court reviews a trial court's dismissal of a complaint for noncompliance with N.C.G.S. § 1A-1, Rule 9(j) (2019). In *Moore v. Proper*, this Court held that when a trial court dismisses a claim because it does not comply with Rule 9(j), appellate courts only ask whether competent evidence in the record supports the trial court's findings of fact and those facts

support its decision. 366 N.C. 25, 32, 726 S.E.2d 812, 818 (2012). The majority purports to clarify that standard from *Moore*, but in fact upends it altogether, replacing *Moore*'s appellate deferential standard of review with a de novo standard used to address summary judgment motions. It thus improperly converts this Court into a factfinder, removing that task from the trial court and subverting the trial court's role as gatekeeper. Because the majority removes this critical and historic role from the trial court, it undermines the legislative purpose of Rule 9(j) to properly screen medical malpractice cases.

The trial court determined that a clinical cardiologist was neither willing to testify nor reasonably expected to qualify to testify against an experienced nuclear cardiologist whose sole involvement in the case was the interpretation of a nuclear stress test. The clinical cardiologist by his own admission has not performed a nuclear stress test and cannot interpret nuclear stress test images. The question in this case is whether this Court should overrule the trial court's factually supported decision. The majority disregards the trial court's findings because it both misconstrues the facts and ignores the proper standard of review. It therefore undermines Rule 9(j) and Rule 702 by ignoring the requirement that testimony against specialists must come from like specialists, and instead effectively says "any doctor will do." Because the trial court correctly granted the motion to dismiss, its decision should be upheld. I respectfully dissent.

The General Assembly enacted Rule 9(j) to establish trial courts as gatekeepers in medical malpractice actions. Rule 9(j) provides that any medical malpractice action "shall be dismissed unless" the plaintiff's medical records and care "have been reviewed by a person" who is (1) "reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence," and (2) "willing to testify that the medical care did not comply with the applicable standard of care." N.C.G.S. § 1A-1, Rule 9(j)(1). The General Assembly passed these requirements to ensure that experts in medical malpractice actions would be "qualified practitioners of a competence similar to those of the practitioners who are the object of the suit." Minutes, *Meeting on H. 636 & H. 730 Before the House Select Comm. on Tort Reform*, 1995 Reg. Sess. (Apr. 19, 1995).

Rule 9(j) thus requires courts to consider whether a witness is reasonably expected to qualify to testify under Rule 702. Rule 702 allows expert testimony only if the witness has specialized knowledge through experience or other training, and: (1) the testimony is based on sufficient facts or data, (2) the testimony is the product or reliable principles and methods, and (3) the witness has applied those principles

and methods reliably to the facts of the case. For medical malpractice actions specifically, Rule 702 explains that if the defendant is a specialist, "a person *shall not give expert testimony* [against the defendant] on the appropriate standard of health care" unless the prospective witness "[s]pecialize[s] in the *same specialty* as the [defendant]; or [s]pecialize[s] in a similar specialty which includes within its specialty *the performance of the procedure that is the subject of the complaint* and ha[s] prior experience treating similar patients." N.C.G.S. § 8C-1, Rule 702(b)(1)(a), (b) (2019) (emphases added).

Thus, for a plaintiff to satisfy Rule 9(j), at the time she filed her complaint she must have retained a witness willing and competent to testify as to the specific specialized procedures involved in the defendant's medical care. By requiring such a showing, "[t]he legislature's intent was to provide a more specialized and stringent procedure for plaintiffs in medical malpractice claims through Rule 9(j)'s requirement of expert certification prior to the filing of a complaint." *Thigpen v. Ngo*, 355 N.C. 198, 203–04, 558 S.E.2d 162, 166 (2002).

This Court, in *Moore*, described how courts should address motions to dismiss under Rule 9(j). It first spoke to the role of trial courts. In determining whether a claim complies with Rule 9(j), this Court said, "the trial court must look to all the facts and circumstances that were known or should have been known by the [plaintiff] at the time of filing." 366 N.C. at 32, 726 S.E.2d at 818. The trial court can consider evidence outside of the plaintiff's affidavit, including evidence which comes to light after the affidavit is filed. *Id.* at 31, 726 S.E.2d at 817. This Court explained that if "there are *reasonable* disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage of determining whether the party *reasonably expected* the expert witness to qualify under Rule 702." *Id.* at 32, 726 S.E.2d at 818. Though only in the "rare case" will "the trial court determine[ ] that reliance on disputed or ambiguous forecasted evidence was not reasonable," in such a case "the court must make written findings of fact . . . ." *Id.* at 32, 726 S.E.2d at 818. *Moore* thus recognized the unique capacity of the trial court as factfinder, directing that court to weigh reasonably disputed evidence in favor of the nonmoving party, but recognizing the trial court may determine in some cases that reliance on disputed or ambiguous forecasted evidence is unreasonable.

Moore then explained the distinct role of appellate courts on appeal of a trial court's Rule 9(j) dismissal. First, an appellate court must determine whether the trial court's factual findings are supported by

"competent evidence." *Id.* at 32, 726 S.E.2d at 818. Second, if the factual findings are supported by competent evidence, the appellate court must determine whether the findings support the trial court's conclusion that the complaint failed to comply with Rule 9(j). *Id.* Thus, though *Moore* requires *trial courts* to construe reasonably disputed evidence in the plaintiff's favor, it directs appellate courts to uphold trial courts' dismissals under a deferential standard—when competent evidence can be found to support the decision.

This is the second of two lawsuits filed by plaintiff.[1] The current action was filed against Dr. Movahed, Dr. Joshi, and the hospital. Doctor Movahed is a board-certified nuclear cardiologist, the head of his department, and an instructor of nuclear cardiology fellows. Doctor Joshi was a clinical cardiologist seeking to become board certified in nuclear cardiology and therefore was working as a fellow under Dr. Movahed. The defendants moved to dismiss the claims for failure to comply with Rule 9(j). In response to the motion, plaintiff argued that Dr. Toporoff was qualified and willing to criticize Dr. Movahed at the time the lawsuit was filed.

With this background, the trial court dismissed plaintiff's complaints against all the defendants for noncompliance with Rule 9(j). Regarding Dr. Movahed, it found the following: that "Dr. Toporoff admitted that he is not a nuclear cardiologist, and has never interpreted nuclear stress tests"; that "Dr. Toporoff also testified that he had no business criticizing and did not feel competent criticizing Dr. Movahed's interpretation of the [nuclear stress test]"; and that "Dr. Toporoff only agreed to testify in the [lawsuit against Dr. Movahed] if Plaintiff's counsel retained a nuclear cardiologist." The court thus concluded as a matter of law that plaintiff's complaint failed to comply with Rule 9(j) because at the time of filing the lawsuit plaintiff had no expert competent and willing to testify against the defendants.[2]

The Court of Appeals agreed with the trial court, reaching only the issue of Dr. Toporoff's willingness to testify. It properly performed its appellate role as set out in *Moore*, holding that the trial court's finding that Dr. Toporoff was not willing to testify against Dr. Movahed at the time the complaint was filed was supported by competent evidence. *Preston v. Movahed*, 825 S.E.2d 657, 665 (N.C. Ct. App. Mar. 5, 2019).

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1. The first action was filed against several hospital defendants and the hospitalists, including Dr. Prodduturvar and Dr. Doctor.

2. Plaintiff appealed and subsequently settled with the hospital and Dr. Joshi, leaving only the action against Dr. Movahed.

Applying the standard of review set out by *Moore*, this Court should affirm the trial court's dismissal of plaintiff's claim for noncompliance with Rule 9(j). The evidence in this case shows that at the time the complaint was filed, plaintiff could not have reasonably expected Dr. Toporoff to qualify to testify against Dr. Movahed regarding either the interpretation of the nuclear stress or the communication of the test results, and that Dr. Toporoff was not willing to do so.

Doctor Toporoff was neither able nor willing to testify regarding Dr. Movahed's interpretation of the nuclear stress test as a whole. Doctor Toporoff's testimony shows that he is not a nuclear cardiologist like Dr. Movahed, that he understood that Dr. Movahed's only role in the case was to interpret the decedent's nuclear stress test, that he does not interpret nuclear cardiology images like those generated by the nuclear stress test, and that he does not feel competent to do so. Doctor Toporoff explained that before the action was filed, he likely told plaintiff that he would not comment on the nuclear stress test images but would only comment on the "review of the summary" of Dr. Movahed's report, as well as Dr. Movahed's communication of that report. He then explained that he told plaintiff he would not testify against Dr. Movahed at all unless plaintiff also retained a nuclear cardiologist to interpret the nuclear stress test images. Indeed, he admitted that he "ha[d] no business criticizing [Dr. Movahed's] summaries" of nuclear stress test images.

Rule 702(b)(2)(a) specifically requires an expert witness to have the same or substantially the same specialty as the defendant against whom the witness intends to testify. Doctor Movahed's role was limited to the interpretation of the nuclear stress test, a role that includes interpreting nuclear stress test images, which Dr. Toporoff admitted he cannot do. Doctor Toporoff also admitted that he is not, and never has been, a nuclear cardiologist. Clearly plaintiff should have been aware that a clinical cardiologist like Dr. Toporoff would not qualify to testify against a nuclear cardiologist regarding a nuclear stress test that only a nuclear cardiologist is able to interpret. Understanding Dr. Toporoff's limitations and his express concerns, plaintiff did eventually identify two nuclear cardiologists willing to serve as expert witnesses. But neither of them had reviewed the medical care at issue at the time of the filing of the complaint against Dr. Movahed. Plaintiff therefore should have been aware at time of filing that a nuclear cardiologist would be required to testify against another nuclear cardiologist whose involvement was limited to the interpretation of the nuclear stress test. However, at the time the complaint was filed, plaintiff did not have a nuclear cardiologist willing to testify.

Plaintiff nevertheless argues that, despite the unified nature of reading a nuclear stress test, the interpretation of the test can be broken into its component parts and criticized piecemeal. Thus, plaintiff asserts that a nuclear cardiologist is not necessary to criticize the care of another nuclear cardiologist. This approach is exactly what Rule 9(j) and Rule 702 are intended to prevent. It violates the plain language of Rule 702 which requires a specialist with the same subspecialty who is familiar with the procedure. Whether a test conducted by a specialist can be broken into component parts and criticized in this manner itself requires an expert in that field rendering that opinion. It is not something that a court can simply find without expert testimony.

Specifically, plaintiff contends that Dr. Toporoff was willing and qualified to testify as to the EKG portion of the treadmill test. A clinical cardiologist, however, is not qualified to criticize how a nuclear cardiologist should utilize an EKG in isolation from the nuclear images. The majority concedes that Dr. Movahed's involvement in this case was limited to the interpretation of the nuclear stress test only. And, as Dr. Toporoff concedes, the nuclear stress test involves reading together both the treadmill EKG and the nuclear imaging. Therefore, a complete interpretation of a nuclear stress test requires an understanding of the integration of both of these components. If Dr. Toporoff could not testify regarding an essential component of that test, the nuclear images, plaintiff could not reasonably believe his testimony would likely "assist the trier of fact to understand the evidence or to determine a fact in issue" as Rule 702 requires. *See* N.C.G.S. § 8C-1, Rule 702(a). Of course, Dr. Toporoff's own testimony supports this conclusion, as he said he would not feel comfortable testifying even about the EKG portion of the test unless plaintiff retained an expert to testify to the nuclear imaging portion as well. Doctor Toporoff's reluctance to testify on this point goes hand in hand with the unlikelihood of his qualifying to do so; he did not want to testify against Dr. Movahed unless a nuclear cardiologist did as well because, in Dr. Toporoff's words, "I did not want to get into an across-the-table where [Dr. Movahed] is highly competent in that field on paper and I have no business criticizing his summaries."

Finally, Dr. Toporoff was not in a position to testify regarding Dr. Movahed's communication of the nuclear stress test results. For nuclear stress tests, typically the primary care doctor is the one who orders the test, and only does so once he or she rules out acute coronary artery syndrome. The nuclear cardiologist is not present when the nuclear stress test is conducted. The nuclear cardiologist's only role is to later interpret the results of the nuclear stress test, which, as Dr. Movahed

has explained, involves "just sitting in a dark room reading the nuclear." Once he has interpreted the nuclear stress test, which Dr. Toporoff cannot do, the results are communicated to the hospitalist. In this case, consistent with the school's protocol for teaching physicians, he communicated the results of the nuclear stress test to Dr. Joshi while he instructed him on how to interpret the nuclear stress test images. The standard practice, Dr. Movahed explained, is that, as part of the nuclear cardiology training, the fellow communicates the test results to the hospitalist—the physician in charge of the patient. The hospitalist sets up any additional visits and testing with the patient. Doctor Movahed testified that when he communicates his results to the fellow, he typically recommends that, in cases of an abnormality like the decedent's, a CTA be conducted on the patient immediately after discharge from the hospital.

Doctor Toporoff admitted that he is not critical of the role of Dr. Joshi. Thus, if Dr. Toporoff is critical of the method of communication, he is critical of the communication protocol, not of Dr. Movahed. Plaintiff, however, has not put forth evidence that Dr. Toporoff is competent to testify about a nuclear cardiologist's communication protocol in this teaching hospital. Doctor Toporoff has no special knowledge about whether nuclear stress test results should be communicated to a nuclear cardiology fellow, to the hospitalist, or to someone else. It is not enough simply to state that Dr. Toporoff is a cardiologist. At the very least, plaintiff must provide a witness who is familiar with proper communication protocols for nuclear cardiologists operating in the role of teaching physician; and plaintiff did not do so.

Competent evidence thus supports the trial court's conclusion that plaintiff had provided no witness willing to testify against Dr. Movahed and reasonably expected to qualify to do so. Doctor Toporoff, as a clinical cardiologist, was in no place to criticize Dr. Movahed's interpretation of the nuclear stress test or Dr. Movahed's communication of that interpretation. Doctor Movahed is well-versed in a narrow specialty in which Dr. Toporoff does not have experience. Testimony from such a person is of the exact sort the General Assembly hoped to screen out when it enacted Rule 9(j).

The majority goes astray from the very foundation of its analysis because it upends the standard of review this Court established in *Moore*. Its approach places the appellate court into the role of the trial court. If this Court in *Moore* intended the appellate court to review de novo the trial court's dismissal, it would have said so. Indeed, if the majority were right that appellate courts can simply find their own facts to overrule

trial courts' Rule 9(j) decisions, that begs the question of why this Court in *Moore* required trial courts to make factual findings and conclusions of law at all. The appellate courts would only need a trial court record to review.

Instead, *Moore* instructed appellate courts to operate under a deferential standard. It said that in the rare case in which the plaintiff's reliance on disputed or ambiguous evidence was unreasonable, "the [trial] court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination." 366 N.C. at 32, 726 S.E.2d at 818. *Moore*'s approach comports with the underlying intent of Rule 9(j) to screen frivolous and unsupported medical malpractice suits. The rule cannot meaningfully accomplish this purpose unless trial courts may weigh the facts to determine whether the two central requirements of the rule are satisfied.

By upending the *Moore* standard, the majority removes the trial court from its gatekeeping function, reassigning that role to the appellate court, finding its own facts and ignoring the findings and conclusions of the court most suited to make such determinations. Under the proper standard of review, the evidence in this case supports the trial court's findings of fact that in turn support its conclusion that at the time the action was filed, Dr. Toporoff was neither willing to testify against Dr. Movahed nor reasonably expected to qualify to do so.

I respectfully dissent.

RAILROAD FRICTION PRODUCTS CORPORATION
v.
NORTH CAROLINA DEPARTMENT OF REVENUE

No. 278A19

Filed 3 April 2020

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order on petitioner's petition for judicial review entered on 21 February 2019 by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases, in Superior Court, Wake 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 10 March 2020.

Parker Poe Adams & Bernstein LLP, by Kay Miller Hobart, for petitioner-appellant.

Joshua H. Stein, Attorney General, by Matthew W. Sawchak, Solicitor General, Ryan Y. Park, Deputy Solicitor General, Perry J. Pelaez, Special Deputy Attorney General, and Nicholas S. Brod, Assistant Solicitor General, for respondent-appellee.

PER CURIAM.

AFFIRMED.

STATE v. CONLEY

[374 N.C. 209 (2020)]

STATE OF NORTH CAROLINA
v.
ADAM WARREN CONLEY

No. 75PA19

Filed 3 April 2020

Firearms and Other Weapons—possession on school property—multiple weapons—one offense

The Court of Appeals correctly reversed five judgments for possession of firearms on school property and remanded for resentencing where defendant was arrested and charged after one incident on school grounds during which he was in possession of five firearms. Because N.C.G.S. § 14-269.2(b) was ambiguous as to whether multiple convictions were permitted for the simultaneous possession of more than one firearm on a single occasion, under the rule of lenity defendant could be convicted lawfully on only one count.

Justice MORGAN dissenting.

Justice NEWBY joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 from a unanimous decision of the Court of Appeals, 825 S.E.2d 10 (N.C. Ct. App. 2019), reversing judgments entered on 16 August 2017 by Judge Robert T. Sumner in Superior Court, Macon County, and remanding for resentencing. Heard in the Supreme Court on 8 January 2020.

Joshua H. Stein, *Attorney General*, *by John R. Green Jr.*, *Special Deputy Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Emily Holmes Davis*, *Assistant Appellate Defender*, *for defendant-appellee.*

DAVIS, Justice.

Subsection 14-269.2(b) of the North Carolina General Statutes prohibits the possession of firearms on school property. In the present case, defendant Adam Warren Conley was convicted and sentenced on five separate counts for violation of the statute based on an incident in which he was discovered on the grounds of a school in possession of five guns.

Based on our determination that N.C.G.S. § 14-269.2(b) is ambiguous as to whether multiple convictions are permitted for the simultaneous possession of more than one firearm on a single occasion, we conclude that—under the rule of lenity—defendant could only lawfully be convicted on one count. Accordingly, we affirm the decision of the Court of Appeals.

Factual and Procedural Background

On 4 June 2015, a couple who lived on Union School Road in Macon County called the police after hearing several gunshots around 4:40 a.m. and observing two unknown persons walking in their front yard. At approximately 5:15 a.m., Alice Bradley, a school bus driver, was conducting a morning safety check at nearby South Macon Elementary School when she noticed two individuals in the parking lot. The two individuals were later identified as defendant and Kathryn Jeter.

Bradley testified that as she was getting into her car, defendant held up a silver firearm and pointed it at her. The two individuals then began running toward her car. In response, Bradley drove her vehicle in their direction and swerved around them. Defendant and Jeter began walking toward an athletic field behind the school building. When she returned to her bus to radio for help, Bradley noticed that a black bag had been placed on the front seat of the bus.

Deputy Audrey Parrish of the Macon County Sheriff's Office responded to the initial call and began to search for defendant and Jeter on the school grounds. She located the two individuals walking near a fence by an athletic field behind the school and noticed that they were approaching the school building. Deputy Parrish identified herself as a law enforcement officer and ordered defendant and Jeter to stop walking and turn around. Defendant turned toward Deputy Parrish, raised the silver pistol, and pointed it at her. Deputy Parrish heard defendant pull the trigger, but the gun did not fire. At that point, she fled to her car.

Additional law enforcement officers arrived around 5:30 a.m. After a struggle, during which officers had to employ a Taser three times, defendant was taken into custody. As he was being detained, officers observed a silver handgun fall from defendant's waistband to the ground. Officers recovered several other firearms and knives from defendant's person. Ultimately, four firearms and two hunting knives were recovered at the scene. During a subsequent search of the school grounds, law enforcement officers discovered that the black bag that had been placed on Bradley's school bus belonged to defendant and contained an additional .22 caliber pistol.

On 29 June 2015, defendant was indicted by the Macon County grand jury on eleven charges: attempted murder, discharge of a firearm on educational property, assault by pointing a gun, cruelty to animals, possession of a knife on educational property, possession of a firearm in violation of a domestic violence protective order, and five counts of possession of a firearm on educational property.

Defendant was convicted by a jury of one count of attempted first-degree murder, five counts of possession of a gun on educational property, one count of possession of a knife on educational property, one count of cruelty to animals, and one count of assault by pointing a gun. Defendant was sentenced to three consecutive terms of imprisonment: (1) 170 to 216 months for the attempted first-degree murder conviction; (2) a consolidated term of six to seventeen months for three convictions of possession of a firearm on educational property; and (3) a consolidated term of six to seventeen months, suspended for 24 months of probation, for all remaining convictions. Defendant filed an untimely notice of appeal on 31 August 2017. On 27 March 2018, he filed a petition for writ of certiorari with the Court of Appeals, requesting that the court review his convictions despite the fact that his notice of appeal was not timely filed. The Court of Appeals allowed his petition on 19 February 2019.

Before the Court of Appeals, defendant argued, *inter alia*, that the trial court erred by entering judgment on five separate counts of possession of a firearm on educational property, contending that N.C.G.S. § 14-269.2(b) did not clearly authorize the court to enter judgment on multiple counts for the simultaneous possession of more than one firearm. In a unanimous decision, the Court of Appeals held that N.C.G.S. § 14-269.2(b) "is ambiguous as to whether multiple punishments for the simultaneous possession of multiple firearms is authorized." *State v. Conley*, 825 S.E.2d 10, 15 (N.C. Ct. App. 2019). Applying the rule of lenity, the Court of Appeals determined that the statute should be construed as permitting only a single conviction. *Id.* at 14–15. For that reason, the Court of Appeals reversed the judgments and remanded the case to the trial court for resentencing. *Id.* at 15.

The State filed a petition for discretionary review with this Court on 25 March 2019. We allowed the petition on 14 August 2019.

Analysis

The sole issue before us is whether a defendant can lawfully be convicted of more than one count of possession of a firearm on educational

property based on his simultaneous possession of multiple firearms.[1] Subsection 14-269.2(b) of the General Statutes provides as follows:

> It shall be a Class I felony for any person knowingly to possess or carry, whether openly or concealed, *any* gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school.

N.C.G.S. § 14-269.2(b) (2019) (emphasis added). The crux of the dispute in this appeal centers around the use of the phrase "any gun" in the statute—namely, whether the statute's prohibition of possessing or carrying "any gun" on educational property means that separate punishments may be imposed for each gun possessed on a specific occasion or, alternatively, that only a single punishment may be imposed, regardless of the number of guns possessed.

This Court has not previously had occasion to determine this precise issue. The Court of Appeals, however, addressed a similar issue in *State v. Garris*, 191 N.C. App. 276, 663 S.E.2d 340 (2008), which was relied on by the Court of Appeals in reaching its result in the present case.

In *Garris*, the defendant was convicted of two counts of possession of a firearm by a felon after two firearms were simultaneously found on his person. *Id.* at 285, 663 S.E.2d at 348. The relevant statute provided that it was unlawful for any felon to possess "any firearm or any weapon of mass death and destruction." N.C.G.S. § 14-415.1(a) (2007). The Court of Appeals determined that the legislature's use of the phrase "any firearm" was ambiguous because "it could be construed as referring to a single firearm or multiple firearms." *Garris*, 191 N.C. App. at 283, 663 S.E.2d at 346. Thus, the court explained that it was "unclear whether a defendant may be convicted for each firearm he possesses if he possesses multiple firearms simultaneously." *Id.* Noting that "[t]he rule of lenity 'forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention[,]' " *id.* at 284, 663 S.E.2d at 347 (quoting *State v. Boykin*, 78 N.C. App. 572, 577, 337 S.E.2d 678, 681 (1985)), the court in *Garris* concluded that the defendant could be "sentenced only once for possession of a firearm by a felon based on his simultaneous possession of both firearms." *Garris*, 191 N.C. App. at 285, 663 S.E.2d at 348.

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1. Defendant has not challenged the validity of his remaining convictions.

In the present case, based upon our thorough review of the language of N.C.G.S. § 14-269.2(b) and guided by our prior case law, we conclude that the result reached by the Court of Appeals was correct. We believe this conclusion is mandated by our decision in *State v. Smith*, 323 N.C. 439, 373 S.E.2d 435 (1988), in which we engaged in an analogous exercise of statutory interpretation with regard to a statute structurally similar to the one at issue here.

In *Smith*, the defendant, a bookstore clerk, was arrested for selling two obscene magazines and one obscene film to an undercover officer. *Id.* at 440, 373 S.E.2d at 436. The defendant was convicted of three separate violations of N.C.G.S. § 14-190.1(a), which made it unlawful to "sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene." *Id.* at 440–41, 373 S.E.2d at 436 (quoting N.C.G.S. § 14-190.1(a)(1) (1986)). The defendant argued that he could not lawfully be punished for three separate counts of the offense because the statute was ambiguous as to "the allowable unit of prosecution" when multiple obscene items are sold in a single transaction. *Id.* at 441, 373 S.E.2d at 437.

This Court agreed with the defendant's argument, reasoning that because the statute made "no differentiation of offenses based upon the quantity of the obscene items disseminated," an ambiguity existed as to whether the legislature intended to punish a defendant for the dissemination of "each obscene item" or, instead, "intended that a single penalty attach to the unlawful conduct of disseminating obscenity." *Id.* at 441, 373 S.E.2d at 436. Due to the statute's failure to clearly express the General Assembly's intent as to the allowable unit of prosecution, we determined that this ambiguity should be resolved in favor of lenity toward the defendant. *Id.* at 441, 373 S.E.2d at 437.

In so holding, we cited with approval the rule articulated by the United States Supreme Court providing that "if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses." *Id.* at 442, 373 S.E.2d at 437 (quoting *Bell v. United States*, 349 U.S. 81, 83–84, 99 L. Ed. 905, 910–11 (1955)). We further stated that our result was "in accord with the general rule in North Carolina that statutes creating criminal offenses must be strictly construed against the State." *Smith*, 323 N.C. at 444, 373 S.E.2d at 438. Accordingly, because the defendant sold the three prohibited items in a single transaction, we concluded that "a single sale in contravention of G.S. § 14-190.1 does not spawn multiple indictments" and, therefore, the defendant could be convicted of only one count of violating the statute. *Id.*

Although the facts in *Smith* are distinguishable from those of the present case and the convictions there arose under a different statute than the one presently before us, we are nevertheless compelled to apply the same legal principles that we applied in *Smith* in interpreting N.C.G.S. § 14-269.2(b). Because it is clear that N.C.G.S. § 14-269.2(b) shares a parallel structure with the statute at issue in *Smith*, our rationale for applying the rule of lenity in that case applies equally here.

The statute in *Smith* prohibited the dissemination of "*any* obscene writing, picture, record or other representation or embodiment of the obscene." *Smith*, 323 N.C. at 440–41, 373 S.E.2d at 436 (emphasis added) (quoting N.C.G.S. § 14-190.1). Subsection 14-269.2(b) prohibits the possession of "*any* gun, rifle, pistol, or other firearm" on educational property. N.C.G.S. § 14-269.2(b) (emphasis added). Thus, the statutes at issue in both cases contain the word "any" followed by a list of singular nouns in order to enumerate the prohibited items. In both statutes, this grammatical structure could reasonably be construed as referring *either* to a single item or to multiple items.[2] Accordingly, we similarly conclude that the statutory language here is ambiguous as to "the allowable unit of prosecution." *Smith*, 323 N.C. at 441, 373 S.E.2d at 437. Thus, defendant can be convicted of only one violation of N.C.G.S. § 14-269.2(b).

While the State attempts to explain why *Smith* should not control on these facts, we find the State's arguments to be unpersuasive. The State first contends that the legislature's use of the word "any" in N.C.G.S. § 14-269.2(b) is merely intended to encompass the numerous *types* of firearms in existence—making clear that a person cannot possess a firearm on educational property regardless of whether the firearm is a pistol, rifle, shotgun, machine gun, or other type of gun. But the same argument could have been made in *Smith*—that is, the argument that the term "any" in the statutory phrase "any obscene writing, picture, record or other representation or embodiment of the obscene" was intended to cover all obscene materials regardless of the form they took.

Moreover, the State's argument is further refuted by the fact that the phrase "or other firearm of any kind" in N.C.G.S. § 14-269.2(b) already

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2. As the Supreme Court of Alabama has noted, in order to discern the legislature's intent as to the intended unit of prosecution, courts often focus on whether a statute uses the word "any" or the words "a" or "another" to describe the prohibited item. *McKinney v. State*, 511 So. 2d 220, 224–25 (Ala. 1987) (citation omitted). The court elaborated on this point as follows: "How, then, should the unit of prosecution be described so that an intent to allow multiple convictions is clear and unequivocal? Instead of using the word 'any' to describe the unit of prosecution, the singular words 'a' or 'another' should be used." *Id.* at 224 (citation omitted).

conveys the meaning that all types of firearms are encompassed by the statute. Therefore, under the State's argument, the General Assembly's use of either the word "any" or the phrase "or other firearm of any kind" would be merely an act of redundancy. It is a well-established rule of statutory construction 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 . . . did not intend any provision to be mere surplusage." *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) (citations omitted).

Second, the State contends that *Smith* is distinguishable from this case because the statute at issue there dealt with the dissemination, as opposed to the possession, of the enumerated items. However, the fact that N.C.G.S. § 14-190.1(a)(1) concerned the dissemination—rather than the possession—of prohibited items is a distinction without a difference. Our ruling in *Smith* was predicated on the ambiguity of the language contained in the above-referenced portion of the statute rather than on any substantive distinction between the act of disseminating and the act of possessing. An act of possession, like an act of dissemination, may involve either one or multiple items. Just as the obscenity statute in *Smith* "ma[de] no differentiation of offenses based upon the quantity of the obscene items disseminated," *Smith*, 323 N.C. at 441, 373 S.E.2d at 436, subsection 14-269.2(b) likewise makes no differentiation of offenses based on the quantity of firearms possessed.

Third, the State asserts that unlike the relatively modest increase in the amount of harm caused by the dissemination of each additional obscene item in *Smith*, defendant's possession of each additional firearm on school property represents a separate and discrete potential for violence. The State argues that the General Assembly could not have intended that a person who brings five firearms onto school property would receive no greater punishment than an individual who brings only one.

We disagree. Indeed, the question of whether to impose one or multiple punishments under N.C.G.S. § 14-269.2(b) in this context is a quintessential example of a policy decision reserved for a legislative body. Our recognition of the serious danger resulting from the presence of guns on school property does not allow us to usurp the General Assembly's authority to make such policy decisions. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) ("The General Assembly is the 'policy-making agency' because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws."). Once

such a policy decision has been made by the General Assembly and codified by statute, it is the duty of the courts to give meaning to the legislature's clearly stated intent. However, we are unable to discern such an unambiguous expression of intent based on our reading of N.C.G.S. § 14-269.2(b) in its present form.

The dissent asserts that N.C.G.S. § 14-269.2(b) is a unique statute because it transforms what might otherwise be a lawful act—the possession of a firearm—into an unlawful one based solely upon the location where the possession occurs. The dissent takes this as proof that the legislature intended for possession of a gun on school property to generate a heightened degree of concern, thereby rendering this statute deserving of special treatment. The dissent also believes that this location-focused nature of the criminal prohibition on firearms on school property makes N.C.G.S. § 14-269.2(b) distinguishable from the statutes at issue in *Smith* and *Garris*, given that the statutes in those two cases merely imposed generalized bans on possession or dissemination of certain items that applied in any location.

However, the dissent does not explain *why* the location-based nature of the criminal prohibition in N.C.G.S. § 14-269.2(b) renders it materially distinguishable from the obscenity statute at issue in *Smith* for purposes of the rule of lenity's applicability. It is certainly true that the two statutes might have different aims, each seeking to address a distinct type of criminal conduct. But this does not change the key fact that both statutes share the same core ambiguity in that neither one clearly indicates the intended allowable unit of prosecution.

Statutory language is either ambiguous or it is not. Moreover, language that is ambiguous in one statute does not magically shed its ambiguity when used in a second statute just because the evil sought to be addressed in the latter law is deemed to be of greater public concern than that addressed by the former one. We are not permitted to disregard the rule of lenity simply because its application in a particular case may be perceived as inconvenient.

The dissent contends that our analysis neglects the spirit of the law and what it believes was the likely result that the legislature sought to accomplish. But the dissent's subjective belief as to the legislature's intent does not change the fact that there are two reasonable constructions of N.C.G.S. § 14-269.2(b) with regard to the intended allowable unit of prosecution. As a result, this is precisely the type of scenario for which the rule of lenity exists. The statutory language at issue in N.C.G.S. § 14-269.2(b) is ambiguous for the very same reason that the analogous

language in the obscenity statute in *Smith* was held to be ambiguous by this Court. Unless we were to overrule *Smith*—a result that the dissent does not advocate—adherence to our prior decision mandates that we reach the same result here.

Smith stands for the proposition that a statute possessing this same type of structure—i.e., employing the word "any" followed by a list of singular nouns to enumerate the prohibited items—is ambiguous as to the allowable unit of prosecution. Accordingly, we are bound by *Smith* to conclude that this ambiguity triggers the rule of lenity in the present case, and we decline to take the dissent up on its invitation to engage in what would be an act of pure judicial speculation in guessing which interpretation the legislature actually intended.

It is important to emphasize that the General Assembly is, of course, free to amend the language of N.C.G.S. § 14-269.2(b) at any time to allow for multiple punishments when an individual simultaneously possesses more than one firearm on educational property. But any such amendment must unambiguously state a legislative intent to accomplish this result. Given the existing ambiguity in N.C.G.S. § 14-269.2(b), we are required by our prior decision in *Smith* to invoke the rule of lenity and to hold that defendant may be convicted of only a single violation of this statute.[3]

Conclusion

For the reasons stated above, we affirm the decision of the Court of Appeals.

AFFIRMED.

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3. We note that our decision today is consistent with several cases from other jurisdictions similarly holding that multiple punishments are not permitted for a single instance of unlawful possession in violation of a statute that uses the term "any" to describe the items to be prohibited. *See, e.g.*, *United States v. Dunford*, 148 F.3d 385, 390 (4th Cir. 1998) (construing a federal statute prohibiting the possession of "any firearm" by a felon to mean that the defendant's "possession of [ ] six firearms and ammunition, seized at the same time from his house, supports only one conviction"); *State v. Watts*, 462 So. 2d 813, 814–15 (Fla. 1985) (holding that a Florida statute prohibiting inmates from possessing "[a]ny firearm or weapon" on prison grounds permitted a defendant who possessed two knives to be convicted of only one count of the offense).

Justice MORGAN dissenting.

I respectfully dissent from my esteemed colleagues in the majority who, in my view, have mistakenly considered our decision in *State v. Smith*, 323 N.C. 439, 373 S.E.2d 435 (1988) to be controlling authority in the present case. As a result, I am of the opinion that the majority has ignored the presence of clear legislative intent in subsection 14-269.2(b) of the North Carolina General Statutes, misapplied the rule of lenity, and, consequently, reached the unfortunate conclusion that a person who violates the statute by carrying multiple firearms on educational property is subject to only a single conviction for such criminal activity. In my view, such a person presents a significant threat to the sanctity of educational property which is so abhorrent in its potentiality that the imposition of multiple punishments for the offense should be available as warranted. Although the majority finds ambiguity in the plain language of N.C.G.S. § 14-269.2(b), which would inure to the benefit of its violator regarding the administration of punishment for an offense under this law, I would instead hold that N.C.G.S. § 14-269.2(b) permits multiple convictions to be entered against defendant under the facts of this case, wherein defendant carried several firearms on his person and carried a separate firearm that was placed on a school bus. Therefore, I would reverse the decision of the Court of Appeals and reinstate the judgment of the trial court.

"Legislative intent controls the meaning of a statute." *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998) (citation omitted). "To determine legislative intent, a court must analyze the statute as a whole, considering the chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish." *Id.* As this Court explained in *State v. Earnhardt*,

> [w]here [a statute] is clearly worded, so that it is free from ambiguity, the letter of it is not to be disregarded in favor of a mere presumption as to what policy was intended to be declared . . . *But where it admits of more than one construction, or is doubtful of meaning, uncertain, or ambiguous, it is not to be construed only by its exact language, but by its apparent general purpose; that meaning being adopted which will best serve to execute the design and purpose of the act.*

170 N.C. 725, 86 S.E.2d 960, 961 (1915) (emphasis added) (citations omitted). While it is true that a statute creating a criminal offense "must be strictly construed against the State[,]" *Smith*, 323 N.C. at 444, 373 S.E.2d

at 438, "[t]he statute . . . should be construed sensibly, and, in order to make sure of the true intent, the meaning of [the] words or phrases may be extended or narrowed or additional terms implied, or it may be presumed that the [l]egislature intended exceptions to its language, where this is necessary to be done in order to enforce the evident purpose" of the statute. *Earnhardt*, 170 N.C. at 725, 86 S.E.2d at 961. Moreover, "if a literal interpretation of a word or phrase's plain meaning [in a statute] will lead to absurd results, or contravene the manifest purpose of the legislature, as otherwise expressed, *the reason and the purpose of the law shall control*." *State v. Rankin*, 371 N.C. 885, 889, 821 S.E.2d 787, 792 (2018) (emphasis added).

N.C.G.S. § 14-269.2(b) reads, in pertinent part: "It shall be a Class I felony for any person knowingly to possess or carry, whether openly or concealed, *any gun*, rifle, pistol, *or other firearm* of any kind on educational property." N.C.G.S. § 14-269.2(b) (2015) (emphasis added). The only element of N.C.G.S. § 14-269.2(b) that would render unlawful an otherwise lawful ability to possess or carry any gun or other firearm is the inability to legally possess or carry it on educational property. Hence, it is clear that the legislature intended that the presence of any gun or other firearm on educational property generate a heightened degree of concern in comparison to a more generalized type of item, and generate a heightened degree of treatment in comparison to a more generalized type of place where a gun or other firearm is possessed or carried. The obvious legislative intent of this focused statutory enactment is to prevent violence in the schools located in North Carolina. An increase in the number of firearms possessed or carried by a person on educational property begets an increase in the dangers faced by those who learn, teach, administrate, work, or are otherwise found in the facilities of these academic institutions or upon their grounds. In its brief, the State's depiction of each firearm possessed or carried on educational property as "a separate, discrete instrument of death" which affords a potential shooter with the means to minimize a need to reload a firearm or the requisite time to replenish its ammunition is a grim observation of the realities of the existence of N.C.G.S. § 14-269.2(b) and the properness of an interpretation of the statute to allow the prospect of multiple convictions for a violation of the law.

The majority, however, finds ambiguity in the phrase "any gun" as utilized in N.C.G.S. §14-269.2(b) and resolves this ambiguity in favor of lenity toward defendant, concluding that the statute does not authorize the entry of multiple convictions for the simultaneous possession of multiple guns on educational property. My esteemed colleagues of

the majority believe that this conclusion is mandated by our decision in *Smith*, a case in which this Court determined that the rule of lenity prevented a defendant from receiving multiple convictions for the dissemination of multiple items of obscenity in one single sales transaction. *See Smith*, 323 N.C. at 440, 373 S.E.2d at 436. In construing N.C.G.S. § 14-190.1, which established that it is unlawful to disseminate "*any* obscene writing, picture, record or other representation or embodiment of the obscene," we found the principle espoused by the United States Supreme Court in *Bell v. United States*, 349 U.S. 81, 99 L. Ed. 2d 905 (1955) to be persuasive. The principle states that "when the legislature does not clearly express legislative intent, . . . any ambiguity should be resolved in favor of lenity." *Smith*, 323 N.C. at 441, 373 S.E.2d at 437 (citing *Bell*, 349 U.S. at 81, 99 L. Ed. 23 at 905). However, despite the specific strictures of N.C.G.S. § 14-269.2(b), the majority in the instant case nonetheless likens this statute to N.C.G.S. § 14-190.1—the dissemination of obscenity statute addressed in *Smith*—to apply the rule of lenity, due to statutory ambiguity in the absence of an express legislative intent. But in *Smith*, the subject matter of the statute concerned obscenity outlawed generally from being disseminated; here, the subject matter of the statute concerns firearms outlawed specifically from being on educational property. In *Smith*, there was no identifiable purpose to punish more severely the dissemination of individual items of obscenity than the dissemination of a group of items of obscenity as to the commission of one offense, because the harm to society was still quantitatively the same; on the other hand, there is an identifiable purpose to punish more severely the act of possessing or carrying individual firearms than a group of firearms as to the commission of one offense, due to the significant threat of danger to human life which is quantitatively increased by the presence of multiple firearms.

The majority also cites the Court of Appeals decision in *State v. Garris*, 191 N.C. App. 276, 663 S.E.2d 340 (2008) as helpful guidance in this case of first impression in our Court. In *Garris*, the lower appellate court determined that the language of N.C.G.S. § 14-415.1, which makes it unlawful for a person who has been convicted of a felony "to . . . have in his custody, care, or control any *firearm* . . . ," was ambiguous as to whether "the statute would allow for multiple convictions for possession if multiple firearms were possessed, even if they were possessed simultaneously." *Smith*, 323 N.C. at 283, 663 S.E.2d at 346 (quoting N.C.G.S. §§ 14-288.8(c), 14-415.1(a) (2007)). The Court of Appeals held that, under the Court's reasoning in *Bell*, the ambiguity should be resolved in favor of lenity so as to allow the defendant felon in *Garris* to be convicted and sentenced only once for possession of a firearm

by a felon based upon his simultaneous possession of multiple firearms "in the absence of a contrary legislative intent." *Id.* at 284, 663 S.E.2d at 347 (citation omitted). The majority analogizes N.C.G.S. § 14-415.1(a) to N.C.G.S. § 14-269.2(b) and hence applies the rule of lenity, due to statutory ambiguity in the absence of contrary legislative intent. But in *Garris*, the subject matter of the statute had application to a firearm possessed by a felon anywhere; here, the subject matter of the statute has application to a firearm carried or possessed specifically on educational property by anyone. Although the majority in the present case cites *Garris* primarily to support its premise that there is an appellate court consistency in these two case outcomes, I submit that the dominant consistency lies in the majority's automatic association of a criminal statute's provision beginning with the term "any" with the majority's propensity to invoke the rule of lenity in such circumstances, which is compounded in the instant case by the majority's express view that there is no evident expression of legislative intent to authorize multiple punishments for multiple firearms being possessed or carried on educational property in violation of N.C.G.S. § 14-269.2(b).

In stretching the tight confines of the present case in order to capture the generalities afforded by N.C.G.S. § 14-190.1 as construed in *Smith* and N.C.G.S. § 14-415.1 as interpreted in *Garris*, the majority conveniently ignores the clear legislative intent that undergirds N.C.G.S. § 14-269.2(b). It also unduly inflates the similarities between and among the legal authorities upon which it relies in order to rationalize its determination that these cited statutes and cases constitute binding precedent, thus misappropriating the rule of lenity. In relying primarily and heavily upon the doctrine, the majority fails to comport with the guidance provided by the United States Supreme Court in *Callanan v. United States*, 364 U.S. 587, 815 S. Ct. 321, 5 L.Ed. 2d 312 (1961) regarding the correct application of the rule of lenity: "The rule [of lenity] comes into operation at the end of the process of construing what [the legislative body] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. That is not the function of the judiciary." *Id.* at 596, 815 S. Ct. at 326.

The majority notes that "N.C.G.S. § 14-269.2(b) shares a parallel structure to the statute at issue in *Smith*" and is "a structurally similar statute." In its analyses of both *Smith* and *Garris*, which the majority has chosen to serve as precedent for its determination of the instant case, along with the corresponding statutes featured in those appellate cases, it appears that the majority has become so lulled by, and enthralled with, the rhythmic cadence of the structurally similar provisions of N.C.G.S.

§ 14-190.1—"*any* obscene writing . . . ."—and N.C.G.S. § 14-415.1—"*any* firearm"—that the language of N.C.G.S. § 14-269.2(b)—"*any* gun"—is hypnotically viewed through the same lens, even though N.C.G.S. § 14-269.2(b) is more grounded in a specific narrow statutory enactment with clearer legislative intent than the other statutes, which I opine should obviate any perceived statutory ambiguity and eliminate any need to invoke the rule of lenity.

Just as the majority looks to the *Garris* decision of the Court of Appeals to support its determination, I am likewise inclined to cite an opinion, *In re Cowley*, 120 N.C. App. 274, 461 S.E.2d 804 (1995), from our distinguished colleagues of the lower appellate court. In determining in *In re Cowley* that a gun possessed on educational property did not have to be operable in order to violate the "any gun" provision of N.C.G.S. § 14-269.2(b), the Court of Appeals recognized that the General Assembly had already fashioned the statute in such a manner that the court was obliged to take note that "the focus of the statute is the increased necessity for safety in our schools." *Id.* at 276, 461 S.E.2d at 806. In expressly distinguishing N.C.G.S. § 14-269.2(b) from other criminal offense statutes pertaining to firearms such as the offense of possession of a firearm by a felon embodied in N.C.G.S. § 14-415.1(a) and the offense of armed robbery found in N.C.G.S. § 14-87, the unanimous panel of the Court of Appeals in *In re Cowley* expressly noted:

> "Public policy favors that [N.C.G.S.] § 14-269.2(b) be treated differently from the other firearm statutes. The other statutes are concerned with the increased risk of endangerment, while the purpose of [N.C.G.S.] § 14-269.2(b) is to deter students and others from bringing any type of gun onto school grounds."

Id. at 276, 461, S.E.2d at 806.

The majority's pervasive holding that the Court of Appeals is correct in the current case that N.C.G.S. § 14-269.2(b) "should be construed as only permitting a single conviction" is an unfortunate construction of this statute which was clearly intended by the legislature to protect a community of individuals with inherently minimal defenses in the educational setting. In determining that in any and all circumstances, a criminal defendant can only be convicted by the trial court of a single offense under N.C.G.S. § 14-269.2(b)—regardless of the number of guns, rifles, pistols, or other firearms which are knowingly carried on educational property or to a curricular or extracurricular activity sponsored by a school—the majority has prospectively limited a statutory violation

involving multiple firearms in a school setting to merely one firearm conviction for scenarios about the likes of which I shall not speculate. Even here, defendant's placement of a firearm in a black bag, found on a school bus at an elementary school in the early morning hours of a school day, in addition to the multiple firearms that were found on his person, is sufficient to give pause, in my view, to the ramifications of this case's outcome, especially as it impacts the deterrent effects of N.C.G.S. § 14-269.2(b).

In holding that N.C.G.S. § 14-269.2(b) does not allow for the prospect of multiple convictions for the simultaneous possession of multiple guns on educational property, I am of the opinion that this Court's majority has made a determination that contravenes the statute's manifest purpose and defies the legislature's clear intent to protect a vulnerable population from potential school shootings. In doing so, I respectfully consider the majority to have neglected to analyze N.C.G.S. § 14-269.2(b) as a whole in order to consider the chosen words, the spirit of the law, and the objectives that the statute seeks to accomplish.

For the reasons given, I respectfully dissent.

Justice NEWBY joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
CHAD CAMERON COPLEY

No. 195A19

Filed 3 April 2020

Criminal Law—prosecutor's closing argument—reasonable fear and race—prejudice analysis

In a first-degree murder trial, the trial court did not err by overruling defendant's objections to the prosecutor's statements during closing argument regarding race and reasonable fear, where defendant asserted he shot the victim through a window in his house in self-defense. Assuming without deciding that the prosecutor's statements were improper, defendant did not demonstrate prejudice, given the totality of the prosecutor's closing argument (which focused extensively on defendant's lack of credibility as a witness) and in light of the overwhelming evidence presented of defendant's guilt of murder by premeditation and deliberation and/or by lying in wait.

Justice EARLS concurring.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 828 S.E.2d 35 (2019), vacating the judgment entered on 23 February 2018 by Judge Michael J. O'Foghludha in Superior Court, Wake County, and remanding for a new trial. Heard in the Supreme Court on 9 December 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for defendant.

HUDSON, Justice.

Here we must determine whether the Court of Appeals erred by holding that the trial court abused its discretion when it overruled defendant's objections during the prosecutor's closing argument. Because we conclude that the trial court rulings did not constitute prejudicial error, we reverse and remand.

I. Factual and Procedural Background

On 6 August 2016, Jalen Lewis threw a party while his parents were out of town. Lewis lived in Neuse Crossing, a quiet neighborhood in Raleigh with no sidewalks. Defendant lived on the same street, two or three houses down on the same side of the road.

Around midnight, the victim, Kourey Thomas, arrived at Lewis's party with two friends, David Walker and Chris Malone, and parked at the end of the street. Thomas was wearing a red NC State hat and a red shirt.

Some time later, a group of about twenty people arrived at the party. The hosts did not know them and asked them to leave. The group walked uneventfully back to their cars which were parked in front of defendant's house. They stood on the curb discussing where to go next. According to the State's witnesses, no one was being loud or disruptive.

Defendant testified that he was upset from having a bad day. He heard people arguing outside and yelled at them from his window. He yelled, "keep it the f--- down." The group yelled back, "shut the f--- up; f--- you; go inside, white boy." Defendant testified that he saw multiple people in the group with guns. Other witnesses testified that they did not see anyone with a gun at the party. Defendant's two young daughters were in the house.

Defendant called 911. Before the operator answered, defendant was recorded saying "I'm going to kill him." In his testimony, defendant admitted to having falsely reported there were "hoodlums racing up and down the street." He said he was "locked and loaded" and going to "secure the neighborhood." Defendant was not a police officer and there was no neighborhood watch. After the 911 call ended, defendant loaded his gun.

Defendant believed his son was part of the rowdy group outside and went to get him. When he got to his garage, which was furnished like a den, he found his son there. From his garage defendant yelled at the group to "leave the premises."

According to witnesses who were at the scene that night, Kourey Thomas and his friends saw police blue lights from an unrelated traffic stop down the street. Thomas had a weed grinder on his person and did not want any trouble with the police, so he ran from Lewis's house back to his friend's car.[1] He cut across a small part of defendant's yard on the

1. A weed grinder is a hand-held device used to grind cannabis into small bits.

way. Defendant saw a man running in his yard. Thomas was shot before he made it to his car. The force from the shot caused him to fall on the curb next to defendant's mailbox. Someone screamed, "he just shot him through the window!" Defendant's house was dark, his garage was closed, and one of the garage windows was broken. Thomas was African American. Defendant is white.

When Deputy Barry Carroll arrived, he saw a group of ten to fifteen people in the street. He saw broken glass in defendant's driveway from the broken garage door window. When the deputy approached the house, he shined a flashlight into the garage and saw defendant step into the garage from the house. The deputy asked defendant if he shot someone and defendant said he had. The deputy asked where the gun was, and defendant indicated that it was in the house. Defendant let the deputy into his house where the deputy observed a shotgun leaning against a stairwell banister. Defendant indicated that it was the gun he had fired.

Thomas died at the hospital from the gunshot wound. The bullet went through his right arm and entered his right side just below the rib cage.

Defendant was charged with first-degree murder. His case went to trial in February 2018. During closing arguments at trial, the prosecutor made the following statements which are at issue here:

> MR. LATOUR [prosecutor]: I have at every turn attempted to not make this what this case is about. And at every turn, jury selection, arguments, evidence, closing argument, there's been this undercurrent, right? What's the undercurrent? The undercurrent that the defendant brought up to you in his closing argument is what did he mean by hoodlums? I never told you what he meant by hoodlums. I told you he meant the people outside. They presented the evidence that he's scared of these black males. And let's call it what it is. Let's talk about the elephant in the room.
>
> MR. POLK [defense counsel]: Objection.
>
> THE COURT: Overruled.
>
> MR. LATOUR: Let's talk about the elephant in the room. If they want to go there, consider it. And why is it relevant for you? Because we talked about that self-defense issue, right, and reasonable fear. What is a reasonable fear? You get to determine what's reasonable. Ask yourself if Kourey

> Thomas and these people outside were a bunch of young, white males walking around wearing N.C. State hats, is he laying dead bleeding in that yard?
>
> MR. POLK: Objection.
>
> THE COURT: Overruled.
>
> MR. LATOUR: Think about it. I'm not saying that's why he shot him, but it might've been a factor he was considering. You can decide that for yourself. You've heard all the evidence. Is it reasonable that he's afraid of them because they're a black male outside wearing a baseball cap that happens to be red? They want to make it a gang thing. The only evidence in this case about gangs is that nobody knows if anybody was in a gang. That's the evidence. They can paint it however they want to paint it, but you all swore and raised your hand when I asked you in jury selection if you would decide this case based on the evidence that you hear in the case, and that's the evidence. Now, reasonableness and that fear, a fear based out of hatred or a fear based out of race is not a reasonable fear, I would submit to you. That's just hatred. And I'm not saying that's what it is here, but you can consider that. And if that's what you think it was, then maybe it's not a reasonable fear.

The prosecutor continued his closing argument for several more minutes and then the trial judge instructed the jury on the applicable law.

In less than two hours the jury found defendant guilty of first-degree murder by premeditation and deliberation and/or by lying in wait. Defendant appealed his conviction.

Defendant argued that the trial court abused its discretion by failing to sustain his objections to the prosecutor's comments about race during closing argument. The Court of Appeals held that the trial court committed prejudicial error by overruling defendant's objections and by failing to instruct the jury to disregard the prosecutor's comments or to declare a mistrial. The Court of Appeals awarded defendant a new trial. The dissenting judge would have held that the trial court did not abuse its discretion in overruling defendant's objections to the prosecutor's comments in closing argument.

The State now appeals. The issue before us is whether the trial court abused its discretion by overruling defendant's objections to the State's closing argument. We hold that the trial court did not commit prejudicial

error and that the Court of Appeals erred by awarding defendant a new trial.

II. Analysis

"A challenge to the trial court's failure to sustain a defendant's objection to a comment made during the State's closing argument is reviewed for an abuse of discretion . . . ." *State v. Fletcher*, 370 N.C. 313, 320, 807 S.E.2d 528, 534 (2017) (citing *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364, *cert. denied*, 540 U.S. 971, 124 S.Ct. 442, 157 L.Ed. 2d 320 (2003)). "In order to assess whether a trial court has abused its discretion when deciding a particular matter, this Court must determine if the ruling 'could not have been the result of a reasoned decision.' " *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (quoting *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996)).

We conduct a two-part analysis to determine whether the trial court committed prejudicial error in overruling defendant's timely objection to the prosecutor's reference to race during the State's closing argument. *See, e.g.*, *Fletcher*, 370 N.C. at 320, 807 S.E.2d at 534; *Jones*, 355 N.C. at 131, 558 S.E.2d at 106. We " 'first determine if the remarks were improper' and then 'determine if the remarks were of such a magnitude that their inclusion prejudiced [the] defendant.' " *Fletcher*, 370 N.C. at 320, 807 S.E.2d at 534 (quoting *Walters*, 357 N.C. at 101, 588 S.E.2d at 364) (alteration in original). "Assuming that the trial court's refusal to sustain the defendant's objection was erroneous, the defendant must show that there is a reasonable possibility that the jury would have acquitted him had the challenged argument not been permitted." *Fletcher*, 370 N.C. at 320, 807 S.E.2d at 534 (citing *State v. Ratliff*, 341 N.C. 610, 617, 461 S.E.2d 325, 329 (1995)).

Here, we need not conduct the two-part analysis in its entirety. Because we determine that the analysis of prejudice is ultimately dispositive, we focus our attention there. *See State v. Murrell*, 362 N.C. 375, 392, 665 S.E.2d 61, 73 (2008) ("Even assuming, *arguendo*, the impropriety of the prosecutor's reference to Dr. Kramer, defendant has failed to demonstrate prejudice."). *See also State v. Peterson*, 361 N.C. 587, 606–07, 652 S.E.2d 216, 229 (2007) ("Because we assume the argument was improper, we must determine whether the argument prejudiced defendant to the degree that he is entitled to a new trial.").[2] Thus, we

2. In *Peterson*, the State conceded that the Assistant District Attorney's arguments were "excessive and inappropriate." 361 N.C. at 607, 652 S.E.2d at 229. Thus, the Court assumed the statements were improper. *Id.* Here, although the State has not conceded the statements were improper, the prejudice prong is still dispositive.

assume without deciding that the prosecutor's comments about race were improper.

Neither the majority nor the dissenting opinion from the Court of Appeals conducted a complete prejudice analysis. The majority held that the trial court committed prejudicial error by overruling defendant's objections and by failing to instruct the jury to disregard the prosecutor's comments or to declare a mistrial. On that basis, the majority awarded defendant a new trial. The dissenting judge disagreed and would have held that the trial court did not abuse its discretion in overruling defendant's objections to the prosecutor's comments in closing argument; thus, there was no need to address the prejudice issue in the dissent.

The Court of Appeals majority stated the proper standard for review of the closing argument and employed the two-part analysis. However, the prejudice analysis was incomplete. The majority concluded that "[t]he offensive nature of the prosecutor's comments exceeded language that our Supreme Court in *Jones* noted was held to be prejudicial error warranting new trials in past cases." *State v. Copley*, 828 S.E.2d 35, 43 (N.C. Ct. App. 2019).

We conclude that *Jones* did not provide an adequate basis for the Court of Appeals' decision on the prejudice issue. Because the challenged argument in *Jones* took place during the State's closing arguments in the sentencing phase of a death penalty case, we consider it inapposite. In *Jones*, we emphasized:

> in determining prejudice in a capital case, such as the one before us, special attention must be focused on the particular state of the trial. Improper argument at the guilt-innocence phase . . . may not be prejudicial where the evidence of defendant's guilt is virtually uncontested. However, at the sentencing proceeding, a similar argument may in many instances prove prejudicial by its tendency to influence the jury's decision to recommend life imprisonment or death.

355 N.C. at 134, 555 S.E.2d at 108. Here, in the guilt-innocence phase of a non-capital trial, the court must look to the evidence of defendant's guilt as well as to the remainder of the closing argument to determine whether the argument was prejudicial. The context of the argument in *Jones* differs so significantly from the context in which the argument here was made that we conclude it was an improper anchor for the prejudice analysis conducted by the majority below.

The majority below also references the cases we cited in *Jones* as examples of prejudicial closing argument language that we have held warranted new trials in the past. We are not persuaded by the logic of the majority's conclusion that the prosecutor here "exceeded" language we have found to be prejudicial in past cases. The specific language held to have been prejudicial in prior cases does not necessarily define prejudice in the case before us.

We recognize that in *Jones* we did look to language deemed prejudicial in other cases to determine whether the language in *Jones* was prejudicial. In the sentencing phase of a death penalty case, where the jury must determine whether to sentence a defendant to life or death, it may be more appropriate to look to language from other cases. Because the sentencing issues in one capital case may be similar to the sentencing issues in other capital cases, prior determinations of prejudice may be more informative by comparison than they are to the issues here.

However, when analyzing prejudice in the guilt-innocence phase of this trial, we view prejudicial comments from other cases as having less bearing on our prejudice analysis than a comparison with the evidence and context here. Prejudice is not a quantifiable commodity; statements cannot be assigned a number on a scale from which we can determine whether one statement here is more or less prejudicial than one in another case. Rather, the purpose of a prejudice analysis is to determine whether there is a reasonable possibility that the jury would have acquitted defendant had his objection to the State's argument been sustained. It is defendant's burden to show this. *Fletcher*, 370 N.C. at 320, 807 S.E.2d at 534 (citing *Ratliff*, 341 N.C. at 617, 461 S.E.2d at 329).

The Court of Appeals majority below did not analyze whether defendant carried his burden of showing the likelihood that the jury would have reached a different verdict in light of the evidence and other arguments the jury heard. We conclude that the majority's analysis is inadequate to resolve the issue.

In order to determine whether defendant was prejudiced by the prosecutor's language in closing argument, we assess the likely impact of any improper argument in the context of the entire closing. *State v. Thompson*, 359 N.C. 77, 110, 604 S.E.2d 850, 873 (2004) ("[S]tatements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal. Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred.") (quoting *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41, *cert. denied*, 513 U.S. 1046,

115 S.Ct. 642, 130 L.Ed.2d 547 (1994)), *cert. denied*, 546 U.S. 830, 126 S.Ct. 48, 163 L.Ed.2d 80 (2005)).

The primary dispute at trial was over defendant's intent and the validity of his explanation of events on the fateful evening and his statements to investigators thereafter. Defendant himself admitted statement-by-statement on cross-examination that he had not been truthful with investigators. The prosecutor focused on defendant's admitted false statements to investigators in his closing argument. Looking at the closing argument as a whole, the allegedly improper argument was a small part of the prosecutor's much more extensive argument that defendant was not a credible witness, that the State had proven his guilt beyond a reasonable doubt, and that defendant had not acted in self-defense.

We must also look to the evidence presented by the State to determine whether there is a reasonable possibility the jury would have acquitted defendant if the prosecutor's remarks had been excluded. *See State v. Jones*, 355 N.C. at 134, 558 S.E.2d at 108 ("Improper argument at the guilt-innocence phase . . . may not be prejudicial where the evidence of defendant's guilt is virtually uncontested."); *see also State v. Murillo*, 349 N.C. 573, 606, 509 S.E.2d 752, 771 (1998) ("[E]ven assuming *arguendo* that this portion of the argument was improper, it was not prejudicial to defendant in light of the substantial evidence of his guilt.") (citing *State v. Campbell*, 340 N.C. 612, 631, 460 S.E.2d 144, 154 (1995), *cert. denied*, 516 U.S. 1128, 116 S.Ct. 946, 133 L.Ed.2d 871 (1996)).

The trial here extended over two full weeks during which time the jury was selected, listened to testimony from numerous witnesses including defendant himself, and received numerous exhibits. Among the exhibits were photographs of the scene, photographs of the victim's body, and the recording of the defendant's voice on the 911 call.

The State presented the following evidence of first-degree murder by premeditation and deliberation and/or by lying in wait: defendant was recorded saying "I'm going to kill him"; defendant told the 911 operator he was "locked and loaded" and was going to "secure the neighborhood"; defendant loaded his gun and went into his dark, closed garage; Thomas ran through a portion of defendant's yard; Thomas was unarmed, non-threatening, and had no interaction with defendant; defendant fired a shot through the closed garage door; defendant admitted to a deputy that he shot someone and that the gun was his; the shot caused Thomas's death. We conclude all of this was compelling evidence of defendant's guilt of first-degree murder and that the

credibility of defendant's contention to the contrary—i.e. that he acted in self-defense—was substantially impaired.[3]

It is then defendant's burden to show that he was prejudiced by the prosecutor's challenged argument. *Fletcher*, 370 N.C. at 320, 807 S.E.2d at 534 (citing *Ratliff*, 341 N.C. at 617, 461 S.E.2d at 329.). But defendant has failed to provide a persuasive argument that there was a reasonable possibility the jury would have acquitted him in the absence of the prosecutor's comments about race.

Given that the jury found beyond a reasonable doubt that defendant was guilty of first-degree murder based on the evidence it heard, and given defendant's failure to argue persuasively that there is a reasonable possibility that the jury would have acquitted him absent the prosecutor's challenged remarks, we cannot conclude that the inclusion of the remarks prejudiced defendant. Therefore, we are unable to conclude that he is entitled to a new trial.

III. Conclusion

In conclusion, we find that the trial court did not commit prejudicial error by overruling defense counsel's objection during the State's closing argument. Assuming without deciding that the prosecutor's comments about race were improper, we cannot conclude that defendant was prejudiced, given the context of the challenged argument, and the extensive evidence of defendant's guilt. Accordingly, we reverse the Court of Appeals' decision to award a new trial and remand to the Court of Appeals to rule on defendant's remaining arguments on appeal.

REVERSED AND REMANDED.

Justice EARLS concurring.

The trial court did not abuse its discretion in overruling defense counsel's two objections to the prosecution's statements regarding race and reasonable fear as it relates to defendant's claim of self-defense in this case. I write separately to address the issue that the majority

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3. Indeed, the jury convicted defendant of first-degree murder on two theories, premeditation and lying in wait. Although defendant argued to the Court of Appeals that there was insufficient evidence to instruct the jury on the State's theory of lying in wait, this issue is not before us. The dissenting judge would have found that there was sufficient evidence for the jury to convict defendant on the lying in wait theory, but the majority did not reach this issue. On remand, defendant is not precluded from making this argument again.

"assumes without deciding" because it is an issue of importance to our criminal justice system, controlled by our precedent and squarely presented by the facts of this case.

We should not assume a statement is improper when the propriety of the statement is the very heart of what matters to the administration of criminal justice and the jurisprudence of this State. The majority below thought the prosecutor's statements were a "prejudicial appeal to race and the jurors' 'sense of passion and prejudice.' " *State v. Copley*, 828 S.E.2d 35, 45 (N.C. Ct. App. 2019) (quoting *State v. Jones*, 355 N.C. 117, 132, 558 S.E.2d 97, 107 (2002)). The dissent concluded the prosecutor's statements were not an appeal to racial animosity. *Id.* at 46 (Arrowood, J., dissenting). We should decide which view is correct under the law of North Carolina.

The essential question is: was it improper, in light of the evidence in this case, for the prosecutor to argue to the jury that a fear based on race would not be a reasonable fear? That argument was proper in this case for two reasons. First, it was not an appeal to racial animosity. Second, statements made by jurors during jury selection, the evidence here concerning race-based statements made by individuals at the scene, and defendant's assertion of self-defense all combine to suggest that jurors potentially might have been swayed by their own conscious or unconscious racial biases instead of the evidence in the case. In these circumstances the prosecutor properly argued that it would not be reasonable for defendant to fear Kourey Thomas, the victim in this case, if that fear was based on the fact that Kourey Thomas was black.

Explicit appeals by a prosecutor to inflame jurors' racial biases are improper. *State v. Williams*, 339 N.C. 1, 24, 452 S.E.2d 345, 259 (1994) (citing *United States ex rel. Haynes v. McKendrick*, 481 F.2d 152 (2nd Cir. 1973); *State v. Wilson*, 404 So. 2d 968 (La. 1981)). "Official guidelines for prosecutors speak often and decisively against racist appeals. With doctrinal roots in the Constitution and professional ethics, the rule against prosecutorial summoning of 'that thirteenth juror, prejudice' has surfaced in nearly every jurisdiction and has occasioned numerous reversals." Elizabeth L. Earle, Note, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 Colum. L. Rev. 1212, 1213 (1992) (quoting *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 659 (2d Cir.) (Frank, J., dissenting), *cert. denied*, 329 U.S. 742 (1946)). The archetypal appeal to racial bias involves a prosecutor using racial slurs, invoking race-based stereotypes, and referring to black defendants in derogatory racial terms. *See, e.g.*, *Bennett v. Stirling*, 842 F.3d 319, 324 (4th Cir. 2016) (holding improper appeal to

racial prejudice occurred where prosecutor's closing argument in case involving a black defendant "alternated between characterizing [defendant] as a primitive, subhuman species and a wild, vicious animal"); *Wilson*, 404 So. 2d at 970–71 (reversing first-degree murder convictions where prosecutor's closing argument, including referring to the black defendants as animals, was filled with direct and indirect appeals to the racial prejudices of the all-white jury); *State v. Monday*, 171 Wn.2d 667, 678–81, 257 P.3d 551, 557–58 (2011) (reversing conviction where prosecutor questioned witness credibility by arguing to the jury that "black folk don't testify against black folk").

In *Miller v. North Carolina*, the prosecutor in closing argument "ultimately argued that a defense based on consent was inherently untenable because no white woman would ever consent to having sexual relations with a black." 583 F.2d 701, 704 (4th Cir. 1978). This Court affirmed the convictions on the ground that even if the statement was improper, the error was harmless because the evidence against the defendants was overwhelming. *Id.* at 704–05. Noting that "an appeal to racial prejudice impugns the concept of equal protection of the laws," the Fourth Circuit reversed the convictions, holding that "there was prejudicial error of sufficient magnitude that even after a curative instruction there would remain doubt as to whether the prejudice was removed." *Id.* at 706–07. Whether direct racial slurs, or indirect appeals to racial prejudice, when a prosecutor seeks to invoke a jury's racial biases to obtain a conviction, such statements are improper. *See*, *e.g.*, *Monday*, 171 Wn.2d at 678, 257 P.3d at 557 ("Like wolves in sheep's clothing, a careful word here and there can trigger racial bias.").

Equally well established is the principle, followed by this Court in *Williams*, that "[n]onderogatory references to race are permissible, however, if material to issues in the trial and sufficiently justified to warrant 'the risks inevitably taken when racial matters are injected into any important decision-making.' " *Williams*, 339 N.C. at 24, 452 S.E.2d at 259, (quoting *McFarland v. Smith*, 611 F.2d 414, 419 (2nd Cir. 1979)). Indeed, courts routinely endorse a prosecutor's statements inquiring of prospective jurors whether they can fairly judge a black defendant in a case involving a white victim without reference to their own racial biases. *See*, *e.g.*, *Williams*, 339 N.C. at 23–25, 452 S.E.2d at 259–60 (legitimate to make nonderogatory references to race to ensure that racially biased prospective jurors were not seated on the jury); *see also Turner v. Murray*, 476 U.S. 28, 35–36 (1986) (inquiry into racial bias of jurors important because it is possible "for racial prejudice to operate but remain undetected," particularly in capital trials); Debra T. Landis,

Annotation, *Prosecutor's Appeal in Criminal Case to Racial, National, or Religious Prejudice as Ground for Mistrial, New Trial, Reversal, or Vacation of Sentence -- Modern Cases*, 70 A.L.R.4th 664 (1991) (collecting cases). *Cf.* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit bias in a Not Yet Post-Racial Society*, 91 N.C. L. Rev. 1555, 1563 (2013) (stating that studies indicate "making race salient or calling attention to the operation of racial stereotypes encourages individuals to suppress what would otherwise be automatic, stereotype-congruent responses and instead act in a more egalitarian manner. … [W]hen race is made salient, individuals tend to treat White and Black defendants the same."); Gary Blasi, *Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*, 49 UCLA L. Rev. 1241, 1277 (2002) (stating that studies "suggest that there is good reason explicitly to instruct juries in every case, stereotype-salient or not, about the specific potential stereotypes at work in the case").

Also permissible is a prosecutor's argument that the defendant or perpetrator acted out of racial motivations, particularly where a racially-motivated hate crime is at issue but generally in any case where there is some evidence to suggest that race-based animus was a motive or factor in the crime. *See State v. Diehl*, 353 N.C. 433, 436, 545 S.E.2d 185, 187 (2001) ("Although it is improper gratuitously to interject race into a jury argument where race is otherwise irrelevant to the case being tried, argument acknowledging race as a motive or factor in a crime may be entirely appropriate."); *State v. Moose*, 310 N.C. 482, 492, 313 S.E.2d 507, 515 (1984) (white defendant's reference to African-American victim as a "damn nigger," and evidence that victim was driving through a white community, sufficient to support prosecutor's jury argument that murder was, in part, racially motivated).

Therefore, our caselaw has a two-part standard for evaluating the propriety of a prosecutor's statements referencing race. The first part of the inquiry is whether the statements are directly or indirectly an appeal based on derogatory racial stereotypes that seeks to encourage a jury to make a decision based on their own racial biases. If so, the statements are improper.

If the statements are not an appeal to racial animus in some form, blatant or subtle, the second part of the inquiry is whether a neutral or non-derogatory reference to race bears any material relevance to the facts of the case being tried. Such statements may be relevant because of the facts and circumstances of the crime, or because of facts that suggest a racial motivation on the part of the defendant, or both. If a prosecutor's

statements are ultimately found to be improper, the question remains whether the error in allowing those statements was harmless.

In addition to cases like *Williams*, where it was held to be permissible for a prosecutor to refer to race when seeking to ensure that jurors will not allow racial biases to infect their consideration of the evidence, an example of a non-derogatory reference to race that is not related to motive but nonetheless permissible is found in *State v. Barden*, 356 N.C. 316, 572 S.E.2d 108 (2002). In *Barden*, this Court held that it was proper for a prosecutor to refer to a victim's race in a non-derogatory fashion during closing argument. We held there that the prosecutor's references to the victim's race and national origin were permissible because they "were not designed to generate an issue of race in the trial. Instead, the prosecutor sought to remind the jury of the victim's humanity and to point out that, despite the victim's unexalted social status and modest economic means, his murder was as consequential as the killing of any other mortal." *Barden*, 356 N.C. at 365, 572 S.E.2d at 139 (citation omitted). *See also State v. Robinson*, 336 N.C. 78, 130, 443 S.E.2d 306, 332 (1994) (permissible for prosecutor in closing to argue that being black and poor was not the cause of defendant's criminal behavior and should not serve as an excuse). An example of permissible references to race related to defendant's motive is found in *Moose*, where this Court held that the prosecutor's repeated references to the victim as an "old black gentleman" and a "black man" were proper because the evidence was sufficient to raise an inference that his murder was, in part, racially motivated. *Moose*, 310 N.C. at 492, 313 S.E.2d at 515.

The record in this case shows that the prosecutor's references to race in his closing argument were non-derogatory, and that they were intended to ensure that the jury did not allow implicit stereotypes about the dangerousness of young black men to infect their determination of whether defendant established that he had a reasonable fear and acted lawfully in self-defense. In these circumstances, the statements were proper.

The majority details the statements made by the prosecutor that defendant objected to at trial. Those statements do not involve racial slurs nor do they attempt to inflame the jurors' passions or prejudices against black males. Equally, those statements are not derogatory towards white males like defendant in this case. The prosecutor did not use references to animals or animalistic behavior on anyone's part, and, unlike *State v. Jones*, 355 N.C. 117, 558 S.E.2d 97 (2002), relied on by the majority in the Court of Appeals, the prosecutor did not refer to

other high-profile cases with analogous facts. The prosecutor did not attempt to link this case to the Trayvon Martin case or any other tragic case involving white men who have killed unarmed young black men. The prosecutor's argument did not involve derogatory references to race intended to invoke or inflame race-based animus in order to secure a conviction.

The remaining inquiry under our precedents is whether the statements were relevant to the facts of the case. In this case, the prosecutor's statements were relevant because jurors themselves had raised the issue of race during jury selection, defendant testified that the men outside his house had used racially charged language, and defendant asserted self-defense. The very first mention of any race-related aspect of this case came during jury selection when defendant's counsel asked a prospective juror "do you remember anything about comparisons to the famous George Zimmerman case in Florida?" At that point the prosecutor objected and the trial court sustained the objection.

Later during defense counsel's questioning of another prospective juror,[1] the prospective juror remarked that defense counsel had earlier "mentioned Zimmerman" and "the Trayvon Martin situation" and asked if this case involves race, to which defense counsel ambiguously replied "yeah." Defense counsel inquired further as to whether the prospective juror followed the case. When counsel asked what opinions the prospective juror had formed regarding our legal system in the aftermath of that case, the prosecutor objected and the trial court sustained the objection. Later during voir dire, the same prospective juror again brought up the Trayvon Martin case, its similarity to this case, and his feeling that justice did not prevail in that case. Thus, during jury selection, defense counsel and a prospective juror raised the "elephant in the room" relating to how attitudes about race and self-defense might impact the jury's deliberations in this case.

Defendant testified that after he yelled out his upstairs window to the group below, they yelled back at him, saying "go inside, white boy," and "things of that nature". The defense in this case turned on whether defendant was justified in shooting Kourey Thomas. Therefore, defendant's claim of self-defense required the jury to determine the reasonableness of defendant's fear that his life was in danger. It was proper and permissible for the prosecutor to urge the jury not to allow any racial

1. This prospective juror, Mr. Thompson, was later excused by defendant. However, six jurors who did serve on the jury were seated and present at the time of the most extensive discussion.

considerations or stereotypical assumptions about young black men to impact their ultimate decision about what was reasonable fear in these circumstances. Indeed, the prosecutor was trying to make sure the jury would make their decision based only on the evidence in the case.

The prosecutor's statements regarding race in his closing argument were not derogatory. Because the statements were relevant to the evidence in the case and the central issue of self-defense, they were proper. I concur in the majority's conclusion that this matter should be remanded for further consideration of the other errors raised by defendant that were addressed by the dissent below but not by the majority.

STATE OF NORTH CAROLINA
v.
KENNETH VERNON GOLDER

No. 79PA18

Filed 3 April 2020

1. Appeal and Error—plain error review—instructional and evidentiary errors in criminal cases—not sufficiency of the evidence

The Court of Appeals' statement that "defendant has not argued plain error" did not amount to announcement of a new rule that sufficiency of the evidence issues could be reviewed under the plain error standard. The Supreme Court reiterated that plain error applies to unpreserved instructional and evidentiary errors in criminal cases and that Appellate Procedure Rule 10(a)(3) governs the preservation of sufficiency of the evidence issues, to the exclusion of plain error review.

2. Appeal and Error—preservation of issues—challenges to sufficiency of the evidence—criminal cases

Defendant preserved each of his challenges to the sufficiency of the State's evidence—regarding aiding and abetting and obtaining a thing of value—by making a motion to dismiss at the close of the State's evidence and again at the close of all evidence in accordance with Appellate Rule 10(a)(3). The Supreme Court emphasized that merely moving to dismiss at the proper time in a criminal case under Rule 10(a)(3) preserves *all* sufficiency of the evidence issues, and the Court overruled a line of Court of Appeals cases that attempted

to categorize motions to dismiss based on the specificity of the motions.

3. Aiding and Abetting—elements—sufficiency of evidence—falsification of court documents

The State presented sufficient evidence that defendant aided and abetted a county clerk's office employee in a scheme to falsify court documents to secure remission of bail bond forfeitures where defendant met with the clerk's office employee and agreed to participate in the scheme, sent text messages instructing him to enter the fraudulent motions, and paid him for entering the motions. Defendant failed to support his argument that distinct evidence was required to satisfy each element of aiding and abetting.

4. False Pretense—sufficiency of evidence—attempt to obtain any thing of value—forfeited bail bonds

The State presented sufficient evidence to convict defendant of obtaining property by false pretenses where defendant attempted to reduce the amount that his bail bond company was required to pay as surety for forfeited bonds—a "thing of value" under N.C.G.S. § 14-100—by participating in a scheme in which he directed a county clerk of court employee to falsify court documents.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 257 N.C. App. 803, 809 S.E.2d 502 (2018), affirming judgments entered on 12 October 2015 by Judge Henry W. Hight Jr. in the Superior Court, Wake County. On 9 May 2019, the Supreme Court allowed the State's conditional petition for discretionary review. Heard in the Supreme Court on 9 December 2019.

Joshua H. Stein, Attorney General, by Michael T. Henry, Assistant Attorney General, for the State-appellee.

Anne Bleyman for defendant-appellant.

Glenn Gerding, Appellate Defender; and Southern Coalition for Social Justice, by John F. Carella and Ivy A. Johnson, for North Carolina Advocates for Justice, amicus curiae.

HUDSON, Justice.

Pursuant to petitions for discretionary review filed by defendant and the State, we review the following issues: (1) whether the Court

of Appeals erred in holding that defendant failed to preserve his challenges to the sufficiency of the State's evidence; (2) whether the State presented sufficient evidence that defendant aided and abetted another; and (3) whether the State presented sufficient evidence that defendant obtained a thing of value to support his obtaining property by false pretenses conviction. We conclude that defendant did preserve his challenges to the sufficiency of the evidence for appeal. However, because we conclude that the State presented sufficient evidence that defendant aided and abetted another and that he obtained a thing of value, we modify and affirm the decision of the Court of Appeals.

Factual and Procedural Background

On 25 February 2014, the Wake County grand jury returned a bill of indictment charging defendant with (1) obtaining property worth over $100,000 by false pretenses in violation of N.C.G.S. § 14-100; (2) accessing a government computer in violation of N.C.G.S. § 14-454.1; (3) altering court records in violation of N.C.G.S. § 14-221.2; (4) a misdemeanor bail bond violation under N.C.G.S. § 58-71-95; and (5) a misdemeanor for performing bail bonding without being qualified and licensed under N.C.G.S. § 58-71-40. The indictment arose from allegations that defendant and Kevin Ballentine, a public employee with the Wake County Clerk's Office, devised a scheme in which defendant would pay Ballentine to alter or falsify court documents to secure remission of bail bond forfeitures.

Before we summarize the evidence presented at trial, we briefly outline the statutory bail bond forfeiture procedures. Specifically, if a defendant is released on a bail bond under Chapter 15A, Article 26 of the General Statutes and "fails on any occasion to appear before the court as required, the court shall enter a forfeiture for the amount of that bail bond in favor of the State against the defendant and against each surety on the bail bond." N.C.G.S. § 15A-544.3(a) (2017). For purposes of this case, a surety on a bail bond includes a " 'Professional bondsman' mean[ing] any person who is approved and licensed by the Commissioner of Insurance under Article 71 of Chapter 58 of the General Statutes" and who provides cash or approved securities to secure a bail bond. N.C.G.S. § 15A-531(7)–(8) (2017); *see also id.* § 15A-531(8) (" 'Surety' means . . . insurance compan[ies], . . . professional bondsm[e]n, . . . [and] accommodation bondsmen."). The defendant and the sureties are notified of the entry of forfeiture by receiving a copy of the forfeiture by first-class mail. *Id.* § 15A-544.4(a)–(b) (2017). Importantly, the entry of forfeiture must contain "[t]he date on which the forfeiture will become a final judgment . . . if not set aside before that date." *Id.* § 15A-544.3(b)(8).

Under certain exclusive, statutorily-enumerated circumstances, an entry of forfeiture may be set aside, including by motion of either the defendant or a surety. N.C.G.S. § 15A-544.5 (b), (d) (2017); *see also id.* § 15A-544.5(c) (allowing relief from an entry of forfeiture in the event that the trial court enters an order striking the defendant's failure to appear). If neither the district attorney nor the county board of education files a written objection to the motion to set aside "by the twentieth day after a copy of the motion is served by the moving party[,] . . . the clerk shall enter an order setting aside the forfeiture, regardless of the basis for relief asserted in the motion, the evidence attached, or the absence of either." *Id.* § 15A-544.5(d)(4).

The evidence at trial here tended to show that Ballentine, who worked for the Wake County Clerk's Office in various capacities from 1999 until 2013, was involved in a scheme with defendant to exploit the automatic set-aside provision under N.C.G.S. § 15A-544.5(d)(4) in exchange for cash. Ballentine understood defendant to be working in the bail bond industry. Evidence produced at trial tended to show that defendant was not a licensed bail bondsman. Ballentine testified that the scheme began in 2006 or 2007 and continued until 2012. During that period, through text messages, defendant sent Ballentine lists with the names and file numbers of cases in which a bond forfeiture had been entered. After receiving a list of cases from defendant, Ballentine would enter a motion to set aside the bond forfeiture for each of the cases into the Wake County Clerk's Office's electronic records system, known as VCAP. Because no motion had actually been filed in the case by the parties, neither the district attorney nor the county board of education would receive notice of the motion and were without an opportunity to object. Therefore, after twenty days, the bond forfeiture would automatically be set aside. *See* N.C.G.S. § 15A-544.5(d)(4). As a result, defendant's bail bonding company would not be required to pay the bond as it otherwise would have been required to do if the forfeiture remained in effect.

In exchange for entering the motions to set aside into VCAP, defendant would pay Ballentine $500 for each list of cases. Ballentine testified that he received payment "normally once every other week" while he and defendant carried out this scheme. The payments were made in cash either by defendant leaving an envelope with the payment in Ballentine's truck, or meeting Ballentine in person. Ballentine ended his arrangement with defendant in November of 2012. Ballentine was eventually terminated from his position at the Wake County Clerk's Office as a result of his involvement in the scheme with defendant, as well as other similar schemes. In September of 2013, he began cooperating

with the State Bureau of Investigation concerning his involvement in the schemes.

At the close of the State's evidence at trial, defendant moved to dismiss. In moving to dismiss, defense counsel stated the following:

> Your Honor, at this time we certainly would like to make our motion to dismiss. As we are all aware, following the State's case in chief, this is our time to make such a motion.
>
> In giving the State the benefit of all reasonable inferences, we are quite confident that several of these charges should be dismissed, if not all, immediately.

Defense counsel then went on to address the individual charges, but did not specifically argue that the State failed to present sufficient evidence that defendant aided and abetted Ballentine in obtaining property by false pretenses, accessing a government computer, or altering court records. Defense counsel did, however, challenge defendant's obtaining property by false pretenses charge on the basis of several specific grounds. Defense counsel argued that the State's evidence was insufficient to prove that defendant obtained (1) a thing of value, because, at the time that Ballentine entered the motions to set aside the bond forfeitures, the prejudgment notice of forfeiture did not entitle the Wake County school board to an immediate interest in the bond amount; and (2) $100,000 worth of property. The trial court denied defendant's motion to dismiss. Defendant then presented evidence and testified on his own behalf.

At the close of all evidence, defendant again moved to dismiss the charges in open court. In making this motion, defense counsel stated that "[a]t this time we would certainly like to reiterate or readdress our motions . . . to dismiss." Defense counsel then went on to repeat defendant's earlier argument against his obtaining property by false pretenses charge, asserting that the State did not present sufficient evidence that defendant obtained property with a value of $100,000 or more. However, defense counsel did not specifically argue—as defense counsel did in the first motion to dismiss—that the State failed to prove that defendant obtained a thing of value. The trial court again denied defendant's motion to dismiss.

The jury then found defendant guilty of (1) obtaining property worth less than $100,000 by false pretenses; (2) accessing a government computer; (3) altering court records; and (4) unlicensed bail bonding. The trial court sentenced defendant to consecutive terms of imprisonment

totaling thirty-five to forty-three months for obtaining property by false pretenses, accessing a government computer, and altering court records. Defendant received an additional consecutive forty-five-day sentence as a result of his misdemeanor unlicensed bail bonding conviction. Defendant was also ordered to pay $480,100 in restitution. Defendant appealed his convictions to the Court of Appeals.

At the Court of Appeals, defendant argued, in pertinent part, that the State failed to present sufficient evidence that he (1) aided and abetted Ballentine in committing the felonies of obtaining property by false pretenses, accessing a government computer, or altering court records; and (2) obtained a thing of value, as required under the obtaining property by false pretenses statute. In support of his argument that the State failed to present sufficient evidence that he obtained anything of value, defendant repeated the same argument made by defense counsel to the trial court in the first motion to dismiss. Specifically, defendant argued that, at the time the false representations were made, neither the State nor the Wake County school board was entitled to an "immediate interest" in the bond amount.

The Court of Appeals disagreed, concluding that defendant waived his challenge to the sufficiency of the State's evidence of aiding and abetting "[b]ecause [d]efendant made several specific arguments when moving the trial court to dismiss certain charges, but did not challenge the State's aiding and abetting theory." *State v. Golder*, 257 N.C. App. 803, 811, 809 S.E.2d 502, 508 (2018). With regard to defendant's argument that the State's evidence was insufficient to prove that he obtained a thing of value, the Court of Appeals concluded that defendant waived his right to appellate review. *Id.* at 813–14, 809 S.E.2d at 508–09. Specifically, the Court of Appeals recognized that defense counsel argued in the first motion to dismiss "that elimination of contingent future interest in property does not fulfill the obtaining 'property' requirement." *Id.* at 813, 809 S.E.2d at 509. However, the Court of Appeals then reasoned that the second motion to dismiss, in which defense counsel only argued "that the dollar amount attributed to the thing of value obtained was less than alleged in the indictment, [ ] narrowed the scope of his objection, and that objection is all that would be reviewable by this Court." *Id.* at 813, 809 S.E.2d at 509. Accordingly, the Court of Appeals concluded that the only issue that was presented for review was the actual value of the property obtained and "[d]efendant [could not] argue [on appeal] that the evidence was insufficient because there was *no* thing of value." *Id.* at 813, 809 S.E.2d at 509.

We conclude that defendant preserved each of his challenges to the sufficiency of the evidence. However, because we conclude that the State presented sufficient evidence that defendant aided and abetted Ballentine, and that he obtained a thing of value, we modify and affirm the decision of the Court of Appeals.

Analysis

I. Plain error

[1] In defendant's petition for discretionary review, he requested that we review the issue of "[w]hether the Court of Appeals erred in announcing a new rule that the sufficiency of the evidence could be reviewed on appeal for plain error." Because the Court of Appeals did not actually announce a new rule that the sufficiency of the evidence can be reviewed for plain error, we conclude that the Court of Appeals did not err on this issue.

A. Standard of Review

"This Court reviews the decision of the Court of Appeals to determine whether it contains any errors of law." *State v. Melton*, 371 N.C. 750, 756, 821 S.E.2d 424, 428 (2018) (citing N.C. R. App. P. 16(a); *State v. Mumford*, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010)).

B. Discussion

We conclude that the Court of Appeals did not err because the court did not announce a new rule that sufficiency of the evidence issues can be reviewed under the plain error standard of review. Instead, the Court of Appeals merely recited Rule 10(a)(4) of the North Carolina Rules of Appellate Procedure and noted that "[d]efendant has not argued plain error." *Golder*, 257 N.C. App. at 811, 809 S.E.2d at 508. We do not interpret the court's statement that defendant did not argue plain error as the pronouncement of a new rule governing appellate review. However, we take this opportunity to reiterate that "[a]n appellate court will apply the plain error standard of review to unpreserved instructional and evidentiary errors in criminal cases." *State v. Maddux*, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018) (citing *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012)). Further, this Court has expressly held that Rule 10(a)(3) (previously codified at Rule 10(b)(3)) governs the preservation of a sufficiency of the evidence issue, to the exclusion of plain error review. *See State v. Richardson*, 341 N.C. 658, 676–66, 462 S.E.2d 492, 504 (1995).

Because the Court of Appeals did not announce a new rule allowing for plain error review of sufficiency of the evidence issues, we conclude that the court did not err.

II. Preservation

[2] We conclude that defendant preserved each of his challenges to the sufficiency of the State's evidence with regard to both (1) the State's theory that he aided and abetted Ballentine in committing the offenses; and (2) that he obtained a thing of value. As discussed below, Rule 10(a)(3) of the Rules of Appellate Procedure provides that when a defendant properly moves to dismiss, the defendant's motion preserves all sufficiency of the evidence issues for appellate review. The Court of Appeals' conclusion to the contrary relied on (1) inapposite case law from our Court; and (2) a line of cases in which the Court of Appeals misinterpreted the extent to which a defendant's motion to dismiss preserves sufficiency of the evidence issues for appellate review.

A. Standard of Review

The standard of review for this issue is the same as the last issue.

B. Discussion

We conclude that defendant properly preserved each of his challenges to the sufficiency of the State's evidence for appellate review.

Rule 10(a)(3) of the North Carolina Rules of Appellate Procedure provides that, in a criminal case, to preserve an issue concerning the sufficiency of the State's evidence, the defendant must make "a motion to dismiss the action . . . at trial." N.C. R. App. P. 10(a)(3). Rule 10(a)(3) also provides that:

> If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, defendant's motion for dismissal . . . made at the close of [the] State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

Id.

However, although Rule 10(a)(3) requires a defendant to make a motion to dismiss in order to preserve an insufficiency of the evidence issue, unlike Rule 10(a)(1)–(2), Rule 10(a)(3) does not require that the defendant assert a specific ground for a motion to dismiss for

insufficiency of the evidence. *Id.*; *compare* N.C. R. App. P. 10(a)(3) *with* N.C. R. App. P. 10(a)(1)–(2) (requiring, as a general rule, that a defendant state the "grounds" for an objection, particularly when objecting to a jury instruction).

Accordingly, our Rules of Appellate Procedure treat the preservation of issues concerning the sufficiency of the State's evidence differently than the preservation of other issues under Rule 10(a). By not requiring that a defendant state the specific grounds for his or her objection, Rule 10(a)(3) provides that a defendant preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time.

This interpretation of Rule 10(a)(3) is consistent with this Court's recognition that a motion to dismiss places an affirmative duty upon the trial court to determine whether, when taken in the light most favorable to the State, there is substantial evidence for every element of each charge against the accused. *See State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016) ("In ruling on a motion to dismiss, 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." (quoting *State v. Hill*, 365 N.C. 273, 275, 715 S.E.2d 841, 842–43 (2011))); *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980) ("In considering a motion to dismiss, it is the duty of the court to ascertain whether there is substantial evidence of each essential element of the offense charged." (quoting *State v. Allred*, 279 N.C. 398, 183 S.E.2d 553 (1971))); *State v. Stephens*, 244 N.C. 380, 383, 93 S.E.2d 431, 433 (1956) (". . . the trial court must determine whether the evidence taken in the light most favorable to the State is sufficient to go to the jury. That is, whether there is substantial evidence against the accused of every essential element that goes to make up the offense charged."). Because our case law places an affirmative duty upon the trial court to examine the sufficiency of the evidence against the accused for every element of each crime charged, it follows that, under Rule 10(a)(3), a defendant's motion to dismiss preserves all issues related to sufficiency of the State's evidence for appellate review.

Here, defendant made a proper motion to dismiss at the close of the State's evidence. Then, after defendant presented evidence, he made another motion to dismiss at the close of all evidence as required under Rule 10(a)(3). N.C. R. App. P. 10(a)(3). We hold that, under Rule 10(a)(3) and our case law, defendant's simple act of moving to dismiss at the proper time preserved all issues related to the sufficiency of the evidence for appellate review.

The Court of Appeals erred to the extent that it held that defendant (1) waived appellate review of the sufficiency of the State's evidence that he aided and abetted Ballentine by not specifically making that argument to the trial court; and (2) narrowed the scope of appellate review of the sufficiency of the State's evidence for his obtaining property by false pretenses conviction with the argument he made in his second motion to dismiss. *Golder*, 257 N.C. App. at 811, 809 S.E.2d at 508.

In reaching its conclusion that defendant waived appellate review of the sufficiency of the State's evidence that he aided and abetted Ballentine, the Court of Appeals relied on inapposite case law from this Court. Before discussing the decision of the Court of Appeals, we note that the State points to our decision in *State v. Benson*, in which we held that in moving to dismiss, the party must argue a specific insufficiency of the evidence issue in order to preserve that issue for appellate review. 234 N.C. 263, 264, 66 S.E.2d 893, 894 (1951). In *Benson*, this Court concluded that although "[t]he defendant entered a general demurrer to the evidence and moved to dismiss," the general demurrer did not "present for decision the question [of] whether there was any sufficient evidence to support the count charging a conspiracy." 234 N.C. at 264, 66 S.E.2d at 894. We stated that "[i]f defendant desired to challenge the sufficiency of the evidence to establish a conspiracy, he should have directed his motion to that particular count." *Id.* at 264, 66 S.E.2d at 894.

However, *Benson* predated the Rules of Appellate Procedure and is now directly contrary to Rule 10(a)(3), which contains no requirement that a defendant state a specific ground to preserve an insufficiency of the evidence issue. *See* N.C. R. App. P. 10(a)(3) (first adopted in 1975). Accordingly, *Benson* is overruled to the extent that it is contrary to Rule 10(a)(3).

Turning to the decision of the Court of Appeals, the court heavily relied on our decision in *State v. Eason* for the proposition that "[i]n order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *Golder*, 257 N.C. App. at 811, 809 S.E.2d at 507–08 (quoting *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991)). However, *Eason* applied then Rule 10(b)(1) of the Rules of Appellate Procedure, later recodified as Rule 10(a)(1). *See* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party 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.").

As discussed above, issue preservation under Rule 10(a)(3) is not the same as preservation under Rule 10(a)(1), because Rule 10(a)(3) does not require that a defendant advance a specific ground for a motion to dismiss in order to preserve all challenges to the sufficiency of the evidence for appellate review. *Compare* N.C. R. App. P. 10(a)(1) *with* N.C. R. App. P. 10(a)(3). Accordingly, the Court of Appeals erred by relying on *Eason* to improperly insert the "specific grounds" requirement under Rule 10(a)(1) into Rule 10(a)(3).

Moreover, in holding that defendant waived appellate review of whether the State's evidence was sufficient to prove that he aided and abetted Ballentine, the Court of Appeals improperly relied on our decision in *State v. Garcia* for the proposition that "[m]atters that are not raised and passed upon at trial will not be reviewed for the first time on appeal." *Golder*, 257 N.C. App. at 811, 809 S.E.2d at 508 (quoting *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004)). *Garcia* involved the question of whether a constitutional issue had been preserved for review, not a challenge to the sufficiency of the evidence presented at trial. *See Garcia*, 358 N.C. at 410, 597 S.E.2d at 745 ("It is well settled that *constitutional matters* that are not 'raised and passed upon' at trial will not be reviewed for the first time on appeal." (emphasis added)) (citing *State v. Watts*, 357 N.C. 366, 372, 584 S.E.2d 740, 745 (2003); N.C. R. App. P. 10(b)(1) (later recodified as Rule 10(a)(1))). It was error for the Court of Appeals to rely on a rule that specifically applies to the preservation of constitutional issues in denying defendant appellate review of the insufficiency of the evidence issue.

In reaching its conclusion that defendant waived appellate review of whether the State's evidence was sufficient to prove that he obtained something of value, the Court of Appeals relied on its own case law which has erroneously narrowed the scope of review preserved by a defendant's motion to dismiss. Specifically, the Court of Appeals relied on its opinion in *State v. Walker* to support its conclusion that defendant narrowed the scope of appellate review of his challenge to the sufficiency of the State's evidence to support his obtaining property by false pretenses charge in his second motion to dismiss. *Golder*, 257 N.C. App. at 813, 809 S.E.2d at 509 ("As in *Walker*, [d]efendant 'failed to broaden the scope of his motion when he renewed it following the close of all the evidence,' and therefore 'failed to preserve the issue[ ] of the sufficiency of the evidence as to the other elements of the charged offense[ ] on appeal.' " (quoting *State v. Walker*, 252 N.C. App. 409, 413, 798 S.E.2d 529, 532 (2017))).

Walker is one case in a line of cases in which the Court of Appeals has viewed a defendant's motion to dismiss as falling under one of three categories: (1) a "general," "prophylactic" or "global" motion, which preserves all sufficiency of the evidence issues for appeal; (2) a general motion, which preserves all sufficiency of the evidence issues for appeal, even though a defendant makes a specific argument as to certain elements or charges; and (3) a specific motion, which narrows the scope of appellate review to only the charges and elements that are expressly challenged. *See Walker*, 252 N.C. App. at 411–412, 798 S.E.2d at 530–31 ("In *State v. Chapman*, this Court applied the 'swapping horses' rule to a scenario in which the defendant argued before the trial court that the State presented insufficient evidence as to one element of a charged offense, and on appeal asserted the State presented insufficient evidence as to a different element of the same charged offense. . . . A general motion to dismiss requires the trial court to consider the sufficiency of the evidence on all elements of the challenged offenses, thereby preserving the arguments for appellate review." (citations omitted))). As discussed above, merely moving to dismiss at the proper time under Rule 10(a)(3) preserves *all* issues related to the sufficiency of the evidence for appellate review. Therefore, the Court of Appeals' jurisprudence, which has attempted to categorize motions to dismiss as general, specifically general, or specific, and to assign different scopes of appellate review to each category, is inconsistent with Rule 10(a)(3).

Accordingly, we conclude that each of defendant's challenges to the sufficiency of the State's evidence, both that he aided and abetted Ballentine and that he obtained a thing of value, are preserved for appellate review.

III. Sufficiency of the Evidence

Turning to the merits of each of defendant's challenges to his convictions, we conclude that the State presented sufficient evidence that defendant (1) aided and abetted Ballentine; and (2) obtained a thing of value to support the obtaining property by false pretenses charge.

A. Standard of Review

"In ruling on a motion to dismiss, 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. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (quoting *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002)). "Substantial evidence is [the] amount . . . necessary to persuade a rational juror to accept a conclusion." *Id.* (quoting *Mann*, 355 N.C. at 301, 560 S.E.2d at 781). In

evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered "in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). In other words, if the record developed at trial contains "substantial evidence, whether direct or circumstantial, or a combination, 'to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.' " *Id.* at 575, 780 S.E.2d at 826 (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018) (quoting *Crockett*, 368 N.C. at 720, 782 S.E.2d at 881).

B. Discussion

i. Aiding and Abetting

[3] As explained below, we conclude that the State presented sufficient evidence that defendant aided and abetted Ballentine in committing the offenses.

A person aids and abets another in committing a crime if "(i) the crime was committed by some other person; (ii) the defendant knowingly advised, instigated, encouraged, procured, or aided the other person to commit that crime; and (iii) the defendant's actions or statements caused or contributed to the commission of the crime by that other person." *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999) (citing *State v. Bond*, 345 N.C. 1, 24, 478 S.E.2d 163, 175 (1996)). We have stated that:

> Mere presence, even with the intention of assisting in the commission of a crime, cannot be said to have incited, encouraged, or aided the perpetrator thereof, unless the intention to assist was in some way communicated to him; but, if one does something that will incite, encourage, or assist the actual perpetration of a crime, this is sufficient to constitute aiding and abetting.

State v. Hoffman, 199 N.C. 328, 154 S.E. 314, 316 (1930) (citations omitted).

Defendant challenges the sufficiency of the evidence presented by the State in support of its theory of aiding and abetting on the basis that the same evidence cannot be used to satisfy two of the elements of

aiding and abetting. Defendant argues that, as a result, the State's evidence that defendant paid Ballentine to fraudulently enter the motions to set aside cannot support more than one element. We are not persuaded by defendant's argument. Further, we note that the State presented substantial evidence that defendant aided and abetted Ballentine in committing the offenses.

First, defendant fails to provide support for his assertion that distinct evidence is needed to support each element. Specifically, defendant relies on our statement in *State v. Davis* that "[c]ausation of a crime by an alleged accessory is not 'inherent' in the accessory's counsel, procurement, command or aid of the principal perpetrator." 319 N.C. 620, 626, 356 S.E.2d 340, 344 (1987). Defendant's reliance on this language from *Davis* is misplaced. This language in *Davis* was meant to disavow our prior decision in *State v. Hunter* to the extent that *Hunter* concluded that a jury instruction was proper when it failed to inform the jury that a defendant's counsel to the perpetrator must have a causal connection to the crime in order for the defendant to be found to have aided and abetted the principal. *See id.* at 626, 356 S.E.2d at 344. Accordingly, the Court in *Davis* did not hold that multiple elements of aiding and abetting could not be supported by the same evidence. *See id.* at 626, 356 S.E.2d at 344.

Further, defendant relies on our decision in *Gallimore v. Marilyn's Shoes* for the proposition that distinct evidence is needed to support each element. 292 N.C. 399, 233 S.E.2d 529 (1977). Defendant's reliance on our decision in *Gallimore* is misplaced. *Gallimore* addressed whether a claimant's injury was compensable under the Workmen's Compensation Act and, therefore, that case is plainly inapplicable to resolving the issue here. *See Gallimore*, 292 N.C. at 402, 233 S.E.2d at 531. Accordingly, defendant has failed to support his rule that distinct evidence is needed in support of each element of aiding and abetting.

Second, in the light most favorable to the State, defendant's payments to Ballentine were only part of the evidence which tended to demonstrate defendant's guilt. Therefore, even assuming *arguendo* that single piece of evidence cannot be used to support multiple elements of aiding and abetting, the State presented sufficient evidence that defendant aided and abetted Ballentine. Specifically, the State presented evidence at trial that defendant (1) met with Ballentine and agreed to participate in the scheme; (2) sent text messages instructing Ballentine to enter the fraudulent motions to set aside in specific cases; and (3) paid Ballentine for entering the fraudulent motions. In the light most favorable to the State, the evidence tended to show that Ballentine entered the fraudulent motions, and that defendant "knowingly advised,

instigated, encouraged, procured, or aided" Ballentine. *Goode*, 350 N.C. at 260, 512 S.E.2d at 422 (citing *Bond*, 345 N.C. at 24, 478 S.E.2d at 175). In the light most favorable to the State, this evidence also tended to show that defendant's actions "caused *or contributed*" to Ballentine entering the fraudulent set aside motions. *Goode*, 350 N.C. at 260, 512 S.E.2d at 422 (emphasis added) (citing *Bond*, 345 N.C. at 24, 478 S.E.2d at 175).

Accordingly, we conclude that the State's evidence was sufficient to support defendant's conviction on the theory that defendant aided and abetted Ballentine in carrying out the scheme.

ii. Obtaining Property by False Pretenses

[4] We conclude that the State presented sufficient evidence that defendant obtained a thing of value to support his conviction for obtaining property by false pretenses.

A person obtains property by false pretenses when that person

> knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value

N.C.G.S. § 14-100 (2017).

Defendant challenges the sufficiency of the evidence supporting his conviction for obtaining property by false pretenses on the basis that the State presented insufficient evidence that defendant obtained a "thing of value" within the meaning of N.C.G.S. § 14-100. Specifically, defendant argues that "[i]n the light most favorable to the State, [defendant] did not obtain any property of the State or the School Board," because the fraudulent representations merely resulted in the "elimination of a potential future liability."

Assuming *arguendo* that the elimination of a potential future liability does not constitute "property" under N.C.G.S. § 14-100, that result is not dispositive. The statute does not only cover instances in which a defendant obtains "property," it also applies when a defendant "obtain[s] *or attempt*[*s*] to obtain . . . *any* . . . other thing of value." N.C.G.S. § 14-100 (emphases added). The fact that the statute imparts criminal liability when a defendant even *attempts* to obtain *any* "other thing of value"

guides this Court in deciding to apply a broader definition of "thing of value" than suggested by defendant. The evidence here shows that defendant and Ballentine, through their actions, attempted to surreptitiously divert attention from sums of bond money by altering bond forfeiture notations in court files. At a minimum, this was an attempt to reduce the amount that defendant's bail bond company was required to pay as surety for forfeited bonds and, therefore, constitutes a "thing of value" under N.C.G.S. § 14-100.

Accordingly, we conclude that defendant did obtain a "thing of value" under N.C.G.S. § 14-100 and, therefore, defendant's challenge to the sufficiency of the State's evidence to support his obtaining property by false pretenses conviction is unavailing.

Conclusion

Because we conclude that the State presented sufficient evidence that defendant aided and abetted Ballentine and that he obtained a thing of value, we affirm the decision of the Court of Appeals as to those issues. However, we modify the decision of the Court of Appeals because we conclude that defendant did preserve each of his challenges to the sufficiency of the State's evidence.

MODIFIED AND AFFIRMED.

TOWN OF PINEBLUFF
v.
MOORE COUNTY; CATHERINE GRAHAM, IN HER CAPACITY AS A COUNTY COMMISSIONER; NICK PICERNO, IN HIS OFFICIAL CAPACITY AS A COUNTY COMMISSIONER; OTIS RITTER, IN HIS CAPACITY AS A COUNTY COMMISSIONER; RANDY SAUNDERS, IN HIS CAPACITY AS A COUNTY COMMISSIONER; AND JERRY DAEKE, IN HIS CAPACITY AS A COUNTY COMMISSIONER

No. 398PA18

Filed 3 April 2020

Cities and Towns—extraterritorial jurisdiction—expansion—statutory requirements

A town lacked authority to extend its extraterritorial jurisdiction (ETJ) into certain proposed areas because N.C.G.S. § 160A-360(e) prohibited ETJ extensions where counties were enforcing zoning ordinances, subdivision regulations, and the State Building Code—unless the county approved the extension, which did not occur in this case. The Supreme Court rejected the town's argument that there was an irreconcilable conflict between the subsections of N.C.G.S. § 160A-360 as modified by Session Law 1999-35.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, published decision of the Court of Appeals, 821 S.E.2d 446 (N.C. Ct. App. 2018), affirming the trial court's entry of summary judgment and writ of mandamus entered on 5 December 2016 by Judge James M. Webb in Superior Court, Moore County. Heard in the Supreme Court on 4 February 2020.

David M. Rooks, for plaintiff-appellee.

Misty Randall Leland, County Attorney, and Elizabeth Curran O'Brien, Assistant County Attorney, for defendant-appellants.

HUDSON, Justice.

Here, we must determine whether the Court of Appeals erred by affirming the trial court's entry of summary judgment for plaintiff Town of Pinebluff (Pinebluff). The Court of Appeals reached its conclusion after determining that there was an irreconcilable conflict between N.C.G.S. § 160A-360(e) and N.C.G.S. § 160A-360(f) as amended by Session Law 1999-35, and that Session Law 1999-35 operated to invalidate the applicability of subsection (e) with regards to Pinebluff. Because we conclude that the Court of Appeals erred in its decision, we reverse.

I. Factual and Procedural Background

The facts of this case are uncontested; the parties have agreed that there are no issues as to any material fact.

In 1999, the General Assembly enacted Session Law 1999-35, a local act that amended North Carolina's extraterritorial jurisdiction (ETJ) statute, N.C.G.S. § 160A-360, as it pertains to Pinebluff. *See* An Act Relating to the Exercise of Extraterritorial Jurisdiction by the Town of Pinebluff, S.L. 1999-35, 1999 N.C. Sess. Laws 35.

On 19 July 2007, Pinebluff annexed approximately fifteen acres of land that officially extended the town's corporate boundaries. Several years later, in October 2014, Pinebluff requested that the Moore County Board of Commissioners adopt a resolution to authorize the expansion of Pinebluff's ETJ two miles beyond the annexed boundary, pursuant to N.C.G.S. § 160A-360, as modified by Session Law 1999-35. Pinebluff interpreted Session Law 1999-35 to require Moore County to approve the extension of ETJ. Moore County disagreed on the effect that Session Law 1999-35 had on N.C.G.S. § 160A-360 and, after several public hearings of the Moore County Planning Board and the Moore County Board of Commissioners, the Board of Commissioners voted unanimously to deny Pinebluff's request to extend the area of its ETJ.

Pinebluff filed a complaint against Moore County seeking a writ of mandamus directing the Board of Commissioners to adopt a resolution authorizing the ETJ expansion. Moore County moved to dismiss Pinebluff's claims and moved for judgment on the pleadings. Pinebluff then moved for summary judgment. The trial court issued an order denying Moore County's motions and allowing Pinebluff's motion for summary judgment. The court directed Moore County to adopt a resolution authorizing Pinebluff to exercise its ETJ within the area requested in its October 2014 resolution.

Moore County appealed the trial court's order to the Court of Appeals. The court unanimously affirmed the trial court's order, concluding that Session Law 1999-35 required Moore County to approve Pinebluff's ETJ expansion request. Moore County filed a petition for discretionary review, which we allowed on 14 August 2019.

II. Analysis

"We review a trial court's order granting or denying summary judgment de novo." *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (emphasis omitted) (citation omitted). This case also presents a question of statutory interpretation,

which we likewise review de novo. *Applewood Props., LLC v. New S. Props., LLC*, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013) (quoting *Dickson v. Rucho*, 366 N.C. 332, 339, 737 S.E.2d 362, 368 (2013)).

Session Law 1999-35 amended subsections (a) and (f) of N.C.G.S. § 160A-360 as they pertain to the Town of Pinebluff. The amendment to subsection (a) allows Pinebluff to extend its ETJ up to two miles beyond its corporate limits. S.L. 1999-35, § 1. We agree with the Court of Appeals that subsection (a) does not require approval from the county for an extension up to two miles. The amendment to subsection (f) allows Pinebluff to extend its ETJ two miles beyond an annexed area. S.L. 1999-35, § 2. When Pinebluff extends its ETJ under this subsection, the county must allow the extension so long as Pinebluff has presented proper evidence that the annexation has been accomplished. *Id.* ("[U]pon presenting proper evidence to the County Board of Commissioners that the annexation has been accomplished, the County Board of Commissioners shall adopt a resolution authorizing [Pinebluff] to exercise these powers within the extended area . . . described.").

However, subsections (a) and (f), as amended, must be read in the context of the rest of the statute, since we assume "that the Legislature acted with full knowledge of prior and existing law." *Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977) (citing *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970)). Despite the fact that subsections (a) and (f) do not themselves impose restrictions on Pinebluff's authority to extend its ETJ within two miles of its corporate limits and annexed areas, we consider whether other subsections of N.C.G.S. § 160A-360 impose limitations on Pinebluff's ability to extend its ETJ into those areas.

Subsection (e) states that "[n]o city may . . . extend its [ETJ] powers . . . into any area for which the county at that time has adopted and is enforcing a zoning ordinance and subdivision regulations and within which it is enforcing the State Building Code." N.C.G.S. § 160A-360(e). The text also provides two exceptions to this rule: (1) where the county is not exercising each of the three powers enumerated in subsection (e) in the area, or (2) when the city and county have agreed on the area within which each will exercise its power. *Id.* Therefore, absent one of the exceptions, subsection (e) prohibits any city—including Pinebluff—from extending its ETJ into an area in which the county is exercising each of its three powers.

The Court of Appeals determined that, as to Pinebluff, subsection (e) was invalidated by subsection (f) as amended by Session Law

1999-35, which required the County Board of Commissioners to approve Pinebluff's ETJ expansion. 821 S.E.2d at 454. But we disfavor any interpretation that repeals by implication another portion of the statute. *See McLean v. Durham Cty. Bd. of Elections*, 222 N.C. 6, 8, 21 S.E.2d 842, 844 (1942) ("[T]he presumption is always against implied repeal. . . . [r]epeal by implication results only when the statutes are inconsistent, necessarily repugnant, utterly irreconcilable, or wholly and irreconcilably repugnant." (internal citations omitted)).

We read the statute in its entirety, harmonize its subsections, and "give effect to each" subsection. *Charlotte City Coach Lines, Inc. v. Bhd. of R.R. Trainmen*, 254 N.C. 60, 68, 118 S.E.2d 37, 43 (1961) (quoting *Town of Blowing Rock v. Gregorie*, 243 N.C. 364, 371, 90 S.E.2d 898, 904 (1956)) ("[I]t is a general rule that the courts must harmonize such statutes, if possible, and give effect to each . . . ."). We conclude that there is no irreconcilable conflict between subsections (e) and (f). Indeed, Session Law 1999-35 has no effect on subsection (e) and Pinebluff may extend its ETJ under subsections (a) and (f) only if the extension also complies with the provisions of subsection (e).

Thus, if Moore County is not exercising all three powers enumerated in subsection (e), Pinebluff may extend its ETJ up to two miles beyond its corporate limits under subsection (a) or beyond its annexed areas under (f) without seeking approval from the county. Likewise, if Moore County and Pinebluff reach an agreement on the area within which each will exercise its powers, Pinebluff may extend its ETJ up to two miles beyond its existing corporate limits under subsection (a) or beyond its annexed areas under (f) without seeking approval from the county. But where no agreement is in place and Moore County has adopted and is enforcing a zoning ordinance and a subdivision regulation, and is also enforcing the State Building Code, Pinebluff may not extend its ETJ into that area without approval of the county, regardless of whether the area falls within two miles of its corporate limits or an annexed area.

Here, Moore County was exercising all three powers under subsection (e) within Pinebluff's proposed ETJ expansion area: it had adopted and was enforcing a zoning ordinance and subdivision regulations, and was enforcing the State Building Code. Therefore, Pinebluff was not allowed to extend its ETJ into that area unless it reached an agreement with or received approval from Moore County. The county held public hearings and voted to deny Pinebluff's request, refusing to adopt a resolution that would allow Pinebluff to expand its ETJ. Thus, Moore County and Pinebluff did not reach an agreement, and the county did

not approve the requested resolution. Therefore, Pinebluff was prohibited from expanding its ETJ into that area.

III. Conclusion

Because we conclude there is no irreconcilable conflict between the subsections of N.C.G.S. § 160A-360 as modified by Session Law 1999-35, and that subsection (e) prohibits Pinebluff from extending its ETJ into the proposed areas without an agreement between Pinebluff and Moore County, we reverse the decision of the Court of Appeals affirming the trial court's entry of summary judgment and remand for further remand to the trial court for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

BETH DESMOND	)	
	)	
v.	)	WAKE COUNTY
	)	
THE NEWS AND OBSERVER PUBLISHING COMPANY AND MANDY LOCKE	)	

No. 132PA18-2

ORDER

Pursuant to 11 U.S.C. § 362(a)(1), the proceedings associated with defendants' appeal are stayed pending further order of the United States Bankruptcy Court for the Southern District of New York. The parties are directed to inform this Court if and when the bankruptcy court grants relief from the automatic stay provisions or when the automatic stay lapses.

By Order of this Court in Conference, this 1st day of April, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3 day of April, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
~~Assistant~~ Clerk

THE NEW HANOVER COUNTY BOARD OF EDUCATION	)	
v.	)	WAKE COUNTY
JOSHUA H. STEIN, IN HIS CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA	)	
AND	)	
NORTH CAROLINA COASTAL FEDERATION, INC. AND SOUND RIVERS, INC.	)	

No. 339A18

ORDER

Plaintiff' New Hanover County Board of Education's Petition for Rehearing is denied. This Court's 3 April 2020 opinion is modified as follows:

The final two sentences in footnote 8 are deleted. *New Hanover Cty. Bd. of Educ. v. Stein*, 840 S.E.2d 194, 209 n.8 (N.C. 2020). In their place, the following new sentences are inserted:

> Although 2019 N.C. Sess. Laws 250, § 5.7.(c) provided that newly-enacted N.C.G.S. § 147-76.1 became effective on 1 July 2019, and would be applicable to all funds received on or after that date, the parties agreed that the provisions of newly-enacted N.C.G.S. § 147-76.1 would not have the effect of mooting this appeal. As a result, we will refrain from attempting to construe N.C.G.S. § 147-76.1 or to apply its provisions to the facts of this case. We express no opinion as to what effect, if any, N.C.G.S. § 147-76.1 has on the agreement or on any past or future payments made thereunder.

By Order of the Court in Conference, this 18th day of May, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18 day of May, 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

3 APRIL 2020

10A20	In the Matter of S.E.T.	1. Respondent-Father's Motion to Strike Portions of Petitioner's Brief 2. Petitioner's Motion to Amend Appellee Brief 3. Petitioner's Motion in the Alternative to File Rule 9(d) Supplement to the Record	1. Allowed **03/25/2020** 2. Denied **03/25/2020** 3. Denied **03/25/2020**
11A20	In the Matter of B.E. and J.E.	1. Respondent-Mother's Motion to Amend Brief 2. Respondent-Father's Motion to Amend Brief	1. Allowed **03/17/2020** 2. Allowed **03/17/2020**
17P20	State v. Kadeem Jaleel Grooms	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1211)	Denied
19P20	State v. Demoncrick Hunter	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA18-1029) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Deem PDR Timely Filed 4. Def's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA	1. Dismissed *ex mero motu* 2. Dismissed 3. Denied 4. Denied
23P20	State v. George Allen Bigler	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Johnston County (COAP19-839) 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
24A20	In the Matter of A.W.	1. Respondent-Mother's Motion for Consolidation of Actions on Appeal 2. Respondent-Mother's Alternative PDR and Consolidation	1. Allowed **03/18/2020** 2. Dismissed as moot **03/18/2020**
27A20	In the Matter of K.D.C. and A.N.C.	Respondent-Mother's Petition for Writ of Certiorari to Review Decision of District Court, Wilkes County	Allowed
28P20	State v. Donald Cole Burchett	Def's Pro Se Motion for Discretionary Review	Dismissed
30P20	State v. Henry Thomas Hairston	Def's PDR Under N.C.G.S. § 7A-31 (COA19-502)	Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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31P20	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	Defs' PDR Under N.C.G.S. § 7A-31 (COA19-308)	Allowed
37P20	State v. Mohammed Al-Hilo	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Henderson County (COAP18-461) 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
38P20	State v. Anthony Cravon Webster	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-257)	Denied
40P20	State v. Leonard Paul Schalow	1. State's Motion for Temporary Stay (COA19-215) 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	1. Allowed **01/27/2020** 2. Allowed 3. Allowed 4. Denied **Davis, J., recused**
44P20	State v. Billy Jackson Simmons, III	Def's PDR Under N.C.G.S. § 7A-31 (COA19-519)	Denied
49A20	State v. Faye Larkin Meader	1. Def's Motion for Temporary Stay (COA19-554) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent 4. Def's Motion for Extension of Time to File Brief	1. Allowed **02/07/2020** 2. 3. 4. Allowed **03/12/2020**
50P14-2	State v. James Allen Minyard	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Burke County (COAP19-17) 2. Def's Motion to Amend Petition for Writ of Certiorari	1. Dismissed 2. Allowed **Ervin, J., recused** **Davis, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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57P20	State v. Alec Redner	1. Def's Pro Se Motion for Notice of Appeal for Discretionary Review (COAP20-38) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
62P20	State v. Andrew McCord	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-517)	Denied
63P12-2	State v. Herbert Marshall Pender, Jr.	1. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA11-647) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
64P20	State v. Tyree Devon Herring	Def's PDR Under N.C.G.S. § 7A-31 (COA19-221)	Denied
71A20	State v. Brandon Scott Goins	1. State's Motion for Temporary Stay (COA19-288) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **02/20/2020** 2. Allowed **03/12/2020** 3. ---
73A20	State v. Molly Martens Corbett and Thomas Michael Martens	1. State's Motion for Temporary Stay (COA18-714) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. Defs' Joint Motion to Strike the State's Proposed Scope of Review 5. Defs' Joint Motion to Limit the Scope of Review to the Issues Set Out in the Dissent 6. Defs' Joint Motion to Amend Motion to Strike the State's Proposed Scope of Review and Motion to Limit the Scope of Review to the Issues Set Out in the Dissent 7. State's Conditional Petition for Writ of Certiorari to Review Decision of the COA 8. State's Motion for Extension of Time to File Brief	1. Allowed **02/24/2020** 2. Allowed **03/11/2020** 3. --- 4. 5. 6. 7. 8. Allowed **03/20/2020** **Davis, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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76A20	In the Matter of M.J.R.B., Z.M.B., N.N.T.B., S.B.	1. Respondent-Father's Petition for Writ of Certiorari to Review Decision of District Court, Craven County 2. Respondent-Mother and Respondent-Father's Motion to Deem Joint Record on Appeal Timely Filed 3. Respondent-Mother and Respondent-Father's Motion in the Alternative, to Extend the Time to File Joint Record on Appeal 4. Respondent-Mother's Petition for Writ of Certiorari to Review Decision of District Court, Craven County	1. Allowed **03/17/2020** 2. Dismissed as moot **03/17/2020** 3. Dismissed as moot **03/17/2020** 4. Allowed **03/17/2020**
86P20	State v. Kenneth Jamaal Ray	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion for Petition for Direct Review 3. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied **02/27/2020** 2. Dismissed **02/27/2020** 3. Allowed **02/27/2020**
87A20	In the Matter of R.L.O., L.P.O., C.M.O.	1. Respondent-Father's Motion to Deem Proposed Record on Appeal Timely Filed 2. Respondent-Father's Motion to Set Schedule for Filing Record on Appeal for 17 March 2020	1. Allowed **02/28/2020** 2. Allowed **02/28/2020**
93P20	State v. Cameron Lee Yarbrough	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **03/04/2020**
94P20	State v. Carlton Lashawn White	1. Def's Pro Se Motion for Notice of Constitutional Challenge to Statute 2. Def's Pro Se Motion to Intervene	1. Dismissed 2. Dismissed
100P16	Alberta Currie, Paris Vaughn, Cassandra Perkins, Mary Caitlyn Sanders, Hayley Farless, League of Women Voters of North Carolina, and North Carolina A. Philip Randolph Institute, Inc. v. The State of North Carolina and the North Carolina State Board of Elections	1. Defs' PDR Prior to a Decision of the COA (COA16-217) 2. Defs' Motion for Temporary Stay 3. Defs' Petition for Writ of Supersedeas 4. Plts' Motion for Extension of Time to File Response 5. Defs' Petition for Writ of Certiorari to Review Order of the COA 6. Plts' Motion to Dismiss Appeal	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed as moot **Morgan, J., recused** **Earls, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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100P20	State v. Shanna Brandon	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **03/06/2020**
101PA15-3	State v. Christopher Anthony Clegg	Def's Motion to Supplement Record on Appeal (COA17-76)	Allowed **03/25/2020**
127P19	Gregory Painter v. City of Mt. Holly, acting as the Mt. Holly Police Department; Thomas Sperling, individually and in his official capacity as a Police Officer for the City of Mt. Holly; James Allen Benfield, individually and in his official capacity as Police Officer/ Captain for the City of Mt. Holly; the City of Belmont, acting as the City of Belmont Police Department; Chad Austin Alexander; Chris Small; and Tracy Small	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA18-197) 2. Plt's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31 3. Plt's Motion for Notice of Appeal and Alternative PDR to be Deemed Timely Filed 4. Plt's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA	1. Dismissed *ex mero motu* 2. Dismissed 3. Denied 4. Denied
128A20	Rickenbaugh v. Power Home Solar, LLC	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas	1. Allowed **03/20/2020** 2.
129P20	Hubert Allen v. Person County Superior Court	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Person County (COA13-1100)	Denied **03/20/2020** **Morgan, J., recused**
132PA18-2	Beth Desmond v. The News and Observer Publishing Company, McClatchy Newspapers, Inc., and Mandy Locke	Def's (The News and Observer Publishing Company, McClatchy Newspapers, Inc.) Notice of Bankruptcy Proceeding	Special Order
135P20	Wetherington v. NC Department of Public Safety	Respondent's Motion for Temporary Stay (COA18-1018)	Allowed **03/25/2020**

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143P20	Henderson v. Vaughn	1. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County (COAP15-854) 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis* 3. Petitioner's Pro Se Motion to Appoint Counsel	1. Denied **03/26/2020** 2. Allowed **03/26/2020** 3. Dismissed as moot **03/26/2020**
151P20	State v. Michael Allen Bullock	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **04/01/2020**
158P19	Jacqueline L. Gray and Mary Stewart Gray v. Federal National Mortgage Association a/k/a Fannie Mae, and Trustee Services of Carolina, LLC, Substitute Trustee	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA18-871) 2. Legal Aid of North Carolina, Inc.'s Motion for Leave to File Amicus Brief in Support of PDR 3. Def's (Trustee Services of Carolina, LLC) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot 3. Dismissed as moot **Davis, J., recused**
241PA19	Parkes v. Hermann	1. Amicus' (NC Medical Society, et al.) Motion to Allow for Additional Time for Argument of Amicus Party (COA18-888) 2. Amicus' (NC Medical Society, et al.) Motion in the Alternative to Participate and Share Time in Argument of Defendant-Appellee	1. Denied **03/04/2020** 2. Denied **03/04/2020**
243P19	State v. Gregory K. Parks	Def's PDR Under N.C.G.S. § 7A-31 (COA18-520)	Denied
254P18-3	State v. Jimmy A. Sevilla-Briones	1. Def's Pro Se Motion for Discovery Requests (COAP17-645) 2. Def's Pro Se Petition for Writ of Habeas Corpus 3. Def's Pro Se Motion to Amend and Append Record Filings 4. Def's Pro Se Motion for Full Review	1. Dismissed **02/28/2020** 2. Denied **02/28/2020** 3. Dismissed **02/28/2020** 4. Dismissed **02/28/2020**
270A18-2	State v. Thomas Earl Griffin	1. State's Motion for Temporary Stay (COA17-386; COA17-386-2) 2. State's Petition for Writ of Supersedeas	1. Allowed **03/06/2020** 2. **Davis, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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274P15-6	State v. Robert K. Stewart	1. Def's Pro Se Petition for Writ of Mandamus (COAP15-68; COAP18-294) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Denied **03/13/2020** 2. Allowed **03/13/2020** 3. Dismissed as moot **03/13/2020**
282P19	Sidney B. Harr v. WRAL-5 News, James F. Goodmon	Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-88)	Denied
284P19	North Carolina Indian Cultural Center, Inc. v. Machelle Sanders, Secretary, N.C. Department of Administration, in her official capacity, Furnie Lambert, Chairman, N.C. State Commission of Indian Affairs, in his official capacity, N.C. Department of Administration, N.C. Commission of Indian Affairs, State of North Carolina, and Paul Brooks	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-807)	Denied
296A19	Wells Fargo Bank, N.A. v. Frances J. Stocks, in his capacity as the executor of the Estate of Lewis H. Stocks a/k/a Lewis H. Stocks, III, Tia M. Stocks, and Jeremy B. Wilkins in his capacity as commissioner	1. Plt's Notice of Appeal Based Upon a Dissent (COA18-1171) 2. Plt's PDR as to Additional Issues 3. Def's (Tia M. Stocks) Motion to Dismiss Appeal 4. Def's (Frances J. Stocks, in his capacity as executor) Notice of Appeal Based Upon a Dissent 5. Def's (Frances J. Stocks, in his capacity as executor) PDR as to Additional Issues 6. Def's (Tia M. Stocks) Motion to Dismiss Appeal	1. --- 2. Allowed 3. Denied 4. --- 5. Allowed 6. Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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300A93-3	State v. Norfolk Junior Best	1. Def's Motion to Hold in Abeyance the Time in Which to File a Petition for Writ of Certiorari from Denial of MAR 2. Def's Motion for Extension of Time to File Petition for Writ of Certiorari 3. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Bladen County 4. Def's Motion to Allow Counsel to Withdraw and Authorize IDS to Appoint Substitute Counsel	1. Dismissed as moot **02/28/2020** 2. Allowed **03/08/2018** 3. Allowed **05/09/2019** 4. Allowed **02/28/2020** **Ervin, J., recused**
308P19	State v. Ismael Marquez Camacho	Def's Pro Se Motion for PDR (COAP17-708)	Dismissed
318P19	State v. Timothy Lavaun Crumitie	Def's PDR Under N.C.G.S. § 7A-31 (COA18-781)	Denied
324A19	State v. Jack Howard Hollars	1. Def's Motion for Appropriate Relief (COA18-932) 2. State's Motion for Extension of Time to File Response to Motion for Appropriate Relief 3. State's (Matthew W. Sawchak) Motion to Withdraw as Counsel of Record	1. 2. Allowed **03/16/2020** 3. Allowed **03/30/2020**
337P19	Asma Hanif v. Attorney Sonya Davis (In the Matter of: the William Edward & Arsenia Davis Estate Belongings)	Petitioner's Pro Se Motion for Petition the Court for Justice in the Matter of William Edward & Arsenia Davis Estate Belongings	Dismissed
344P19	State v. Jacquel Levell Holliday	1. Def's Motion for Temporary Stay (COA18-1144) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/04/2019** Dissolved **04/01/202**0 2. Denied 3. Denied
356P17-3	State v. Brandon Lee	1. Def's Pro Se Motion for Notice of Appeal (COAP19-785) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Allowed
361P19	State v. Taveun Dayquan Davis	Def's PDR Under N.C.G.S. § 7A-31 (COA18-559)	Denied

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372P19	Clayton Bache, Employee v. TIC-Gulf Coast, Employer, Self-Insured (Sedgwick CMS, Servicing Agent)	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-788)	Denied
383A19	Newman v. Stepp	1. Def's Notice of Appeal Based Upon a Dissent (COA19-112) 2. Plts' Motion for Continuance from March 10, 2020, Oral Arguments Calendar	1. --- 2. Allowed **03/09/2020**
392A19	State v. Bruce Wayne Glover	Def's Motion to Amend Reply Brief (COA18-538)	Allowed **03/06/2020**
397A19	In the Matter of O.W.D.A.	Respondent-Father's Petition for Writ of Certiorari to Review Order of District Court, Henderson County	Allowed **03/10/2020**
404P19	State v. Joshua Dustin Lutz	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1291)	Denied
408P19	In the Matter of S.P. and J.P.	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA18-1190)	Denied
412P13-5	State v. Henry Clifford Byrd, Sr.	Petitioner's Pro Se Petition for Writ of Habeas Corpus (COA17-288; COAP13-424)	Denied **03/16/2020** **Ervin, J., recused**
412P19	In the Matter of the Foreclosure of a Deed of Trust Executed by Rebecca Worsham and Greg B. Worsham Dated January 8, 2007 and Recorded in Book 21638 at page 600 in the Mecklenburg County Public Registry, North Carolina	Respondents' PDR Under N.C.G.S. § 7A-31 (COA18-1302)	Denied
421P19	State v. Thomas Allen Cheeks	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA18-884) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Allowed 3. Allowed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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431A19	In the Matter of W.I.M.	Parties' Joint Motion for the Court to Hear the Case Based on the Briefs Filed	Allowed **03/04/2020**
434PA18	PHG Asheville, LLC v. City of Asheville	1. Respondent's PDR Under N.C.G.S. § 7A-31 (COA18-251) 2. Respondent's Motion to Supplement the Record on Appeal 3. Petitioner's Motion to Dismiss Appeal as Moot 4. Petitioner's Motion to Supplement Appellate Record	1. Allowed **05/09/2019** 2. Allowed **08/14/2019** 3. Denied 4. Allowed **12/04/2019**
457P19	Sharell Farmer v. Troy University, Pamela Gainey, and Karen Tillery	1. Plt's PDR Prior to a Determination by the COA (COA19-1015) 2. Def's Motion to Dismiss Appeal	1. Denied 2. Denied
464P19	State v. Darwin Josue Peralta	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-374) 2. Def's Motion to Include COA Opinion with PDR	1. Denied 2. Allowed
469P19	State v. Roderick Jermaine Boykins	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA18-949) 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
472P19	State v. Clarence Wendell Roberts	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1194)	Denied
487P19	In the Matter of T.G.H., Y.G.L., S.N.L.	1. Respondent-Father's Motion for Temporary Stay (COA18-1314) 2. Respondent-Father's Petition for Writ of Supersedeas 3. Respondent-Father's PDR	1. Allowed **12/27/2019** Dissolved **04/01/2020** 2. Denied 3. Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

3 APRIL 2020

490P19	Morguard Lodge Apartments, LLC d/b/a The Lodge at Crossroads v. Warren Follum	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA18-1014)	1. ---
		2. Def's Pro Se PDR Under N.C.G.S. § 7A-31	2. Denied
		3. Plt's Motion to Dismiss Appeal	3. Allowed
		4. Def's Pro Se Motion for Extension of Time to File Response to Motion to Dismiss PDR and Appeal	4. Allowed **01/24/2020**
		5. Def's Pro Se Emergency Motion for Extension of Time to File Response to Motion to Dismiss PDR and Appeal	5. Allowed **01/31/2020**
		6. Def's Pro Se Motion to Strike Response in Opposition to Notice of Appeal; in the Alternative PDR	6. Dismissed as moot
		7. Plt's Motion to Strike Defendant's Reply in Favor of PDR	7. Dismissed as moot
		8. Def's Pro Se Motion to Strike Plaintiff's Response in Opposition to Defendant's PDR and Dismissing Defendant's Appeal	8. Dismissed as moot **Davis, J., recused**
492P19	Discover Bank v. Raleigh Rogers	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA19-217)	1. ---
		2. Def's Pro Se PDR Under N.C.G.S. § 7A-31	2. Denied
		3. Plt's Emergency Motion for Extension of Time to Respond to Notice of Appeal and PDR	3. Dismissed as moot
		4. Plt's Motion to Dismiss Appeal	4. Allowed
493P19	Cheryle Jernigan Wicker v. Gilles Andre Wicker	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA18-1212)	1. ---
		2. Plt's Motion to Withdraw PDR	2. Allowed **02/28/2020** **Davis, J., recused**

TED P. CHAPPELL AND SARAH CHAPPELL
v.
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 51PA19

Filed 1 May 2020

1. Eminent Domain—inverse condemnation—quick-take procedure by NCDOT—timeliness of filing

In an inverse condemnation action filed by homeowners after the N.C. Department of Transportation (NCDOT) filed a roadway corridor map encompassing their property, the trial court did not abuse its discretion by allowing the proceeding to continue to trial despite NCDOT having filed a motion for a permissive counterclaim to assert quick-take rights under N.C.G.S. § 136-104 (which would allow it to take title immediately to the subject property). Trial courts have broad discretion pursuant to section 136-114 to make all necessary orders and rules to carry out the purpose of the condemnation statutes, the trial court in this case did not block NCDOT's right to assert a permissive counterclaim under all circumstances, and the trial court properly took into account the length of time the proceeding had been pending (over three years) before denying NCDOT's attempt to assert its right two months prior to trial.

2. Eminent Domain—inverse condemnation—recordation of roadway corridor map—nature of taking—evidentiary rulings

In an inverse condemnation action filed by homeowners after the N.C. Department of Transportation (NCDOT) filed a roadway corridor map encompassing their property, the trial court did not abuse its discretion in its rulings regarding evidence of the parties' respective appraisers where the court correctly applied the proper measure of just compensation for a partial taking pursuant to N.C.G.S. § 136-112—the difference between the fair market value of the property before the map was recorded and after—and allowed only the testimony that was in accordance with that measure, after determining that the nature of the taking was that of an indefinite negative easement, not a three-year restriction as NCDOT argued. Nor did the trial court abuse its discretion by excluding potentially misleading expert testimony that analogized the property restrictions after the map was recorded to those placed on property in floodplains.

3. Eminent Domain—inverse condemnation—recordation of roadway corridor map—fair market value—expert testimony

In an inverse condemnation action filed by homeowners after the N.C. Department of Transportation (NCDOT) filed a roadway corridor map encompassing their property, the trial court did not abuse its discretion by allowing the homeowners' appraiser to testify that the fair market value of the property was zero after the map was recorded where evidence was presented that there was no market at all for the property in that geographic area based on the effect of the map, even though the homeowners were able to continue using their property.

4. Eminent Domain—inverse condemnation—recordation of roadway corridor map—jury instructions—consideration of project once completed

In an inverse condemnation action filed by homeowners after the N.C. Department of Transportation (NCDOT) filed a roadway corridor map encompassing their property, any error in the trial court's instruction to the jury to consider the proposed highway project in its completed state when determining the amount of just compensation—where the nature of the taking was an indefinite negative easement and not similar to a fee simple taking—would not have impacted the result and therefore was not prejudicial where the evidence supported the jury's verdict on fair compensation.

5. Eminent Domain—inverse condemnation—Map Act—recordation of roadway corridor map—compensation for taxes paid

In an inverse condemnation action filed by homeowners after the N.C. Department of Transportation (NCDOT) filed a roadway corridor map encompassing their property, the trial court properly took into account the taxes paid by the homeowners—on property that essentially had no fair market value after the map was recorded—when considering the amount of compensation due the homeowners.

6. Eminent Domain—inverse condemnation—pre-judgment interest—prudent investor standard—appropriate interest rate

In an inverse condemnation action filed by homeowners after the N.C. Department of Transportation (NCDOT) filed a roadway corridor map encompassing their property, the trial court erred in applying a compounded interest rate of 8% per annum to the value of both the 1992 and 2006 takings when determining pre-judgment interest, because this method essentially combined two allowable

methods rather than choosing between them. A party may choose between a presumptively reasonable statutory rate pursuant to N.C.G.S. § 24-1, or rebut that rate with a prudent investor rate compounded, if compounded rates would have been available. Further, the trial court erred by basing its decision on a non-diversified prudent investor's investment portfolio. The issue was remanded to determine the appropriate interest rate.

Appeal pursuant to N.C.G.S. § 7A-27(b) from a final judgment entered on 3 July 2018 and an amended final judgment entered on 11 July 2018 by Mary Ann Tally, Superior Court Judge, Cumberland County. On 11 June 2019, pursuant to N.C.G.S. § 7A-31(a) and (b)(2), the Supreme Court granted defendant's petition for discretionary review prior to determination by the Court of Appeals. Heard in the Supreme Court on 9 December 2019.

Yarborough, Winters & Neville, P.A., by Garris Neil Yarborough and H. Addison Winters; and Hendrick, Bryant, Nerhood, Sanders & Otis, LLP, by Matthew Bryant and T. Paul Hendrick, for plaintiff-appellees.

Cranfill, Sumner & Hartzog, by George B. Autry Jr., Stephanie Hutchins Autry, and Jeremy P. Hopkins, for amicus curiae Owners' Counsel of America.

Shiloh Daum and B. Joan Davis for amicus curiae North Carolina Advocates for Justice.

Joshua H. Stein, Attorney General by James M. Stanley, Alexandra Hightower, and William A. Smith, Assistant Attorneys General; Teague, Campbell Dennis & Gorham, by Jacob H. Wellman and Matthew W. Skidmore; and Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP by Steven Sartorio and William H. Moss, for the defendant-appellant.

EARLS, Justice.

Ted and Sarah Chappell first moved to the Raeford Road property in Fayetteville that is at issue in this case in 1962, living there as tenants and raising their family. In 1985, they purchased a house on the property and approximately 2.92 acres of land. Two years later, the North Carolina General Assembly adopted the Roadway Corridor Official Map Act, Act

of Aug. 7, 1987, ch. 747, sec. 19, 1987 N.C. Sess. Laws 1520, 1538–43, [hereinafter Map Act] (codified as amended N.C.G.S. §§ 136-44.50–44.54 (2017)). In 1992 and 2006, various portions of the Chappells' property were designated as within a roadway corridor pursuant to that statute. On 5 December 2014, the Chappells filed an inverse condemnation complaint against the North Carolina Department of Transportation (hereinafter NCDOT) seeking compensation for the taking of their property caused by NCDOT's recording of a Roadway Corridor Official Map that encompassed part of their property. Following a trial in 2018, a final judgment was issued awarding the Chappells $137,247 for the 1992 taking and $6,139 for the 2006 taking, both with pre-judgment interest at 8% compounded annually, along with reimbursement of property taxes paid, attorney's fees, costs, disbursements, expenses, and expert witness fees.

On direct appeal, pursuant to N.C.G.S. § 7A-27(b), prior to determination by the Court of Appeals, NCDOT raises four issues alleging error by the trial court. First, NCDOT contends the trial court erroneously characterized the nature of the taking in this case as the equivalent of a fee simple taking and therefore instructed the jury to consider "the project in its completed state" as if the road already had been built when, in fact, the taking was much more limited in nature. According to NCDOT, this mischaracterization of the taking also led the trial court to make erroneous evidentiary rulings concerning what expert appraisal testimony would be excluded and what would be admitted.

Second, NCDOT argues that the trial court erred in adding the Chappells' discounted property taxes to the jury's award of just compensation, thus misinterpreting this Court's directive in *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 786 S.E.2d 919 (2016), that a trier of fact in these cases must determine the value of the loss, taking into account "any effect of the reduced *ad valorem* taxes." *Kirby*, 368 N.C. at 856, 786 S.E.2d at 926. The third issue raised by NCDOT is that the trial court erred in its use of an equity investment strategy to base its calculation of pre-judgment interest on the value of the taking. Finally, NCDOT contends that the trial court erred when it refused to allow NCDOT to exercise its statutory quick-take rights to take the entire property on the eve of trial. NCDOT asks us to vacate the trial court's judgment and remand for a new trial and additional post-judgment proceedings.

Addressing each of these issues, we first hold that as a threshold matter, there was no error in the trial court's exercise of its discretion to proceed to trial on the Chappells' inverse condemnation complaint notwithstanding NCDOT filing a motion for a permissive counterclaim

to assert its quick-take rights on the eve of trial. Second, we hold that any error in the trial court's characterization of the taking was harmless in light of the evidence in this case. Third, on the facts of this case, the trial court's treatment of the reduced property taxes was consistent with this Court's instruction in *Kirby*. Finally, we reverse the portion of the trial court's order concerning the proper evaluation of the pre-judgment interest rate because it was contrary to this Court's precedents, and we remand for further proceedings to apply a pre-judgment interest rate consistent with our prior cases.

I. Facts

The parties stipulated that the Chappells owned the property at issue along Raeford Road in Cumberland County, with no known encroachments adversely impacting the property prior to the takings at issue here. Between 1985 and 1992, the Chappells put a new roof on the home, remodeled the bathrooms, updated the wiring, and dug a well. On 29 October 1992, in furtherance of a project to build the Fayetteville Outer Loop, NCDOT recorded a Roadway Corridor Official Map pursuant to the Map Act with the Cumberland County Register of Deeds, which covered approximately .58 acres of plaintiffs' property. (Hereinafter the 1992 Map). Although this was only roughly twenty percent of the property's total land area, the 1992 Map showed the right of way line of the road going through the middle of the Chappells' house, a two-story, single-family home. On 6 June 2006, a second map was filed by defendant, expanding the area of plaintiffs' property covered by the corridor by an approximately 1.67 additional acres. (Hereinafter the 2006 Map).

Pursuant to the Map Act, property owners were prevented from developing or subdividing land within the protected corridor without approval from NCDOT. *See* N.C.G.S. §§ 136-44.51–44.53 (2017). *See also*, *Kirby*, 358 N.C. at 849–50, 786 S.E.2d at 921–22 (describing in detail the Map Act's restrictions, variances, and advance acquisition provisions). However, the Map Act did not permit NCDOT to physically enter or otherwise alter land or buildings in the proposed highway corridor. Landowners, including the Chappells, continued to have the right to use their property in any way that did not require a building permit or subdivision plat, and could sell or otherwise transfer rights to the property subject to the Map Act restrictions. They retained the right to lease or rent the property to others. The Chappells continued to live on their property until 2016.

The Chappells' expert appraiser testified at trial that the market value of their property in 1992, immediately before the Map Act taking,

was $144,888, and the market value immediately after the taking was $7,641. In 2006, the market value of their property immediately before the second Map Act taking was $11,268, and the value immediately after the taking was $5,129. Thus, in his expert opinion, the damages suffered by the Chappells for the Map Act takings of their rights to develop their property were $137,247 in 1992 and $6,139 in 2006. Another real estate expert for the Chappells testified that there was no market for any of the properties in the 1992 corridor map area because there were plenty of alternative properties for sale in Cumberland County that were not encumbered, and prospective buyers would not "want to buy something that does not work for the purpose that its designed." Similarly, there was no market for any real estate within the corridor map that was filed on 6 June 2006.

NCDOT did not present evidence for the jury in this case. The trial court granted the Chappells' motion in limine to exclude from evidence any expert opinion based on a variety of assumptions, such as assumptions about the duration of the Map Act restrictions or actions the Chappells could take to trigger condemnation of the property. Significantly, the trial court also excluded "[a]ny opinion on the value of the property based on the assumption that there is a market for the property in the corridor at fair market prices . . . " The trial court further excluded "any evidence concerning T.B. Harris, Jr. & Associates' after value appraisal of the Plaintiffs' property," and denied NCDOT the ability to cross-examine the Chappells' appraiser "as to the value of continued use, possession, [and] control of the value of the property." Having concluded that NCDOT's expert appraisers failed to comply with the definition of damages as set out in *Kirby* and further failed to meet the test for expert testimony under Rule 702 of the North Carolina Rules of Evidence, the trial court excluded any testimony from NCDOT's proposed expert witnesses.

Following the jury's verdict as to the amount of just compensation that the Chappells are entitled to recover for NCDOT's Map Act takings on 29 October 1992 and 6 June 2006, the trial court issued a final judgment addressing three additional issues. The trial court awarded the Chappells their attorneys' fees, costs, disbursements, expenses, and expert witnesses fees; required NCDOT to pay all of the ad valorem taxes actually paid by the Chappells from 2002 to 2016, the years for which evidence was presented as to the taxes they paid on their property; and awarded pre-judgment interest on the values of the two takings at the compounded rate of 8% per annum.

II. NCDOT's Quick-Take Rights

[1] We first address the ruling, made by the trial court prior to trial, denying NCDOT the right to exercise its statutory quick-take rights under N.C.G.S. § 136-104 (2019) to take title immediately to the entire property. The Chappells filed this inverse condemnation action raising constitutional claims and a declaratory judgment claim on 5 December 2014. NCDOT answered the complaint on 6 February 2015, denying that a taking had occurred and seeking dismissal of the action on several grounds. Asserting a total of eighteen defenses, NCDOT alleged that the Chappells lacked standing, that the court lacked jurisdiction, that the claims were not ripe, that administrative remedies had not been exhausted, that damages were not mitigated, and that plaintiffs' claims were barred by estoppel. On 9 October 2015, the trial court stayed the case, on motion by the Chappells, pending this Court's ruling in *Kirby*, which was subsequently decided on 10 June 2016. It was not until 1 February 2018, as the parties and the trial court were preparing to go to trial on the Chappells' claims, that NCDOT sought to acquire full rights to the Chappells' property through a quick-take action asserted as a permissive counterclaim. The trial court ruled, at a hearing in open court on 1 February 2018, that NCDOT could file a condemnation action as a permissive counterclaim in the present action, but because the case was already calendared to go to trial on 9 April 2018, a quick-take complaint that immediately transfers title to the property would not be permitted.

The appropriate standard of review here is abuse of discretion because the General Assembly has granted trial courts broad discretion to conduct condemnation proceedings in the manner that will best achieve the purposes of the statute. Recognizing the uniqueness of the quick-take procedure, the statute provides that:

> [i]n all cases of procedure under this Article where the mode or manner of conducting the action is not expressly provided for in this Article or by the statute governing civil procedure or where said civil procedure statutes are inapplicable the judge before whom such proceeding may be pending shall have the power to make all the necessary orders and rules of procedure necessary to carry into effect the object and intent of this Chapter and the practice in such cases shall conform as near as may be to the practice in other civil actions in said courts.

N.C.G.S. § 136-114 (2019). The procedure to follow when the NCDOT seeks to acquire fee simple rights to property within a Map Act corridor

that is already the subject of a pending inverse condemnation action is not specified in Chapter 136. Therefore, the trial court needed to make all the necessary orders and rules to carry out the purpose of the statute. *Id.*, *see also*, *Vaughan v. Mashburn*, 371 N.C. 428, 433, 817 S.E.2d 370, 374 (2018) (denial of a motion to amend a pleading is reviewed for abuse of discretion). In general, an "[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citing *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985)). Thus, the question here is whether the trial court's ruling was unsupported by reason or manifestly arbitrary. We have previously held that delay in seeking to amend a pleading, and particularly where it causes prejudice to a party, can justify a decision to deny the amendment. *See News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 485, 412 S.E.2d 7, 19 (1992) ("Among proper reasons for denying a motion to amend are undue delay by the moving party and unfair prejudice to the non-moving party.")

NCDOT argues that the trial court's decision to deny it the right immediately to obtain title to the Chappells' property once NCDOT complied with the provisions of N.C.G.S. §§ 136-103, -104 (2019), by identifying the property being taken, estimating just compensation, and depositing that amount in court, was an abuse of discretion because the statute mandates that in those circumstances the title transfers immediately to NCDOT, and the trial court has no discretion to deny possession to the department. Under the plain language of the statute, NCDOT contends, the trial court had no authority to deny title and to rule otherwise would allow a single property owner to "stop a highway project in its tracks by simply declining to resolve his or her Map Act claim."

To be clear, the trial court's 1 February 2018 ruling in open court, later entered by written order dated 16 February 2018, did not deny NCDOT the right to assert a permissive counterclaim under any and all circumstances. Indeed, the trial court stated that "a counterclaim in an inverse condemnation case is the appropriate manner by which the Department of Transportation may seek to acquire additional rights in the property subject to the ongoing, prior litigation." What the trial court denied was the right to assert the counterclaim as presented because, as drafted, it appeared to be an "attempt to convert this inverse condemnation action into a direct condemnation action." Thus, the issue here is the proper procedure in this particular case, not the denial of NCDOT's statutory right to obtain title to the property and ultimately, to build the Fayetteville Outer Loop. Because Chapter 136 of the North

Carolina General Statutes provides no manner or mode for conducting a quick-claim direct condemnation action during a pending inverse condemnation action, the judge before whom the inverse condemnation action is pending is in the best position to determine how the matter should proceed.

Here, the trial court's order was based on the length of time the inverse condemnation proceeding had been pending, the procedure the court followed in a prior similar case, and its review of the specific language of the proposed permissive counterclaim. From the record in this case, it appears the trial court was concerned to prevent the derailment, immediately before trial, of the Chappells' efforts to obtain just compensation for the takings they experienced in 1992 and 2006. The trial court did not abuse its discretion, granted by N.C.G.S. § 136-114, in ruling that any permissive counterclaim filed by NCDOT in this case could not be interposed at the last minute to prevent a trial on the Chappells' inverse condemnation claim. On remand, NCDOT can assert its quick-take action, and the fair market value of the Chappells' remaining property interest as of the date of the final judgment has been established by the jury's verdict here.

III. The Nature of the Taking

A. Standard of Review

A trial court's conclusions of law are reviewed *de novo*, including legal conclusions contained in jury instructions. *See Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 338, 757 S.E.2d 466, 471 (2014); *see also Akzona, Inc. v. Southern Ry. Co.*, 314 N.C. 488, 494, 344 S.E.2d 759, 763 (1985) (reversing trial court for improper jury instructions on inverse condemnation and remanding for new trial). Generally, a trial court's rulings about whether to admit or exclude expert testimony are reviewed for abuse of discretion. *N.C. Dep't of Transp. v. Mission Battleground Park, DST*, 370 N.C. 477, 480, 810 S.E.2d 217, 220 (2018). Among other ways, an abuse of discretion may occur when the trial court misapprehends the applicable law. *See, e.g.*, *In re Estate of Skinner*, 370 N.C. 126, 139-40, 404 S.E.2d 449, 457-58 (2017).

To set aside a verdict, any errors made by the trial court must also be shown to be prejudicial. Rule 61 of the North Carolina Rules of Civil Procedure provides that:

> No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by any of the parties is ground for

> granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right.

N.C.G.S. § 1A-1, Rule 61. In the context of legally erroneous jury instructions, "it must be shown that 'a different result would have likely ensued had the error not occurred.' " *Word v. Jones ex rel. Moore*, 350 N.C. 557, 565, 516 S.E.2d 144, 148 (1999) (quoting *Responsible Citizens in Opposition to the Flood Plain Ordinance v. City of Asheville*, 308 N.C. 255, 271, 302 S.E.2d 204, 214 (1983)) (granting a new trial where the Court was unable to say as a matter of law that plaintiff was not prejudiced by erroneous jury instruction on defense of sudden incapacitation); *see also*, *N.C. State Highway Comm'n v. Gasperson*, 268 N.C. 453, 456, 150 S.E.2d 860, 863 (1966) (reversing jury verdict and remanding for new trial to determine just compensation for highway easement where "the challenged instruction was erroneous and prejudicial.").

B. Valuing an Indefinite Negative Easement

[2] NCDOT argues that the trial court fundamentally mischaracterized the nature of the taking when NCDOT recorded a corridor map under the Map Act that encompassed the Chappells' property. The trial court found that the nature of the taking was a negative easement that never expired and specified that the only permissible proof of damages was a calculation of the difference between the value of the Chappells' property before the corridor maps were recorded and the value of the property after recordation. NCDOT contends that the Chappells were allowed to argue that the taking was a fee simple taking; that the trial court improperly precluded the introduction of any evidence to the contrary, including evidence of the Chappells' continued use and enjoyment of the property; that the jury was improperly precluded from hearing that the Chappells could be relieved from the Map Act's restrictions after three years; and that the jury was erroneously instructed that "in arriving at the fair market value of the property subject to the Defendant's restrictions on its use immediately after the taking, you should contemplate the project in its completed state and any damage to the remainder due to the use to which the part appropriated may, or probably will, be put."

Instead, NCDOT sought to introduce evidence of the value of the negative easement that restricted the Chappells' right to improve, develop or subdivide their property for three years, through the expert

opinion of an appraiser who calculated that value to be $425 for the 1992 restrictions and $12,000 for the 2006 restrictions. After the trial court ruled that NCDOT's appraiser could not render an opinion based on the three-year period established by the statute,[1] the appraiser revised his calculations and concluded that the value of the 1992 restrictions was $1,250 and $21,050 for the 2006 restrictions. NCDOT's appraiser did not seek to calculate the fair market value of the property before and after the Map Act corridor maps were recorded and had no opinion on the difference in market value. The question NCDOT asks is whether the trial court's alleged mischaracterization of the nature of the taking led the court to erroneously exclude its appraiser's testimony, improperly allow the Chappells' appraiser to testify, and erroneously instruct the jury.

Our answer is that what matters is whether the trial court correctly applied the law concerning how just compensation is measured, not the label given by the trial court or the parties to the taking that occurred. The nature of the taking impacts the fair market value of the property before and after the taking, but the touchstone is fair market value of the property. The trial court's evidentiary rulings concerning the expert testimony here were not an abuse of discretion because they were based on a correct understanding of the proper measure of just compensation.[2]

The General Assembly has specified how damages are to be measured in inverse condemnation proceedings in these circumstances.

> Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

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1. The Map Act provided that a property owner could seek relief from the Act's restrictions by submitting an application for a building permit or subdivision plat, which triggered a three-year period during which NCDOT would have to either approve the application or move to acquire the property in fee simple. *See* N.C.G.S. §136-44.51(b) (2017). If the department took no action within the three-year period, the restrictions ended and the property could be treated as unencumbered. *Id.*

2. A trial court's ruling on the admissibility of expert testimony will not be reversed on appeal absent a showing of abuse of discretion, even when the exclusion of expert testimony determines the outcome of the case. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (citing *GE v. Joiner*, 522 U.S. 136, 142-43, 118 S. Ct. 512, 517 (1997)).

N.C.G.S. § 136-112(1) (2019).[3] *See also*, *N.C. Highway Comm'n v. Hettiger*, 271 N.C. 152, 156, 155 S.E.2d 469, 472 (1967) (identifying that this statute prescribes the rule for determining what constitutes just compensation); *Gallimore v. Highway Comm'n*, 241 N.C. 350, 353, 85 S.E.2d 392, 395 (1955) (holding that just compensation is the fair market value of the property before and after the taking of a portion for highway purposes).

Kirby holds that a Map Act recordation effected an "indefinite restraint on fundamental property rights" which restricts the property owners' rights to improve, develop, and subdivide their property for an indefinite period of time. 368 N.C. at 855–56, 786 S.E.2d at 925–26. The value of the loss of those rights is to be measured "by calculating the value of the land before the corridor map was recorded and the value of the land afterward, taking into account all pertinent factors, including the restriction on each plaintiff's fundamental rights, as well as any effect of the reduced *ad valorem* taxes." *Kirby*, 368 N.C. at 856, 786 S.E.2d at 926 (citing *Natahala Power & Light Co. v. Moss*, 220 N.C. 200, 205–06, 17 S.E.2d 10, 13–4 (1941) and *Beroth*, 367 N.C. at 343–44, 757 S.E.2d at 474–75.). Thus, the relevant determination when calculating just compensation for a taking that involves less than the entire parcel of property starts with the fair market value of the entire property before the taking and the fair market value of what remains after the taking. This is true whether the taking is an indefinite negative easement, as in the case of Map Act takings, or involves some other taking for public use. By eminent domain, the state may take "an easement, a mere limited use, leaving the owner with the right to use in any manner he may desire so long as such use does not interfere with the use by the sovereign for the purpose for which it takes, or it may take an absolute, unqualified fee, terminating all of defendant's property rights in the land taken." *Morganton v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 533, 112 S.E.2d 111, 113 (1960) (citations omitted). The property owner's damages are calculated on the basis of before and after fair market values in each instance.

While it speaks to the exclusive measure of damages, the statute does not restrict expert real estate appraisers with regard to the method they use to determine fair market value. *Bd. of Transp. v. Jones*, 297 N.C.

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3. The General Assembly enacted N.C.G.S. § 136-112 as a part of Section 2, Chapter 1025, of the Session Laws of 1959. 1959 N.C. Sess. Laws 1046, 1051. The rule, as to the measure of damages stated there, "is in accord with that adopted and stated by this Court in numerous decisions prior to the adoption of the 1959 Act." *N.C. State Highway Comm'n v. Gasperson*, 268 N.C. 453, 455, 150 S.E.2d 860, 862 (1966) (citing *Robinson v. Highway Comm'n*, 249 N.C. 120, 105 S.E. 2d 287 (1958)).

436, 438, 255 S.E.2d 185, 187 (1979). "Methods of appraisal acceptable in determining fair market value include: (1) comparable sales, (2) capitalization of income, and (3) cost. While the comparable sales method is the preferred approach, the next best method is capitalization of income when no comparable sales data are available." *Dep't of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 13 n.5, 637 S.E.2d 885, 894 n.5 (2006) (citing 5 Julius L. Sackman et al., *Nichols on Eminent Domain* § 19.01, 19-2 (rev. 3d ed. 2006) and 4 Julius L. Sackman et al., *Nichols on Eminent Domain* § 12B.08, 12B-47 to -48 (rev. 3d ed. 2006)); *see also*, *Templeton v. State Highway Comm'n*, 254 N.C. 337, 339, 118 S.E.2d 918, 920 (1961) (allowing the admission of "[a]ny evidence which aids . . . in fixing a fair market value of the land and its diminution by the burden put upon it").

NCDOT was entitled to present evidence of the before and after fair market value of the Chappells' property using acceptable methods of appraisal, but only methods using factors that legally can be considered. In *Dep't of Transp. v. M.M. Fowler, Inc.*, the Court reversed and remanded for a new trial because the property owner's appraiser based their fair market value of the property solely on the capitalized alleged lost business profits, which we held was not admissible evidence because the lost business profit from a business conducted on the property is not a compensable loss. *M.M. Fowler, Inc.*, 361 N.C. at 15, 637 S.E.2d at 895. In that case, we explained:

> During a proceeding to determine just compensation in a partial taking, the trial court should admit any relevant evidence that will assist the jury in calculating the fair market value of property and the diminution in value caused by condemnation. *Abernathy v. S. & W. Ry. Co.*, [ ]150 N.C. 97, 108–09, 63 S.E. 180, 185 (1908). Admission of evidence that does not help the jury calculate the fair market value of the land or diminution in its value may "confuse the minds of the jury, and should be excluded." *Id.* [ ] at 109, 63 S.E. at 185. In particular, specific evidence of a landowner's noncompensable losses following condemnation is inadmissible. *Templeton v. State Highway Comm'n*, 254 N.C. 337, 339–40, 118 S.E.2d 918, 920–21 (1961) (finding trial court erred in admitting evidence of the cost of silt and mud removal because "it [was] possible that the jury could have gotten the impression that the removal . . . was compensable as a separate item of damage").

M.M. Fowler, Inc., 361 N.C. at 6–7, 637 S.E.2d at 890 (third and fourth alteration in original). Therefore, an opinion concerning a property's fair

market value is inadmissible if it materially relies on factors that legally cannot be considered. Moreover, an expert's opinion must be reasonably reliable to be admissible. *See Dep't of Transp. v. Haywood Cty.*, 360 N.C. 349, 352–53, 626 S.E.2d 645, 647 (2006) (trial court properly excluded appraisers' expert testimony because it "lacked sufficient reliability").

Applying these principles to this case, the trial court did not abuse its discretion to rule that NCDOT's expert appraiser's opinion, to the extent that the expert sought to value the rights that remained to the property owner after the taking based on a three-year temporary negative easement, was not admissible. That testimony assumed a three-year negative easement when this Court previously held that a Map Act recording creates an "indefinite restraint on fundamental property rights." *Kirby*, 368 N.C. at 855–56, 786 S.E.2d at 925-26. *Cf. North Carolina State Highway v. Black*, 239 N.C. 198, 205, 79 S.E.2d 778, 784 (1954) (compensation for a perpetual easement cannot be based on an assumption that it will be abandoned).

NCDOT's expert appraiser testified at the motions hearing that lacking any comparable sales and assuming an indefinite negative easement, he based a subsequent valuation of the property on floodplain property values because in his view the restrictions imposed by a Map Act recordation are similar to the restrictions on properties in a floodplain. The trial court ultimately ruled that the floodplain analogy was not a proper basis for determining the fair market value of the property after the Map Act taking. The trial court's ruling was based on the fact that the floodplain property used in the appraisal was in and around Mecklenburg County, "not anywhere near Cumberland County," and that the floodplain designation is an exercise of police power, unlike the Map Act taking which is an exercise of eminent domain. The court's decision here to exclude the testimony as unreliable and potentially misleading to the jury because "there is no reliable reason to choose flood plain property as the analogous property" was not an abuse of discretion. *See*, *e.g.*, *Gallimore v. State Highway & Pub. Works Com.*, 241 N.C. 350 354, 85 S.E.2d 392, 396 (1955) ("Any evidence which aids the jury in fixing a fair market value of the land, and its diminution by the burden put upon it, is relevant and should be heard; any evidence which does not measure up to this standard is calculated to confuse the minds of the jury, and should be excluded.").

Lacking any sales of comparable property from which to determine fair market value, there remained two other methods of assessing the fair market value of the property, the cost approach and the income capitalization approach. *M.M. Fowler*, *Inc.*, 361 N.C. at 13 n.5,

637 S.E.2d at 894 n.5. Some of the evidence that NCDOT sought to introduce concerning the value of the property after the Map Act recordings, such as the fact that the Chappells continued to live in the home until 2016, might have been admissible if the income capitalization approach to the value of the home had been employed by NCDOT's appraisers.[4] However, there was no evidence from a NCDOT appraiser concerning the fair market value of the property after the 1992 and 2006 takings based on a cost approach or income capitalization approach to valuation. Thus, it was not an abuse of discretion for the trial court to exclude testimony that did not relate to one of the three appropriate methods of determining fair market value.

[3] Citing *Duke Power Co. v. Rogers*, 271 N.C. 318, 320, 156 S.E.2d 244, 247 (1967) and other precedent establishing that it is error to instruct the jury to award damages based on a fee simple taking where the condemning authority takes a lesser interest in the property, NCDOT further argues that it was error for the trial court to admit the testimony of the Chappells' appraiser. NCDOT contends that testimony improperly assumed that the highway was present on the property immediately after the filing of the corridor map, and it valued the property rights inside the corridor at zero despite the fact that the Chappells retained some rights to use the property after the takings. However, here there was ample evidence in the record, including the *voir dire* testimony of NCDOT's own appraisers, that there was no market for the Chappells' property once the 1992 corridor map was recorded. Whether one assumes the road is built, calls the taking similar to a fee simple taking, or gives the taking some other name, the fact that there was evidence of no market whatsoever for the property, in other words, that no one wanted to buy a house in the Outer Loop corridor once the 1992 map was recorded, was a proper consideration in determining the after-taking fair market value.

It is certainly correct that Rule 702 of the North Carolina Rules of Evidence applies here. *See N.C. Dep't of Transp. v. Mission Battleground Park, DST*, 370 N.C. 477, 485, 810 S.E.2d 217, 223 (2018) (directing on remand, with regard to a licensed real estate broker, "the superior court should decide in the first instance whether his testimony about fair market value is admissible under Rule 702."). However, we only overturn the trial court's ruling on whether to admit or exclude expert testimony where there has been an abuse of discretion. *State v. McGrady*, 368 N.C. at 893, 787 S.E.2d at 11 ("The standard of review remains the same

4. The fact that the Chappells lived in the property arguably could be relevant to the habitability of the premises and its rental value.

whether the trial court has admitted or excluded the testimony …"). In this case it was not an abuse of discretion for the trial court to allow the Chappells' appraiser to testify concerning the fair market value of their property after the taking because that expert opinion was based on evidence that there was, in fact, no market whatsoever for the property.

[4] With regard to the jury instructions, NCDOT argues the trial court erred in twice instructing that the jury should "contemplate the project in its completed state and any damage to the remainder due to the use to which the part appropriated may, or probably will, be put." The trial court based this instruction on the language of *Dep't of Transp. v. Bragg*, 308 N.C. 367, 370, 302 S.E.2d 227, 229 (1983), cited in the footnote to the pattern jury instruction. Again citing *Rogers*, NCDOT contends that it was reversible error to instruct the jury to award damages based on a fee simple taking where a lesser taking occurred. *See Rogers*, 271 N.C. at 320, 156 S.E.2d at 247.

Bragg involved the taking of a portion of the landowners' property for the purpose of widening a road pursuant to N.C.G.S. § 136-104, immediately vesting title with NCDOT. In the process of widening the road, a new drainage pattern caused additional damage to the remaining property, and the issue was whether evidence of this damage caused by the water diversion could be considered by the jury in assessing just compensation. *Bragg*, 308 N.C. at 370, 302 S.E.2d at 229. In those circumstances, it was appropriate for the jury to consider as an element of just compensation any evidence of damage to the landowners' remaining property.[5]

In contrast, under the Map Act, the indefinite negative easement created by recording a corridor map does not by itself result in the building or widening of a road. While it may have been erroneous to include this jury instruction given the facts of this case, to the extent that the taking here was a negative easement and not similar to a fee simple taking of the property, the error was not prejudicial because it could not have impacted the jury's determination of just compensation. The only evidence of the fair market value of the Chappells' property before and after

5. Indeed, the Court in *Bragg* concluded that the jury should consider the project as though completed in arriving at just compensation because "when, as here, the Department has initiated a partial taking under N.C.G.S. § 136-103 and trial on the issue of damages has not yet occurred, principles of judicial economy dictate that the owners of the taken land may allege a further taking by inverse condemnation in the ongoing proceedings." *Bragg*, 308 N.C. at 370 n.1, 302 S.E.2d at 230 n.1. Under a Map Act recording, title has not transferred, a road is not built, and drainage damages have not occurred.

the 1992 and 2006 takings was the evidence provided by the Chappells' appraiser. There was no evidence of an alternative fair market valuation on a cost basis or income capitalization basis that could have informed the jury's verdict. Therefore, regardless of the trial court's instruction regarding the road being built, the evidence admitted at trial supported the jury's verdict on fair compensation. The error, if any, would not have impacted the result in this particular trial.

IV. Property Taxes

[5] The Map Act initially reduced tax rates for impacted unimproved properties, and in 2011, the General Assembly further provided that designated properties in protected corridors would be assessed lower property taxes, being taxed at 20% of appraised value for unimproved property and 50% of the appraised value for improved property. *See* An Act to Reduce the Property Tax Owed For Improved Property Inside Certain Roadway Corridors, S.L. 2011-30, 2011 N.C. Sess. Laws 42 (codified at N.C.G.S.. §§ 105-277.9, -277.9A (2019)). In *Kirby*, this Court directed that the trier of fact should determine the value of the property after the corridor map was recorded, "taking into account . . . any effect of the reduced *ad valorem* taxes." *Kirby*, 368 N.C. at 849, 786 S.E.2d at 921. The trial court interpreted this to mean that the Chappells should be compensated for the actual *ad valorum* taxes they paid following the taking, while NCDOT contends that the amount of just compensation should be offset by the reduced property taxes because the reduction in taxes was intended to be partial compensation for the taking. NCDOT further argues that owners can only be reimbursed their property taxes when there is a fee simple taking. *See* N.C.G.S.§ 136-121.1 (2019).

However, in this case, where the evidence was that the property essentially had no fair market value once the 1992 corridor map was recorded, and there was no other evidence of the fair market value of the property assessed using a cost approach or an income capitalization approach, the Chappells were effectively paying taxes on property that had no value. Thus, it was appropriate, following *Kirby*, for the trial court to take into account the effect of the reduced *ad valorem* taxes in the way that it did, and compensate the Chappells for the actual taxes they paid at a time when their property had virtually no fair market value.

V. Pre-Judgment Interest

[6] Plaintiffs in inverse condemnation proceedings may seek interest on the judgment awarded by a jury as damages "at the legal rate on said amount from the date of the taking to the date of the judgment." N.C.G.S.. § 136-113 (2015). At the time this action was filed, the legal

rate of interest for the purposes of this statute was set by N.C.G.S. § 24-1 (2015) at 8% per annum.[6] The landowner may rebut this presumptively reasonable rate through the introduction of evidence of prevailing market interest rates. *Lea Co. v. N.C. Bd. of Transp.*, 317 N.C. 254, 261 345 S.E.2d 355, 359 (1986). The amount of additional compensation for a delay in payment in inverse condemnation actions is the "prudent investor" standard, defined as the rate which would have been earned by "a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal." *Lea*, 317 N.C. at 262, 345 S.E.2d at 360 (citations omitted). Even more specifically, the *Lea* Court assumed that a prudent investor would typically diversify her portfolio, and therefore the trial court must "consider prevailing rates, during the period of delay, for investments of varying lengths and risk," and such investments typically include "short, medium, and long-term government and corporate obligations." *Id.*, 317 N.C. at 263, 345 S.E.2d at 360 (citations omitted). In addition, *Lea* held that "[s]ince this Court had now adopted the 'prudent investor' standard, compound interest should be allowed for delayed payment in condemnation cases if the evidence shows that during the pertinent period the 'prudent investor' could have obtained compound interest in the market place." *Id.*, 317 N.C. at 264, 345 S.E.2d at 361.

In this case, the parties stipulated that 8% simple interest is presumptively reasonable and that it was proper for the trial court to rule on the issue of interest. The trial court heard testimony from experts in finance and economics offered by both parties and based on that evidence, made relevant findings of fact and conclusions of law. Specifically, the trial court found that compound rates of return were available to the Chappells from 1992 to the date of the judgment, and that a compound rate of return of 8% per annum would put the Chappells in as good a position as they would have been if NCDOT had not taken their property.

The Chappells' economist, found to be credible by the trial court, testified that a 60% stock/40% bond portfolio mix "would satisfy the prudent investor goal of providing a reasonable return while maintaining the safety of principal." Based on that mix, his testimony was that the compound rate of return from the date of the 1992 taking to the present was 8.52%, and the compound rate of return from the date of the 2006

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6. N.C.G.S. § 136-113 was amended in 2016 to tie the legal rate of interest in condemnation proceedings to the prime lending rate instead of the 8% set in N.C.G.S. § 24-1. However, because that amendment post-dated the filing of this action, it does not apply here.

taking to the present would be 7.5%. The trial court concluded that it was appropriate to apply a compounded interest rate of 8% per annum to the value of both the 1992 and 2006 takings from the date of each taking to the entry of final judgment.

The problem with the trial court's analysis is that if the 8% interest is based on the legal rate of 8% per annum simple interest set by N.C.G.S. § 24-1, deemed presumptively reasonable and stipulated by the parties, then it was error to compound that rate because under *Lea*, a plaintiff can choose a) the statutory rate, or, b) rebut it with a prudent investor rate compounded if compounded rates would have been available, but cannot combine both methods of arriving at the appropriate interest calculation. *See*, *Lea*, 317 N.C. at 261, 345 S.E.2d at 359.

Alternatively, as seems more likely, if the trial court's compounded interest rate of 8% per annum was based on the "prudent investor" standard, then the expert testimony in this case failed to limit the type of alternative investments to interest-bearing instruments but rather assumed a portfolio of 60% equity/40% bond mix. *Lea* referenced an "interest" portfolio and "government and corporate obligations." Reading *Lea* in conjunction with this Court's opinion in *Fidelity Bank v. N.C. Dept. of Revenue*, 370 N.C. 10, 20, 803 S.E.2d 142, 150 (2017), which was not an inverse condemnation case but did hold that the term "interest" when undefined in a statute is unambiguous and means "periodic payments received by the holder of a bond," the interest rate available under the "prudent investor" standard for determining the appropriate interest rate to apply to a judgment in an inverse condemnation case must be a rate produced by debt instruments or debt obligations, such as commercial bonds or treasury bills during the relevant time period.

Therefore, the trial court erred in applying a compounded interest rate of 8% per annum based on a prudent investor's investment portfolio that included equity investments. In the absence of evidence in the record concerning what rates of return a prudent investor might have obtained from a diversified portfolio of commercial bonds and/or treasury bills, and our own inability to make factual findings, we remand to the trial court for further proceedings to determine the appropriate interest rate to apply consistent with this opinion.

VI. Conclusion

Kirby v. N.C. Dep't of Transp. established that by recording corridor maps, the NCDOT took significant and fundamental property rights from the property owners in the affected corridors. The evidence in this case showed that for the Chappells, the fair market value of their

property plummeted after the 1992 map was recorded because no one was interested in buying a house in Cumberland County that might eventually be condemned to make way for the Fayetteville Outer Loop. The trial court correctly applied the statutorily defined measure of damages for a partial taking and made evidentiary rulings consistent with what is relevant to determining fair market value. Any error in the jury instructions was harmless in light of the evidence in this case. The trial court did not err in taking into account the taxes the Chappells paid on property that had virtually no value and correctly compensated them for the actual amounts they demonstrated they paid. On remand, all parties can provide supplemental evidence to the trial court concerning the appropriate compounded interest rate to apply under the "prudent investor" standard, properly understood.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

DTH MEDIA CORPORATION, CAPITOL BROADCASTING COMPANY, INC., THE CHARLOTTE OBSERVER PUBLISHING COMPANY, AND THE DURHAM HERALD COMPANY

v.

CAROL L. FOLT, IN HER OFFICIAL CAPACITY AS CHANCELLOR OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, AND GAVIN YOUNG, IN HIS OFFICIAL CAPACITY AS SENIOR DIRECTOR OF PUBLIC RECORDS FOR THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL

No. 142PA18

Filed 1 May 2020

Public Records—public university—student disciplinary records—effect of federal law on state disclosure requirement

Student disciplinary records sought pursuant to the Public Records Act (PRA)—including the name of the student, the violation committed, and any sanction imposed by the university, but not the date of offense—must be disclosed as public records, despite the records also qualifying as educational records under the federal Family Educational Rights and Privacy Act (FERPA). The federal and state law were not in conflict with each other under these circumstances, and the federal law did not grant discretion to the university to determine whether the records should be disclosed. Therefore, FERPA did not operate to preempt the PRA, either through the doctrine of conflict preemption or field preemption, so as to protect from disclosure the disciplinary records at issue.

Justice DAVIS dissenting.

Justices ERVIN and EARLS join in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 from the decision of a unanimous panel of the Court of Appeals, 259 N.C. App. 61, 816 S.E.2d 518 (2018), reversing a judgment entered on 9 May 2017 by Judge Allen Baddour in Superior Court, Wake County. Heard in the Supreme Court on 27 August 2019.

Stevens Martin Vaughn & Tadych, PLLC, by Hugh Stevens and Michael J. Tadych, for plaintiff-appellees.

Joshua H. Stein, Attorney General, by Stephanie A. Brennan, Special Deputy Attorney General, and Matthew Burke, Solicitor General Fellow, for defendant-appellants.

J.D. Jones Law, PLLC, by Jonathan D. Jones for Student Press Law Center and Brechner Center for Freedom of Information, amici curiae.

Fox Rothschild LLP, by Troy D. Shelton for Victim Rights Law Center, N.C. Coalition Against Sexual Assault, National Alliance to End Sexual Violence, National Network to End Domestic Violence, and the N.C. Coalition Against Domestic Violence, amici curiae.

MORGAN, Justice.

This matter presents questions which require this Court to interpret the federal Family Educational Rights and Privacy Act (FERPA) and the North Carolina Public Records Act (the Public Records Act) in order to determine whether officials of The University of North Carolina at Chapel Hill (UNC-CH or University) are required to release, as public records, disciplinary records of its students who have been found to have violated UNC-CH's sexual assault policy. The Court of Appeals unanimously determined that such records are subject to mandatory disclosure. We affirm.

Factual and Procedural Background

This case arises out of a dispute between various news organizations and officials of UNC-CH's administration. Plaintiffs DTH Media Corporation; Capitol Broadcasting Company, Inc.; The Charlotte Observer

Publishing Company; and The Durham Herald Company (collectively, plaintiffs) are news organizations based in North Carolina which regularly report on matters regarding UNC-CH. Defendants are Carol L. Folt, the former Chancellor of UNC-CH and Gavin Young, the Senior Director of Public Records of UNC-CH (collectively, defendants). Plaintiffs brought this legal action against defendants in the defendants' official capacities for alleged violations of the Public Records Act. The Act was enacted by the North Carolina General Assembly in order to make public records readily available because they "are the property of the people." *See* N.C.G.S. §§ 132-1 to -11 (2017). Defendants contend that they are prohibited from complying with the Public Records Act in light of applicable provisions of FERPA. The parties stipulated to the following facts, which were adopted by the lower courts and utilized in their respective determinations in the controversy prior to this Court's involvement.

Since 2014, UNC-CH has adhered to its comprehensive "Policy on Prohibited Discrimination, Harassment and Related Misconduct" that includes prohibitions on, and potential punishments for, sexual-based and gender-based harassment and violence. In a letter dated 30 September 2016, plaintiffs requested, pursuant to the Public Records Act, "copies of all public records made or received by [UNC-CH] in connection with a person having been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by [UNC-CH's] Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office." The letter was addressed to officials of UNC-CH, including defendant Young. In a letter dated 28 October 2016 and signed by Joel G. Curran, UNC-CH's Vice Chancellor for Communications and Public Affairs, UNC-CH expressly denied plaintiffs' request. In his letter, Vice Chancellor Curran asserted that the records requested by plaintiffs were "educational records" as defined by FERPA and were thus "protected from disclosure by FERPA."

After subsequent communications between the parties, including mediation proceedings which were conducted pursuant to N.C.G.S. § 78-38.3E, plaintiffs narrowed the scope of their request for records which were held in the custody of UNC-CH to: "(a) the name of any person who, since January 1, 2007, has been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by the [UNC-CH] Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office; (b) the date and nature of each violation for which each such person was found responsible; and (c) the sanction[] imposed on each such person for each such violation." UNC-CH denied plaintiffs' revised, more limited request on 11 November

2016 during an in-person meeting, and further reiterated to plaintiffs on 18 November 2016 that the University would continue to decline plaintiffs' request for the records at issue pursuant to FERPA.

On 21 November 2016, following the continued denial of their request, plaintiffs filed a complaint and sought an order for defendants to show cause under the Public Records Act and the North Carolina Declaratory Judgments Act. *See* N.C.G.S. §§ 1-253 to -267. Plaintiffs sought in relevant part: (1) a preliminary order compelling defendants to appear and produce the records at issue; (2) an order declaring that the requested records are public records as defined by N.C.G.S. § 132-1; and (3) an order compelling defendants to permit the inspection and copying of these records, pursuant to N.C.G.S. § 132-9(a) in their capacity as public records.

Defendants filed their answer to plaintiffs' complaint and petition for the show cause order on 21 December 2016, claiming that "FERPA, a federal law that preempts the Public Records Act, strictly prohibits" the disclosure of the records at issue. More specifically, defendants asserted UNC-CH's position that

> [u]nder FERPA, the University has reasonably exercised its discretion not to release this information, because doing so would breach the confidentiality of the University's Title IX process and would interfere with and undermine that process. More specifically, disclosure of this information would deter victims from coming forward and participating in the University's Title IX process, thus preventing victims from receiving the help and support available to them through the University's Title IX process and preventing the University from learning about potential serial perpetrators, which would undermine the safety of the campus community. Additionally, disclosure of this information would permit the identification of victims by members of the campus community who know their relationship to the responsible person and by providing the responsible student motivation to reveal the name of the victim, which would lead to victims being re-traumatized. Such disclosure would deter the participation of witnesses and further impede the University's ability to render a fair, just, and informed determination, and jeopardize the safety of students found responsible during the Title IX process by placing them at risk for retribution.

Following a hearing on plaintiffs' request for declaratory judgment which was conducted on 6 April 2017, the Superior Court, Wake County entered an order and final judgment filed on 9 May 2017 which, *inter alia*, denied plaintiffs' request for a declaratory judgment in determining that defendants were not required to produce the student records requested by plaintiffs.[1] In reaching its decision, the trial court concluded that the Public Records Act does not compel the release of public records where an exception is "otherwise specifically provided by law," and agreed with defendants' position as expressed in the trial court's order and final judgment, that

> [i]n 20 U.S.C. § 1232(b)(6), FERPA grants the University the discretion to determine whether to release (1) the name of any student found 'responsible' under University policy of a 'crime of violence' or 'nonforcible sex offense,' (2) the violation, and (3) the sanction imposed. The University may disclose (but is not required to disclose) this information only if the University determines that the student violated the University's rules or policies.

In applying principles enunciated in the United States Constitution and pertinent cases of the Supreme Court of the United States, the trial court entered conclusions of law that the doctrines of both field preemption and conflict preemption operate to implicitly preempt, by force of federal law, any required disclosure by North Carolina's Public Records Act of the requested records. Plaintiffs appealed the portion of the trial court's order and final judgment relating to the denial of access to the student records in dispute to the Court of Appeals.

In addressing the respective arguments of plaintiffs and defendants, the lower appellate court's analysis of the questions presented for resolution included the following subjects: the Public Records Act enacted by the North Carolina General Assembly, the Family Educational Rights and Privacy Act enacted by the United States Congress, the interaction between this state law and this federal law regarding their individual and joint impacts on the present case, and principles of federal preemption. In an effort to promote efficiency and to diminish repetition, we shall integrate the parties' respective arguments, the Court of Appeals' determinations, and the Court's conclusions throughout our opinion's overlapping treatment of them.

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1. Both parties agree that the matter concerning UNC-CH employees' records which is addressed in the trial court's order and final judgment is not at issue on appeal.

Analysis

A. The legislative enactments

Plaintiffs initially asked defendants to provide copies of all public records made or received by UNC-CH in connection with any person having been found responsible for rape, sexual assault, or any related or lesser-included sexual conduct by UNC-CH's Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office. This request was made pursuant to the Public Records Act, which is codified in the North Carolina General Statutes in §§ 132-1 through 132-11. The request was subsequently narrowed to encompass records in the custody of UNC-CH that included (a) the name of any person who, since January 1, 2007, had been found responsible for rape, sexual assault, or any related or lesser-included sexual misconduct by the UNC-CH Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office; (b) the date and nature of each violation for which each such person was found responsible; and (c) the sanctions imposed on each such person for each such violation.

In its totality, N.C.G.S. § 132-1 reads as follows:

> (a) "Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.
>
> (b) The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. As

> used herein, "minimal cost" shall mean the actual cost of reproducing the public record or public information.

N.C.G.S. § 132-9(a) states, in its entirety:

> Any person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records, may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying, and the court shall have jurisdiction to issue such orders if the person has complied with G.S. 7A-38.3E.[2] Actions brought pursuant to this section shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts.

In declining plaintiffs' request for the identified records in its custody, UNC-CH interpreted the Family Educational Rights and Privacy Act—codified at 20 United States Code Section 1232g—to permit UNC-CH the ability to deny access to the records at issue, based upon its obligation to comply with Title IX of the Education Amendments of 1972, found in 20 U.S.C. §§ 1681–88. Pertinent provisions of FERPA regarding the parties' respective positions, the trial court's order and final judgment, the Court of Appeals decision, and this Court's determination include salient segments of:

- 20 U.S.C. § 1232g(a)(4)(A): "For the purposes of this section, the term 'education records' means . . . those records, files, documents, and other materials which[ ] (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution";
- 20 U.S.C. § 1232g(b)(1): "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .) of students without the written consent of their parents . . .";

2. N.C.G.S. § 7A-38.3E governs the mediation of public records disputes.

- 20 U.S.C. § 1232g(b)(2): "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information . . . except . . . such information is furnished in compliance with judicial order . . . upon condition that parents and the students are notified of all such orders . . . in advance of the compliance therewith by the educational institution or agency . . .";
- 20 U.S.C. § 1232g(b)(6)(B): "Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence . . . or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense";
- 20 U.S.C. § 1232g(b)(6)(C): "For the purpose of this paragraph, the final results of any disciplinary proceeding[ ] (i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and (ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student"; and
- 20 U.S.C § 1681(a): "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."

B. Consideration and application of the Public Records Act and the Family Educational Rights and Privacy Act

This Court reviews issues of statutory interpretation *de novo*. "The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998). "The cardinal principle of statutory construction is that

the intent of the legislature is controlling. In ascertaining the legislative intent courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish." *State ex rel. Util. Comm'n v. Public Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 443-44 (1983) (citations omitted). "When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself[.]" *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010). "When multiple statutes address a single matter or subject, they must be construed together, *in pari materia*, to determine the legislature's intent." *Carter-Hubbard Publ'g Co., Inc. v. WRMC Hosp. Operating Corp.*, 178 N.C. App. 621, 624, 633 S.E.2d 682, 684 (2006), *aff'd*, 361 N.C. 233, 641 S.E.2d 301 (2007). "Statutes *in pari materia* must be harmonized, 'to give effect, if possible, to all provisions without destroying the meaning of the statutes involved.' " *Id.* (citation omitted). As we said in *Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 447 S.E.2d 768 (1994), a case upon which both parties rely to support their respective views here regarding statutory construction and its *in pari materia* component:

> as in any area of law, the primary function of a court is to ensure that the purpose of the Legislature in enacting the law, sometimes referred to as legislative intent, is accomplished . . . We should be guided by the rules of construction that statutes *in pari materia*, and all parts thereof, should be construed together and compared with each other. Such statutes should be reconciled with each other when possible.

Id. at 591, 447 S.E.2d at 781.

In the present case, the state's legislative body—the North Carolina General Assembly—has clearly expressed its intent through the Public Records Act to make public records readily accessible as "the property of the people," as described in N.C.G.S. § 132-1(b). There is no dispute between plaintiffs and defendants before this Court that the student disciplinary records meet the definition of "public records" under N.C.G.S. § 132-1, that UNC-CH comes within the purview of the Public Records Act, and that said records are within the custody and control of UNC-CH. The Public Records Act "affords the public a broad right of access to records in the possession of public agencies and their officials." *Times-News Publ'g Co. v. State of N.C.*, 124 N.C. App. 175, 177, 476 S.E.2d 450, 451-52 (1996) *disc. review denied*, 345 N.C. 645, 483 S.E.2d 717 (1997). The Act is intended to be liberally construed to ensure that governmental records be open and made available to the public, subject only to a few limited exceptions. The Public Records Act thus allows access to

all public records in an agency's possession "*unless* either the agency or the record is specifically exempted from the statute's mandate." *Times-News*, 124 N.C. App. at 177, 476 S.E.2d at 452 (emphasis added). "Exceptions and exemptions to the Public Records Act must be construed narrowly." *Carter-Hubbard Publ'g Co.*, 178 N.C. App. at 624, 633 S.E.2d at 684.

As for the Family Educational Rights and Privacy Act, the federal legislative body—the United States Congress—has clearly expressed its intent through FERPA that the ready accessibility of education records exhibited by an "educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .) of students without the written consent of their parents . . ." shall result in "[n]o funds . . . be[ing] made available under any applicable program" to such an educational agency or institution, pursuant to 20 U.S.C. § 1232g(b)(1). Just as the student disciplinary records at issue in the instant case are considered to be "public records" under the state's Public Records Act, they are also considered to be "education records" under FERPA; just as UNC-CH is deemed to be an "agency of North Carolina government or its subdivisions" under the Public Records Act, it is also deemed to be an "educational agency or institution" under FERPA.

Defendants have chosen to construe FERPA in such a manner that they have considered UNC-CH to be prohibited "from disclosing 'education records,' including records related to sexual assault investigations and adjudications governed by Title IX." Regarding "campus disciplinary adjudications of sexual assault," UNC-CH opines that "FERPA prohibits the disclosure of education records but grants universities discretion to determine whether to disclose three items of information: the name of the responsible student, the violation, and the sanction imposed." In light of its construction of FERPA and this federal law's perceived concomitant relationship with Title IX as embodied in 20 U.S.C. § 1681(a), *et seq.*, UNC-CH assumes the posture as to the release of the student disciplinary records which are the focus of this legal controversy, that "the University has exercised its discretion and has declined to disclose this information because the University has determined that the release of this information would lead to the identification of victims, jeopardize the safety of the University's students, violate student privacy, and undermine the University's efforts to comply with Title IX."

Defendants' justification for its interpretation of FERPA in this subject matter area is premised on its application of FERPA's provision of

20 U.S.C. § 1232g(b)(6)(B), from which it is surmised that UNC-CH has the discretion to determine whether to release information about a student disciplinary proceeding outcome, and FERPA's provision of 20 U.S.C. § 1232g(b)(6)(C)(i), which limits the divulgence of "the final results of any disciplinary proceeding" to "the name of the student, the violation committed, and any sanction imposed by the institution or that student . . . ." Defendants discern that the phrase contained in 20 U.S.C. § 1232g(b)(6)(B), "*if* the institution *determines* as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense" (emphasis added) impliedly cloaks UNC-CH with the discretionary authority to determine whether to release the outcome of a student disciplinary proceeding in light of the introductory portion of the provision that "[n]othing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence . . . or a nonforcible sex offense . . . ." It is compelling in light of the Court's duty to observe and to implement the aforementioned canons of statutory construction, that there is no express provision in FERPA that reposes the authority in UNC-CH to exercise the discretion that it purports to have. On the other hand, plaintiffs assert that there is no conflict between the state's Public Records Act and the federal law, FERPA, that the Public Records Act and its underlying legislative intent support liberal access to the records at issue here, and that the Court of Appeals is correct in its determination that the two legislative enactments which govern these records can and should be construed *in pari materia* so as to afford plaintiffs the access to the student disciplinary records which is sought.

We conclude that the Court of Appeals correctly held that 20 U.S.C. § 1232g(b)(6)(B) did not grant implied discretion to UNC-CH to determine whether to release the results of a student disciplinary proceeding emanating from rape, sexual assault, or sexual misconduct charges in absence of language expressly granting such discretion. We also note that the lower appellate court properly recognized that "[p]laintiffs' records request is limited to students who UNC-CH has already expressly determined to have engaged in such misconduct, and the records of which are expressly subject to disclosure under FERPA." *DTH v. Folt*, 259 N.C. App. at 69, 816 S.E.2d at 524 (citing 20 U.S.C. § 1232g(b)(6)(B)). Since FERPA contains no such language, but instead specifies that the categories of records sought here are public records subject to disclosure—"Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing . . ."

—we see no conflict between the federal statute and the state Public Records Act. This North Carolina law has been interpreted consistently by our state courts as intended for liberal construction affording ready access to public records, subject to limited exceptions. *See Carter-Hubbard Publ'g Co.*, 178 N.C. App. at 624, 633 S.E.2d at 684. Accordingly, we conclude, as did the Court of Appeals, that defendants' contended interpretation of the two statutes "conflicts with both the Public Records Act's mandatory disclosure requirements and the plain meaning of FERPA's § 1232g(b)(6)(B), which allows disclosure." *Id.* at 70–71, 816 S.E.2d at 525. This result reconciles and harmonizes the Public Records Act and the Family Educational Rights and Privacy Act, while preserving the integrity of the well-established doctrines which guide proper statutory construction. It also reinforces that the Public Records Act may be available to compel disclosure through judicial process if necessary, in the face of a denial of access to such records.

Unfortunately, the dissent subscribes to UNC-CH's depiction of the University's discretion "to produce the records at issue upon request by a third party if it chooses to do so *in the exercise of its independent judgment*." In embracing the position of UNC-CH that the institution possesses such pervasive discretion in light of the federal law, the dissent strives to justify its acceptance of this representation by combining the open-ended, non-prohibitive beginning phrase of 20 U.S.C. § 1232g(b)(6)(B), "*Nothing in this section shall be construed* to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student . . ." (emphasis added) with the permissive introductory language of 34 C.F.R. § 99.31(a), "An educational agency or institution *may* disclose personally identifiable information from an education record of a student . . ." (emphasis added) so as to allow this tandem of federal law provisions to operate as though the state's Public Records Act does not exist. Indeed, it is a fairly elementary deduction, in neatly configuring these two separate segments of federal enactments into the single determinant which the dissent declares, that "Nothing in this section [20 U.S.C. § 1232g(b)(6)(B)] shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student . . . [such that] [a]n educational agency or institution may disclose personally identifiable information from an education record of a student . . . ." We agree that, standing alone, a postsecondary educational institution possesses such discretion to disclose. However, when such a postsecondary educational institution is a *public* postsecondary educational institution such as UNC-CH, operating as an undisputed "agency

of North Carolina" under the Public Records Act and therefore subject to comply with requests for public records when asserted under N.C.G.S. § 132-1, then "[n]othing in this section [20 U.S.C. § 1232g(b)(6)(B)] shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student."

Therefore, in properly applying the foundational principles of statutory construction so as to reconcile multiple legislative enactments in an effort to harmonize their joint and mutual operation, the established methodology to be applied here would be an examination, in the first instance, of the state law's mandatory Public Records Act provision and the federal law's permissive Code of Federal Regulations language which supplements FERPA's open-ended and non-prohibitive language, instead of the dissent's employment of the erroneous methodology of initially combining the two federal provisions, thus developing in a vacuum the flawed conclusion consistent with UNC-CH's view that the University commands discretion over the release of the public records, and only then secondarily considering the operation of the Public Records Act after having prematurely succumbed to the conclusions that "a university has the authority to produce the records at issue upon request by a third party if it chooses to do so in *the exercise of its independent judgment*" and "the doctrine of conflict preemption is directly applicable" which would preclude the operation of the Public Records Act in the present case. Plaintiffs submitted their request for the records at issue to the University pursuant to the Public Records Act because of the educational institution's status as an "agency of North Carolina." It is therefore appropriate, due to the mandatory nature of the state law and the liberal construction which our state courts have given it, to look initially at the application of the Public Records Act in light of plaintiffs' request, then assess whether there are any other legislative provisions of any sort which present potential conflict with the operation of the Public Records Act, and then implement the established principles of statutory construction to reconcile such provisions. *See Times-News*, 124 N.C. App. at 177, 476 S.E.2d at 452 (The Public Records Act allows access to all public records in an agency's possession "*unless either the agency or the record is specifically exempted from the statute's mandate*." (emphasis added)). In the present case, however, the dissent elects to ignore the logical inception of the analysis by vaulting the state's Public Records Act, grasping the federal nature of FERPA and the cited provision from the Code of Federal Regulations, and concluding that an opening assessment of the applicability of the state law upon which plaintiffs' records request is expressly premised leads to a "look to North Carolina

law to determine congressional intent." The dissent's depiction and conclusion are both inaccurate. This defective approach by the dissent miscalculates the authority of 20 U.S.C. § 1232g(b)(6)(B) and 34 C.F.R. § 99.31 in the face of N.C.G.S. §132-1, by erroneously elevating the authority of the federal law's application here while wrongfully subjugating the authority of the state law's express mandates which require that the public records at issue be released in the dearth of any federal law express mandates which require that these public records be withheld.

Consistent with the rule of statutory construction to regard the plain meaning of the words of a statute, 20 U.S.C. § 1232g(b)(6)(C) allows only the disclosure of the name of the student, the violation committed, and any sanction imposed by the institution on that student upon the release of the final results of any disciplinary proceeding. We agree with the Court of Appeals that the dates of offenses which were requested by plaintiffs pursuant to the Public Records Act are not subject to disclosure under FERPA; therefore, UNC-CH is only required to disclose to plaintiffs, pursuant to the operation of the Public Records Act, the name of the student, the violation committed, and any sanction imposed by UNC-CH on that student upon the release of the final results of any disciplinary proceeding.

C. Examination of the federal preemption doctrine

Defendants invoke the doctrine of federal preemption in contending that "[e]ven if the [state's] Public Records Act mandated disclosure, FERPA would preempt the Act through conflict preemption[,]" and "FERPA also preempts the Public Records Act because mandating disclosure frustrates the purposes of federal law, which allocates to the University the ability to decide whether disclosure best promotes the prevention of sexual assaults and misconduct on a campus." Additionally, defendants posit that "FERPA's discretion also conflicts with the Public Records Act's purported disclosure mandate." These federal preemption theories, which are posited by defendants, are all based on the faulty premise that UNC-CH has the discretion to determine whether to release the final results of any student disciplinary proceeding—a postulation which we have already nullified in our earlier analysis. While defendants claim that "[c]onflict preemption applies because compliance with both FERPA and the Public Records Act is impossible here," we have already determined in this case that such compliance is possible. Although defendants argue that "FERPA and the Public Records Act conflict because the University cannot both exercise discretion about releasing information and be forced to release records containing that information," we have heretofore established in this case that the two

Acts do not conflict under these circumstances as well as held in this case that UNC-CH does not have the discretion regarding the release of the information at issue. Nonetheless, since our learned colleagues who are in the dissent have addressed their view of the role of the doctrine of federal preemption in this case and since the lower appellate court addressed the subject of the applicability of the federal preemption doctrine in notable detail in its opinion, we elect to examine the principle to a warranted degree.

Generally, if a state law conflicts with a federal law that regulates the same conduct, the federal law prevails under the doctrine of preemption. "A reviewing court confronting this question begins its analysis with a presumption against federal preemption." *State ex rel Utilities Comm'n v. Carolina Power & Light Co.*, 359 N.C. 516, 525, 614 S.E.2d 281, 287 (2005); *see also Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985). The presumption is grounded in the fact that a finding of federal preemption intrudes upon and diminishes the sovereignty accorded to states under our federal system. Indeed, in *Wyeth v. Levine*, the United States Supreme Court explained that "[i]n all [preemption] cases, and particularly those in which Congress has 'legislated . . . in a field which the States have traditionally occupied' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " 555 U.S. 555, 565 (2009) (alterations in original) (quoting *Medtronic, Inc. v. Lovr*, 518 U.S. 470, 485 (1996)). The exercise of such authority by the United States Congress, where shown clearly and manifestly by the federal legislative body, is known as "express preemption"; however, Congress may also achieve such a result through "implicit preemption." Congress may consequently preempt, i.e. invalidate, a state law through federal legislation. It may do so through express language in a statute. But even where a statute does not refer expressly to preemption, Congress may implicitly preempt a state law, rule, or other state action. *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015). Congress may implement implicit preemption either through conflict or field preemption. *Id.* "Conflict preemption exists where 'compliance with both state and federal law is impossible' or where 'the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.* at 377 (citing *California v. AR Calmenica Corp.*, 490 U.S. 93, 100–01 (1989)). As to field preemption, "Congress has forbidden the State to take action in the *field* that the federal statute preempts." *Id.*

The Court of Appeals, in the present case, considered both types of the conflict preemption aspect of the federal preemption doctrine and

determined that there was no conflict between the federal law, FERPA, and the state's Public Records Act, because compliance by UNC-CH with both of them is possible. As the lower tribunal noted in considering the first type, "[d]efendants would not violate § 1232g(b)(6)(B) by disclosing and releasing the records Plaintiffs requested in order to comply with the Public Records Act." *DTH v. Folt*, 259 N.C. App. at 74, 816 S.E.2d at 527. With regard to the second type, the Court of Appeals reasoned that "the Public Records Act disclosure requirements do not 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' " in that "[t]he plain text of § 1232g(b)(6)(B) permits Defendants' disclosure of the limited information specifically listed therein." *Id.* (quoting *Oneok*, 575 U.S. at 377). Although in our view the Court of Appeals analyzed conflict preemption unnecessarily as explained above, it nonetheless applied the doctrine correctly in general, and *Oneok* in particular.

The dissent unequivocally views FERPA as preventing the operation of the Public Records Act in the present case, opining that "[a] federal law that grants discretion is fundamentally irreconcilable with a state law that seeks to override that discretion." In this analytical exercise, the dissent again begins with the fundamental misstep that the FERPA provision of 20 U.S.C. § 1232g(b)(6)(B) is buttressed by 34 C.F.R. § 99.31 so as to establish a federally entrenched discretion for a *public* postsecondary educational institution like UNC-CH which is mandatorily subject to the Public Records Act as a state agency before the dissent is inclined to include the state law in its contemplation. This misstep, in turn, leads to the dissent's logical—though erroneous due to the faulty original premise—sequential misstep that "the federal law and state law fundamentally conflict." Consequently, instead of utilizing the aforementioned established tenets of statutory construction "that statutes *in pari materia*, and all parts thereof, should be construed together and compared with each other [because] [s]uch statutes should be reconciled with each other when possible," *Empire Power*, 337 N.C. at 591, 447 S.E.2d at 781, the dissent chooses to construe the cited principles in *Oneok* to support the applicability of the doctrine of conflict preemption in the instant case. Ultimately, as a result of the misapprehended precursors, the dissent arrives at its conclusion that conflict preemption exists here, as the principle is explained in *Oneok*.

Oneok presented an opportunity for the Supreme Court of the United States to address the issue of whether the federal Natural Gas Act preempted state antitrust lawsuits against interstate pipelines which would be based upon non-federally regulated retail natural gas prices.

Oneok, 575 U.S. at 376. In holding that the state's antitrust claims were not preempted by the federal Natural Gas Act, the high court explained that an examination of the applicability of preemption must "emphasize the importance of considering the *target* at which the state law aims in determining whether that law is preempted." *Id.* at 377. Just as the United States Supreme Court determined in *Oneok* that it would not find the operation of the principle of conflict preemption as appropriate in construing the federal law and the state law, we agree with the overarching principle enunciated in *Oneok* and therefore apply it here. While conflict preemption exists where compliance with both state and federal law is impossible or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, conflict preemption does not exist in the present case because compliance with both the Public Records Act and FERPA is possible, and the Public Records Act does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress regarding the governance of education under Title 20 of the Unites States Code.

Lastly, defendants' reliance on *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002) to establish the existence of the field preemption aspect of the federal preemption doctrine to this Court's satisfaction is unpersuasive. While we reiterate that the analysis which this Court elects to engage is arguably superfluous due to defendants' illustrated misassumptions, we choose to evaluate this remaining feature of the federal preemption doctrine in order to address defendants' contention that in *Miami University*, "[t]he court rejected claims that the Ohio public records law was broad and required disclosure." However, while the Sixth Circuit Court of Appeals acknowledged that FERPA generally shields student disciplinary records from release, the exception to the Act's disclosure prohibitions in *Miami University* which has direct application to the instant case was viewed by the federal appellate court in the following manner:

> Congress balanced the privacy interests of an alleged perpetrator of any crime of violence or nonforcible sex offense with the rights of the alleged victim of such a crime and concluded that the right of an alleged victim to know the outcome of a student disciplinary proceeding, regardless of the result, outweighed the alleged perpetrator's privacy interest in that proceeding. *Congress also determined that, if the institution determines that an alleged perpetrator violated the*

> *institution's rules with respect to any crime of violence or nonforcible sex offense, then the alleged perpetrator's privacy interests are trumped by the public's right to know about such violations.*

294 F.3d 797, 812-813 (2002) (emphasis added).

The federal appellate court's ruling in *Miami University* clearly demonstrates that the principle of field preemption does not apply to this case and that defendants' dependence on its operation here is misplaced. Although FERPA is a legislative enactment of Congress, nevertheless the public records law of Ohio was deemed to be the prevailing authority where the access to information about the result of a student disciplinary proceeding regarding any allegation of a crime of violence or nonforcible sex offense outweighed the alleged student perpetrator's privacy interests which are generally protected by FERPA. In light of the strong parallels between the state public records laws of Ohio and North Carolina, the subject matter of the disclosure of the outcomes of the types of student disciplinary proceedings of educational institutions located in each of the two states, and each university's respective reliance on the applicability of the field preemption doctrine based on a contention that FERPA preempts the operation of such a state public records law, we embrace the logic of the Sixth Circuit Court of Appeals. In enacting FERPA, Congress has not forbidden North Carolina's legislative body from taking action in the field of education where the disclosure of the result of a student disciplinary proceeding conducted at a public postsecondary educational institution which operates as an agency of North Carolina is mandated by the state's Public Records Act. Consequently, defendants' reliance on the principle of field preemption fails.

In the instant case, the federal preemption doctrine does not apply; therefore, the Family Educational Rights and Privacy Act does not preempt the Public Records Act so as to prohibit UNC-CH from disclosing the final results of any disciplinary proceeding as requested by plaintiffs.

Conclusion

We hold that officials of The University of North Carolina at Chapel Hill are required to release as public records certain disciplinary records of its students who have been found to have violated UNC-CH's sexual assault policy. The University does not have discretion to withhold the information sought here, which is authorized by, and specified in, the federal Family Educational Rights and Privacy Act as subject to release. Accordingly, as an agency of the state, UNC-CH must comply with the

North Carolina Public Records Act and allow plaintiffs to have access to the name of the student, the violation committed, and any sanction imposed by the University on that student in response to plaintiffs' records request.

AFFIRMED.

Justice DAVIS dissenting.

I respectfully dissent. The majority's analysis fundamentally misapplies the federal preemption doctrine. As discussed more fully below, the dispositive issue in this case is whether FERPA confers discretion upon universities regarding whether to release the category of records at issue. If FERPA does so, then the doctrine of preemption precludes states from mandating that universities exercise that discretion in a certain way.

The threshold question of whether such discretion exists must be resolved solely by examining the relevant *federal* law, which in this case consists of FERPA and its accompanying federal regulations. The majority goes astray in this inquiry by instead looking to *state* law to determine whether discretion has been conferred. In doing so, the majority turns the preemption analysis on its head. It simply makes no sense to examine a provision of state law to determine whether *Congress* has conferred discretion upon universities.

The essence of the preemption doctrine is that state law cannot conflict with federal law. In this case, the specific question is whether the application of the North Carolina Public Records Act—which, in the absence of FERPA, would require defendants to produce these records—would be inconsistent with how Congress has authorized universities to treat such records. Therefore, because this inquiry solely concerns the intent of Congress, it is illogical to look to North Carolina law to determine congressional intent. It is only once a determination has been made as to whether *federal* law confers such discretion that it then becomes appropriate to examine state law to ascertain whether a conflict exists between state and federal law on the issue. But state law has no bearing on the issue of whether such discretion exists in the first place. It is this basic error that infects the majority's entire analysis and causes it to reach a result that is legally incorrect.

The specific provision of FERPA relevant to this case is 20 U.S.C. § 1232g(b)(6)(B) (2018), which provides, in pertinent part, as follows:

> *Nothing in this section shall be construed to prohibit* an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence . . . or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

Id. (emphasis added). This statutory provision is supplemented by the following pertinent provisions contained in regulations promulgated by the United States Department of Education and codified in the Code of Federal Regulations:

> (a) An educational agency or institution *may* disclose personally identifiable information from an education record of a student . . . if the disclosure meets one or more of the following conditions:
>
> . . . .
>
> (14)
>
> (i) The disclosure . . . is in connection with a disciplinary proceeding at an institution of postsecondary education. The institution must not disclose the final results of the disciplinary proceeding unless it determines that—
>
> (A) The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and
>
> (B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.

34 C.F.R. § 99.31(a)(14)(i) (2019) (emphasis added).

The regulations then proceed to clarify that "paragraph[ ] (a) . . . of this section *do[es] not require* an educational agency or institution . . . to disclose education records or information from education records to any party, *except for parties under paragraph (a)(12) of this section*." 34 C.F.R. § 99.31(d) (emphasis added). Paragraph (a)(12), in turn, applies only to the disclosure of information "to the parent of a student . . . or to the student." 34 C.F.R. § 99.31(a)(12).

Thus, FERPA's grant of discretion to universities regarding the release of these records to third parties such as plaintiffs is evidenced by the pertinent language of the statute itself read in conjunction with the language of the accompanying federal regulations. As quoted above, the applicable provision of FERPA states that "[n]othing in this section shall be construed to prohibit" disclosure—language that neither prohibits nor requires the release by universities of the category of records sought by plaintiffs. 20 U.S.C. § 1232g(b)(6)(B). This permissive language is then reinforced by the language of the accompanying federal regulations, which remove any doubt on this issue. These regulations plainly and unambiguously state that a university "may"—but is "not require[d]" to— disclose such records to parties other than the students themselves and their parents. 34 C.F.R. § 99.31(a), (d). Thus, the combined effect of 20 U.S.C. § 1232g(b)(6)(B) and 34 C.F.R. § 99.31 serves to make clear that a university has the authority to produce the records at issue upon request by a third party if it chooses to do so in the exercise of its independent judgment.

The Supreme Court of the United States—like this Court—has made clear that when a statute says an actor "may" take certain action, such language constitutes a grant of discretion to that actor. *See, e.g.*, *Halo Elecs.*, *Inc. v. Pulse Elecs.*, *Inc.*, 136 S. Ct. 1923, 1931 (2016) ("[W]e have emphasized that the word 'may' clearly connotes discretion."); *Jama v. Immigration and Customs Enf't*, 543 U.S. 335, 346 (2005) ("The word 'may' customarily connotes discretion."); *Fogerty v. Fantasy*, *Inc.*, 510 U.S. 517, 533 (1994) ("The word 'may' clearly connotes discretion."); *United States v. Rodgers*, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion."); *see also Silver v. Halifax Cty. Bd. of Comm'rs*, 371 N.C. 855, 863–864, 821 S.E.2d 755, 760–762 (2018) (explaining that the word " 'may' is generally intended to convey that the power granted can be exercised in the actor's discretion").

Indeed, both in its appellate brief to this Court and at oral argument, plaintiffs' counsel *expressly conceded* that FERPA grants discretion to defendants regarding the release of the records sought in this lawsuit. *See* Pl.'s Br. at 12–13 ("In their brief defendants argue that . . . FERPA confers them with 'discretion' whether to release or withhold the records at issue. *Indeed, it does* . . .") (emphasis added).

This concession by plaintiffs' counsel is not surprising. Given the absence of any dispute that the category of documents sought by plaintiffs in this case is, in fact, governed by 20 U.S.C. § 1232g(b)(6)(B), there are only three possible conclusions. FERPA either (1) *prohibits*

universities from producing the records at issue; (2) *requires* that they produce the records; or (3) allows universities to exercise their own independent judgment over whether to produce them. Given that the majority does not take the position that Congress has either expressly required or expressly prohibited such disclosure, the only remaining option is the third one—that is, the conclusion that FERPA confers discretion on universities as to whether such records should be produced to a third party in a particular case. Indeed, at one point in its analysis, the majority appears to recognize that discretion exists under federal law, stating that "standing alone, a postsecondary educational institution possesses such discretion to disclose" these records.[1]

Because it is clear that such discretion exists under FERPA, the only remaining question is whether a state law such as North Carolina's Public Records Act can lawfully require that a university exercise its discretion in favor of disclosure. Under the doctrine of federal preemption, the answer is no. A university must be allowed to exercise its federally mandated discretion unimpeded by a state law that seeks to eliminate that discretion.

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . [the] Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. As a result, "when federal and state law conflict, federal law prevails and state law is preempted." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). The Supreme Court of the United States has made clear that preemption can occur not only through a federal statute but also based on federal regulations. *See Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes."); *see also City of New York v. F.C.C.*, 486 U.S. 57, 64 (1988) ("The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof.").

The Supreme Court has recognized three different forms of this doctrine: (1) express preemption, (2) field preemption, and (3) conflict

1. The majority also acknowledges that it is only because UNC-CH is a public institution that North Carolina's Public Records Act applies and therefore private educational institutions in this state unquestionably continue to possess the discretion granted by FERPA to decide whether to release the requested information. If there was no conflict between FERPA and the Public Records Act, then private and public institutions would be in the same situation. However, it is precisely because of that conflict that the majority's opinion results in different rules for post-secondary educational institutions in the state, depending on whether they are public or private.

preemption. *Murphy*, 138 S. Ct. at 1480. Express preemption occurs when a federal statute uses explicit language indicating its intent to override state law. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990). Field preemption occurs when Congress passes comprehensive legislation intending "to occupy an entire field of regulation," acting as the exclusive authority in that area and "leaving no room for the States to supplement federal law." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 509 (1989).

The final type of preemption is conflict preemption (also known as implied preemption), which occurs when federal law and state law fundamentally conflict. Conflict preemption exists when (1) "compliance with both state and federal law is impossible" or (2) when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015).

The present case involves conflict preemption. A university cannot simultaneously (1) exercise its discretion conferred by FERPA regarding whether these records should be produced to third parties upon request; *and* (2) be automatically required by state law to produce those same records on demand. A federal law that grants discretion to universities is fundamentally irreconcilable with a state law that seeks to override that discretion. FERPA gives defendants a choice, while the Public Records Act gives them a command. As a result, the doctrine of conflict preemption is directly applicable.

In asserting that the doctrine of conflict preemption does not apply in this case, the majority misapprehends the basic inquiry in which a court must engage when faced with a federal preemption issue. If—as here—a conflict exists between state and federal law, the federal law must prevail. Thus, the majority's assertion that application of the preemption doctrine would require "erroneously elevating" the federal law while "wrongfully subjugating" the state law is, in reality, nothing less than a rejection of the preemption doctrine itself.

While its opinion is not entirely clear, the majority then appears to state its belief that—even assuming discretion does exist under FERPA—the preemption doctrine is not triggered simply because releasing the records as mandated by North Carolina's Public Records Act is one of the options available to defendants in the exercise of their discretion. But this reasoning is antithetical to the very concept of discretion. Black's Law Dictionary defines discretion as "[w]ise conduct and management *exercised without constraint*; the ability coupled with

the tendency to act with prudence and propriety . . . [f]reedom in the exercise of judgment; *the power of free decision-making*." *Black's Law Dictionary* (11th ed. 2019) (emphasis added). It is self-evident that a law that commands a single outcome necessarily conflicts with a separate law that grants the power of unconstrained decision-making.

Moreover, the Supreme Court of the United States has expressly rejected the very mode of reasoning engaged in by the majority. In *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25 (1996), a federal statute granted national banks the authority to sell insurance, but Florida law prohibited such banks from doing so. *Id.* at 27–28. The Supreme Court first noted that "the two statutes do not impose directly conflicting duties on national banks—as they would, for example, if the federal law said 'you must sell insurance,' while the state law said, 'you may not.' " *Id.* at 31. Nevertheless, the Supreme Court determined that the federal statute preempted the Florida law. *Id.* The Supreme Court characterized the conflict as involving a federal statute that "authorizes national banks to engage in activities that the State Statute expressly forbids." *Id.* The Supreme Court concluded that when Congress grants an entity "an authorization, permission, or power," states may not "forbid, or [ ] impair significantly, exercise of a power that Congress explicitly granted." *Id.* at 33.

Similarly, in *Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), a federal regulation permitted savings and loan associations to utilize due-on-sale clauses in contracts, but California law limited the use of these clauses. *Id.* at 144–145. The Supreme Court held that the state law was preempted, explaining that the "conflict [between the laws] does not evaporate because the [ ] regulation simply permits, but does not compel" banks to include such clauses. *Id.* at 155. Just as in *Barnett*, the Supreme Court found it immaterial that compliance with both laws "may not be a physical impossibility," reasoning that the state law impermissibly deprived the banks of the "flexibility given it by the [federal regulation]." *Id. See also Lawrence Cty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 260–61 (1985) (holding that a federal law providing that counties "may use [certain specified federal] payments for any governmental purpose" preempted a state law requiring counties to allocate those payments to school districts; rejecting as "seriously flawed" the state's argument that no preemption existed simply because the funding of school districts constituted a governmental purpose).

The same principles apply here. FERPA and its accompanying regulations gave defendants the discretion to decide whether release of the

records sought by plaintiffs was appropriate. The Public Records Act, conversely, would—if given effect—make the release of such records mandatory, thereby completely eliminating the discretion conferred by Congress. Therefore, the Public Records Act cannot be given effect under these circumstances. In short, a federal law's "may" cannot be constrained by a state law's "must."

For these reasons, I would reverse the decision of the Court of Appeals. Accordingly, I respectfully dissent.[2]

Justices ERVIN and EARLS join in this dissenting opinion.

2. It is important to emphasize that this Court lacks the authority to determine whether the release of the records sought by plaintiffs is wise or unwise as a matter of public policy. Congress has expressly made that determination by conferring discretion upon universities regarding the disclosure of such information.

IN RE A.G.D.

[374 N.C. 317 (2020)]

IN THE MATTER OF A.G.D. AND A.N.D.

No. 258A19

Filed 1 May 2020

Termination of Parental Rights—grounds for termination—willful abandonment—incarceration—order prohibiting direct contact with children

The trial court's findings supported its conclusion that a father's parental rights in his children were subject to termination on the ground of abandonment (N.C.G.S. § 7B-1111(a)(7)). Even though the father was incarcerated and was prohibited by a custody and visitation order from directly contacting his children, he made no attempts during the determinative six-month period to contact the mother or anyone else to inquire about the children's welfare or to send along his best wishes to them. Further, the father would not even clearly tell his trial counsel whether he wanted to contest the termination of parental rights action.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 6 March 2019 by Judge Robert J. Crumpton in District Court, Ashe County. This matter was calendared for argument in the Supreme Court on 25 March 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief filed for petitioner-appellee mother.

Edward Eldred for respondent-appellant father.

ERVIN, Justice.

Respondent-father Aaron D. appeals from orders[1] entered by the trial court terminating his parental rights in his minor children A.G.D.

1. The trial court entered separate, although essentially identical, orders terminating respondent-father's parental rights in each of his two children. For ease of comprehension, we will treat these separate orders as a single document throughout the remainder of this opinion.

and A.N.D. on the grounds of willful abandonment.[2] After careful consideration of respondent-father's challenge to the trial court's termination orders in light of the record and the applicable law, we conclude that the trial court's termination orders should be affirmed.

Petitioner Amber D. and respondent-father were married in April 2008, with Amy having been born to the parents in 2008 and with Andy having been born to the parents in 2011. The parties separated in March 2013 after Amy revealed that respondent-father had committed repeated sexual assaults against her. Along with a number of other individuals, respondent-father was subsequently charged with having committed multiple criminal acts of sexual abuse in the state and federal courts, including crimes involving child pornography. On 27 May 2014, an order was entered granting the mother sole legal and physical custody of the children, with respondent-father being ordered to have no contact with them in the absence of a further order of the court.[3] A judgment granting an absolute divorce between the parents was entered in July 2014.

On 26 June 2018, the mother filed petitions seeking to have respondent-father's parental rights in the children terminated on the grounds that he had willfully failed to pay any portion of the cost of the children's care and that he had willfully abandoned the children. *See* N.C.G.S. § 7B-1111(a)(4), (7) (2019). After a hearing held on 25 February 2019, the trial court entered orders terminating respondent-father's parental rights in both children on 6 March 2019,[4] with this decision resting upon determinations that respondent-father had willfully abandoned Amy and Andy and that the termination of respondent-father's parental rights in the children would be in their best interests. Respondent-father noted appeals to this Court from the trial court's termination orders.

In seeking to persuade us to grant relief from the trial court's termination orders, respondent-father argues that the trial court erred by

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2. We will refer to A.G.D. and A.N.D. throughout the remainder of this opinion as "Amy" and "Andy," respectively, with these names being pseudonyms that we use for ease of reading and to protect the privacy of the juveniles.

3. The custody and visitation order in question, which the trial court incorporated by reference into the termination order, found as a fact that respondent-father was "currently incarcerated in [the] Ashe County Jail" and was "under a [c]ourt [o]rder not to have any contact with [Amy]" or "with a child under 18" and ordered that respondent-father "shall have no contact with the [children] absent future [o]rders of this Court."

4. The trial court did not find that respondent-father's parental rights in the children were subject to termination on the grounds of a willful failure to pay a reasonable portion of the cost of the children's care.

determining that his parental rights in the children were subject to termination on the grounds of willful abandonment in light of the fact that he had been "prohibited . . . from having any contact with his children." According to respondent-father, "it was not within [his] power to display his love and affection for his children because he was court-ordered not to contact them." In respondent-father's view, the trial court's reliance upon his failure to seek relief from the earlier custody and visitation order was misplaced given that the record contained no evidence tending to show that he had the ability to make such a filing or that there had been "any change of circumstances warranting the filing of" such a motion, citing *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (stating that a party is only entitled to seek to have a prior custody order modified in the event that "there has been a substantial change in circumstances and that the change affected the welfare of the child"), with it "beg[ging] belief" that respondent-father "could have filed a custody motion every six months for four years." As a result, since respondent-father "was court-ordered not to contact [his children] and could only have shown them filial affection by disobeying a court's order," respondent-father contends that the trial court's termination orders should be reversed.[5]

"We review a trial court's adjudication under N.C.G.S. § 7B-1111 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). A trial court may terminate a parent's parental rights in his or her children based upon a determination that "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion . . . ." N.C.G.S. § 7B-1111(a)(7).[6] In order to find that a parent's parental rights are subject to termination based upon willful abandonment, the trial court must make findings of fact that show that the parent had a "purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to [the child]," *In re N.D.A.*, 373 N.C. 71, 79, 833 S.E.2d 768, 774 (2019) (quoting *In re D.M.O.*, 250 N.C. App. 570, 573, 794 S.E.2d 858, 861–62 (2016)), with a parent having abandoned his or her child

5. The mother did not file a brief in defense of the trial court's orders with this Court.

6. As a result of the fact that the termination petitions were filed on 26 June 2018, the relevant six-month period for purposes of this case runs from 26 December 2017 until 26 June 2018.

for purposes of N.C.G.S. § 7B-1111(a)(7) in the event that he "withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance . . . ." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962).

We further note that "[o]ur precedents are quite clear—and remain in full force—that '[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.' " *In re M.A.W.*, 370 N.C. 149, 153, 804 S.E.2d 513, 517 (2017) (second alteration in original) (quoting *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006)). Although "a parent's options for showing affection while incarcerated are greatly limited, a parent *will not be excused from showing interest in [the] child's welfare by whatever means available*." *In re C.B.C.*, 373 N.C. 16, 19–20, 832 S.E.2d 692, 695 (2019) (quoting *In re D.E.M.*, 257 N.C. App. 618, 621, 810 S.E.2d 375, 378 (2018)). As a result, our decisions concerning the termination of the parental rights of incarcerated persons require that courts recognize the limitations for showing love, affection, and parental concern under which such individuals labor while simultaneously requiring them to do what they can to exhibit the required level of concern for their children. *In re K.N.*, 373 N.C. 274, 283, 837 S.E.2d 861, 867–68 (2020) (stating that "the extent to which a parent's incarceration or violation of the terms and conditions of probation support a finding of neglect depends upon an analysis of the relevant facts and circumstances, including the length of the parent's incarceration").

In the course of determining that respondent-father's parental rights in the children were subject to termination on the grounds of willful abandonment, the trial court found as a fact that:

> 5. [Respondent-father] was not present, but represented by Adam E. Anderson, Esq. [Respondent-father's] Attorney informed the Court that he met with [respondent-father], but was unable to ascertain his wishes as to whether he wished to contest this action or not. [Respondent-father] also indicated he did not want to be present due to wanting to focus his efforts on "trial preparation" for his upcoming criminal matters. [Respondent-father's] Attorney also reached out to [respondent-father's] Federal Attorney, Anthony Martinez, who spoke with [respondent-father] and indicated that he was also unable to ascertain whether [respondent-father] wished to contest this matter. [Respondent-father's] Attorney made a motion to

continue this matter, which was denied. This matter was filed on June 26, 2018 and was noticed on well in advance of the trial date.

. . . .

10. Respondent[-father] has not participated in the care of the [children] in the last six (6) months and has not had any meaningful interaction with the [children] since March 8, 2013.

. . . .

12. Respondent[-father] has pending criminal charges for child related sex offenses which have prevented and prevent him from being a meaningful part of the [children's] live[s].

13. [Amy] was four (4) years old when she disclosed that she was the victim of a sexual assault by her father. Upon disclosure, [the mother] made [respondent-father] leave the home and reported these allegations to the Ashe County Sheriff's Department, who started an investigation. [Respondent-father] was charged with fourteen (14) counts of sexual assault in state court and eight (8) charges in Federal Court. [The mother] did not know the exact names of the charges but did testify that they related to these allegations and other sexual acts including child pornography.

14. The Federal investigation also led to [respondent-father] being charged along with others for sexual acts including child pornography. . . .

15. During the time these acts were committed, [Amy] was two to four (2–4) years old. Her brother, [Andy], was a newborn and nonverbal at the time.. . . .

18. [Respondent-father] has not seen or spoken to the children since March 8, 2013. About eighteen (18) months after this date, he contacted the [mother] requesting to see the children, but this is the only attempt he has made to contact the children.. . . .

22. . . . . [The children] have no bond with [respondent-father. Amy] refers to [respondent-father] as "Aaron", not "dad".

. . . .

24. The [mother] was granted sole legal and physical custody of the children in 2014. [Respondent-father] was not allowed further visitation "absent further orders of the Court." [Respondent-father] has taken no action to file anything with the Court seeking visitation with the children.

25. [Respondent-father] has not made any attempt to contact or see the [children] for the six (6) months next preceding the filing of this action and has not had any meaningful interaction with the [children] since March of 2013.

26. [Respondent-father] has willfully abandoned the juvenile[s] for at least six (6) months immediately preceding the filing of this action. The actions of [respondent-father] manifest a willful determination to forego all parental duties and relinquish all parental claims regarding the minor children. This was done with purpose and deliberation.

27. [Respondent-father's] attorney argued that the actions of [respondent-father] were not willful due to his incarceration. The Court's findings of willfulness are not based on incarceration alone. Despite his incarceration, [respondent-father] is not excused from showing an interest in his children's welfare. The Court has considered other actions that could have been taken by the [respondent-father]. He could have filed a motion for contact or visitation with the Court in the custody action.

28. [Respondent-father] has at all times been able to ascertain the whereabouts of the [children.] [The mother] testified that [respondent-father's] Federal Attorney came to her home a few months ago to ask questions regarding [respondent-father's] criminal case.

Although these findings of fact are, admittedly, rather sparse, we believe that they do suffice to support the trial court's conclusion that respondent-father's parental rights in the children were subject to termination for abandonment pursuant to N.C.G.S. § 7B-1111(a)(7).

In its termination orders, the trial court found[7] as a fact that respondent-father's trial counsel "met with [respondent-father]" and "was unable to ascertain his wishes as to whether he wished to contest this action or not." In addition, the trial court found that respondent-father's trial counsel had "reached out" to the attorney responsible for representing respondent-father in connection with his pending federal criminal cases, who "was also unable to ascertain whether [respondent-father] wished to contest this matter." The trial court further found that Amy "was four (4) years old when she disclosed that she was the victim of a sexual assault by" respondent-father,[8] who "was charged with fourteen (14) counts of sexual assault in state court and eight (8) charges in [f]ederal court." The trial court found that the mother "was granted sole legal and physical custody of the" children by means of an order entered in the District Court, Ashe County, with respondent-father not being "allowed further visitation 'absent further orders of the Court.' " The trial court also found that respondent-father "has not participated in the care of the [children] in the past six (6) months," "has not had any meaningful interaction with the [children] since March 8, 2013," "has taken no action to file anything with the Court seeking visitation with the children," and "has not made any attempt to contact or see the [children] for the six (6) months next preceding the filing of this action and has not had any meaningful interaction with the [children] since March of 2013." The trial court found that, approximately eighteen months after March 8, 2013, respondent-father had "contacted [petitioner-mother] requesting to see the children," with this having been "the only attempt he has made to" do so. In response to respondent-father's contention that "the actions of [respondent-father] were not willful due to his incarceration," the trial court found that, "[d]espite his incarceration, [respondent-father] is not excused from showing an interest in his children's welfare," that "[t]he Court ha[d] considered other actions that could have been taken by" respondent-father, and that respondent-father "could have filed a motion for contact or visitation with the Court in the custody action." Finally, the trial court found that respondent-father "ha[d] at all times been able to ascertain the whereabouts of the [children]" and that the attorney that represented respondent-father in his federal criminal cases "came

7. Respondent-father has not challenged any of the trial court's findings of fact as lacking in sufficient evidentiary support, rendering the trial court's findings binding upon us for purposes of appellate review.

8. The mother testified at the termination hearing that respondent-father had admitted the truth of Amy's accusation.

to [petitioner-mother's] home a few months ago to ask questions regarding [respondent-father's] criminal case." Based upon these findings of fact, the trial court concluded that respondent-father's actions and inactions "manifest a willful determination to forego all parental duties and relinquish all parental claims regarding the" children and that "[t]his was done with purpose and deliberation."

A careful review of the termination orders reveals that the trial court did not conclude that respondent-father's parental rights in the children were subject to termination on the grounds of abandonment solely because he had failed to make direct contact with them in violation of the custody and visitation order. On the contrary, the trial court specifically noted that respondent-father was "not excused from showing an interest in his children's welfare" because of his incarceration and found as a fact that, among other things, the only attempt that respondent-father had made to contact the children had occurred when he communicated with petitioner-mother about eighteen months after his last "meaningful" contact with them. In other words, the trial court found that respondent-father had, with one exception, done nothing to maintain contact with the mother, with whom the children lived and who would know how they were doing,[9] making this case similar to *In re C.B.C.*, 373 N.C. at 23, 832 S.E.2d at 697 (noting, in describing the reasons that the trial court had not erred by finding that a parent's parental rights in a child were subject to termination for abandonment, that the trial court had found that the parent "did not contact [the child's custodians] to inquire into [the child's] well-being"), and *In re B.S.O.*, 234 N.C. App. 706, 711, 760 S.E.2d 59, 64 (2014) (upholding the trial court's determination that a parent had abandoned his children on the grounds that the trial court's findings showed that, "during the relevant six-month period, respondent-father 'made no effort' to remain in contact with his children or their caretakers and neither provided nor offered anything toward their support"), and distinguishable from *In re D.E.M.*, 257 N.C. App. at 621, 810 S.E.2d at 379 (holding that the trial court had erred by finding that an incarcerated parent's parental rights in his child were subject to termination for abandonment based, in part, on the fact that "the trial court's findings . . . do not address, in light of his incarceration,

9. Admittedly, petitioner-mother testified that, at the time that respondent-father contacted her, she "hung up" on him and that, subsequently, "the state put a ban and didn't let him call me." As a result, once again, respondent-father was the author of his own misfortune given that he "demanded" to be allowed to see the children. Moreover, nothing in the mother's testimony suggests that respondent-father was in any way prohibited from communicating with the mother by mail or through intermediaries.

what other efforts [the parent] could have been expected to make to contact [the other parent] and the juvenile").

Although the custody and visitation order that was entered at petitioner-mother's request did preclude respondent-father from having direct contact with the children, it did not place any other limitation upon his ability to interact with or show love, affection, and parental concern for the children.[10] The trial court's findings of fact reflect that respondent-father had the legal right and practical ability to contact the mother directly or through intermediaries for the purpose of inquiring about the children's welfare and asking that she convey his best wishes to them, with nothing in the custody and visitation order serving to prohibit him from doing so. Similarly, nothing in the custody and visitation order prohibited respondent-father from using other persons as a vehicle for the indirect communication of his love, affection, and parental concern for the children. In spite of the fact that respondent-father had the ability to make such inquiries or to request others to do so, the trial court's findings of fact reflect that respondent-father did not ever make contact with petitioner-mother to ask permission to have contact with the children or to otherwise express any love, affection, or parental concern for them during the six-month period prescribed in N.C.G.S. § 7B-1111(a)(7) and that respondent-father would not even clearly tell his trial counsel whether he opposed the allowance of the termination petitions. As a result, we have no difficulty in determining that the trial court's findings do, wholly aside from their references to respondent-father's failure to seek a modification of the custody and visitation order, support a conclusion that respondent-father completely withheld his love, affection, and parental concern for the children, rendering his parental rights in them subject to termination for abandonment pursuant

10. In spite of the fact that respondent-father has contended in his brief before this Court that he would have been unable to make a showing of "changed circumstances" sufficient to support a request for modification of the existing custody and visitation order, respondent-father points to nothing in the relevant order that prohibited him from attempting to obtain permission from the mother to have contact with the children or from requesting the mother or others to relay his best wishes to them. Aside from the fact that this argument seems inconsistent with our recent decision in *In re E.H.P.*, 372 N.C. at 394, 831 S.E.2d at 53, in which we declined to accept a parent's contention that he had failed to seek modification of a temporary custody order because "he 'wasn't in a place in [his] life to—to really be a father or parent,' " respondent-father's exclusive focus upon an attempt to handicap his own likelihood of successfully obtaining a change in the existing custody and visitation order is inconsistent with our insistence that incarcerated parents do what they can in order to show love and affection for their children and the trial court's depiction of defendant's failure to do anything to this effect at all.

to N.C.G.S. § 7B-1111(a)(7) and rendering this case easily distinguishable from decisions such as *In re K.C.*, 247 N.C. App. 84, 87–88, 805 S.E.2d 299, 301–02 (2016) (holding that the trial court's findings of fact failed to support the termination of the mother's parental rights on the grounds of neglect by abandonment despite her failure to visit with the child for the last year prior to the termination hearing given that the father, based upon the advice of a therapist, refused to grant the mother's request for a visit, the fact that the mother had had sporadic visits with the child prior to being denied access to the child, and the fact that the mother had paid court-ordered child support), and *In re T.C.B.*, 166 N.C. App. 482, 485–87, 602 S.E.2d 17, 19–20 (2004) (holding that the trial court's findings of fact failed to support the termination of the father's parental rights in his child on the grounds of abandonment despite the fact that he had not visited with the child for four years prior to the termination hearing and had not sent the child any letters, cards, or gifts during that period given the fact that the mother had denied his request to visit the child during that period, the fact that he had visited with the child on an earlier date, the fact that the attorney representing the father in connection with charges that he had sexually abused his child (that were later dismissed) advised him to refrain from attempting to visit the child during the pendency of the criminal charges, the fact that the father refused to accept an agreement pursuant to which the pending charges would be dismissed in return for his relinquishment of his parental rights, and the fact that the father regularly paid child support).[11]

In seeking to persuade us to reach a different result, respondent-father argues, in essence, that the order prohibiting him from having contact with the children stood as an absolute barrier to his ability to show love, affection, and parental concern for them and that this fact should preclude a finding of abandonment for purposes of N.C.G.S. § 7B-1111(a)(7). Respondent-father appears to take the position that, in the absence of a reasonable belief that he had a chance of prevailing in an action seeking to have the existing custody or visitation arrangements modified, he could not be found to have willfully abandoned the children despite having done absolutely nothing to express any interest in their welfare. However, as we have already demonstrated, the trial court did not find that respondent-father's parental rights in the children were subject to termination for abandonment solely because he failed to make direct contact with the children at a time when he was

11. The conduct of the father in *T.C.B.* stands in stark contrast to that of respondent-father, who, as described in the trial court's findings, would not even take a position concerning whether he did or did not oppose the termination of his parental rights in the children.

incarcerated and prohibited from doing so by the custody and visitation order. Instead, the trial court's findings of fact reflect that respondent-father failed to do anything whatsoever to express love, affection, and parental concern for the children during the relevant six-month period, making this case completely different from *In re K.N.*, 373 N.C. at 284, 837 S.E.2d at 868, in which we held that the trial court's findings were "insufficient to support [its] ultimate determination that respondent's parental rights were subject to termination on the basis of neglect." Thus, respondent-father's argument fails to take the entirety of the trial court's findings of fact into consideration or to come to grips with the ultimate problem created by the fact that the trial court's findings reflect a total failure on his part to take any action whatsoever to indicate that he had any interest in preserving his parental connection with the children.

A decision to overturn the trial court's termination orders in this case would also run afoul of our decisions concerning the manner in which termination of parental rights cases involving incarcerated individuals should be decided. As we have already noted, the fact of incarceration is neither a sword nor a shield for purposes of a termination of parental rights proceeding. Although the fact that he was incarcerated and subject to an order prohibiting him from directly contacting the children created obvious obstacles to respondent-father's ability to show love, affection, and parental concern for the children, it did not render such a showing completely impossible. In spite of the fact that other options for showing love, affection, and parental concern for the children remained open to him, the trial court's findings show that respondent-father remained inactive. For that reason, the effect of a decision to overturn the trial court's termination orders would be to allow respondent-father to use his incarceration and the provisions of the custody and visitation order as a shield against a finding of abandonment contrary to the consistent decisions of this Court and the Court of Appeals.

A decision to overturn the trial court's termination orders would also preclude a trial court from determining that a parent who has been accused of sexually abusing one of his children and incarcerated for a lengthy period of time prior to trial had abandoned his children solely because the parent's spouse and representatives of the State took action to protect the family from any risk that the incarcerated parent would inflict further harm upon the members of the family. A decision to reach the result that respondent-father contends to be appropriate in this case would raise serious questions about the extent, if any, to which an incarcerated individual subject to limitations upon his ability to contact a child that he had allegedly abused could ever be found to have

abandoned his or her children for purposes of N.C.G.S. § 7B-1111(a)(7) regardless of that parent's failure to do what he or she could have done to show love, affection, and parental concern for his or her children. Such a result seems inconsistent with the intent of the General Assembly and the precedents of this Court or the Court of Appeals. As a result, for all of these reasons, we conclude that the trial court's termination orders should be affirmed.

AFFIRMED.

Justice EARLS dissenting.

This case is yet another example of bad facts making bad law. The majority's decision undermines parental rights and expands the definition of abandonment because to do otherwise, in the majority's view, would "raise serious questions about the extent, if any, to which an incarcerated individual subject to limitations upon his ability to contact a child that he had allegedly abused could ever be found to have abandoned his or her children for purposes of N.C.G.S. § 7B-1111(a)(7) regardless of that parent's failure to do what he or she could have done to show love, affection, and parental concern for his or her children." Stated more simply, the majority would like to make sure that a parent's rights to a child can be terminated if the parent abuses the child, even if the parent is incarcerated. While I certainly agree with that objective, the General Assembly has already addressed it. *See* N.C.G.S. § 7B-1111(a)(1) (2019) (allowing for the termination of parental rights if a parent has abused the child). It is therefore unnecessary, as the majority does today, to expand the definition of willful abandonment to include a factual situation as limited as the one before us in this case. I would remand this case to the trial court for additional findings.

As the majority acknowledges, the trial court's order shows that the judgment terminating respondent's parental rights was based on findings that respondent did not have any contact with the children since 2013, that he did not attempt to contact or see them in the six months preceding the termination petition, and that he did not file a motion in the civil custody case to modify the no-contact provisions of the 2014 custody order.[1] None of these findings support the conclusion that respondent willfully abandoned his children.

1. The majority separately claims that the trial court based its conclusions, in part, on respondent's failure to maintain contact with the children's mother. The trial court's order contains no statement to that effect.

First, respondent's mere lack of contact does not demonstrate that he had a purposeful, deliberative, and manifest willful determination to forego all parental duties and relinquish all parental claims to Amy and Andy, because he was prohibited by court order from contacting the children. *Cf. In re T.C.B.*, 166 N.C. App. 482, 486-87, 602 S.E.2d 17, 19–20 (2004) (holding that a trial court's conclusion of willful abandonment was not supported by its findings regarding lack of visits, because a protection plan between DSS and the mother prohibited visitation with the respondent-father, and because the respondent-father's attorney instructed him not to have any contact with the child); *In re K.C.*, 247 N.C. App. 84, 88, 805 S.E.2d 299, 301-02 (2016) (holding that a trial court's conclusion of neglect by abandonment was not supported by its findings regarding lack of visits, because the petitioner-father denied the respondent-mother's request for visitation "on the grounds that the child's therapist determined that visits should be suspended indefinitely"). Willful abandonment under N.C.G.S. § 7B-1111(a)(7) requires *willful* abdication of parental responsibility, which simply does not occur if a parent does not contact his children in compliance with a court order. *Cf. Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962) (defining abandonment "as wilful neglect and refusal to perform the natural and legal obligations of parental care and support"); *id.* at 502, 126 S.E.2d at 608 ("Abandonment requires a wilful intent to escape parental responsibility and conduct in effectuation of such intent."). Respondent's mere lack of contact thus does not support the trial court's conclusion on the ground of willful abandonment.

Second, the fact that respondent did not file a motion seeking to modify the no-contact provisions of the civil custody order similarly does not demonstrate that he willfully abandoned his children. Filing a motion to modify custody or visitation is evidence that a parent does not have a willful determination to forego all parental duties and relinquish all parental claims to a child. *See, e.g.*, *In re D.T.L.*, 219 N.C. App. 219, 222, 722 S.E.2d 516, 518 (2012) ("Having been prohibited by court order from contacting either petitioner or the juveniles, respondent's filing of a civil custody action clearly establishes that he desired to maintain custody of the juveniles and cannot support a conclusion that he had a willful determination to forego all parental duties and relinquish all parental claims to the juveniles."). However, the trial court's findings do not indicate that respondent could have successfully modified the civil custody order with such a motion. Actual modification of custody or visitation requires a parent to show a substantial change in circumstances affecting the welfare of the child. *Shipman v. Shipman*, 357 N.C. 471, 473, 586 S.E.2d 250, 253 (2003) ("It is well established in this jurisdiction

that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a 'substantial change of circumstances affecting the welfare of the child' warrants a change in custody." (quoting *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998))); *Charett v. Charett*, 42 N.C. App. 189, 193, 256 S.E.2d 238, 241 (1979) (applicable here because "[c]ustody and visitation are two facets of the same issue."). Given his continued incarceration on pending charges that included child pornography and sexual offenses against Amy, respondent could not show the required substantial change in circumstances necessary to modify the civil custody order. Respondent's failure to file a meritless motion in the civil custody case thus does not support the trial court's conclusion that he willfully abandoned his children.

To be sure, there may be other facts the petitioner could establish and the trial court could find that would support a conclusion that respondent willfully abandoned his children or that another ground for termination of his parental rights exists in this case. But our ruling today should be based solely on the facts that have been found by the trial court in its order terminating respondent's parental rights on the ground of willful abandonment. *See In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019) ("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.' " (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984))).

The majority makes two additional mistakes on its path to affirming the trial court. First, the trial court's findings concerning respondent's attorneys being "unable to ascertain" whether respondent wished to contest the termination somehow become support for the conclusion that respondent manifested a willful determination to forgo all parental duties and relinquish all parental claims to his children. However accurate the attorneys' statements may have been, those statements are not competent evidence of abandonment. Second, the majority essentially flips the burden of proof by reasoning that a lack of evidence in the record justifies a finding of abandonment because the father was "not excused from showing an interest in his children's welfare." This second point must be addressed in detail.

It remains true that the fact of a parent's incarceration neither requires a court to terminate the incarcerated parent's rights nor prevents a court from doing so. *See In re M.A.W.*, 370 N.C. 149, 153, 804 S.E.2d 513, 517 (2017) ("Our precedents are quite clear—and remain

in full force—that '[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.' " (alteration in original) (quoting *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005))). Indeed, this Court recently held that there were sufficient facts to support a finding of abandonment where the order barring the incarcerated father from having any contact with the minor child was merely a temporary custody order, and where there was evidence in the record that the father had the capacity to seek modification of the custody order and failed to do so because he felt he was not able to be a father to his child. *See In re E.H.P.*, 372 N.C. 388, 394, 831 S.E.2d 49, 53 (2019) ("A temporary custody order is by definition provisional, and the order at issue here expressly contemplated the possibility that the no-contact provision would be modified in a future order."); *see also In re C.B.C.*, 373 N.C. at 19–23, 832 S.E.2d at 695–97 (holding that abandonment was established despite the fact that respondent had been incarcerated for approximately three of the relevant six months before the filing of the petition because respondent made no attempt to contact the child while not incarcerated and there was no court order barring him from doing so).

In this case, however, the record is silent as to whether the respondent could successfully modify the court orders that prevented him from having any contact whatsoever with his children. Thus, we are confronted with a situation similar to the situation in *In re K.N.*, 373 N.C. 274, 837 S.E.2d 861 (2020). In that case, we held that

> respondent's incarceration, by itself, cannot serve as clear, cogent, and convincing evidence of neglect. Instead, the extent to which a parent's incarceration or violation of the terms and conditions of probation support a finding of neglect depends upon an analysis of the relevant facts and circumstances, including the length of the parent's incarceration. The trial court's findings do not contain any such analysis.

Id. at 283, 837 S.E.2d at 867–68. Likewise, the bare bones order in this case does not provide sufficient facts to support the conclusion that respondent willfully abandoned his children. The trial court's findings do little more than establish that at the time of the hearing respondent was in jail awaiting trial, under a court order not to contact his children. There are therefore few facts upon which to distinguish this case from *In re K.N.*

Accordingly, the trial court's findings do not support its conclusion that the ground of willful abandonment exists to terminate respondent's parental rights. Willful abandonment was the only basis upon which the trial court terminated respondent's parental rights to the minor children, and I would therefore vacate the trial court's order and remand for further proceedings.

STATE OF NORTH CAROLINA
v.
NICHOLAS OMAR BAILEY

No. 360A19

Filed 1 May 2020

Search and Seizure—search warrant application—affidavit—probable cause—nexus between location and illegal activity

An affidavit submitted with an application for a search warrant established probable cause to search a residence for suspected drugs and related paraphernalia even though the affidavit did not relate any evidence that drugs were actually sold at the residence, where it showed some connection between the residence and an observed illegal drug transaction conducted by two people known to live at the residence.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 831 S.E.2d 894 (N.C. Ct. App. 2019), affirming a judgment entered on 10 July 2018 by Judge Charles H. Henry in Superior Court, Carteret County. Heard in the Supreme Court on 9 March 2020.

Joshua H. Stein, Attorney General, by Jessica Macari, Assistant Attorney General, for the State-appellee.

Richard Croutharmel for defendant-appellant.

DAVIS, Justice.

The issue in this case is whether probable cause existed to support the issuance of a search warrant for defendant's residence. The warrant was issued based on information contained in a law enforcement

officer's affidavit relating to the sale of illegal drugs earlier that day by other residents of the home. Because we are satisfied that the affidavit contained facts that were sufficient to provide a nexus between the residence and suspected criminal activity, we conclude that the warrant was supported by probable cause and affirm the decision of the Court of Appeals.

Factual and Procedural Background

On 25 April 2017, Detective Dallas Rose of the Carteret County Sheriff's Office applied for a warrant to search a residence located at 146 East Chatham Street in Newport, North Carolina, based on events that had occurred earlier that day. In his affidavit, Detective Rose set out the following information: At approximately 5:35 p.m. on that date, Detective Rose was conducting visual surveillance of a secluded parking lot outside of an apartment complex in Newport, along with three other law enforcement officers. Detective Rose observed a blue Jeep Compass pull into the parking lot. He was familiar with the occupants of the Jeep, James White and Brittany Tommasone, based on their previous drug-related activities, which included the sale of illegal narcotics. He also knew that White and Tommasone did not live at the apartment complex and instead lived across town at a residence located at 146 East Chatham Street.

Detective Rose then observed a female passenger get out of a nearby white Mercury Milan and walk over to the blue Jeep. After entering the Jeep and spending approximately 30 seconds inside the vehicle, the woman exited the Jeep and returned to the white Mercury. Both vehicles then exited the parking lot at a high rate of speed and drove away.

Based on his training and experience, Detective Rose believed that he had just witnessed a transaction involving the sale of drugs. Along with two of the other officers, he proceeded to follow the white Mercury and shortly thereafter pulled over the vehicle upon witnessing its driver commit several traffic offenses. The female passenger in the white Mercury, Autumn Taylor, admitted to Detective Rose that she had just purchased a twenty-dollar bag of heroin from White, consumed it in the car, and then thrown the bag out of the car window.

Meanwhile, Detective Tim Corey followed the blue Jeep as it left the parking lot and proceeded to 146 East Chatham Street. Detective Corey observed the two occupants of the Jeep, White and Tommasone, exit the vehicle and go into Apartment 1. Detective Rose was aware that White and Tommasone lived at this address.

The search warrant application submitted by Detective Rose described the residence at 146 East Chatham Street as a "multi family wooden dwelling" divided into "3 separate known living quarters." The application contained a list of the items to be seized from the residence, which included controlled substances, drug paraphernalia, weapons, cell phones, computers, and "[a]ny United States Currency."

After reviewing the search warrant application and supporting affidavit, Carteret County Magistrate Erica Hughes issued a warrant authorizing a search of the residence located at 146 East Chatham Street as well as of any persons present at the time the warrant was executed and of any vehicles located on the premises. Unbeknownst to the officers at the time the warrant was issued, defendant also lived at the apartment on 146 East Chatham Street along with White and Tommasone.

Officers executed the search warrant at approximately midnight and found White and Tommasone, along with defendant and his girlfriend, present at the residence. Defendant was in a bedroom of the apartment in which approximately 41 grams of cocaine, drug paraphernalia, and $924 in cash were also discovered.

Defendant was indicted by a grand jury on 9 October 2017 on a charge of trafficking in cocaine. On 3 July 2018, defendant filed a motion in Superior Court, Carteret County, to suppress evidence seized during the execution of the search warrant based on his contention that the facts contained in the affidavit were insufficient to establish probable cause to search his residence. After conducting a hearing on the motion to suppress, the trial court orally denied defendant's motion on 9 July 2018. Defendant subsequently entered into a plea agreement in which he pled guilty to the offense of trafficking in cocaine, while preserving his right to appeal the denial of his motion to suppress. Defendant was sentenced to 35–51 months imprisonment and ordered to pay a $50,000 fine. On 12 July 2018, the trial court entered a written order memorializing its prior ruling denying defendant's motion to suppress.

Defendant appealed to the Court of Appeals, arguing that the trial court had erred in denying his motion to suppress. The Court of Appeals majority affirmed the trial court's order, holding that the magistrate had a substantial basis for concluding that probable cause existed to issue the warrant. *State v. Bailey*, 831 S.E.2d 894, 895 (N.C. Ct. App. 2019). In a dissenting opinion, Judge Zachary stated her belief that the warrant was not supported by probable cause due to the absence of any information in the affidavit specifically linking the residence to the sale or possession of drugs. *Id.* at 900. Based on the dissent, defendant appealed as of right to this Court on 10 September 2019.

Analysis

The Fourth Amendment to the United States Constitution states that "no Warrants shall issue but upon probable cause." U.S. Const. amend. IV. Our state constitution "likewise prohibits unreasonable searches and seizures and requires that warrants be issued only on probable cause." *State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 302–03 (2016) (citing N.C. Const. art. I, § 20). Pursuant to these constitutional directives, our General Statutes provide that a search warrant "must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched." N.C.G.S. § 15A-244(3) (2019). With regard to a search warrant directed at a residence, probable cause "means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender." *State v. Campbell*, 282 N.C. 125, 128–29, 191 S.E.2d 752, 755 (1972).

Our prior decisions provide a well-established framework for reviewing determinations of probable cause.

> This standard for determining probable cause is flexible, permitting the magistrate to draw "reasonable inferences" from the evidence in the affidavit supporting the application for the warrant . . . . That evidence is viewed from the perspective of a police officer with the affiant's training and experience, and the commonsense judgments reached by officers in light of that training and specialized experience. Probable cause requires not certainty, but only "*a probability or substantial chance* of criminal activity." The magistrate's determination of probable cause is given "great deference" and "after-the-fact scrutiny should not take the form of a *de novo* review."

State v. McKinney, 368 N.C. 161, 164–65, 775 S.E.2d 821, 824–25 (2015) (citations omitted).

Our case law makes clear that when an officer seeks a warrant to search a residence, the facts set out in the supporting affidavit must show some connection or nexus linking the residence to illegal activity. Such a connection need not be direct, but it cannot be purely conclusory.

For example, in *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984), officers obtained a warrant to search a mobile home for evidence

of drug dealing based on the following facts: (1) a confidential informant stated that he had previously purchased marijuana from the defendant and that the defendant was growing marijuana at his mobile home; and (2) a second confidential source stated that he had observed "a steady flow of traffic" in and out of the mobile home within the past month, consisting of many known drug users. *Id.* at 634, 319 S.E.2d at 255. Upon executing the warrant, officers found large amounts of marijuana on the premises. *Id.* at 635, 319 S.E.2d at 256.

We held that the warrant was supported by probable cause because the two tips provided a "strong inference" that the defendant was growing and selling marijuana inside the mobile home. *Id.* at 641–42, 319 S.E.2d at 259–60. We stated that "[a] common sense reading of the information supplied by both informants provides a substantial basis for the *probability* that the defendant had sold marijuana [in the residence] . . . . No more is required under the Fourth Amendment." *Id.* at 642, 319 S.E.2d at 260.

Our decision in *Allman* provides another pertinent illustration. In that case, three roommates were pulled over while riding in a car together, and a search of their vehicle revealed the presence of a large quantity of marijuana and over $1,600 in cash. *Allman*, 369 N.C. at 292–93, 794 S.E.2d at 302. An officer applied for a warrant to search their home for evidence of drug dealing and asserted in his affidavit that: (1) large quantities of drugs and cash were found in their car; (2) two of the occupants of the car had a criminal history of drug offenses; and (3) the occupants had lied to officers about where they lived. *Id.* at 295–96, 794 S.E.2d at 304–05. The affidavit also stated, "based on [the officer's] training and experience, that drug dealers typically keep evidence of drug dealing at their homes." *Id.* A warrant was issued, and a search of the residence revealed the presence of illegal narcotics and drug paraphernalia. *Id.* at 296, 794 S.E.2d at 304.

Based on the facts contained in the affidavit, when viewed in light of the officer's training and experience, we determined that "it was reasonable for the magistrate to infer that there would be evidence of drug dealing" found at the residence. *Id.* at 296–97, 794 S.E.2d at 305. We acknowledged that "nothing in [the officer's] affidavit directly linked defendant's home with evidence of drug dealing" but stated that such direct evidence is not always necessary to establish probable cause. *Id.* at 297, 794 S.E.2d at 305.

In *Campbell*, conversely, this Court determined that probable cause to search a residence was lacking when the facts set out in the officer's

affidavit failed to establish any meaningful connection whatsoever between the illegal activity and the residence. *Campbell*, 282 N.C. at 128–32, 191 S.E.2d at 755–57. In that case, an officer sought a warrant to search the residence of three suspected drug dealers for evidence of illegal drugs. *Id.* at 130, 191 S.E.2d at 756. The warrant stated, in part, as follows:

> All of the . . . subjects live in the house across from Ma's Drive-in on Hwy. 55. They all have sold narcotics to Special Agent J. M. Burns of the SBI and are all actively involved in drug sales to Campbell College students; this is known from personal knowledge of affiant, interviews with reliable confidential informants and local police officers.

Id.

A warrant was issued, and a search of the residence revealed 289 LSD tablets on the premises. *Id.* at 126–27, 191 S.E.2d at 754. The defendant argued on appeal that no probable cause had existed to support the issuance of the search warrant. *Id.* at 127, 191 S.E.2d at 754. We agreed that the affidavit supporting the warrant was "fatally defective" because it "failed to implicate the premises to be searched." *Id.* at 131, 191 S.E.2d at 757. We explained that "[p]robable cause cannot be shown 'by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based.' " *Id.* at 130–31, 191 S.E.2d at 756 (quoting *United States v. Ventresca*, 380 U.S. 102, 108–09 (1965)).

> [The affidavit] details no underlying facts and circumstances from which the issuing officer could find that probable cause existed *to search the premises described.* The affidavit implicates those premises *solely as a conclusion of the affiant.* Nowhere in the affidavit is there any statement that narcotic drugs were ever possessed or sold in or about the dwelling to be searched. Nowhere in the affidavit are any underlying circumstances detailed from which the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling. The inference the State seeks to draw from the contents of this affidavit—that narcotic drugs are illegally possessed on the described premises—does not reasonably arise from the facts alleged.

Id. at 131, 191 S.E.2d at 757. Accordingly, we concluded that the warrant was not supported by probable cause and that the evidence gathered as a result of the search was inadmissible. *Id.* at 132, 191 S.E.2d at 757.

Applying these principles to the present case, we are satisfied that the magistrate had a sufficient basis to conclude that probable cause existed to search the residence on East Chatham Street based on the facts contained in Detective Rose's affidavit. His affidavit included the following key information: (1) Detective Rose personally observed an encounter between Taylor, White, and Tommasone in a secluded parking lot that he believed—based on his training and experience—likely involved the sale of drugs; (2) Detective Rose knew White and Tommasone had a history of dealing drugs; (3) when Taylor was pulled over shortly after leaving the parking lot, she confirmed that she had just purchased heroin from White; (4) an officer observed White and Tommasone travel from the scene of the drug deal to the residence on East Chatham Street, exit the vehicle, and go inside the apartment; and (5) Detective Rose knew that this address was, in fact, where White and Tommasone lived.

As in *Allman* and *Arrington*, these facts supported a reasonable inference that a link existed between the apartment on East Chatham Street and the sale of drugs by White and Tommasone. The information set out in Detective Rose's affidavit allowed the magistrate to infer that evidence related to this criminal activity—such as drugs, drug paraphernalia, proceeds from drug sales, or associated items—would likely be found at the residence.[1]

It is true that Detective Rose's affidavit did not contain any evidence that drugs were actually being sold at the apartment. But our case law makes clear that such evidence was not necessary in order for probable cause to exist. Rather, the affiant was simply required to demonstrate *some* nexus between the apartment on East Chatham Street and criminal activity. Because Detective Rose's affidavit set out information that established such a nexus, we are unable to conclude that the magistrate lacked a sufficient basis for determining that probable cause existed to search the apartment.

While defendant relies heavily on our decision in *Campbell* in arguing for a different result, we believe that the present case is readily

1. Indeed, at a bare minimum, the affidavit clearly permitted an inference that the proceeds from the sale of the heroin to Taylor several hours earlier would be located at the apartment.

distinguishable from *Campbell*. In that case, there was no information contained in the officer's affidavit to support a reasonable inference that the residence at issue was in any way connected to the suspects' alleged drug dealing. Rather, the affidavit merely relied on the bare fact that the suspects lived there. Here, conversely, Detective Rose's affidavit provided a link between the apartment and criminal activity.

To be sure, Detective Rose could have included greater detail in his affidavit as to why—based on his training and experience—he believed that evidence of criminal activity was likely to be present in the residence. Nevertheless, viewing the affidavit in its totality and remaining mindful of the deference that we accord to a magistrate's determination of probable cause, we conclude that the trial court did not err in denying defendant's motion to suppress. In so holding, we break no new legal ground and instead simply apply well-settled principles of law to the facts presented in this case.

Conclusion

For the reasons stated above, we affirm the decision of the Court of Appeals.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
SHAWN PATRICK ELLIS

No. 340A19

Filed 1 May 2020

Search and Seizure—reasonable suspicion—disorderly conduct—vehicle passenger—"flipping the bird"

A state trooper lacked reasonable suspicion that defendant was engaged in disorderly conduct where the trooper saw a vehicle traveling down the road with defendant's arm out of the window making a pumping-up-and-down motion with his middle finger. The trooper did not know whether defendant's gesture was directed at him or at another driver, and the facts were insufficient to lead a reasonable officer to believe that defendant was intending to or was likely to provoke a violent reaction from another driver that would cause a breach of the peace.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 832 S.E.2d 750 (N.C. Ct. App. 2019), affirming a judgment entered on 13 March 2018 by Judge Karen Eady-Williams in Superior Court, Stanly County. This matter was calendared for argument in the Supreme Court on 11 March 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Joshua H. Stein, Attorney General, by Kimberly N. Callahan, Assistant Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Michele A. Goldman, Assistant Appellate Defender, for defendant-appellant.

Irena Como; and Kirkland & Ellis LLP, by Stefan Atkinson and Joseph Myer Sanderson, for American Civil Liberties Union of North Carolina Legal Foundation, amicus curiae.

HUDSON, Justice.

Here we must decide whether the Court of Appeals erred by affirming the trial court's denial of defendant's motion to suppress evidence. The trial court found that there was reasonable suspicion that criminal

activity was afoot to justify the law enforcement officer's stop when defendant signaled with his middle finger from the passenger side window of a moving vehicle. Because we conclude that there was no reasonable suspicion to justify the stop, we reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with our decision.

I. Facts and Procedural Background

Around lunch time on 9 January 2017, a few days after a significant snowstorm, Trooper Paul Stevens of the North Carolina State Highway Patrol was flagged down in Stanly County by a stranded motorist who had run out of gas. Temperatures were below freezing, and Trooper Stevens stopped to help. Trooper Stevens called for an officer with the Albemarle Police Department to help him render aid to the motorist. Officer Adam Torres arrived at the scene. Both Trooper Stevens and Officer Torres had their blue lights activated while their patrol cars were positioned on the side of the road.

While assisting the stranded motorist, Trooper Stevens turned his attention to another car traveling on the roadway. Defendant, a passenger in a small white SUV, had his arm outside of the window and was making a back-and-forth waving motion with his hand. As Trooper Stevens turned to look towards the car, defendant's gesture changed from a waving motion to a pumping up-and-down motion with his middle finger. Believing that defendant was committing the crime of disorderly conduct, Trooper Stevens got into his patrol car to pursue and stop the SUV.

Trooper Stevens pursued the vehicle for approximately half a mile with his blue lights still activated. Trooper Stevens did not observe the SUV break any traffic laws during his pursuit, and the SUV pulled over to the side of the road without incident.

When Trooper Stevens asked the driver and defendant for identification, they both initially refused. After about a minute, the driver provided her identification, but defendant still refused. Trooper Stevens took defendant to his patrol car, and eventually, defendant agreed to provide his name and date of birth. Trooper Stevens issued defendant a citation for resisting, delaying, or obstructing an officer under N.C.G.S. § 14-223.

At the trial court, defendant moved to suppress Trooper Stevens' testimony, arguing that there was no reasonable suspicion to justify the

stop. The trial court orally denied the motion, finding that there was reasonable suspicion for the stop.

Defendant gave notice that he intended to appeal from the trial court's denial of his motion to suppress and then pleaded guilty to resisting, delaying, or obstructing a public officer.

At the Court of Appeals, defendant again argued that the stop was not valid because Trooper Stevens lacked reasonable suspicion that defendant was engaged in disorderly conduct. The State argued that the stop fell within the community caretaking exception to the Fourth Amendment and, therefore, that Trooper Stevens did not need reasonable suspicion to justify the stop. The Court of Appeals unanimously decided that the community caretaking exception did not apply to the facts here. Instead, the majority at the Court of Appeals concluded there was reasonable suspicion for the stop and affirmed the trial court's denial of defendant's motion to suppress. The dissenting judge disagreed and would have concluded that the stop was not supported by reasonable suspicion.

Defendant appealed to this Court on the basis of the dissenting opinion. In its brief here, the State acknowledges that its sole argument in the Court of Appeals involved the community caretaking exception, and that the court unanimously rejected that argument.[1] In fact, the State agrees that the specific, articulable facts in the record do not establish reasonable suspicion of the crime of disorderly conduct.

Because we agree, we reverse the decision of the Court of Appeals.

II. Analysis

We review a trial court's denial of a motion to suppress to determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (quoting *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012)). However, findings of fact are only required "when there is a material conflict in the evidence." *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015). Where, as here, there is no conflict in the evidence, the trial court's findings can be inferred from its decision. *Id.* (citing *State v. Munsey*, 342 N.C. 882, 885, 467 S.E.2d 425, 427 (1996)). In these circumstances, we review de novo whether the findings inferred from

1. The community caretaking exception was not the basis for the dissenting opinion and is not otherwise before this Court.

the trial court's decision support the ultimate legal conclusion reached by the trial court. *State v. Nicholson*, 371 N.C. 284, 288, 813 S.E.2d 840, 843 (2018).

Refusing to identify oneself to a police officer during a *valid* stop may constitute a violation of N.C.G.S. § 14-223. *See State v. Friend*, 237 N.C. App. 490, 493, 768 S.E.2d 146, 148 (2014) ("We hold that the failure to provide information about one's identity during a lawful stop can constitute resistance, delay, or obstruction within the meaning of [N.C.G.S.] § 14-223." (citation omitted)); N.C.G.S. § 14-223 (2017). The primary issue before us is whether or not Trooper Stevens's stop was valid.

> The United States Supreme Court has long held that the Fourth Amendment permits a police officer to conduct a brief investigatory stop of an individual based on reasonable suspicion that the individual is engaged in criminal activity. The Fourth Amendment permits brief investigative stops when a law enforcement officer has a particularized and objective basis for suspecting the particular person stopped of criminal activity. The standard takes into account the totality of the circumstances—the whole picture. Although a mere hunch does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause.
>
> As this Court has explained, the stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. . . . Therefore, when a criminal defendant files a motion to suppress challenging an investigatory stop, the trial court can deny that motion only if it concludes, after considering the totality of the circumstances known to the officer, that the officer possessed reasonable suspicion to justify the challenged seizure.

Nicholson, 371 N.C. at 288–89, 813 S.E.2d at 843–44 (cleaned up) (citations omitted).

The trial court concluded that there was reasonable suspicion to justify the stop, and the Court of Appeals agreed. But reviewing the record before us de novo, we are unable to conclude that there were specific and articulable facts known to Trooper Stevens which would

lead a reasonable officer to suspect that defendant was engaged in disorderly conduct.

"Disorderly conduct is a public disturbance intentionally caused by any person who . . . [m]akes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace." N.C.G.S. § 14-288.4(a)(2) (2017).

The following facts can be inferred from Trooper Stevens' testimony: defendant was waving from the passenger window of an SUV and, a few seconds later, began to gesture with his middle finger; Trooper Stevens did not know whether defendant's gesture was directed at him or at another driver; and, after pursuing the vehicle for approximately half a mile, Trooper Stevens did not observe any traffic violations or other suspicious behavior.

We conclude that these facts alone are insufficient to provide reasonable suspicion that defendant was engaged in disorderly conduct. The fact that Trooper Stevens was unsure of whether defendant's gesture may have been directed at another vehicle does not, on its own, provide reasonable suspicion that defendant intended to or was plainly likely to provoke violent retaliation from another driver. Likewise, the mere fact that defendant's gesture changed from waving to "flipping the bird" is insufficient to conclude defendant's conduct was likely to cause a breach of the peace. Based on the facts in the record, we are unable to infer that, by gesturing with his middle finger, defendant was intending to or was likely to provoke a violent reaction from another driver that would cause a breach of the peace.

Thus, we conclude that it was error for the trial court to find that there was reasonable suspicion of disorderly conduct to justify the stop.[2]

III. Conclusion

In conclusion, there was no reasonable suspicion of disorderly conduct to justify Trooper Stevens' stop, and it was error for the trial court

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2. Because we conclude that there was no reasonable suspicion for the stop, we need not address defendant's First Amendment arguments. *State v. Hyleman*, 324 N.C. 506, 510, 379 S.E.2d 830, 833 (1989) ("Having decided upon statutory grounds that defendant's motion to suppress should have been allowed, this Court will not decide the same issue on constitutional grounds.") (citing *State v. Creason*, 313 N.C. 122, 326 S.E.2d 24 (1985); *State v. Blackwell*, 246 N.C. 642, 99 S.E.2d 867 (1957); *State v. Jones*, 242 N.C. 563, 89 S.E.2d 129 (1955)).

to deny defendant's motion to suppress. We reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with our decision.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA
v.
CEDRIC THEODIS HOBBS JR.

No. 263PA18

Filed 1 May 2020

1. Jury—selection—Batson challenge—prima facie case—mootness

Whether an African-American first-degree murder defendant established a prima facie case of discrimination in a *Batson* challenge (*Batson*'s first step) was a moot question because the State provided purportedly race-neutral reasons for its peremptory challenges against black potential jurors (*Batson*'s second step) and the trial court ruled on them (*Batson*'s third step).

2. Jury—selection—Batson challenge—pretext—erroneous analysis

Where an African-American first-degree murder defendant lodged *Batson* challenges to the State's exercise of peremptory challenges against two black potential jurors, the trial court erred in its analysis that ultimately concluded the State's use of its peremptory challenges was not based on race. The trial court erroneously considered the peremptory challenges exercised by defendant; failed to explain how it weighed the totality of the circumstances, including the historical evidence of discrimination raised by defendant; and erroneously focused only on whether the prosecution asked white and black jurors different questions, rather than also comparing their answers.

3. Jury—selection—Batson challenge—pretext—erroneous analysis

Where an African-American first-degree murder defendant lodged a *Batson* challenge to the State's exercise of a peremptory challenge against a black potential juror, the Court of Appeals erred in its analysis that ultimately concluded the State's use of its peremptory challenge was not based on race. That court failed to

conduct a comparative juror analysis and failed to weigh all the evidence presented by defendant, including historical evidence of discrimination.

Justice NEWBY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 260 N.C. App. 394, 817 S.E.2d 779 (2018), finding no error after appeal from judgments entered on 18 December 2014 by Judge Robert F. Floyd in Superior Court, Cumberland County. Heard in the Supreme Court on 3 February 2020.

Joshua H. Stein, *Attorney General*, *by Amy Kunstling Irene*, *Special Deputy Attorney General*, *for the State-appellee.*

Glenn Gerding, *Appellate Defender*, *by Sterling Rozear*, *Assistant Appellate Defender*, *for defendant-appellant.*

Donald H. Beskind, *Robert S. Chang*, *and Taki V. Flevaris for Fred T. Korematsu Center for Law and Equality*, *amicus curiae.*

David Weiss, *James E. Coleman Jr.*, *and Elizabeth Hambourger for Coalition of State and National Criminal Justice and Civil Rights Advocates*, *amici curiae.*

EARLS, Justice.

Cedric Theodis Hobbs Jr. is an African-American male who was indicted for the murder of a young white man and for a further eight additional felonies including armed robbery and kidnapping against three other white victims. Before trial, Mr. Hobbs filed a motion pursuant to the Racial Justice Act which included information about prior capital cases in Cumberland County. During jury selection in his capital trial, Mr. Hobbs made a number of objections arguing that the State was exercising its peremptory challenges in a racially discriminatory manner. He pursues two of these objections in arguments before this Court. At the time of his final objection, the State had used eight out of eleven of its peremptory challenges against black jurors. While it had accepted eight and excused eight black jurors at that time, the State had accepted twenty and excused two white jurors.

On 12 December 2014, Mr. Hobbs was found guilty of one count of first-degree murder by malice, premeditation and deliberation, and also

under the felony murder rule; two counts of robbery with a dangerous weapon; two counts of attempted robbery with a dangerous weapon; and one count of felonious conspiracy to commit robbery with a dangerous weapon. He was sentenced to life imprisonment without parole for the first-degree murder conviction and one count of attempted robbery with a dangerous weapon, as well as three consecutive sentences of 73 to 97 months for each of the two convictions for robbery with a dangerous weapon and for the other attempted robbery with a dangerous weapon conviction. Mr. Hobbs was also sentenced to 29 to 44 months for conspiracy to commit robbery with a dangerous weapon.

Mr. Hobbs appealed to the Court of Appeals. On appeal, he argued that the trial court should have accepted his proffered jury instruction concerning his mental capacity to consider the consequences of his actions and should have granted three objections that he made under the decision of the Supreme Court of the United States in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), which prohibits the use of race-based peremptory challenges during jury selection. In a unanimous opinion, the Court of Appeals rejected Mr. Hobbs's arguments, concluding that Mr. Hobbs received a fair trial, free from prejudicial error. *State v. Hobbs*, 260 N.C. App. 394, 409, 817 S.E.2d 779, 790 (2018). Mr. Hobbs then sought discretionary review in this Court, arguing that the Court of Appeals erred in its analysis of his *Batson* claims with respect to three jurors. We agree. As to the first two jurors, the Court of Appeals rejected Mr. Hobbs's argument "that the trial court's ruling [that Hobbs had failed to establish a prima facie case of discrimination] became moot." *Hobbs*, 260 N.C. App. at 404, 817 S.E.2d at 787. This was error. As to the third juror, the Court of Appeals affirmed the trial court's determination that Mr. Hobbs had not met his ultimate burden of showing that the strike was motivated by race. This, also, was error. As to all three jurors, we remand for reconsideration of the third stage of the *Batson* analysis, namely whether Mr. Hobbs proved purposeful discrimination in each case.

Background

The evidence at trial tended to show that Mr. Hobbs robbed the Cumberland Pawn and Loan Shop on 6 November 2010. Kyle Harris, Derrick Blackwell, and Sean Collins were all working and present at the pawn shop on that date. During the robbery, Mr. Hobbs shot Kyle Harris, a nineteen-year-old college student, in the chest, killing him. At trial, Mr. Hobbs presented a defense of diminished capacity, arguing that his troubled upbringing, severe childhood traumas, poor mental health, and substance abuse affected his mental ability at the time of the offenses. *Hobbs*, 260 N.C. App. at 396–99, 817 S.E.2d at 783–84.

The jury pool for Mr. Hobbs's capital trial was divided into panels of twelve, which were called up in subsequent rounds of jury selection as the parties progressed through voir dire. Mr. Hobbs made his first *Batson* objection during the third round of jury selection after the State excused jurors Brian Humphrey and Robert Layden, both of whom were black. At the time of those strikes, the State had issued peremptory challenges against eight jurors, two of whom were nonblack and six of whom were black. Of the thirty-one qualified jurors tendered to the State, the State had excused two out of twenty white jurors (10%) and six out of eleven black jurors (54.5%).

Mr. Hobbs argued that the facts above, along with the fact that he was a black male accused of robbing multiple white victims and murdering one white victim, the similarities between the answers provided by the excused black jurors and the accepted nonblack jurors, and the history of racial discrimination in jury selection in the county where Mr. Hobbs was being prosecuted all worked together to establish a prima facie case that the State had impermissibly based its peremptory challenges on the race of the jurors. The trial court determined that Mr. Hobbs had not made out a prima facie case of discrimination. However, the trial court asked the State, for purposes of the record, to explain the State's use of peremptory challenges against the black jurors it had excused up to that point. After the State offered its reasons, the trial court gave Mr. Hobbs an opportunity to reply and argue that the State's reasons were pretextual. The trial court described this as "a full hearing on the defendant's *Batson* claim." Following the hearing, the trial court ruled that the State's peremptory challenges were not made on the basis of race.

Mr. Hobbs made another objection[1] pursuant to *Batson* during the fourth round of jury selection, following the State's use of a peremptory challenge to strike William McNeill from the jury. At the time, the State had used eight out of eleven peremptory challenges against black jurors. At that point, the trial court determined that a prima facie case had been made out by the defense. Accordingly, the trial court required the State to provide race-neutral reasons for its use of a peremptory challenge to strike juror McNeill. The trial court allowed Mr. Hobbs to respond to the State's reasons and, during argument between the parties, noted that the State had accepted eight black jurors in total and issued peremptory challenges against eight black jurors. The trial court concluded that

1. Only those objections which Mr. Hobbs argues to this Court are detailed here.

the State's use of a peremptory challenge against juror McNeill was not based on race.

Reviewing the decision of the trial court, the Court of Appeals held that, notwithstanding the fact that the trial court had requested race-neutral explanations for the strikes of jurors Humphrey and Layden and the fact that it made an ultimate ruling on whether the strikes were motivated by race, the question of whether Mr. Hobbs made out a prima facie case of discrimination as to jurors Humphrey and Layden was not moot. *Hobbs*, 260 N.C. App. at 404, 817 S.E.2d at 787. The Court of Appeals then concluded that Mr. Hobbs had failed to establish a prima facie case of discrimination. *Id.* at 405, 817 S.E.2d at 787–88. As to juror McNeill, the Court of Appeals affirmed the trial court's ruling that Mr. Hobbs had failed to prove racial discrimination in the State's peremptory challenge. *Id.* at 407, 817 S.E.2d at 789. Mr. Hobbs petitioned this Court for discretionary review, which we granted.

Standard of Review

Mr. Hobbs claims that the State's peremptory challenges, detailed above, were impermissibly based on the race of the jurors. The trial court has the ultimate responsibility of determining "whether the defendant has satisfied his burden of proving purposeful discrimination." *State v. Golphin*, 352 N.C. 364, 427, 533 S.E.2d 168, 211 (2000) (quoting *State v. Bonnett*, 348 N.C. 417, 433, 502 S.E.2d 563, 575 (1998)). We give this determination "great deference," overturning it only if it is clearly erroneous. *Id.* (citations omitted). Indeed, we have previously held that "[t]rial judges, who are 'experienced in supervising voir dire,' and who observe the prosecutor's questions, statements, and demeanor firsthand, are well qualified to 'decide if the circumstances concerning the prosecutor's use of peremptory challenges create[ ] a prima facie case of discrimination against black jurors.' " *State v. Chapman*, 359 N.C. 328, 339, 611 S.E.2d 794, 806 (2005) (alteration in original) (quoting *Batson*, 476 U.S. at 97, 106 S. Ct. at 1723.) As with any other case, issues of law are reviewed de novo. *See, e.g.*, *State v. Parisi*, 372 N.C. 639, 649, 831 S.E.2d 236, 243 (2019) (legal conclusions " 'are reviewed de novo and are subject to full review,' with an appellate court being allowed to 'consider[ ] the matter anew and freely substitute[ ] its own judgment for that of the lower tribunal.' " (alterations in original) (quoting *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011))).

Analysis

When a defendant claims that the State has exercised its peremptory challenges in a racially discriminatory manner, a trial court conducts a

three-step analysis pursuant to the decision of the Supreme Court of the United States in *Batson v. Kentucky*. *See Snyder v. Louisiana*, 552 U.S. 472, 476–77, 128 S. Ct. 1203, 1207 (2008).

***Prima facie* case**

"[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170, 125 S. Ct. 2410, 2417 (2005); *see Batson*, 476 U.S. at 93–94, 106 S. Ct. at 1721 (stating that a defendant makes a prima facie case of discrimination "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose" (citation omitted)). "[A] prima facie showing of racial discrimination[ ] is not intended to be a high hurdle for defendants to cross. Rather, the showing need only be sufficient to shift the burden to the State to articulate race-neutral reasons for its peremptory challenge." *State v. Waring*, 364 N.C. 443, 478, 701 S.E.2d 615, 638 (2010) (quoting *State v. Hoffman*, 348 N.C. 548, 553, 500 S.E.2d 718, 722 (1998)) (alteration in original). So long as a defendant provides evidence from which the court can infer discriminatory purpose, a defendant has established a prima facie case and has thereby transferred the burden of production to the State. *See*, *e.g.*, *State v. Porter*, 326 N.C. 489, 497, 391 S.E.2d 144, 150 (1990) ("When a defendant makes out a prima facie case, the burden of production shifts to the State to come forward with a neutral explanation for each peremptory strike." (cleaned up)).

In making this showing, a defendant is entitled to "rely on 'all relevant circumstances' to raise an inference of purposeful discrimination." *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 240, 125 S. Ct. 2317, 2325 (2005) (citation omitted). Our prior cases have identified a number of factors to consider when determining whether a defendant has made out a prima facie case of discrimination, which

> include the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State's acceptance rate of potential black jurors.

State v. Quick, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995). These are not the only factors to consider. For example, a court must consider historical evidence of discrimination in a jurisdiction. *See, e.g.*, *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322, 346, 123 S. Ct. 1029, 1044 (2003); *see also Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019) (stating that a criminal defendant raising a *Batson* objection may present evidence of a "relevant history of the State's peremptory strikes in past cases" to support a claim of discrimination).

Importantly, the burden on a defendant at this stage is one of production, not of persuasion. That is, a defendant need only provide evidence supporting an inference discrimination has occurred. At the stage of presenting a prima facie case, the defendant is not required to persuade the court conclusively that discrimination has occurred. The United States Supreme Court has made this clear:

> Indeed, *Batson* held that because the petitioner had timely objected to the prosecutor's decision to strike "all black persons on the venire," the trial court was in error when it "flatly rejected the objection without requiring the prosecutor to give an explanation for his action." 476 U.S.[ ] at 100, 106 S.[ ]Ct. 1712. We did not hold that the petitioner had proved discrimination. Rather, we remanded the case for further proceedings because the trial court failed to demand an explanation from the prosecutor—i.e., to proceed to *Batson*'s second step—despite the fact that the petitioner's evidence supported *an inference* of discrimination. *Ibid.*
>
> Thus, in describing the burden-shifting framework, we assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated. We did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

Johnson, 545 U.S. at 169–70, 125 S. Ct. at 2417. The Court then reiterated the point:

> The first two *Batson* steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim. "It is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination."

Johnson, 545 U.S. at 171, 125 S. Ct. at 2417–18 (quoting *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 1771 (1995)).

Indeed, language in our own cases affirms this. *See*, *e.g.*, *Quick*, 341 N.C. at 144, 462 S.E.2d at 188 ("Therefore, to make out a prima facie case of discrimination, a defendant need only show that the relevant circumstances raise an inference that the prosecutor used peremptory challenges to remove potential jurors solely because of their race.");[2] *Porter*, 326 N.C. at 497, 391 S.E.2d at 150 (referring to "the burden of production" which shifts from a defendant to the State once a defendant establishes a prima facie case).

Race-neutral reasons

If a defendant has made a prima facie showing, the analysis proceeds to the second step where the State is required to provide race-neutral reasons for its use of a peremptory challenge. *Flowers*, 139 S. Ct. at 2243.

> The State's explanation must be clear and reasonably specific, but does not have to rise to the level of justifying a challenge for cause. *See Bonnett*, 348 N.C. at 433, 502 S.E.2d at 574; *State v. Porter*, 326 N.C. 489, 498, 391 S.E.2d 144, 151 (1990). Moreover, " 'unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.' " *Bonnett*, 348 N.C. at 433, 502 S.E.2d at 574–75 (quoting *Hernandez*,

2. As we recognized in *State v. Waring*, this statement is incorrect to the extent that it suggests a strike is only impermissible if race is the sole reason. Instead, "the third step in a *Batson* analysis is the less stringent question whether the defendant has shown 'race was *significant* in determining who was challenged and who was not.' " *Waring*, 364 N.C. 443, 480, 701 S.E.2d 615, 639 (2010) (quoting *Miller-El II*, 545 U.S. 231, 252, 125 S. Ct. 2317, 2332 (2005)).

> 500 U.S. at 360, 114 L. Ed. 2d at 406); *see also Purkett v. Elem*, 514 U.S. 765, 768-69, 131 L. Ed. 2d 834, 839-40, 115 S. Ct. 1769 (1995); *State v. Barnes*, 345 N.C. 184, 209-10, 481 S.E.2d 44, 57, *cert. denied*, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997), *and cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473, 118 S. Ct. 1309 (1998). In addition, the second prong provides the defendant an opportunity for surrebuttal to show the State's explanations for the challenge are merely pretextual. *See State v. Gaines*, 345 N.C. 647, 668, 483 S.E.2d 396, 408, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177, 118 S. Ct. 248 (1997); *State v. Robinson*, 330 N.C. 1, 16, 409 S.E.2d 288, 296 (1991).

Golphin, 352 N.C. at 426, 533 S.E.2d at 211. Therefore, at *Batson*'s second step, the State offers explanations for the strike which must, on their face, be race-neutral. If they are, then the court proceeds to the third step.

Pretext

At the third step of the analysis, the defendant bears the burden of showing purposeful discrimination. *Waring*, 364 N.C. at 475, 701 S.E.2d at 636; *see also*, *State v. Wright*, 189 N.C. App. 346, 352–54, 658 S.E.2d 60, 64–65 (2008) (where the State failed to meet its burden of offering race-neutral reasons for the exercise of each of its peremptory challenges to strike black jurors, a *Batson* violation was established). "The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties." *Flowers*, 139 S. Ct. at 2243. At the third step, the trial court "must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race." *Id.* at 2244. "The ultimate inquiry is whether the State was 'motivated in substantial part by discriminatory intent.' " *Id.* (quoting *Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016)).

Mr. Hobbs presents two issues for our consideration. First, Mr. Hobbs argues that the first step, whether he established a prima facie case of discrimination, became moot as to jurors Humphrey and Layden once the prosecution offered its reasons for excusing those jurors and trial court ruled on the ultimate issue of whether the prosecutor's strikes were motivated by race. Second, he argues that the trial court erred in its ultimate determination that the State was not impermissibly motivated

by race in its strikes of jurors Humphrey, Layden, and McNeill. We address each argument in turn.[3]

Mootness

[1] Where the State has provided reasons for its peremptory challenges, thus moving to *Batson*'s second step, and the trial court has ruled on them, completing *Batson*'s third step, the question of whether a defendant initially established a prima facie case of discrimination becomes moot. *State v. Robinson*, 330 N.C. 1, 17, 409 S.E.2d 288, 297 (1991) ("We find it unnecessary to address the trial court's conclusion that defendant failed to make a prima facie case of discrimination because in this case the State voluntarily proffered explanations for each peremptory challenge."); *id.* at 16, 409 S.E.2d at 296–97 (stating that the trial court accepted the State's race-neutral reasons for its peremptory challenges). When the trial court has already ruled that a defendant failed in his ultimate burden of proving purposeful discrimination, there is no reason to consider whether the defendant has met the lesser burden of establishing a prima facie case of discrimination. *See Hernandez v. New York*, 500 U.S. 352, 359, 111 S. Ct. 1859, 1866 (1991) (plurality opinion) ("Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot."); *Waring*, 364 N.C. at 478, 701 S.E.2d at 638 (stating that prima facie case's purpose is to "shift the burden to the State to articulate race-neutral reasons for its peremptory challenge"). This rule is longstanding in our precedents, going back to our 1991 decision in *State v. Thomas*. 329 N.C. 423, 430–31, 407 S.E.2d 141, 147 (1991); *see also State v. Bell*, 359 N.C. 1, 12, 603 S.E.2d 93, 102 (2004); *State v. Williams* (*J. Williams*), 355 N.C. 501, 550–51, 565 S.E.2d 609, 638–39 (2002); *Robinson*, 330 N.C. at 17, 409 S.E.2d at 297.

The Court of Appeals relied on cases stating a different rule, those holding that our review is limited to whether a defendant made a prima facie showing of discrimination where the trial court has ruled on that issue but has not made an ultimate determination of whether the State's proffered reasons are actually race-neutral or pretextual. *See, e.g.*, *State v. Williams* (*J.E. Williams*), 343 N.C. 345, 359, 471 S.E.2d 379, 386–87 (1996) (holding that appellate review is limited to whether the

3. Mr. Hobbs also presented a third issue, whether the trial court and the Court of Appeals erred in their determinations that Mr. Hobbs failed to establish a *prima facie* case of discrimination as to jurors Humphrey and Layden. Because we conclude that the question is moot, we do not address this issue.

trial court erred in finding that a defendant failed to make out a prima facie case of discrimination where the trial court so ruled, allowed the State to give reasons for the record, and did not make findings after the prosecutor gave reasons for the strikes). The Court of Appeals relied on *J.E. Williams* and *State v. Smith*, 351 N.C. 251, 262, 524 S.E.2d 28, 37 (2000), to hold that the question of whether Mr. Hobbs made out a prima facie case was not moot. *Hobbs*, 260 N.C. App. at 404, 817 S.E.2d at 787. Similar to *J.E. Williams*, the trial court in *Smith* had ruled only on whether the defendant in that case had made a prima facie showing of discrimination, not whether the defendant carried the ultimate burden of persuasion. *Smith*, 351 N.C. at 262, 524 S.E.2d at 37. Accordingly, the case is distinguishable from the present case. The facts of this case are governed by the rule as stated by this Court in *Robinson* because the trial court here did consider the prosecution's race-neutral reasons for excusing jurors Humphrey and Layden, ultimately concluding that there was no racial discrimination.

Here, as in *Robinson*, we need not "examine whether defendant met his initial burden." *Robinson*, 330 N.C. at 17, 409 S.E.2d at 297. Neither *J.E. Williams* nor any of the cases relying on it provide a reason to depart from the analysis this Court provided in *Robinson*. Further, this Court has reaffirmed the rule in *Robinson* many times since it was decided. *See, e.g.*, *Bell*, 359 N.C. at 12, 603 S.E.2d at 102; *J. Williams*, 355 N.C. at 550–51, 565 S.E.2d at 638–39; *State v. Smith*, 352 N.C. 531, 540, 532 S.E.2d 773, 780 (2000); *State v. Lemons*, 348 N.C. 335, 361, 501 S.E.2d 309, 325 (1998). Accordingly, consistent with *Robinson*, we reaffirm that the question of whether a defendant has established a prima facie case of discrimination in a *Batson* challenge becomes moot after the State has provided purportedly race-neutral reasons for its peremptory challenges and those reasons are considered by the trial court. *See Robinson*, 330 N.C. at 17, 409 S.E.2d at 297; *see also Miller-El I*, 537 U.S. at 338, 123 S. Ct. at 1040.

In urging the opposite result, the dissent ignores the fact that the trial court ruled on the ultimate question of whether Mr. Hobbs had established a *Batson* violation. Similarly, the dissent ignores our long-standing line of cases holding that, in such a circumstance, the question of whether a defendant has established a *prima facie* case is moot.

In the instant case, the State provided purportedly race-neutral reasons for its use of peremptory challenges to strike jurors Layden and Humphrey. Those reasons were considered by the trial court. As a result, the question of whether Mr. Hobbs established a *prima facie* case of discrimination as to those two jurors is moot.

Purposeful Discrimination

[2] Neither the trial court nor the Court of Appeals appropriately considered all of the evidence necessary to determine whether Mr. Hobbs proved purposeful discrimination with respect to the State's peremptory challenges of jurors Humphrey, Layden, and McNeill. Accordingly, we must remand to the trial court for a new *Batson* hearing.

"A defendant may rely on 'all relevant circumstances' " to support a claim of racial discrimination in jury selection. *Flowers*, 139 S. Ct. at 2245 (quoting *Batson*, 476 U.S. at 96, 106 S. Ct. at 1723); *accord Johnson*, 545 U.S. at 170, 125 S. Ct. at 2417 ("Thus, in describing the burden-shifting framework, we assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated."). It follows, then, that when a defendant presents evidence raising an inference of discrimination, a trial court, and a reviewing appellate court, must consider that evidence in determining whether the defendant has proved purposeful discrimination in the State's use of a peremptory challenge.

A criminal defendant may rely on "a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race." *Flowers*, 139 S. Ct. 2243. This evidence includes, but is not limited to:

- statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
- evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;
- side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
- a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
- relevant history of the State's peremptory strikes in past cases; or
- other relevant circumstances that bear upon the issue of racial discrimination.

Id. (citations omitted).

Here, the Court of Appeals did not consider whether Mr. Hobbs met his ultimate burden of persuasion as to potential jurors Humphrey and Layden, instead limiting its review to whether Mr. Hobbs had established a *prima facie* case of discrimination. *Hobbs*, 260 N.C. App. at 404, 817 S.E.2d at 787-88 ("Considering all the relevant factors, we conclude the trial court did not err in finding Defendant had failed to establish a prima facie showing for prospective jurors Layden and Humphrey."). However, the trial court did ultimately rule on the *Batson* challenge as to potential jurors Humphrey and Layden, concluding they were not based on race and describing itself as entering an "order in regards to the full hearing we had with regards to the *Batson* claims and challenges." Because the question of whether there was a prima facie case of discrimination was moot, the Court of Appeals should have reviewed whether the trial court properly applied the law of *Batson* and its progeny in reaching its ultimate conclusion that the prosecution did not use its peremptory challenges to excuse Layden and Humphrey from service on the jury because of their race.

In reaching its decision as to Mr. Hobbs's *Batson* challenge to the State's strikes of Mr. Layden and Mr. Humphrey, the trial court stated that it had "elected to proceed to a full hearing on the defendant's *Batson* claim." The trial court recited facts concerning the race of the victims, the race of the defendant, the race of witnesses, the number of peremptory challenges exercised by the State, and that seventy-five percent of the State's peremptory challenges removed black jurors. The trial court also noted that Mr. Hobbs had used forty percent of his peremptory challenges to remove black jurors. The trial court then recited the reasons given by the State for its decision to excuse jurors Layden and Humphrey, as well as numerous other jurors. As to any comparison of the responses of black and white potential jurors to questioning by the prosecution, the court recited that it "further considered" Mr. Hobbs's arguments in that regard. Following this recitation of facts, the trial court stated that it had concluded "that the State's use of its peremptory challenges were not based on race nor gender, nor has there been a showing that they were based on discrimination of any constitutionally protected class."

There are three legal errors with the trial court's analysis at this point. First, in evaluating a defendant's *Batson* challenge, the peremptory challenges exercised by the defendant are not relevant to the State's motivations. *Miller-El II*, 545 U.S. at 245 n.4, 125 S. Ct. at 2328 n.4 ("[T]he underlying question is not what the defense thought about these jurors" but whether the State was using its peremptory challenges based on race.). The trial court erred by considering the peremptory challenges exercised by Mr. Hobbs.

Second, the trial court did not explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges, including the historical evidence that Mr. Hobbs brought to the trial court's attention. The dissent describes this as "a new legal standard" because the historical evidence was not "part of the argument regarding McNeill during the third stage." The trial transcript reveals that in fact, during the argument regarding McNeill, when asked by the trial court whether there was "[a]ny other showing?" counsel for Mr. Hobbs responded: "I believe that we would stand on everything that we've earlier stated." Indeed, there is nothing new about requiring a court to consider all of the evidence before it when determining whether to sustain or overrule a *Batson* challenge. *See*, *e.g.*, *Flowers v. Mississippi*, 139 S. Ct. 2228, 2245 (2019) (requiring consideration of "all relevant circumstances," including "historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction" in deciding a *Batson* claim); *accord Johnson v. California*, 545 U.S. 162, 170, 125 S. Ct. 2410, 2417 (2005). As the *Flowers* Court reminded us, "*Batson* did not preclude defendants from still using the same kinds of historical evidence that *Swain* had allowed defendants to use to support a claim of racial discrimination. Most importantly for present purposes, after *Batson*, the trial judge may still consider historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction, just as *Swain* had allowed." *Flowers*, 139 S. Ct. at 2245 (referencing *Swain v. Alabama*, 380 U. S. 202, 85 S. Ct. 824 (1965)).

Finally, the trial court misapplied *Miller-El II* by focusing only on whether the prosecution asked white and black jurors different questions, rather than also examining the comparisons in the white and black potential jurors' answers that Mr. Hobbs sought to bring to the court's attention. For example, the trial court found that "there's no evidence as to technically racially motivated questions nor does it appear that the method of questioning was done in a discriminatory or racially motivated manner." But Mr. Hobbs argued extensively that every reason given for the State's use of a peremptory challenge against Mr. Layden and Mr. Humphrey was also found among the responses given by white jurors who were passed by the State.

As just one example, experience with mental health professionals was given as a race-neutral reason for excluding Mr. Humphrey; however, white juror Stephens was in group therapy for eight years, while white juror Williams, passed by the State, suffers from anxiety and depression and actually started crying during voir dire. Another white juror passed by the State had a granddaughter who suffered from

bipolar disorder and has been an abuse victim—the juror indicated she had been very much involved in the issue with her granddaughter. We do not know from the trial court's ruling how or whether these comparisons were evaluated. Evidence about similar answers between similarly situated white and nonwhite jurors is relevant to whether the prosecution's stated reasons for exercising a peremptory challenge are mere pretext for racial discrimination. Potential jurors do not need to be identical in every regard for this to be true. *Miller-El II*, 545 U.S. at 247 n.6, 125 S. Ct. at 2329 n.6 ("A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.") "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Id.* at 241, 125 S. Ct. at 2325. On the ultimate question of whether the State's use of peremptory challenges to exclude jurors Layden and Humphrey was based on race, the trial court misapplied the *Batson* analysis. Thus, we remand for reconsideration of this issue.

[3] Similar legal error occurred in the evaluation by the Court of Appeals and the trial court's evaluation of the *Batson* challenge as to potential juror McNeill, even though by that point the trial court concluded that Mr. Hobbs had established a *prima facie* case of racial discrimination in the prosecution's use of peremptory challenges. The Court of Appeals failed to conduct a comparative juror analysis, despite being presented with the argument by Mr. Hobbs. *Hobbs*, 260 N.C. App. at 407, 817 S.E.2d at 788–89.

The Court of Appeals failed to weigh all the evidence put on by Mr. Hobbs, instead basing its conclusion on the fact that the reasons articulated by the State have, in other cases, been accepted as race-neutral. *See id.* at 407, 817 S.E.2d at 789 ("As with the previous venireman, we conclude the State presented valid, race-neutral reasons for excusing prospective juror McNeill. *See Robinson*, 336 N.C. at 97, 443 S.E.2d at 314 (finding a dismissal of a juror who stated a preference of life imprisonment over the death penalty was 'clear and reasonable'); *see also State v. Maness*, 363 N.C. 261, 272, 677 S.E.2d 796, 804 (2009) (excusing a juror who had mental illness and who had worked with substance abusers, causing the State to fear she would 'overly identify with defense evidence' was valid and race-neutral)."). The trial court similarly failed to either conduct any meaningful comparative juror analysis or to weigh any of the historical evidence of racial discrimination in jury

selection presented by Mr. Hobbs. This failure was erroneous and warrants reversal. *See Flowers*, 139 S. Ct. at 2245; *Johnson*, 545 U.S. at 170, 125 S. Ct. at 2417.

On remand, considering the evidence in its totality, the trial court must consider whether the primary reason given by the State for challenging juror McNeill was pretextual. This determination must be made in light of all the circumstances, including how McNeill's responses during voir dire compare to any similarly situated white juror, the history of the use of peremptory challenges in jury selection in that county, and the fact that, at the time that the State challenged juror McNeill, the State had used eight of its eleven peremptory challenges against black potential jurors. At the same point in time, the State had used two of its peremptory challenges against white potential jurors. Similarly, the State had passed twenty out of twenty-two white potential jurors while passing only eight out of sixteen black potential jurors.

Failing to apply the correct legal standard, neither the trial court nor the Court of Appeals adequately considered all of the evidence offered by Mr. Hobbs to support his claim that certain potential jurors were excused from serving on the jury in his case on the basis of their race. Accordingly, the trial court must conduct a new hearing on these claims.

Conclusion

The Court of Appeals erred in holding that the question of whether Mr. Hobbs had established a prima facie case was not moot. Further, the Court of Appeals erred as a matter of law and the trial court clearly erred in ruling that Mr. Hobbs failed to prove purposeful discrimination with respect to the State's use of peremptory challenges to strike jurors Humphrey, Layden, and McNeill without considering all of the evidence presented by Mr. Hobbs. This error included failing to engage in a comparative juror analysis of the prospective juror's voir dire responses and failing to consider the historical evidence of discrimination that Mr. Hobbs raised. We remand for further proceedings in the trial court not inconsistent with this opinion. The trial court is instructed to conduct a *Batson* hearing consistent with this opinion, to make findings of fact and conclusions of law, and to certify its order to this Court within sixty days of the filing date of this opinion, or within such time as the current state of emergency allows. *See Hoffman*, 348 N.C. at 555, 500 S.E.2d at 723.

REVERSED AND REMANDED.

Justice NEWBY dissenting.

In this case the Court should apply our well-established deferential standard of review that allows the trial court to assess the prosecutor's demeanor and credibility and other circumstances of jury selection. Here defense counsel made several *Batson* challenges when the State exercised peremptory challenges to excuse black prospective jurors. After receiving extensive argument from the parties on the three jurors at issue here and conducting the proper analysis, the trial court concluded that defendant had not met his burden of presenting a prima facie showing of discrimination for two prospective jurors, nor had defendant met his burden to prove purposeful discrimination for a third prospective juror.

While the majority rotely recites the proper standard of review, which is highly deferential to the trial court, it then circumvents that standard by finding what it labels to be "legal errors" in the trial court's determination, thus warranting a new *Batson* hearing. The majority makes arguments not presented to the trial court or the Court of Appeals and then faults both courts for not specifically addressing them. It finds and weighs facts from a cold record. The trial court has already conducted the correct inquiry. Because the trial court's ruling, concluding that defendant neither made a prima facie showing of discrimination nor ultimately met his burden of proving purposeful discrimination, is not clearly erroneous, it should be upheld. I respectfully dissent.

I. Facts and Procedural History

Defendant[1] concedes that he killed two people, one black and one white, and that he committed an armed robbery. On 5 November 2010 in Georgia, defendant executed Rondriako Burnett in cold blood. Burnett's body was later identified, and officers recovered a .380 caliber bullet from his body.

On 6 November 2010, defendant and his girlfriend Alexis Mattocks sat in Burnett's bloodstained, stolen SUV in the parking lot of a pawn shop in Fayetteville, North Carolina. The SUV had broken down. Defendant entered the shop to try to pawn a CD player. The pawn shop employee would not purchase the CD player because it was broken. Defendant walked outside, but later reentered the shop, asked to sell car speakers, and told Kyle Harris, a nineteen-year-old college student and employee at the pawn shop, that defendant needed help since the SUV was broken

1. In following this Court's 200 years of precedent, this opinion uses the term "defendant." The majority deviates from this Court's precedent by using defendant's name.

down. Harris agreed to purchase the speakers and paid defendant $50. Defendant left the pawn shop, but he and Mattocks remained at the shopping center all day with the apparent intent to later rob the store. In furtherance of this plot, they bought duct tape which they planned to use to bind the victims.

Later that evening, defendant and Mattocks entered the pawn shop to commit an armed robbery. After browsing the shop, defendant pulled out a .380 caliber handgun and pointed it at the pawn shop employees. Defendant told the employees to empty their pockets and demanded that they hand over their valuables and empty the cash register. In abiding with defendant's direction, Harris began walking toward the cash register, at which time defendant shot Harris in the upper chest.

Defendant had also directed another employee, Derrick Blackwell, to empty the register, and had told a third employee, Sean Collins, to empty his pockets. Once Collins complied, defendant took Collins' belongings, grabbed the dying Harris's car keys from his belt loop, and exited the store. Defendant moved items from the stolen SUV to Harris's car, a silver Saturn Ion. Defendant and Mattocks then left in the Saturn. When first responders arrived on the scene, Harris was unresponsive. He later died from the gunshot wound.

On 6 November 2010, in Washington, D.C., a police officer observed a car with a North Carolina tag, learned that the vehicle was stolen, and began to pursue the vehicle. The officer conducted a traffic stop and arrested defendant. Officers thereafter learned that defendant was a "person of interest" in connection with a robbery and homicide in Fayetteville, North Carolina. After verifying that defendant was the person of interest and seeing blood on defendant's shoes and pant leg, officers obtained a search warrant for the Saturn. During the search, officers recovered a .380-caliber Lorcin handgun, which was later confirmed to match the bullets found in both Burnett's and Harris's bodies.

After obtaining the proper warrants, a detective from North Carolina traveled to Washington, D.C. to interview defendant. During the interview, defendant admitted to the robbery and said he was trying to get "[m]oney and guns." He said he had fired his weapon to "scare" the pawn shop employees but that he "wasn't trying to shoot [Harris]." Defendant was later indicted for, *inter alia*, first-degree murder, two counts of robbery with a dangerous weapon, two counts of attempted robbery with a dangerous weapon, and one count of conspiracy to commit robbery with a dangerous weapon. The State gave notice that it intended to proceed capitally. Defendant gave notice that he would assert mental infirmity, diminished capacity, and automatism defenses.

At trial there was no dispute that defendant killed Harris and committed the armed robbery since he confessed to committing both offenses. The only question at trial was defendant's culpability and his sentencing, *i.e.*, whether defendant's actions warranted capital punishment.

At defendant's trial, as is the case in all North Carolina criminal proceedings involving potential capital punishment, the State and defendant were each given fourteen peremptory challenges. *See* N.C.G.S. § 15A-1217(a) (2019). Because defendant was being tried capitally, each prospective juror had to be capitally qualified, meaning the juror would be willing to impose the death penalty if the evidence warranted such punishment. As such, proper procedure required the State to examine the prospective jurors to elicit, in part, whether they "[a]s a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge." N.C.G.S. § 15A-1212(8) (2019). If prospective jurors testified that they would not be able to impose the death penalty, they could be removed for cause. The State and defendant could exercise a peremptory challenge for any other reason, so long as the challenge was not used for a discriminatory purpose.

During jury selection, the State exercised two peremptory challenges to excuse black prospective jurors Robert Layden and Brian Humphrey. Defense counsel then objected on *Batson* grounds. At the time defense counsel raised the *Batson* objection, the State had peremptorily challenged eight prospective jurors, six of whom were black, but had passed five black prospective jurors to defendant, equaling a 45% acceptance rate of the black prospective jurors it had questioned. Defense counsel had peremptorily challenged three white prospective jurors and two black prospective jurors, meaning it had used 40% of its peremptory challenges to strike black prospective jurors. Thus, defendant reduced the number of black prospective jurors serving on the jury.

After defense counsel raised the *Batson* objection, at defendant's request, the trial court agreed to delay argument on the *Batson* challenge until the following day. The trial court advised the parties, however, that it was inclined, "even if [it found] there's no prima facie showing[,] . . . to hear an explanation just for appellate purposes from the State."

The next morning, when presenting its argument supporting its *Batson* challenge, defense counsel stated that there had been a history of discrimination in the county, that defendant was black but the victim and most of the witnesses were white, that the challenged black prospective jurors gave answers similar to those given by the white prospective jurors that the State passed to defendant, that six of

the eight peremptory challenges exercised by the State were exercised against black prospective jurors, and that the State had disproportionately struck black prospective jurors when compared to white prospective jurors.

The trial court then stated, consistent with its statement the day before, that it would give the State the opportunity to respond, not for "mutual justification or [its rebuttal]," but just to establish why defendant had "not made a prima facie case just as to those issues." Among other reasons, the State noted that defense counsel had failed to object to any of the black prospective jurors before Humphrey and Layden, who were the seventh and eighth prospective jurors challenged. The State also noted that there was both a white and a black victim in the case as well as key black witnesses.[2]

After evaluating the evidence, the trial court ruled that defendant had not made a prima facie showing of discrimination. The trial court then stated the following: "However, I want the State—for purpose[s] of the record, I will hear the State and ask the State now to show any neutral justifications for the excuse of the exercise and peremptory challenges against the African American jurors." The State then gave the following reasons for excusing Layden: (1) his sister, with whom he was very close, had significant mental health issues, including post-traumatic stress disorder (PTSD), and had experienced symptoms very similar to those claimed by defendant in his defense; (2) his reservations about the death penalty combined with his position on being a father figure to others; (3) his testimony that he favored giving people a second chance or chance for reform; (4) his statement that he was going to have to put his personal feelings aside; (5) his testimony about having reservations about the death penalty though he ultimately said he would be able to impose it; (6) his statement that he did not want to go into detail about his prior breaking or entering conviction; and (7) the fact that he did not provide information about another previous criminal charge against him. The State then gave the following reasons for excusing Humphrey: (1) he had connections and employment in the mental health field; (2) he had interacted with and had a positive opinion of mental health professionals, which the State found especially concerning since defendant planned to rely heavily on the testimony of mental health providers; (3) he had worked at a facility serving and mentoring individuals in a group

2. Burnett was not the victim at issue here because he was killed in Georgia. The State, however, introduced evidence of his death for the limited, permissible purposes of showing motive, intent, and "other purposes," such as chain of circumstances as allowed by N.C.G.S. § 8C-1, Rule 404(b) (2019).

home and a halfway house, which made the State believe he would identify with defendant's life history; and (4) he had expressed a hesitancy to impose the death penalty since "he is not a killer" and said he would have sympathy for defendant.

After this challenge, the trial court ultimately reiterated its finding that defendant had not made a prima facie showing of discrimination. Regardless, after having conducted a full *Batson* hearing for the potential appellate record, the trial court concluded that the State did not use any of its peremptory challenges based on a juror's race or any discrimination against any constitutionally protected class.

Jury selection continued, and defendant later raised another *Batson* objection when the State peremptorily challenged William McNeill, another black prospective juror. At that point, the State had peremptorily challenged eight black prospective jurors and passed eight black prospective jurors to defendant, having used a total of eleven of its statutory fourteen peremptory challenges. The trial court found that when McNeill was challenged, defendant had made a prima facie showing of discrimination. The State then gave the following reasons for excusing McNeill: (1) his reservations about the death penalty; (2) the fact that he hesitated, raised his hand during questioning, and did not know how to answer the trial court's questions about imposing the death penalty; (3) his response that he was not for the death penalty though he ultimately said he could consider it; (4) his overall preference for life imprisonment without parole, which was not strong enough to justify a challenge for cause, but could warrant a peremptory challenge in the State's opinion; (5) the fact that he had family members with substance abuse and anxiety issues; and (6) the fact that he was a pastor that participated in outreach to those going through difficult issues. In addition, the State compared McNeill to Rosas, a Hispanic prospective juror it had also peremptorily excused, who expressed similar hesitation about imposing the death penalty. Defendant countered that Rosas and McNeill did not give similar answers when asked about their opinion on the death penalty, but defendant cited no other prospective jurors the State had passed to argue that the State's reasons for excusing McNeill were pretextual.

After considering all of the evidence, including how many black prospective jurors the State had peremptorily excused versus how many it had passed to defendant, the trial court concluded that the State gave permissible, race-neutral reasons for exercising its peremptory challenge against McNeill. The trial court found persuasive that the State had also peremptorily challenged Rosas, who gave similar answers as McNeill. Thus, after concluding that defendant's constitutional rights

had not been violated, the trial court ultimately denied defendant's *Batson* challenge.

The case proceeded to trial. Defendant did not testify, but various mental health experts and family members testified on his behalf. Consistent with the defenses that defendant noted he would raise, witnesses testified that defendant had a troubled childhood, was surrounded by violence and substance abuse, that his mother had abused him, and that he eventually began using drugs. The mental health experts also testified that defendant had various personality disorders and PTSD. The mental health experts testified that defendant had told them that he was mad at Burnett and therefore wanted to kill him and that he was not remorseful for doing so. On the other hand, defendant stated that he did not intend to kill Harris.

The jury convicted defendant of all charges. As for the first-degree murder charge, the jury found defendant guilty based on theories of malice, premeditation, and deliberation, as well as under the felony murder rule based on defendant committing two counts of robbery with a dangerous weapon and two counts of attempted robbery with a dangerous weapon. Despite these findings, the jury could not unanimously agree to impose the death penalty. Defendant was sentenced to life imprisonment without parole for the first-degree murder conviction, consolidated with one attempted robbery with a dangerous weapon conviction, followed by consecutive sentences for each of the remaining convictions.

On appeal to the Court of Appeals, defendant argued, *inter alia*, that the trial court erred in concluding that defendant had not met his burden to establish a prima facie case of discrimination when the State peremptorily excused Layden and Humphrey and in concluding that defendant had not established purposeful discrimination in challenging Layden, Humphrey, and McNeill. The Court of Appeals disagreed, holding that the trial court did not err in rejecting each of defendant's *Batson* challenges. *State v. Hobbs*, 260 N.C. App. 394, 409, 817 S.E.2d 779, 790 (2018).

The Court of Appeals began by recognizing the historic, deferential standard of review in matters involving *Batson* challenges. *Id.* at 401–02, 817 S.E.2d at 785. Applying precedent from the Supreme Court of the United States and this Court, the Court of Appeals recognized that the applicable standard of review required deference to the trial court's findings; thus, the trial court's decision on a *Batson* challenge should be upheld unless an appellate court is convinced the trial court's decision is clearly erroneous. *Id.* at 401, 817 S.E.2d at 785. The Court of Appeals reiterated this Court's well-established principle that, "[w]here there are

two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Id.* at 401, 817 S.E.2d at 785 (quoting *State v. Lawrence*, 352 N.C. 1, 14, 530 S.E.2d 807, 816 (2000), *cert. denied*, 531 U.S. 1083, 121 S. Ct. 789 (2001)).

Employing the well-settled standard of review, the Court of Appeals evaluated defendant's argument about the trial court's decision on the first two prospective jurors, Layden and Humphrey. *Hobbs*, 260 N.C. App. at 404, 817 S.E.2d at 787. It concluded that the question of whether defendant had established a prima facie case of purposeful discrimination was not moot as the trial court had merely asked for the State's reasoning to put on the record in case of appeal. *Id.* The Court of Appeals then concluded that, looking at all of the relevant circumstances, the trial court did not err in deciding that defendant had not established a prima facie showing of discrimination regarding prospective jurors Layden and Humphrey. *Id.* at 405, 817 S.E.2d at 787. Considering McNeill, the Court of Appeals noted the trial court's articulated reasons for concluding that the State had provided valid, race-neutral reasons for excusing McNeill and that defendant had failed to prove any purposeful discrimination by the State. *Id.* at 407, 817 S.E.2d at 788–89. Thus, applying the appropriate deferential standard of review, the Court of Appeals upheld the trial court's decision on all grounds. *Id.* at 408–09, 817 S.E.2d at 789–90.

II. Analysis

The essence of a *Batson* challenge is to reveal discriminatory intent by the State in excusing a prospective juror. Thus, *Batson* challenges involve credibility determinations, *i.e.*, evaluating the State's motives in exercising peremptory challenges. Given that a *Batson* challenge alleges intentional discrimination, the trial court must determine whether the State intentionally removed a prospective juror because of race. An appellate court must rely on the trial court's objective assessment of the State's motives and other circumstances. *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019) ("[T]he trial [court's] findings in the [*Batson*] context . . . largely will turn on evaluation of credibility." (quoting *Batson v. Kentucky*, 476 U.S. 79, 98 n.21, 106 S. Ct 1712, 1715 n.21 (1986))); *see also id.* at 2243 (stating that "the job of enforcing *Batson* rests first and foremost with trial judges" (citing *Batson*, 476 U.S. at 99 n.22, 106 S. Ct. at 1724 n.22)); *State v. Barnes*, 345 N.C. 184, 212, 481 S.E.2d 44, 59 (1997) ("It also bears repeating that jury selection is 'more art than science' and that only in the rare case 'will a single factor control the decision-making process,' as well as that a prosecutor may rely on legitimate hunches in the exercise of peremptory challenges." (first quoting *State v. Porter*, 326 N.C. 489, 501, 391 S.E.2d 144, 152 (1990); and then citing *State v. Rouse*,

339 N.C. 59, 79, 451 S.E.2d 543, 554 (1994))). Notably, "[t]rial judges, who are 'experienced in supervising voir dire,' and who observe the prosecutor's questions, statements, and demeanor firsthand, are well qualified to 'decide if the circumstances concerning the prosecutor's use of peremptory challenges create[ ] a prima facie case of discrimination against black jurors.' " *State v. Chapman*, 359 N.C. 328, 339, 611 S.E.2d 794, 806 (2005) (alteration in original) (quoting *Batson*, 476 U.S. at 97, 106 S. Ct. at 1723).

Because this determination involves assessing credibility, the standard of review for *Batson* challenges is well-established. A trial court's factual findings on a *Batson* determination must be upheld unless they are clearly erroneous. *Flowers*, 139 S. Ct. at 2244 ("On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 1207–08 (2008))); *State v. Taylor*, 362 N.C. 514, 527–28, 669 S.E.2d 239, 254 (2008) (stating that a trial court's findings on whether defendant has made a prima facie showing of discrimination will be upheld "unless they are clearly erroneous"); *State v. Golphin*, 352 N.C. 364, 427, 533 S.E.2d 168, 211 (2000) (recognizing that a trial court's determination on the third prong of *Batson*—whether defendant has met his burden to show that the State purposefully discriminated in exercising peremptory challenges—should be upheld "unless we are convinced it is clearly erroneous" (citing *State v. Kandies*, 342 N.C. 419, 434–35, 467 S.E.2d 67, 75, *cert. denied*, 519 U.S. 894, 117 S. Ct. 237 (1996))).

While reciting the correct deferential standard of review, the majority fails to apply it. The majority circumvents the deferential standard of review by characterizing its criticism of the trial court as "legal errors." In doing so, it devalues the significant institutional advantages of the trial court including the ability to have face-to-face interaction with the parties, to observe an individual's demeanor, and to make credibility determinations based on the parties' non-verbal communication cues accompanying its arguments. Given these advantages, the trial court is best suited to assess the use of each peremptory challenge. This is particularly true in that we have recognized that jury selection "is 'more art than science' and that . . . a prosecutor may rely on legitimate hunches in the exercise of peremptory challenges." *Barnes*, 345 N.C. at 212, 481 S.E.2d at 59. It appears that the majority is again placing itself in the role of fact-finder, usurping the role of the trial court. *See State v. Reed*, 838 S.E.2d 414, 429 (N.C. 2020) (Newby, J., dissenting) ("An appellate court must determine whether the trial court's findings of fact are supported by competent evidence and whether those findings support the

trial court's conclusions of law. Instead, on a cold record the majority reweighs the evidence and makes its own credibility determinations in finding facts." (citing *State v. Williams*, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012))); *State v. Terrell*, 372 N.C. 657, 674, 831 S.E.2d 17, 28 (2019) (Newby, J., dissenting) ("In addition, to reach its result, the majority violates the standard of review by rejecting facts found by the trial court, which are supported by substantial evidence, and substitutes its own fact-finding."); *State v. Grady*, 372 N.C. 509, 552, 831 S.E.2d 542, 573 (2019) (Newby, J., dissenting) ("[The majority] rejects the facts found by the trial court and finds its own.").

There are two types of challenges that attorneys may use to challenge or excuse certain prospective jurors. *Flowers*, 139 S. Ct. at 2238. First, an attorney may exercise a for-cause challenge, "which usually stems from a potential juror's conflicts of interest or inability to be impartial." *Id.* In North Carolina, a prospective juror may be challenged for cause for, *inter alia*, being "unable to render a verdict with respect to the charge in accordance with" North Carolina law. N.C.G.S. § 15A-1212(8) (2019).

The second type of challenge that attorneys may exercise is a peremptory challenge. Though not a constitutionally recognized principle, "[p]eremptory strikes have very old credentials and can be traced back to the common law." *Flowers*, 139 S. Ct. at 2238. "[P]eremptory strikes traditionally may be used to remove any potential juror for any reason—no questions asked." *Id.*

The Equal Protection Clause prevents discrimination, however, and thus can conflict with an attorney's ability to exercise peremptory challenges for any reason. *Id.* Accordingly, the Supreme Court of the United States recognized limitations on peremptory challenges to ensure that strikes are not used for a discriminatory purpose against a protected class. Thus, in *Batson*, the Supreme Court of the United States set forth a three-prong test to determine whether a prosecutor improperly dismissed a prospective juror based on that juror's race. This Court expressly "adopted the *Batson* test for review of peremptory challenges under the North Carolina Constitution." *State v. Fair*, 354 N.C. 131, 140, 557 S.E.2d 500, 509 (2001) (citing *Lawrence*, 352 N.C. at 13, 530 S.E.2d at 815; *State v. Mitchell*, 321 N.C. 650, 365 S.E.2d 554 (1988)); *see* N.C. Const. art. I, § 26.

"First, the defendant must make a prima facie showing that the state exercised a peremptory challenge on the basis of race." *Fair*, 354 N.C. at 140, 557 S.E.2d at 509. "[A] defendant satisfies the requirements of

Batson's first step by producing evidence sufficient to permit the trial [court] to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170, 125 S. Ct. 2410, 2417 (2005). Nonetheless, this step is important in minimizing disruption in the jury selection process, limiting the number of trials within trials that occur within *Batson* hearings. *See generally id.* at 172–73, 125 S. Ct. at 2418–19 (noting that the *Batson* framework "encourages 'prompt rulings on objections to peremptory challenges without substantial disruption to the jury selection process' " (quoting *Hernandez v. New York*, 500 U.S. 352, 358–59, 111 S. Ct. 1859, 1865–66 (1991) (plurality opinion))). Several factors are relevant in informing the trial court as to whether the defendant has carried his burden to show an inference of discrimination:

> Those factors include the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State's acceptance rate of potential black jurors.

State v. Quick, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995).

"Once a defendant has made a prima facie case, the burden of production shifts to the prosecutor to come forward with race-neutral explanations for the peremptory challenges." *Id.* at 144, 462 S.E.2d at 188. "[T]he 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes." *Johnson*, 545 U.S. at 168, 125 S. Ct. at 2416 (quoting *Batson*, 476 U.S. at 94, 106 S. Ct. at 1721). Notably, "the law 'does not demand [a race-neutral] explanation that is persuasive, or even plausible. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.' " *Quick*, 341 N.C. at 144–45, 462 S.E.2d at 188 (alteration in original) (quoting *Purkett v. Elem*, 514 U.S. 765, 767–68, 115 S. Ct. 1769, 1770–71 (1995)). "[T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." *Batson*, 476 U.S. at 97, 106 S. Ct. at 1723 (citing *McCray v. Abrams*, 750 F.2d 1113, 1132 (2d Cir. 1984), *cert. granted*, *judgment vacated by Abrams v. McCray*, 478 U.S. 1001, 106 S. Ct. 3289 (1986); *Booker v. Jabe*, 775 F.2d 762, 773 (6th Cir. 1985), *cert. granted*, *judgment vacated by Michigan v. Booker*, 478 U.S. 1001, 106 S. Ct. 3289 (1986)).

> The first two *Batson* steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim. 'It is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.'

Johnson, 545 U.S. at 171, 125 S. Ct. at 2418 (quoting *Purkett*, 514 U.S. at 768, 115 S. Ct. at 1771). Thus, " '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." *Purkett*, 514 U.S. at 767, 115 S. Ct. at 1770–71 (citing *Hernandez*, 500 U.S. at 358–59, 111 S. Ct. at 1865–66; *id.* at 375, 111 S. Ct. at 1874 (O'Connor, J., concurring in judgment); *Batson*, 476 U.S. at 96–98, 106 S. Ct. at 1722–23). "The ultimate inquiry is whether the State was 'motivated in substantial part by discriminatory intent.' " *Flowers*, 139 S. Ct. at 2244 (quoting *Foster v. Chatman*, 136 S. Ct. 1737, 1754 (1996)). Thus, "[s]tep three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, and 'the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge.' " *Snyder*, 552 U.S. at 477, 128 S. Ct. at 1208 (second alteration in original) (first citing *Batson*, 476 U.S. at 98 n.21, 106 S. Ct. at 1724 n.21; and then quoting *Hernandez*, 500 U.S. at 365, 111 S. Ct. at 1869).

a. Mootness

Here defendant argues, and the majority agrees, that the question of whether defendant established a prima facie case of discrimination became moot when, at the trial court's request, the State offered its reasoning for challenging Layden and Humphrey.

"Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez*, 500 U.S. at 359, 111 S. Ct. at 1869. "If the prosecutor volunteers his reasons for the peremptory challenges in question before the trial court rules whether the defendant has made a prima facie showing or if the trial court requires the prosecutor to give his reasons without ruling on the question of a prima facie showing, the question of whether the defendant has made a prima facie showing becomes moot." *State v. Williams*, 343 N.C. 345, 359, 471 S.E.2d 379, 386 (1996) (citing *Hernandez*, 500 U.S. at 359, 111. S. Ct. at 1866; *State v. Robinson*, 336 N.C. 78, 93, 443 S.E.2d

306, 312 (1994), *superseded by statute on other grounds as stated in Cummings v. Ortega*, 365 N.C. 262, 716 S.E.2d 235 (2011)).

When a trial court asks for the State's reasoning for using peremptory challenges *after* making a ruling that the defendant has not met his initial burden of showing an inference of prima facie discrimination, however, the question of whether the defendant has made a prima facie showing is not moot. *See id.* If the trial court asks for the State's reasons after a defendant requests them to be stated for the record, for example, the first step of the *Batson* inquiry is not moot. *See id.*; *see also State v. Smith*, 351 N.C. 251, 262, 524 S.E.2d 28, 37 (2000) ("In the instant case, the trial court concluded that defendant had not made a prima facie showing that the peremptory challenge was exercised on the basis of race, but the trial court permitted the State to make any comments for the record that it chose to make. When the trial court rules that a defendant has failed to make a prima facie showing, our review is limited to whether the trial court erred in finding that defendant failed to make a prima facie showing even if the State offers reasons for its exercise of the peremptory challenges." (citing *State v. Hoffman*, 348 N.C. 548, 554, 500 S.E.2d 718, 722–23 (1998))).

Here the trial court explicitly stated that it was inclined, "even if [it found] there's no prima facie showing on any case[,] . . . to hear an explanation just for appellate purposes from the State." Thus, even though the trial court asked for and the State presented reasons why defendant had not made a prima facie case, the trial court made clear that it was only for the purpose of preserving the record and not for consideration for its decision. Moreover, the trial court asked for the State's reasons justifying its use of the peremptory challenges only after the trial court had ruled that defendant had not made a prima facie showing of discrimination. Because the trial court explicitly stated that it was asking for the State's reasoning solely for the purpose of preserving the record, the question of whether defendant presented a prima facie case is not moot. *See Williams*, 343 N.C. at 359, 471 S.E.2d at 386. The trial court appropriately recognized that its *Batson* ruling would be subject to appellate review given the serious charges and resulting lengthy trial, and therefore attempted to provide a complete record. The majority's holding will eliminate this practice.

b. Humphrey and Layden

Since the first step prima facie question is not moot, and recognizing the extremely deferential standard of review, it cannot be said that the trial court clearly erred in determining that defendant did not establish

a prima facie case of discrimination. Among other things, the trial court considered the State's demeanor when responding to defense counsel, the questions that the State asked the black prospective jurors, and that the State had passed five of the black prospective jurors that were not excused for cause. *See Quick*, 341 N.C. at 145, 462 S.E.2d at 189. Because the trial court considered the correct factors and reached a reasoned, factually supported conclusion, and given the deference afforded to the trial court, the trial court's decision here cannot be deemed clearly erroneous.

Nonetheless, even if the trial court should have proceeded to the second and third *Batson* stages, the trial court did not clearly err in determining for the record that the State offered permissible, race-neutral reasons for exercising peremptory challenges to excuse Layden and Humphrey. After hearing extensive argument, the trial court made comprehensive findings in which it considered the race of defendant, the victim, and the witnesses. The trial court evaluated the way the State questioned the black prospective jurors versus the way it questioned white prospective jurors, concluding that the State had not questioned any jurors in a discriminatory manner. The trial court recounted the relevant statistics, noting that the State had passed 45% of black prospective jurors and that the State had struck two white prospective jurors. The trial court recounted and found convincing the State's reasons for excusing Layden and Humphrey, including their mental health history, connections, equivocation on the death penalty, and other life history. Those factors directly related to the defense that defendant planned to assert at trial as well as to the potential capital punishment at issue. The trial court also considered the prospective jurors that the State had passed to defendant versus those it had peremptorily excused. Thus, the trial court's decision that the prosecutor had acted with discriminatory intent in removing Layden and Humphrey was supported by the evidence and the testimony and cannot be deemed clearly erroneous.

c. McNeill

With the challenge to McNeill, the trial court found that defendant had presented a prima facie case of discrimination. The trial court then conducted a full *Batson* hearing. At the third stage, the trial court considered all of the evidence presented and arguments made, and ultimately determined defendant had not proven that the State purposefully discriminated in peremptorily challenging McNeill. The burden of proof was on defendant to prove discriminatory intent. In making its decision, the trial court made the following findings: (1) the State had exercised eight of its peremptory challenges to excuse black prospective jurors and passed the same number of black prospective

jurors to defendant; (2) when asked whether he could impose the death penalty, McNeill had equivocated on his responses and expressed a general preference for a sentence of life imprisonment without parole; (3) McNeill had family members with anxiety issues; (4) that in his position as a pastor, McNeill dealt with individuals who had drug problems; and (5) when compared with Rosas, who the State also excused, both McNeill and Rosas expressed hesitancy about imposing the death penalty. Significantly, the only specific prospective juror comparison that defendant argued to the trial court was that of McNeill to Rosas.

These race-neutral reasons found by the trial court have a direct bearing on the issues presented in this case and McNeill's duties as a prospective juror. While McNeill's equivocation about the death penalty may not have risen to a level sufficient for the State to challenge him for cause, McNeill's reservations on the death penalty relate to an essential part of the case. Moreover, given defendant's extensive mental health and substance abuse concerns presented in detail at trial, certainly the trial court did not clearly err by determining that these types of connections, especially that McNeill worked directly with individuals with similar concerns as defendant, fairly informed the State's decision to exercise a peremptory challenge. Thus, the trial court appropriately considered the evidence and arguments presented to it and held that the State did not intentionally discriminate in exercising a peremptory challenge to remove McNeill from the jury. Applying the correct standard of review, the trial court's decision to reject defendant's *Batson* challenge of McNeill was not clearly erroneous.

In order to justify its remand, the majority recites what it characterizes as "three legal errors" committed by the trial court. First, it holds that "in evaluating the defendant's *Batson* challenge, the number of peremptory challenges exercised by the defendant are not relevant to the State's motivations." That is not true. When considering the totality of the circumstances, the ultimate racial composition of the jury is directly impacted by the defendant's exercise of peremptory challenges to excuse minority prospective jurors.

Second, the majority says the trial court erred because it "did not explain how it weighed the totality of the circumstances surrounding the prosecutor's use of peremptory challenges, including the historical evidence that [defendant] brought to the trial court's attention." However, the trial court thoroughly evaluated all of the evidence presented and each of defendant's arguments and set forth its reasons in finding that there was no racial discrimination by the State. Notably, the historical evidence was argued by defendant at the prima facie showing phase

regarding the first two jurors. It was not part of the argument regarding McNeill during the third stage. The majority creates a new legal standard by requiring the trial court to explain how it weighed an argument that was not presented.

Third, the majority holds "the trial court misapplied *Miller-El II* by focusing only on whether the prosecution asked white and black jurors different questions, rather than also examining the comparisons in the white and black potential jurors' answers that [defendant] sought to bring to the court's attention." With this holding, the majority finds that the trial court and the Court of Appeals erred by not addressing arguments that defendant failed to present to them. The comparison to Stephens presented by the majority was not presented to the trial court or the Court of Appeals. The majority says that the Court of Appeals "failed to conduct a comparative juror analysis, despite being presented with the argument by" defendant. Notably, the entirety of defendant's comparative juror analysis at the Court of Appeals was as follows: the "circumstances the State said were reasons for striking African-American jurors also fit white jurors the State accepted as jurors." Defendant carries the burden of making arguments to the trial court and the appellate courts, and he advanced no argument about any specific comparative juror analysis to the either court. It is not the role of the appellate court to peruse the trial transcript and formulate new arguments for defendant that he did not make at trial or on appeal. The majority cannot realistically say that the trial court or the Court of Appeals should have addressed factually specific arguments that defendant himself did not make.

Importantly, the standard of review for reviewing *Batson* challenges is whether the trial court's decision was clearly erroneous. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Lawrence*, 352 N.C. at 14, 530 S.E.2d at 816 (quoting *State v. Thomas*, 329 N.C. 423, 433, 407 S.E.2d 141, 148 (1991)). This Court is not a trial court. It should not make factual determinations based on a cold record. Furthermore, it should not create arguments not presented to the trial court or the Court of Appeals. The trial court did not clearly err by determining that defendant had not shown that the State purposefully discriminated in exercising its peremptory challenges. As such, the trial court's determination as to those prospective jurors should be upheld. Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
PATRICK MYLETT

No. 6A19

Filed 1 May 2020

Conspiracy—to commit juror harassment—agreement—sufficiency of evidence

Defendant's conviction of conspiracy to harass jurors was reversed where the State presented insufficient evidence of an agreement to threaten or intimidate jurors following the conviction of defendant's brother for assault. Although defendant, his brother, and his brother's girlfriend all interacted with multiple jurors in the hallway outside of the courtroom, most of defendant's contact with the jurors occurred in a relatively brief amount of time when defendant was alone, and there was almost no evidence that defendant's group communicated with each other or that they synchronized their behavior to support an inference, beyond mere suspicion, that they had reached a mutual understanding to harass the jurors.

Justice ERVIN dissenting.

Justices NEWBY and DAVIS 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, 822 S.E.2d 518 (N.C. Ct. App. 2018), finding no error after appeal from a judgment entered on 2 February 2017 by Judge Marvin P. Pope, Jr. in Superior Court, Watauga County. Heard in the Supreme Court on 8 January 2020.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Deputy Solicitor General, for the State-appellee.

Goodman Carr, PLLC, by W. Rob Heroy, for defendant-appellant.

Tin Fulton Walker & Owen, PLLC, by Noell P. Tin; and Scott & Cyan Banister First Amendment Clinic, UCLA School of Law, by Eugene Volokh, for Pennsylvania Center for the First Amendment, amicus curiae.

EARLS, Justice.

STATE v. MYLETT

[374 N.C. 376 (2020)]

Defendant, Patrick Mylett, attended the trial of his twin brother who was found guilty of assault on a government official by a jury in Superior Court, Watauga County, on 31 March 2016. Approximately eleven months later, defendant was convicted of conspiracy to commit harassment of a juror in the same county because of his actions at the Watauga County Courthouse following his brother's conviction. Because the evidence in defendant's trial was insufficient to raise anything more than mere conjecture that he had made an agreement with another person to threaten or intimidate a juror, it was error for the trial court to deny his motion to dismiss.

Background

On 29 August 2015, defendant and his twin brother, Dan, were involved in an altercation at a fraternity party in Boone, North Carolina, during which Dan was severely beaten, requiring hospitalization. Dan was subsequently charged with assault on a government official for allegedly spitting on a law enforcement officer during the incident. At the end of the trial, at which defendant testified on Dan's behalf, the jury found Dan guilty of the offense on 31 March 2016. After Dan's sentencing, defendant exited the courtroom and was waiting in the lobby of the courthouse as jurors began exiting the courtroom and retrieving their belongings from a nearby jury room[1] before departing. During this time, defendant confronted and spoke to multiple jurors about the case. When Dan, Dan's girlfriend (Kathryn), and defendant's mother subsequently exited the courtroom, Dan and Kathryn also spoke to jurors as the jurors were leaving. Video footage of these interactions, without audio, was captured by video cameras in and around the courthouse. When Dan's attorney exited the courtroom approximately two and one-half minutes after defendant first left the courtroom, he joined defendant and defendant's group in the lobby and they departed from the courthouse.

On 19 April 2016, defendant was arrested and charged with six counts of harassment of a juror pursuant to N.C.G.S. § 14-225.2(a)(2), which provides that an individual "is guilty of harassment of a juror if" the individual "[a]s a result of the prior official action of another as a juror in a . . . trial, threatens in any manner or in any place, or intimidates the former juror or his spouse." Defendant was also charged with one count of conspiracy to commit harassment of a juror pursuant to N.C.G.S. § 14-225.2(a)(2) (2015). The Watauga County grand jury subsequently indicted defendant for these charges.

1. This "jury room" or "jury lounge" appears to be on the opposite side of the lobby from the courtroom and is where the jury would go for breaks during the trial.

Defendant filed pretrial motions to dismiss, including a motion arguing that N.C.G.S. § 14-225.2(a)(2) is unconstitutional under the First Amendment and a motion arguing that the statute is unconstitutionally vague and overbroad. The trial court denied defendant's motions.

At trial, six jurors from Dan's trial testified as witnesses for the State. At the close of the State's evidence, defendant renewed his pretrial motions and also moved to dismiss for insufficiency of the evidence. The trial court denied these motions. Following the presentation of defendant's evidence, including his own testimony, defendant renewed his motions to dismiss at the close of all evidence. The trial court again denied these motions. At the charge conference, defendant requested that the trial court instruct the jury that in order to find him guilty, the jury must find that his conduct constituted a true threat or that he intended to intimidate the jurors. The trial court denied the requested instruction.

The jury found defendant not guilty of the six counts of harassment of a juror. However, the jury found defendant guilty of the single offense of conspiracy to commit harassment of a juror. The trial court sentenced defendant to forty-five days in the custody of the sheriff of Watauga County, suspended his active sentence, and placed defendant on eighteen months of supervised probation. Additionally, the trial court ordered defendant, *inter alia*, to perform fifty hours of community service, successfully complete an anger management course and follow any recommended treatment, and obtain twenty hours of weekly employment. Further, the trial court imposed "a curfew of 6 p.m. to 6 a.m. for a period of four months . . . which can be accomplished by electronic monitoring," requiring defendant to remain at his residence except for employment and school classes during the period of the curfew. Defendant appealed.

At the Court of Appeals, defendant first argued that the trial court erred in denying his motions to dismiss on the basis of the constitutionality of N.C.G.S. § 14-225.2(a)(2). *State v. Mylett*, 822 S.E.2d 518, 523 (N.C. Ct. App. 2018). The Court of Appeals majority disagreed, concluding that the statute applies to nonexpressive conduct and does not implicate the First Amendment. *Id.* at 524. Further, the majority determined that even assuming the First Amendment was implicated, the statute survives intermediate scrutiny as a content-neutral restriction. *Id.* at 524–26. Additionally, the majority rejected defendant's contentions that the undefined term "intimidate" renders N.C.G.S. § 14-225.2(a)(2) unconstitutionally void for vagueness and that the trial court erred in denying defendant's request for a jury instruction defining "intimidate" as

requiring a "true threat." *Id.* at 526, 530. Finally,[2] the majority concluded that the trial court did not err in denying defendant's motion to dismiss the conspiracy charge for insufficient evidence. *Id.* at 531.

Writing separately, Chief Judge McGee dissented, opining first that N.C.G.S. § 14-225.2(a)(2) is unconstitutional both on its face and as applied to defendant and that the trial court erred in denying defendant's request for a jury instruction defining "intimidation." *Id.* at 531–41 (McGee, C.J., dissenting). Moreover, Chief Judge McGee concluded that even in the absence of any "true threat" requirement, the State presented insufficient evidence to support the conspiracy charge. *Id.* at 541–45.

On 7 January 2019, defendant filed a notice of appeal as of right based on the dissenting opinion in the Court of Appeals pursuant to N.C.G.S. 7A-30(2).

Analysis

Defendant argues that the Court of Appeals majority erred in: (1) concluding that the State presented sufficient evidence of a conspiracy to threaten or intimidate a juror; (2) rejecting defendant's constitutional challenges to N.C.G.S. § 14-225.2(a)(2) on the basis that it violates his First Amendment rights and that it is unconstitutionally vague and overbroad; and (3) concluding that the trial court did not err in denying defendant's requested jury instruction defining "intimidate." We conclude that there was insufficient evidence of a conspiracy to threaten or intimidate a juror and therefore the trial court erred in denying defendant's motion to dismiss the conspiracy charge. In light of our holding, we need not address defendant's other contentions.

When ruling on a defendant's motion to dismiss for sufficiency of the evidence, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (first citing *State v. Roseman*, 279 N.C. 573, 580, 184 S.E.2d 289, 294 (1971); then citing *State v. Mason*, 279 N.C. 435, 439, 183 S.E.2d

2. The majority also rejected defendant's challenges to evidentiary rulings by the trial court, including defendant's arguments "that the trial court erroneously (1) excluded a Facebook post proffered by defendant to impeach a juror-witness and (2) admitted the juror-witnesses' testimony about the fraternity party fight underlying Dan's trial, while excluding defendant's testimony about the same issue." *State v. Mylett*, 822 S.E.2d 518, 528 (N.C. Ct. App. 2018). The dissenting judge did not address these issues, and defendant did not seek further review of these issues in this Court.

661, 663 (1971)). "Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986) (first citing *State v. Pridgen*, 313 N.C. 80, 94–95, 326 S.E.2d 618, 627 (1985); then citing *State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981)). "[T]he trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citing *State v. McCullers*, 341 N.C. 19, 28–29, 460 S.E.2d 163, 168 (1995)). "A motion to dismiss should be granted, however, 'where the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant's guilt.' " *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755 (2008) (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)); *see also Sumpter*, 318 N.C. at 108, 347 S.E.2d at 399 ("Evidence is not substantial if it arouses only a suspicion about the fact to be proved, even if the suspicion is strong." (citing *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983))). "Whether the State has presented substantial evidence is a question of law, which we review de novo." *State v. China*, 370 N.C. 627, 632, 811 S.E.2d 145, 149 (2018) (citing *State v. Cox*, 367 N.C. 147, 150–51, 749 S.E.2d 271, 274–75 (2013)).

"A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means." *State v. Gibbs*, 335 N.C. 1, 47, 436 S.E.2d 321, 347 (1993) (quoting *State v. Bindyke*, 288 N.C. 608, 615–16, 220 S.E.2d 521, 526 (1975)). "In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice." *State v. Winkler*, 368 N.C. 572, 575, 780 S.E.2d 824, 827 (2015) (quoting *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991)). Because "[t]he conspiracy is the crime and not its execution," *Gibbs*, 335 N.C. at 47, 436 S.E.2d at 347 (citation omitted), "[t]he crime of conspiracy is complete when there is a meeting of the minds and no overt act is necessary," *State v. Christopher*, 307 N.C. 645, 649, 300 S.E.2d 381, 383 (1983) (citing *State v. Gallimore*, 272 N.C. 528, 158 S.E.2d 505 (1969)). Nonetheless, there must exist an agreement, and the parties to a conspiracy must "intend[ ] the agreement to be carried out at the time it was made." *State v. Jenkins*, 167 N.C. App. 696, 700, 606 S.E.2d 430, 433 (citing *State v. Diaz*, 155 N.C. App. 307, 319, 575 S.E.2d 523, 531 (2002)), *aff'd per curiam*, 359 N.C. 423, 611 S.E.2d 833 (2005). Moreover, while a conspiracy can be established through circumstantial evidence, there must be "such evidence to prove the agreement directly or such a state of facts that an agreement may be legally inferred. Conspiracies

cannot be established by a mere suspicion, nor does evidence of mere relationship between the parties or association show a conspiracy." *State v. Williams*, 255 N.C. 82, 86, 120 S.E.2d 442, 446 (1961) (quoting *State v. Phillips*, 240 N.C. 516, 521, 82 S.E.2d 762, 766 (1954)).

Here, the unlawful act at issue is the alleged violation of N.C.G.S. § 14-225.2(a)(2), which, as noted above, provides that an individual "is guilty of harassment of a juror if" the individual "[a]s a result of the prior official action of another as a juror in a . . . trial, threatens in any manner or in any place, or intimidates the former juror or his spouse." Accordingly, in order to survive a motion to dismiss, the State was required to present substantial evidence showing that defendant entered into an agreement with one or more persons to threaten or intimidate a juror from his brother's trial.[3]

Viewing the evidence in the light most favorable to the State, including the videos from the courthouse and the witness testimony, there is simply insufficient evidence to reasonably infer the existence of any agreement to threaten or intimidate a juror. The evidence shows that at the conclusion of Dan's sentencing hearing, defendant exited the courtroom from a door off of the lobby (the courtroom door) and was standing alone by a common-area table waiting with his hands in his pockets when the first of the jurors, Rose Nelson, exited from the courtroom door further down the hall (the far door). Nelson testified that as she walked past defendant, heading for the stairwell to exit the building, defendant stated that "he hoped that [she] could live with [her]self because [she] had convicted an innocent man, and then as [she] was making [her] way to the stairs trying to get down the stairs, he was saying something about the crooked Boone police, and he hoped that [she] slept well." After Nelson left the courthouse, defendant slowly paced across the room and was waiting by the courtroom door when four more jurors, Kinney Baughman, William Dacchille, Denise Mullis, and

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3. Defendant argues that in order for N.C.G.S. § 14-225.2(a)(2) to pass constitutional muster, "intimidates" must be defined to require a "true threat," which are "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *State v. Bishop*, 368 N.C. 869, 87 8 n.3, 787 S.E.2d 814, 821 n.3 (2016) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)). We assume, without deciding, that "intimidates" for the purposes of N.C.G.S. § 14-225.2(a)(2) *does not* require "a serious expression of an intent to commit an act of unlawful violence." To be clear, we express no opinion on the constitutionality of N.C.G.S. § 14-225.2(a)(2) or whether "intimidates" requires a true threat. We hold that, assuming *arguendo* that the statute should be construed as urged by the State, the State did not present substantial evidence that defendant entered into an agreement with another person to threaten or intimidate a juror.

Lorraine Ratchford, exited the far door and crossed the lobby to the jury room. According to their testimony, as these jurors walked by defendant, defendant stated to Baughman "that his brother was an innocent man, [and] that [Baughman] had done wrong," told Dacchille that "[Dan is] an innocent man, he's an innocent man," stated to Mullis that she "got it wrong, that [she] made a mistake," and told Ratchford, "congratulations, you just ruined his life."

As these four jurors were entering the jury room across the lobby, Kathryn, defendant's mother, and Dan, in that order, exited the courtroom door, approximately one minute and twenty seconds after defendant first left the courtroom. Kathryn was crying as she left the courtroom, and defendant had a brief interaction with her in which he came from behind the door and placed his hand on her head and shoulder to console her as she moved around the door and towards the nearby wall. As this was happening, Dan exited the doorway last and, before having any interaction with defendant, spotted Baughman exiting the jury room. Dan, shaking his head, immediately walked across the lobby toward Baughman and began speaking to him. Defendant and Kathryn then walked across the lobby and were standing behind Dan with defendant's mother as Baughman exited the jury room and started walking back toward the far door. Kathryn also began speaking to Baughman and, according to Baughman, stated: "you convicted him, you sent him to jail, you ruined his life and it's all your fault." Dan and Kathryn were both speaking to Baughman as he walked past defendant's group, and both of them moved back to make way for him to walk toward the hallway. While this was occurring, Dacchille, Mullis, and Ratchford were still in the jury room and could not hear what was being said, except Ratchford heard Kathryn "screaming he'll never get a job."

Baughman was nearing the hallway and the far door when defendant said something to him, at which point Baughman turned back and engaged with defendant while crossing the lobby again, this time heading for the stairwell. Baughman attempted to explain the jury's verdict while walking slowly toward the stairwell. Baughmen testified that as "a former professor, [he] like[s] to explain things." According to Baughman, defendant was not raising his voice but "was clearly upset about the verdict" and defendant's tone was "not pleasant." Baughman explained: "Well, it's firm, but, I mean, he's not yelling at me here. So the way I recall was, [defendant was saying] my brother was innocent, he's an innocent man, and, you know, we had done wrong. In this case, you know, I'd done - - you done wrong." During this discussion, defendant and Kathryn both moved away from Baughman, insuring his path was

not blocked, as Baughman headed for the stairwell. The video shows that after Baughman entered the stairwell, defendant walked over to the stairwell twelve seconds later, followed by Dan, their mother, and then Kathryn. Baughman stated that Kathryn was "the one that was really screaming and yelling at me more than anybody else, but they were all pointing their fingers in my face as I was sitting down – I was standing in the stairway and they're hanging over the railing and telling me I ruined this kid's life." Approximately ten or eleven seconds later, defendant's group returned to where they were initially standing in the lobby. The attention of defendant, Dan, and Kathryn was focused almost exclusively on Baughman from the time he exited the jury room, and neither Dachille nor Ratchford had any more troubling interactions with defendant's group as they left the jury room and went down the stairs to leave.

Finally, the last of the six jurors, Charlotte Lino (Lino), came from the hallway near the far door, crossed the lobby, and started down the stairs, where she encountered Mullis waiting in the stairwell. Lino testified that as she passed defendant's group, one of them told her "he'll never get a job, he won't finish school, and we lie just like the cops do, very intimidating." Shortly after Lino entered the stairwell, Dan's attorney exited the courtroom and joined defendant's group in the lobby, at which point defendant's group immediately moved towards the stairwell to exit the courthouse. Lino testified that defendant's group passed Mullis and her on the way down the stairs, that "it was so crammed in on the staircase," and that defendant's group was talking to them as they passed, telling them "how bad [they] were." According to Mullis, as defendant's group passed them, Dan said "you really blew it," Kathryn said "he'll never get a job" in an "angry, sad" tone, and one member of defendant's group "passed very closely to where somebody was touching [her]." Approximately two and one half minutes after defendant first left the courtroom alone and entered the lobby, defendant's group exited the courthouse.

The evidence is almost entirely devoid of any interactions between defendant and Dan or defendant and Kathryn from which the formation of any agreement can be inferred. The State does not identify any substantial evidence regarding defendant's conduct prior to the incident in the lobby tending to show any agreement with Dan or Kathryn. Regarding the incident itself, apart from defendant's very brief gesture to console Kathryn, it is not clear that any of the three even made eye contact during the incident, let alone communicated in any manner from which a meeting of the minds can reasonably be inferred. The only clear interaction between these individuals, prior to the arrival of Dan's

attorney, was with defendant's mother, who at times attempted to keep defendant and Dan from speaking to the jurors and who the State does not allege was a part of any conspiracy. None of the State's witnesses testified that they heard any statements or saw any actions between defendant and Dan or defendant and Kathryn indicating any agreement to threaten or intimidate a juror.

Nonetheless, the State points to the purported "parallel conduct" of defendant, Dan, and Kathryn, contending that "a jury can infer a conspiracy based on highly synchronized, parallel conduct in furtherance of a crime." We agree with this statement in principle; yet, such an inference would be far stronger where the conduct at issue is more synchronized, more parallel, and more clearly in furtherance of a crime. For instance, given that the only evidence of contact with the jurors by defendant, Dan, or Kathryn was during this relatively brief incident in the lobby, and that most of the allegedly unlawful contact with the jurors occurred when defendant was in the lobby alone, before defendant's group exited the courtroom, the conduct here is not particularly synchronized. Once defendant's group entered the lobby, the conduct of defendant, Dan, and Kathryn in the lobby while they were waiting for Dan's attorney was hardly the work of a master plan. Moreover, while defendant was acquitted of the charges of harassment of a juror by threats or intimidation and we express no opinion on the sufficiency of the evidence with respect to those charges, the evidence was far from overwhelming. Put simply, this is not a situation like a drug transaction or a bank robbery, where it is evident that an unlawful act has occurred, and where the degree of coordination associated with those unlawful acts renders an inference of "mutual, implied understanding" between the participants far more reasonable. *Winkler*, 368 N.C. at 575, 780 S.E.2d at 827 (quoting *Morgan*, 329 N.C. at 658, 406 S.E.2d at 835).[4]

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4. For example, in *State v. Abernathy*, the Court determined that there was no "direct evidence that the defendant . . . expressly agreed" to commit a house robbery, but "the circumstantial evidence [was] sufficient to create an inference that [the defendant] knew of an agreement to rob the [victim's] residence and that there was an implied understanding between him and the others to accomplish this purpose." 295 N.C. 147, 165, 244 S.E.2d 373, 385 (1978). There, the defendant was with one of the robbers beforehand and asked a witness "if [the witness] wanted to make some money to go check out a place." *Id.* Additionally, the evidence showed that the defendant drove the robbers to the house, whereupon he drove by the house one time, turned around at an intersection, and parked at a nearby graveyard, at which point the robbers exited the car with masks, guns and tape and entered the house for thirty minutes to an hour. *Id.* While the robbers were in the house, the defendant drove up and down the road in front of the house "waiting for the actual robbers in order to assist them in escaping after the robbery was completed." *Id.* at 165–66, 244 S.E.2d at 385.

The dissent asserts that our analysis "appears . . . to amount to an analysis of the weight that should be given to the State's evidence," which is a question for the jury, "rather than to its sufficiency." The weight of the evidence is, of course, to be determined by the jury, but only when the State has first presented *substantial evidence* of each element of the offense—that is, evidence from which a rational juror could find the fact to be proved beyond a reasonable doubt. *See Sumpter*, 318 N.C. at 108, 347 S.E.2d at 399 ("Evidence is not substantial if it arouses only a suspicion about the fact to be proved, even if the suspicion is strong." (citing *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983))).[5] Further, contrary to the dissent's assertion, we do not suggest that proof that alleged conspirators committed a crime is necessary to prove conspiracy; rather, we note only that when the State relies on evidence of similar and simultaneous conduct to establish an agreement to commit an unlawful act, the fact that the evidence of such conduct, even where similar, leaves ample questions of whether an unlawful act has even been committed, tends to lessen the reasonableness of any inference from circumstantial evidence that the individuals involved had an agreement *to commit an unlawful act*—here, an agreement to "threaten" or

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5. The dissent also asserts that our approach is inconsistent with this Court's decision in *State v. Whiteside*, in which the Court stated:

> Direct proof of the charge is not essential, for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy. When resorted to by adroit and crafty persons, the presence of a common design often becomes exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote their real purpose. Under such conditions, the results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties, and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom, furnish, in the absence of direct proof, and often in the teeth of positive testimony to the contrary, ample ground for concluding that a conspiracy exists.

204 N.C. 710, 712–13, 169 S.E. 711, 712 (1933) (citations omitted). We reiterate that direct evidence of an explicit agreement is not required and that the State may prove conspiracy through circumstantial evidence. *See Winkler*, 368 N.C. at 575 (stating that "the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice" (quoting *Morgan*, 329 N.C. at 658, 406 S.E.2d at 835)). Here, taking the evidence in the light most favorable to the State, we conclude only that the circumstantial evidence and the "inferences legitimately deducible therefrom" amount solely to suspicion or conjecture of the fact to be proved and that the evidence is insufficient to give rise to a reasonable inference that defendant entered an agreement to commit an unlawful act—specifically, an agreement to threaten or intimidate a juror.

"intimidate" a juror, as required to support a felony conviction under N.C.G.S. § 14-225.2(a)(2).

In sum, we conclude that the evidence, taken in the light most favorable to the State, raises no more than a suspicion or conjecture of defendant's guilt. As such, the State failed to present substantial evidence that defendant conspired to threaten or intimidate a juror. The trial court therefore erred in denying defendant's motion to dismiss for insufficient evidence.

Conclusion

For the reasons stated, we reverse the decision of the Court of Appeals finding no error in the trial court's judgment convicting defendant for conspiracy to commit harassment of a juror pursuant to N.C.G.S. § 14-225.2(a)(2). Because we reach this decision based upon our conclusion that the trial court erred in denying defendant's motion to dismiss the conspiracy charge for insufficient evidence, we decline to address defendant's other arguments, including his constitutional challenges to N.C.G.S. § 14-225.2(a)(2). *See James v. Bartlett*, 359 N.C. 260, 266, 607 S.E.2d 638, 642 (2005) ("However, appellate courts must 'avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.' " (quoting *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam))). This case is remanded to the Court of Appeals for further remand to the trial court with instructions to vacate defendant's conviction for conspiracy to commit harassment of a juror and the judgment entered thereon.

REVERSED.

Justice ERVIN dissenting.

A majority of my colleagues have concluded that the State's evidence, which tends to show that defendant, acting simultaneously with his brother and his brother's girlfriend, confronted a series of jurors leaving the courtroom in which they had just voted to convict defendant's brother of assaulting a law enforcement officer for the purpose of intensely criticizing the verdict rendered by those jurors, does not suffice to establish the existence of the agreement necessary to support defendant's conspiracy conviction. In light of my belief that the Court's decision fails to analyze the evidence in the light most favorable to the State and that, when considered in light of the applicable legal standard, the evidence contained in the record provided ample support for the

jury's determination that the necessary agreement did, in fact, exist, I respectfully dissent from the Court's decision.

According to well-established North Carolina law, we are required to evaluate the validity of defendant's challenge to the sufficiency of the evidence to support his conspiracy conviction by viewing the evidence in the light most favorable to the State. *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002) (citing *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001)). The State's evidence need not be compelling in order to prevent the allowance of a defendant's dismissal motion; instead, the State's evidence need only be "substantial," with "substantial evidence" being the "amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* (citing *State v. Frogge*, 351 N.C. 576, 584, 528 S.E.2d 893, 899 (2000)). For that reason, "the question for the trial court is not one of weight, but of the sufficiency of the evidence," *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2001) (citing *Lucas*, 353 N.C. at 581, 546 S.E.2d at 721), with the trial court being required to "draw[ ] all reasonable inferences from the evidence in favor of the State's case." *Id.* (quoting *Lucas*, 353 N.C. at 581, 546 S.E.2d at 721); *see also State v. Lowery*, 309 N.C. 763, 766, 309 S.E.2d 232, 236 (1983). As a result, the ultimate issue raised by defendant's challenge to the sufficiency of the evidence to support his conspiracy conviction is whether a reasonable juror could have rationally concluded that defendant was guilty of the crime that he was charged with committing.

"A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means." *State v. Lamb*, 342 N.C. 151, 155, 463 S.E.2d 189, 191 (1995). "[T]he State need not prove an express agreement"; instead, "evidence tending to show a mutual, implied understanding will suffice." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991); *see also State v. Lawrence*, 352 N.C. 1, 24–25, 530 S.E.2d 807, 822 (2000); *State v. Smith*, 237 N.C. 1, 16, 74 S.E.2d 291, 301 (1953). "The existence of a conspiracy may be established by circumstantial evidence." *State v. Bell*, 311 N.C. 131, 141, 316 S.E.2d 611, 617 (1984) (citing *State v. Bindyke*, 288 N.C. 608, 616, 220 S.E.2d 521, 526 (1975)); *see also Lawrence*, 352 N.C. at 25, 530 S.E.2d at 822 (citing *Bindyke*, 288 N.C. at 616, 220 S.E.2d at 526) (stating that "[t]he existence of a conspiracy may be shown with direct or circumstantial evidence"); *State v. Horton*, 275 N.C. 651, 659, 170 S.E.2d 466, 471 (1969) (citing *State v. Butler*, 269 N.C. 733, 737, 153 S.E.2d 477, 481 (1967)) (stating that "a criminal conspiracy may be established by circumstantial evidence from which the conspiracy may be legitimately inferred"); *State v. Wrenn*, 198 N.C 260, 263, 151 S.E.2d 261, 263 (1930)

(stating that the existence of a conspiracy may be "inferred from facts and circumstances"); *State v. Knotts*, 168 N.C. 173, 188, 83 S.E. 972, 979 (1914) (stating that "[t]his joint assent of minds, like all other facts of a criminal case, may be established as an inference of the jury from other facts proved; in other words, by circumstantial evidence"). As the Court recognized more than three-quarters of a century ago, "[d]irect proof of the [conspiracy] charge is not essential, for such is rarely obtainable," so that the existence of a conspiracy "may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively," "point unerringly to the existence of a conspiracy." *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933) (citing *Wrenn*, 198 N.C. at 260, 151 S.E. at 261). "[T]he results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom" provide "ample ground for concluding that a conspiracy exists." *Id.* at 713, 169 S.E.2d at 712. "Ordinarily the existence of a conspiracy is a jury question," and where reasonable minds could conclude that a meeting of the minds exists, the trial court does not err in denying a motion to dismiss for insufficiency of the evidence. *State v. Larrimore*, 340 N.C. 119, 156, 456 S.E.2d 789, 809 (1995).

The record developed before the trial court established that Dan Mylett had been charged with and was convicted of assaulting a governmental official based upon an incident during which he spat upon an officer employed by the Boone Police Department. During the trial of that case, Dan Mylett, Dan Mylett's girlfriend Kathyn Palmer, and defendant, who is Dan Mylett's brother, appeared to be watching the members of the jury during breaks in the proceedings. For example, Charlotte Lino, who served on the jury at Dan Mylett's trial, testified that defendant and Dan Mylett "hung out . . . very close" to the door of the jury room, looked into the room, and "circl[ed] the table" in the hallway outside the jury room. In addition, Kinney Baughman, who also served on the jury at Dan Mylett's trial, testified that defendant and Dan Mylett made frequent eye contact with members of the jury during their breaks throughout the trial and that defendant, Dan Mylett, and Ms. Palmer stared at them "intently."

After the jury returned a verdict convicting Dan Mylett of assault upon a governmental official, six of the members of the jury remained in the courtroom, which was located on the second floor near a stairwell that led to the first floor entrance, for the sentencing hearing. At

the conclusion of the sentencing hearing, surveillance video footage showed that defendant left the courtroom by himself before anxiously pacing the hallway outside the courtroom. When he stopped pacing, defendant stood on the opposite side of the hallway facing the doors that led into the courtroom.

As Juror Rose Nelson left the courtroom and walked through the hallway toward the stairwell, defendant stared at her and told her that he "hoped that [she] could live with [her]self," that "[she] had convicted an innocent man," and that "he hoped that [she] slept well." According to Ms. Nelson, defendant spoke in a "very threatening" tone of voice and continued to make comments in her direction even after she entered the stairwell and began walking down the steps.

At that point, defendant re-crossed the hallway, stood between the two doors that led to the courtroom, and faced the entrance through which each of the jurors left the courtroom. While defendant stood alone in the hallway, jurors Kinney Baughman, William Dacchille, Denise Mullis, and Lorraine Ratchford left the courtroom together. As this group of jurors walked past him to enter the jury room to retrieve their belongings, defendant appears to have stared at them and told the four jurors, in an increasingly "louder," "more aggressive," and "more aggravated" manner, that his brother was "an innocent man," that they had "done wrong," and that they had "ruined [his brother's] life." Ms. Ratchford testified that defendant had "intercepted" and "accost[ed]" her as she proceeded to the jury room and said, "congratulations, you just ruined [my brother's] life." Similarly, Ms. Mullis testified that, as she walked to the jury room, defendant told her in a "very angry" tone that she had "got it wrong" and had "made a mistake." In the same vein, Mr. Dacchille testified that defendant told him that "[Dan Mylett was] an innocent man, he's an innocent man."

At that point, Dan Mylett, Ms. Palmer, and defendant's mother, each of whom were visibly upset, left the courtroom and joined defendant in the hallway, where defendant made a brief attempt to console Ms. Palmer. Upon leaving the courtroom, Dan Mylett walked directly toward the jury room and was standing outside of that room when Mr. Baughman re-entered the hallway preparatory to leaving the building. As Mr. Baughman walked toward the far courtroom door, defendant, Dan Mylett, and Ms. Palmer approached him, with defendant having "immediately engaged" Mr. Baughman and telling Mr. Baughman that he "had done wrong" and that Dan Mylett "was an innocent man." According to surveillance video footage, defendant and Dan Mylett can be seen speaking to Mr. Baughman while defendant, Dan Mylett, and Ms. Palmer each

exhibited body language that expressed dissatisfaction and frustration. Mr. Baughman testified that defendant was "clearly upset," that his tone was "firm," and that defendant was "not yelling at" him.

While still in the jury room, Mr. Dacchille could hear that those associated with Dan Mylett were engaged with Mr. Baughman. In light of his concern that things would "get[ ] out of hand[,]" Mr. Dacchille made a "bee line for the stairwell" while the group accosted Mr. Baughman. Mr. Dacchille informed a law enforcement officer that the group associated with Dan Mylett was "abusing the jury" and were "yelling at the jurors" in a "belligerent" manner.

As Mr. Baughman neared the far courtroom door, he realized that he was going the wrong way. For that reason, Mr. Baughman reversed course and attempted to make his way around Dan Mylett's supporters in order to enter the stairwell and leave the courthouse. Although Mr. Baughman attempted to "explain" the jury's verdict and to tell Dan Mylett's supporters that there "was a lot of sympathy for [Dan Mylett] in there" while walking toward the stairwell, he "immediately got pounced" by Ms. Palmer.

Upon noticing that defendant was "getting himself upset," defendant's mother can be seen on video surveillance footage making multiple attempts to pull defendant back from Mr. Baughman, "pleading with him to stop" accosting the jurors and to refrain from following Mr. Baughman, and placing her hand over defendant's mouth as he attempted to speak to Mr. Baughman once Mr. Baughman had reached the stairwell. Unfortunately, however, defendant broke free from his mother's grip and walked around her, at which point defendant and other family members followed Mr. Baughman into the stairwell, where Mr. Baughman testified that Ms. Palmer "scream[ed] and yell[ed]" that Mr. Baughman had "sent [Dan Mylett] to jail" and that he had "ruined [Dan Mylett's] life and it's all [your] fault." According to Mr. Baughman, Dan Mylett's supporters "were all pointing their fingers in [his] face" and telling him that he had "ruined [Dan's] life."

As Ms. Mullis left the jury room in order to enter the stairwell, Dan Mylett's supporters returned to the hallway. Defendant and Dan Mylett both appeared to be staring at Ms. Mullis as they passed her; after Ms. Mullis had entered the hallway, Dan Mylett shook his head and threw his hand up. Shortly thereafter, Ms. Ratchford left the jury room and walked past Dan Mylett's supporters for the purpose of using the restroom. While she was in the restroom, Ms. Ratchford became concerned given that the actions of Dan Mylett's supporters were "so outside the bounds of propriety."

As the final juror, Ms. Lino, left the courtroom and crossed the hallway to enter the stairwell, defendant and Dan Mylett made a slight turn to face her and watched as she walked into the stairwell. Ms. Lino testified that Dan Mylett's supporters confronted her in a "loud," "angry," and "very intimidating" manner and yelled that Dan Mylett would "never get a job," that he wouldn't be able to "finish school," and that the jury "lie[d] just like the cops do." Ms. Mullis and Ms. Lino waited for Ms. Ratchford on a stairwell landing.

After the attorney who had represented Dan Mylett left the courtroom, Dan Mylett and his supporters entered the stairwell for the purpose of exiting the courthouse. Ms. Mullis and Ms. Lino were still waiting for Ms. Ratchford on the stairwell when Dan Mylett and his supporters passed them. As the group passed in close proximity to Ms. Mullis and Ms. Lino, they "shout[ed]" at them in an "angry" manner, told them "how bad [the jurors] were," and screamed that "[y]ou really blew it." Ms. Mullis testified that one member of the group had touched her, but she was unable to identify the individual who had made contact with her.

The conduct of defendant, Dan Mylett, and Ms. Palmer caused considerable consternation for the jurors whom the group had confronted. Ms. Nelson drove to her husband's place of employment immediately after leaving the courthouse and testified that she feared that she would be the subject of retaliatory conduct. Similarly, Ms. Lino purchased a security camera after her encounter with the group associated with Dan Mylett and expressed fear because she "didn't know what they were capable of doing." Mr. Baughman "spent th[e] weekend absolutely in fear of [his] life," considered "leaving town," checked to see that his security cameras were in good working order, and took leave from his employment to cope with his emotional distress, describing his encounter with Dan Mylett and his group as "one of the most disturbing experiences of [his] life." All of the jurors that defendant, Dan Mylett, and Ms. Palmer confronted feared for their safety after the incident in question, with a number indicating that they would refuse to serve on another jury in the future.

I have no hesitation in concluding that this evidence, when taken in the light most favorable to the State and considered in the light of the legal standard enunciated by this Court in *Whiteside*, amply supports a determination that defendant, Dan Mylett, and Ms. Palmer conspired to threaten or intimidate the members of the jury that convicted Dan Mylett of assaulting a governmental official. As a result of the fact that defendant and Dan Mylett were brothers and the fact that defendant's attempt to console Ms. Palmer permits an inference that there was a

close affinity between the two of them as well, the jury could reasonably infer that all three of the alleged conspirators had "antecedent relations" with each other. *Whiteside*, 204 N.C. at 713, 169 S.E. at 712. The record evidence further shows that, even before the trial ended, defendant and Dan Mylett were placing themselves in close proximity to the members of the jury and engaging in actions that most people would find threatening or intimidating. After the jury returned its verdict, defendant, Dan Mylett, and Ms. Palmer, who were standing in close proximity to each other, confronted multiple jurors and made angry and provocative remarks to them that succeeded in placing the jurors in an exceedingly frightening position. As they did so, defendant, Dan Mylett, and Ms. Palmer said essentially the same kinds of things to multiple jurors simultaneously even though conduct of this nature "diverge[s]" from "the course which would ordinarily be expected" of responsible persons in the vicinity of a court of justice. *Id.*

I am satisfied that, when evaluating the evidence in this case in light of the analytical rubric suggested by this Court in *Whiteside*, a decision that continues to be cited by this Court for the purpose of describing the circumstances under which the agreement necessary to support a conspiracy conviction exists, *see, e.g.*, *State v. Winkler*, 368 N.C. 572, 576, 780 S.E.2d 824, 827 (2015), a reasonable juror could have easily found that there was a "mutual, implied understanding" between defendant, Dan Mylett, and Ms. Palmer to threaten or intimidate the members of the jury that convicted Dan Mylett of assaulting a governmental official, *Morgan*, 329 N.C. at 658, 406 S.E.2d at 835, given that each of these three individuals were "able mentally to appreciate" each other's conduct so as to make an implicit "agree[ment] to cooperate in the achievement of that objective" of threatening or intimidating the departing members of the jury. *State v. Sanders*, 208 N.C. App. 142, 146, 701 S.E.2d 380, 383 (2010) (citing 15A C.J.S. *Conspiracy* § 114 (2002)). For that reason, I believe that the evidence, when taken in the light most favorable to the State, permitted the jury to find the existence of the necessary agreement between defendant, Dan Mylett, and Ms. Palmer to threaten or intimidate a juror, *see Winkler*, 368 N.C. at 581–82, 780 S.E.2d at 829 (holding that evidence tending to show that defendant had mailed an unmarked bottle that had been stuffed with tissue to prevent it from rattling and which contained controlled substances to an individual with whom he had a prior relationship using an address which the individual had not provided to his probation officer and evidence that defendant was unable to account for the remaining controlled substances that he should have possessed based upon the prescriptions that had been written for him or his reasons for mailing the controlled substances rather

than simply carrying them on his person was sufficient to support the defendant's conspiracy conviction); *Lawrence*, 352 N.C. at 25, 530 S.E.2d at 822 (stating that "[t]he mutual, implied understanding between defendant and [his alleged co-conspirator] is apparent from the effortless manner in which they supported each other throughout the commission of the murder and kidnaping"); *State v. Gibbs*, 335 N.C. 1, 48–49, 436 S.E.2d 321, 348 (1993) (holding that evidence tending to show that the defendant and his alleged co-conspirator watched another person leave a residence before approaching it and cooperating in the commission of a burglary constituted sufficient evidence to support the defendant's conspiracy conviction); *State v. Polk*, 309 N.C. 559, 565, 308 S.E.2d 296, 299 (1983) (holding that evidence tending to show that three different individuals committed a series of sexual assaults upon the prosecuting witness after luring her to a secluded location was sufficient to support the defendant's conspiracy conviction), with the evidence of defendant's guilt in this case consisting of much more than "evidence of mere relationship between the parties . . . ." *State v. Williams*, 255 N.C. 82, 86, 120 S.E.2d 442, 446 (1961) (quoting *State v. Phillips*, 240 N.C. 516, 521, 82 S.E.2d 762, 766 (1954)).

In reaching a contrary conclusion, the Court asserts that "[t]he evidence is almost entirely devoid of any interactions between [defendant, Dan Mylett, or Ms. Palmer] from which the formation of any agreement can be inferred." As has already been demonstrated, however, well-established North Carolina law permits a jury to find the necessary agreement based upon "a mutual, implied understanding." *Morgan*, 329 N.C. at 658, 406 S.E.2d at 835. Thus, while I agree with my colleagues that the record does not contain any direct evidence of an explicit agreement between defendant, Dan Mylett, and Ms. Palmer to threaten or intimidate the members of the jury that convicted Dan Mylett of spitting on a law enforcement officer, the absence of such evidence does not stand as an obstacle to the finding of an unlawful, implied understanding sufficient to support defendant's conspiracy conviction.

In addition, while acknowledging that the agreement necessary to support a conspiracy conviction can be inferred from "parallel conduct," the Court disregards the extensive evidence that defendant, Dan Mylett, and Ms. Palmer engaged in highly "parallel" conduct when they confronted members of the jury that convicted Dan Mylett of assaulting a governmental official on the grounds that "such an inference would be far stronger where the conduct at issue is more synchronized, more parallel, and more clearly in furtherance of a crime." Aside from the fact that this portion of the Court's analysis appears to me to amount to an

analysis of the weight that should be given to the State's evidence, rather than to its sufficiency, and the fact that the rubric upon which the Court relies in rejecting the State's "parallel conduct" analysis fails to track the approach that the Court adopted in *Whiteside* and lacks support in any of our prior decisions, I am unable to agree with my colleagues that the conduct in which defendant, Dan Mylett, and Ms. Palmer engaged was not "particularly synchronized," "parallel," or "in furtherance of a crime." In my opinion, the fact that defendant, Dan Mylett, and Ms. Palmer did essentially the same things to the same people in the same place and at the same time shows that the actions of each alleged co-conspirator closely "synchronized" with and "paralleled" the actions of the others. In addition, aside from the fact that proof that the alleged conspirators actually committed a crime is not a prerequisite for a conspiracy conviction, *Bindyke*, 288 N.C. at 616, 220 S.E.2d at 526 (citing *State v. Lea*, 203 N.C. 13, 27, 164 S.E. 737, 745 (1932)) (stating that "[t]he conspiracy is the crime and not its execution"), the record evidence clearly indicates that defendant, Dan Mylett, and Ms. Palmer, acting as a group and engaging in remarkably similar conduct, amply succeeded in threatening or intimidating the jurors whom they accosted in the hallway outside the courtroom.[1] Thus, I do not believe that any of the reasons that my colleagues have advanced in support of their decision to find the evidence insufficient to show the existence of the agreement necessary for defendant's conspiracy conviction are persuasive and would, on the contrary, find that the record contained sufficient evidence to permit a reasonable juror to infer that defendant, Dan Mylett, and Ms. Palmer conspired to threaten or intimidate the members of the jury that convicted Dan Mylett of assaulting a governmental official. As a result, rather than overturning defendant's conviction, I believe that the Court should proceed to address defendant's remaining challenges to the trial court's judgment, including his various constitutional claims, about the merits of which I express no opinion.

Justices NEWBY and DAVIS join in this dissenting opinion.

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1. As a matter of clarity, I do not understand either defendant, the dissenting judge at the Court of Appeals, or the majority of this Court to be stating that the record failed to contain sufficient evidence to establish that the conduct of defendant, Dan Mylett, and Ms. Palmer did threaten or intimidate the jurors who voted to convict Dan Mylett of spitting upon a law enforcement officer. Instead, my understanding is that defendant, the dissenting judge, and the majority of this Court have argued or concluded that the record does not show the existence of the agreement necessary to support defendant's conspiracy conviction. In light of this fact and the fact that the record contains ample evidence tending to show that the conduct of the group associated with Dan Mylett had the effect of threatening or intimidating the relevant jurors, I have focused the discussion contained in the text of this dissenting opinion upon the "agreement" issue rather than any "threaten or intimidate" issue.

WINSTON AFFORDABLE HOUSING, LLC D/B/A WINSTON SUMMIT APARTMENTS
v.
DEBORAH ROBERTS

No. 267PA19

Filed 1 May 2020

1. Landlord and Tenant—breach of lease—automatically renewing—acceptance of rent—right to evict

A Section 8 apartment complex did not waive the right to evict a tenant for breaches of her lease agreement when it accepted her rent payments knowing she had violated her lease. The Supreme Court held that a landlord does not, by accepting rent payments, waive the right to terminate an automatically renewing lease at the end of the lease term for breaches where (1) the landlord notifies the tenant of the breaches, (2) the landlord communicates to the tenant that, as a result of the breaches, the landlord will not renew the lease at the end of the then-effective lease term, (3) the landlord accepts rent from the tenant through the end of the then-effective lease term, and (4) non-renewal of the lease is specifically enumerated in the lease as a remedy in the event of a breach by the tenant.

2. Landlord and Tenant—termination of lease—federally subsidized housing—compliance with federal law

A summary ejectment action was remanded to the trial court for findings as to whether a Section 8 apartment complex complied with federal requirements when terminating a tenant's lease. Termination of a lease or a federal subsidy for a tenant in federally subsidized housing requires compliance with applicable federal law as incorporated in the terms of the lease.

3. Landlord and Tenant—termination of lease—nonpayment of rent—sufficiency of findings

A summary ejectment action was remanded because it did not contain sufficient findings to support the conclusion that a Section 8 apartment complex was entitled to possession of a tenant's apartment based on her nonpayment of rent. The record did not contain a termination notice regarding nonpayment of rent, and there were no findings as to whether a rent increase was made in accordance with the terms of the lease and federal requirements.

Justice NEWBY concurring in part and dissenting in part.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 828 S.E.2d 755, 2019 WL 2510879 (N.C. Ct. App. 2019), affirming a judgment entered on 3 November 2017 by Judge Denise S. Hartsfield in District Court, Forsyth County. Heard in the Supreme Court on 11 March 2020.

Blanco, Tackabery & Matamoros, P.A., by Elliot A. Fus and Chad A. Archer, for plaintiff-appellee.

Legal Aid of North Carolina, Inc., by Andrew Cogdell, Liza A. Baron, Valene K. Franco, and Celia Pistolis, for defendant-appellant.

William D. Rowe, Jack Holtzman, and Carlene McNulty, for North Carolina Justice Center; Elizabeth Myerholtz and Lisa Grafstein, for Disability Rights North Carolina; and J.L. Pottenger Jr., for Yale Law School Housing Clinic; amici curiae.

EARLS, Justice.

Deborah Roberts is a longtime tenant of the Winston Summit Apartments, having lived there for more than twenty years. The complex is owned by Winston Affordable Housing, LLC (WAH). Winston Summit Apartments is a project-based Section 8 property. This means that the U.S. Department of Housing and Urban Development (HUD) provides money to the landlord, subsidizing the rents for units at the property and lowering the effective rent for low-income tenants like Ms. Roberts. WAH receives the subsidy payment directly from HUD pursuant to a Housing Assistance Payments (HAP) contract between HUD and WAH. The subsidy is tied to the unit—it is not a voucher that a tenant could take to a different apartment complex to receive a subsidized rental rate.

In late 2016, WAH sought to evict Roberts by terminating her lease for alleged breaches primarily relating to her conduct toward property management staff and conditions in and around her unit. Roberts did not leave. WAH's property management company, Ambling Management Corp. (Ambling), filed a Complaint in Summary Ejectment on 5 January 2017, claiming that Roberts was a holdover tenant. On 9 January 2017, the property manager served Roberts with a ten-day notice to pay rent or quit, alleging that Roberts was in default under "the rental agreement dated 01/01/2007" in the amount of $547. Following a judgment in small claims court, WAH filed an amended complaint. Ultimately, the District Court in Forsyth County entered a judgment evicting Roberts and granting possession of the apartment in which she lived to WAH "based on

nonpayment of rent for January 2017 and the first part of February 2017." In doing so, the trial court determined that WAH had waived its claims as to Roberts's alleged lease breaches. The Court of Appeals affirmed, holding that the trial court's findings of fact supported its conclusion that Roberts's failure to pay rent entitled WAH to possession. *Winston Affordable Hous., L.L.C. v. Roberts*, 828 S.E.2d 755, 2019 WL 2510879 (N.C. Ct. App. 2019).

We reverse the Court of Appeals and remand to the trial court for further findings of fact. First, we hold that the trial court's findings do not support its determination that WAH had waived its right to terminate the lease based on the alleged breaches by Roberts. Second, we hold that terminating either a lease or a federal subsidy for a particular tenant in a federally-subsidized housing arrangement requires compliance with applicable federal law as incorporated in the terms of the lease. Third, we hold that the record does not contain sufficient findings to support the conclusion that WAH is entitled to possession on the basis of nonpayment of rent.

Background

Roberts is a sixty-two-year-old woman with cognitive disabilities. She has lived in her unit at the Winston Summit Apartments since 1997. Prior to the current dispute regarding her lease, she paid $139 per month in rent. Roberts receives a fixed income of $755 per month in addition to food stamps.

WAH alleged that Roberts violated her lease terms by:[1]

> (a) Harassing Ambling's staff about various issues—including but not limited to management's refusal to provide Tenant with a key to the mail room that would enable Tenant to access other tenants' mail and packages—and making and threatening false claims against Plaintiffs.
>
> (b) Spreading pest control powder in common areas and other tenants' apartments, despite the objection of other

1. Because the trial court determined that WAH waived these alleged breaches by accepting rent payments from Roberts, the trial court necessarily did not consider whether the evidence produced at trial amounted to material noncompliance, which would warrant termination of the lease by its terms. Accordingly, we consider only the claims included by WAH in its amended complaint, assuming their truth for the purposes of this opinion. *Cf. Renwick v. News & Observer Pub. Co.*, 310 N.C. 312, 315, 312 S.E.2d 405, 408 (1984) (stating that allegations in a complaint are taken as true when deciding whether they should be dismissed).

> tenants and despite Ambling's repeated requests that Tenant cease this practice and not interfere with the professional extermination services arranged by Plaintiffs.
>
> (c) Keeping her Premises in a cluttered, dirty and unsafe condition.
>
> (d) Violating "no smoking" policies.

On 3 October 2016, Roberts received a letter with the subject heading "Notice of Termination of Lease." The letter notified Roberts that "Winston Summit ha[d] elected to terminate [her] lease" and stated that her lease would terminate at the end of the then-current term, which ended 31 December 2016. It alleged that Roberts's "repeated lease violations" had "disrupted the livability of the property, adversely affected the health or safety of residents and staff, the peaceful enjoyment of other residents to the property, and interfered with the management of the property." The letter provided examples of the offending behavior. It then notified Roberts of when she would have to leave her unit and stated that she was "required to pay [her] full rental amount up to the day [she] move[d] out." The letter then stated: "You have the right to respond in writing or request a meeting within 10 days to dispute this proposed termination. You have the right to defend this action in court."

Roberts did not vacate her apartment by 31 December 2016. WAH's evidence at trial indicated that, on 4 January 2017, the on-site property manager saw Roberts at the mailbox and asked Roberts to come in and sign a document. The document was a HUD form titled "Owner's Certification of Compliance with HUD's Tenant Eligibility and Rent Procedures." In the section marked "Gross Rent Changes and Unit Transfers," the document listed "Tenant Rent" as $532. Roberts signed the document. At the same time, Roberts signed[2] a document titled "Lease Amendment" which read in part:

> This is to notify you that on the basis of our recent review of your income and family composition, your monthly rent has been adjusted as follows:
>
> | | |
> |---|---|
> | Contract Rent | $532.00 |
> | Utility Allowance | $61.00 |

2. Roberts appears to have written "Under duress" beneath her signature on this document. We do not consider or opine on the legal significance, if any, of this qualifier.

Assistance Payment	$0.00
Total Tenant Payment	$593.00
Tenant Rent	$532.00

> The new rent is effective with the rent due for the month of 12/31/2016. This notification amends Paragraph 3 of your lease agreement, which sets forth the amount of rent you pay each month. All other provisions of your lease remain in full force and effect. The next scheduled recertification is 01/01/2017.

Both the Lease Amendment and the Owner's Certification of Compliance with HUD's Tenant Eligibility and Rent Procedures were dated 4 January 2017.

On 5 January 2017, Ambling filed a summary ejectment action in Forsyth County Small Claims Court. Then, on 9 or 10 January 2017, Ambling delivered a document to Roberts titled "Ten-Day Notice to Pay Rent or Quit." The document alleged that Roberts owed $547 under her rental agreement and demanded that she pay the amount in ten days or surrender possession of her apartment. If she did not do so, the document stated that WAH would sue her.

On 7 February 2017, the magistrate in Small Claims Court entered judgment in the summary ejectment action in favor of Ambling. Roberts appealed to the District Court for a trial *de novo* on 14 February 2017. The Notice of Appeal form contained the following notice to the appealing party:

> If you are a tenant appealing from a summary ejectment judgment entered against you and you wish to stay on the premises until the appeal is heard, you must SIGN A BOND that you will pay your rent as it becomes due into the Clerk's office; you must PAY IN CASH the amount of rent in arrears as determined by the magistrate; and if the judgment was entered more than five (5) days before the next rental payment is due, you may also have to PAY IN CASH the prorated amount of rent due from the date the judgment was entered until the next rental payment is due. Ask the clerk for the bond form (AOC-CVM-304) to allow you to stay on the premises. If you have not signed this bond and paid the prorated amount of cash within ten (10) days after the judgment was entered, the landlord can

> ask to have the sheriff remove you from the premises even though the case is being appealed.

The magistrate did not assess any amount of rent in arrears to Roberts, but did determine that the rental rate was $532 per month. Consequently, Roberts began paying a monthly rent bond of $532 in mid-February.

On 6 April 2017, WAH filed an amended complaint which made two claims for relief.[3] First, WAH alleged that it was entitled to a judgment for summary ejectment on the basis of (1) alleged lease violations occurring prior to 3 October 2016 and (2) failure to pay rent for January 2017 and part of February 2017. Second, WAH alleged that it was entitled to a monetary judgment reflecting the unpaid rents for January 2017 and part of February 2017. Roberts filed an answer and counterclaims on 7 June 2017. The answer included ten defenses and five counterclaims. Only one of Roberts's counterclaims, that WAH's termination of her rental subsidy constituted an unfair and deceptive trade practice (UDTP) in violation of N.C.G.S. § 75-1.1, survived to trial.

The competing claims were tried in October 2017. On 3 November 2017, the trial court entered judgment in favor of WAH, granting WAH possession of the apartment on the basis of nonpayment of rent and dismissing all other pending claims and counterclaims. The trial court made the following findings of fact:

> 1. Plaintiff is the owner of Winston Summit Apartments, 137 Columbine Drive, Winston-Salem, North Carolina, where defendant has been a longtime resident. As of 2016, defendant was leasing Unit 311 (the "Premises") from plaintiff pursuant to a Model Lease for Subsidized Programs (the "Lease") signed on November 2, 2010.
>
> 2. On October 3, 2016, plaintiff provided defendant with a Notice of Termination of Lease, declaring that the Lease would be terminated effective December 31, 2016 for "material noncompliance" based on repeated lease violations, including violations of rules regarding pest control, smoking, housekeeping and other issues.

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3. While it is not entirely clear from the record, it seems that WAH was substituted for Ambling at some point prior to the filing of the amended complaint. This procedural aspect of the case has not been presented for our review.

3. Following the October 3, 2016 notice—but before the December 31, 2016 termination date—plaintiff accepted November and December 2016 rents from defendant.

4. Defendant did not vacate the Premises and has continued to reside there.

5. On or about January 4, 2017, defendant signed documents presented to her by the plaintiff's management, indicating that $532 per month in rent would be owed by defendant after December 31, 2016 (although defendant previously paid $139 per month in rent and received "Section 8" subsidized rental assistance from HUD).

6. This summary ejectment action was commenced on January 5, 2017.

7. On or about January 10, 2017, plaintiff's management gave defendant a "Ten-Day Notice to Pay Rent or Quit" regarding defendant's non-payment of January 2017 rent.

8. A judgment for ejectment was granted to plaintiff in Small Claims Court on February 7, 2017. Defendant appealed to District Court.

9. Rents since mid-February have been paid into Court by defendant. However, defendant never paid rents for January 2017 or for the portion of February 2017 accruing prior to her first payment of rent bond into Court.

10. Plaintiff filed an Amended Complaint on April 6, 2017. Plaintiff sought ejectment, based on the violations of the Lease listed in the October 3, 2017 [sic] notice as well as failure to pay January 2017 and early February 2017 rents. Plaintiff also sought a money judgment for the unpaid rents.

11. Defendant filed Counterclaims. The Counterclaims were dismissed prior to trial, except for a claim for Unfair and Deceptive Trade Practices for allegedly "improperly terminating defendant's Section 8 assistance."

12. Plaintiff represented in open court during trial that possession of the Premises was its only priority and that it would voluntarily waive any money judgment.

From these facts, the trial court concluded that WAH had "waived any right to evict defendant based on any Lease violations occurring prior to" its acceptance of rent for November and December 2016 and dismissed WAH's claim for breach of lease other than nonpayment of rent. The trial court also concluded that Roberts should be evicted because she did not pay rent for January 2017 and the first portion of February 2017. Finally, the trial court concluded that Roberts had presented insufficient evidence to establish a UDTP claim regarding the termination of her rental subsidy.

The Court of Appeals affirmed the trial court. First, the Court of Appeals considered whether Roberts was properly evicted for nonpayment of rent. The court acknowledged that the parties disputed the appropriate amount of rent, but it was uncontested on appeal that Roberts did not pay rent for January 2017 to mid-February 2017. *Roberts*, 828 S.E.2d 755, 2019 WL 2510879 at *3. As a result, the court concluded that Roberts's failure to pay rent "constituted a breach of lease entitling WAH to possession of the premises." *Id.*

Second, the Court of Appeals considered whether the trial court appropriately rejected Roberts's UDTP claim. The Court of Appeals determined that there was "insufficient evidence in this case of an injury proximately caused by the alleged act or practice" and concluded that Roberts had not proved her claim. *Id.* at *4.

WAH and Roberts each sought discretionary review in this Court. Roberts asked us to consider (1) whether she was properly evicted for nonpayment of rent and (2) whether WAH's alleged violations of federal regulations governing the subsidized housing program were unfair trade practices pursuant to N.C.G.S. § 75-1.1. WAH asked us to consider whether WAH had waived eviction on the basis of Roberts's alleged violations of the lease by accepting rent payments in November and December 2016. We granted both petitions.

Standard of Review

When reviewing a judgment entered following a bench trial,

> "the trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding." *Bailey v. State*, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998) (citing *Curl v. Key*, 311 N.C. 259, 260, 316 S.E.2d 272, 273 (1984)). Although findings of fact "supported by

> competent, material and substantial evidence in view of the entire record[ ], are conclusive upon a reviewing court, and not within the scope [of its] reviewing powers," *In re Berman*, 245 N.C. 612, 616–17, 97 S.E.2d 232, 235 (1957), "[f]indings not supported by competent evidence are not conclusive and will be set aside on appeal." *Penland v. Bird Coal Co.*, 246 N.C. 26, 30, 97 S.E.2d 432, 436 (1957) (citing *Logan v. Johnson*, 218 N.C. 200, 10 S.E.2d 653 (1940)). "[F]acts found under a misapprehension of the law are not binding on this Court and will be set aside, and the cause remanded to the end that the evidence should be considered in its true legal light." *Hanford v. McSwain*, 230 N.C. 229, 233, 53 S.E.2d 84, 87 (1949) (citing, *inter alia*, *McGill v. Town of Lumberton*, 215 N.C. 752, 3 S.E.2d 324 (1939)).

In re Estate of Skinner, 370 N.C. 126, 139, 804 S.E.2d 449, 457–58 (2017) (alterations in original). The trial court's legal conclusions are reviewed de novo. *In re C.H.M.*, 371 N.C. 22, 28, 812 S.E.2d 804, 809 (2018) (quoting *In re Foreclosure of Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013)).

Analysis

In the proceedings below, WAH claimed that it was entitled to possession on two bases: alleged lease violations by Roberts and nonpayment of rent in January 2017 and part of February 2017.[4] We address the issues of waiver, the purported lease and subsidy termination, and nonpayment of rent in turn. We then address the remand to the trial court, which relates to Roberts's UDTP claim.

Waiver of lease violations

[1] As to the alleged lease violations, the trial court determined that WAH waived any claim based on the breaches because it accepted rent from Roberts after it knew of the breaches. On the facts presented by this record, that determination was erroneous. Because the trial court did not consider whether Roberts's behavior amounted to material

4. WAH also alleged that Roberts was an improper holdover on an expired lease. However, WAH no longer pursues this claim, and it is unavailing in any case. Under the terms of the lease, which mirror the requirements of federal law, Roberts could only be evicted for specifically enumerated reasons or "other good cause." Otherwise, unless Roberts terminated the lease herself, it would automatically renew at the end of each lease term. As a result, Roberts could not be a "holdover tenant" in the sense that she would be subject to eviction for simply remaining after the expiration of her lease. Without action on her part, the lease would not ordinarily expire.

noncompliance with the lease, we remand for the trial court to take evidence and make appropriate findings. On remand, the parties may still present arguments as to whether any of WAH's conduct after 31 December 2016 constituted a waiver of the alleged violations occurring prior to 3 October 2016, including the presentation to Roberts of the 3 January 2017 document labeled as a lease amendment. However, we hold that a landlord does not, by accepting rents, waive the right to terminate an automatically-renewing lease at the end of the lease term for breaches of the lease where (1) the landlord notifies the tenant of the breaches; (2) the landlord communicates to the tenant that, as a result of the breaches, the landlord will not renew the lease at the end of the then-effective lease term; (3) the landlord accepts rent from the tenant through the end of the then-effective lease term; and (4) non-renewal of the lease is specifically enumerated in the lease as a remedy to the landlord in case of a breach by the tenant.

When a landlord accepts rent from a tenant knowing that the tenant has breached the lease, the acceptance "will ordinarily be treated as an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease and demanding a forfeiture thereof." *Winder v. Martin*, 183 N.C. 410, 411, 111 S.E. 708, 709 (1922).

> It is the generally accepted rule that if the landlord receive rent from his tenant, after full notice or knowledge of a breach of a covenant or condition in his lease, for which a forfeiture might have been declared, such constitutes a waiver of the forfeiture which may not afterwards be asserted for that particular breach, or any other breach which occurred prior to the acceptance of the rent.

Id. This doctrine of waiver is based "on the ground that the landlord has an election. He may choose whether he will declare the lease at an end and reenter at once, or whether he will overlook the breach and let the lease remain in force." *Id.* (quoting *Palmer v. City Livery Co.*, 98 Wis. 33, 34, 73 N.W. 559, 559 (1897)).

In the ordinary case, where a lease does not by its terms provide for automatic renewal, this proposition is somewhat unremarkable. A landlord faced with a tenant in breach of the lease may either terminate the lease immediately or forgive the breach. If the landlord instead elects not to renew the lease at the end of the lease term, then the landlord has effectively chosen to forgive the breach. This is because, where the lease would terminate anyway, the landlord is under no obligation to

continue to perform upon expiration of the lease—the contractual relationship between the parties dissolves at the end of the lease term. The landlord has not taken advantage of any "right to excuse or repudiate his own performance." *Wachovia Bank & Tr. Co., N. A. v. Rubish*, 306 N.C. 417, 426, 293 S.E.2d 749, 755 (1982). Thus, in the ordinary case of a non-renewing lease, a landlord who knows that a tenant has breached the lease and subsequently accepts rent from the tenant waives any right to assert the breach in court. *See, e.g.*, *Fairchild Realty Co. v. Spiegel, Inc.*, 246 N.C. 458, 468, 98 S.E.2d 871, 878 (1957).

The case is different, however, if the lease would automatically renew at the end of the lease term without a breach by the tenant. In that circumstance, a decision not to renew the lease but also not to pursue immediate eviction does not amount to forgiving the breach. Instead, the landlord has sought to address the tenant's breach by pursuing a remedy specifically laid out in the lease. In this case, the landlord does not have to "choose whether he will declare the lease at an end and reenter at once, or whether he will overlook the breach and let the lease remain in force." *Winder*, 183 N.C. at 411, 111 S.E. at 709. Instead, the lease provides a third option: suspending the lease's automatic renewal provision and ending it at the completion of the lease term. Of course, a landlord cannot make inconsistent elections. For example, once the landlord has chosen the remedy of nonrenewal, the landlord has necessarily elected not to seek immediate eviction and cannot then "declare the lease at an end and reenter at once." *Id.* However, if nonrenewal of a lease is a remedy specified in the lease in case of a tenant's breach, then a landlord's decision not to pursue immediate eviction is not a waiver of the landlord's right to terminate the lease at the end of its term.

The lease agreement between WAH and Roberts automatically renewed each year unless it was terminated pursuant to the lease terms. Under the lease terms, WAH could only terminate the lease for specifically enumerated breaches of the lease or other good cause. Therefore, WAH was required to renew the lease with Roberts unless Roberts breached the lease in one of the ways specifically listed in the lease or established other good cause for the lease's termination. WAH's acceptance of rent and election to terminate the lease at the end of its term, then, could not be a waiver of the breaches to which the termination was intended to respond.

WAH sent a letter to Roberts on 3 October 2016 notifying her that her lease would terminate on 31 December 2016, the end of its then-effective term. The letter specifically stated the lease provisions that WAH believed Roberts had violated and stated specific examples of

how she had violated those terms. Rather than seeking to evict Roberts immediately, WAH gave her almost three months in which to organize her affairs and find alternative housing, or to prepare her defense to eviction, when the lease required notice of, at most, 30 days. On these facts, WAH's acceptance of rent is not a waiver of its right to pursue a remedy specifically contemplated in the lease agreement.

Termination of the lease and subsidy

[2] Roberts's lease and subsidy payments could only be terminated if WAH complied with the applicable federal law. By its terms, the lease agreement required that any termination of the lease by WAH "be carried out in accordance with HUD regulations." Paragraph four of the lease also incorporates "the time frames and administrative procedures set forth in HUD's handbooks, instructions and regulations related to administration of multifamily subsidy programs" as those sources relate to changes in the tenant rent or the subsidy payments. In addition to administrative regulations, federal statutes provide tenants with protections that must be followed. *See*, *e.g.*, 42 U.S.C. § 3544(c)(2)(B) (2018) (prohibiting the termination, denial, suspension, or reduction of public housing benefits unless proper steps are followed). HUD regulations specify how much a tenant can be charged in rent and when a lease can be terminated. *See* 24 C.F.R. § 880.607[5] (2018) (lease termination requirements for Section 8 Housing Assistance Payments for New Construction); *id.* § 5.628 (calculation of total tenant payment from which is derived tenant rent). It is clear, then, that WAH was only entitled to terminate Roberts's subsidy and lease in the event it acted in accordance with federal requirements.

The record contains no findings as to whether WAH complied with federal requirements. The lease between WAH and Roberts specifies many reasons that the lease may be terminated, but only two are relevant on the facts of this case: the lease may be terminated for "[Roberts's] material noncompliance with the terms of" the lease, or it may be terminated "for other good cause." If the trial court determines that WAH did not waive the alleged breaches, the trial court must determine whether the alleged breaches occurred, whether they meet the standards set out in the lease, and whether WAH complied with federal law. Under the terms of the lease itself, WAH may only "rely upon those grounds cited in the termination notice required by" the lease.

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5. It is not entirely clear from the record which specific Section 8 project-based assistance program controlled Ms. Roberts's housing arrangement. However, the programs have similar requirements as they relate to the points discussed in this opinion. In any case, the record would benefit from greater exploration of this issue on remand.

Nonpayment of rent

[3] The trial court entered its judgment, and the Court of Appeals affirmed that judgment, on the basis that Roberts should be evicted for nonpayment of rent for January 2017 and part of February 2017. This conclusion was erroneous.

First, and most straightforwardly, WAH cannot pursue this ground of eviction under the terms of the lease. Under the lease's terms, WAH can only pursue grounds for eviction that are "cited in the termination notice required by" the lease terms. The only such termination notice in the record issued prior to the filing of the summary ejectment action on 5 January 2017 is the notice dated 3 October 2016. That notice stated that the lease was being terminated for "material noncompliance, based on [Roberts's] repeated lease violations which have disrupted the livability of the property, adversely affected the health or safety of residents and staff, the peaceful enjoyment of other residents to the property, and interfered with the management of the property." The notice makes no mention of nonpayment of rent. As a result, without a lease-compliant notice that Roberts failed to pay rent in January 2017 and part of February 2017, it cannot pursue eviction on this basis under the lease.

Second, it is unclear from the record what the basis is for the nonpayment of rent allegation. Under the lease agreement between Roberts and WAH, Roberts paid $139 per month in rent. WAH also received a payment from HUD pursuant to an agreement between WAH and HUD. However, the rent amount paid by Roberts is controlled by paragraph three of the lease agreement between WAH and Roberts. Paragraph four of the lease agreement controls any changes to tenant rent. For example, a change in the tenant's rent requires "at least 30 days advance written notice of any increase" except in certain circumstances, none of which apply to the present case. Further, the lease agreement provides that WAH may change the tenant's "rent or tenant assistance payment only in accordance with the time frames and administrative procedures set forth in HUD's handbooks, instructions and regulations related to administration of multifamily subsidy programs." However, the trial court made no findings of fact as to whether any change in the tenant rent was made consistent with these requirements.

Further, Roberts asserted in her answer to WAH's amended complaint that she tendered rent in the amount of $139 in January of 2017, and that the tender was rejected by WAH's property manager. WAH admitted in its reply that it refused Roberts's offer of payment. Whether Roberts tendered her rental payment and WAH refused the offer is relevant to

determining whether the landlord can evict for non-payment of rent. *See* N.C.G.S. § 42-33 (2019); *Hoover v. Crotts*, 232 N.C. 617, 618, 61 S.E.2d 705, 706 (1950) (where tenant tenders rent due and landlord declines to accept, landlord may not take possession for nonpayment of rent).

Roberts began paying a rent bond of $532 per month beginning in mid-February of 2017. On the record before us, it appears that she has made the payments consistently every month. If there was no change to tenant rent made consistent with the terms of the lease, then Roberts's rent under the lease remained $139 per month. Therefore, Roberts would have more than satisfied any past-due rent owed by April of 2017 at the latest. On the other hand, if the rent owed by Roberts was effectively and properly changed to $532 per month, then Roberts would not have already paid the rent owed for January 2017 and part of February 2017.

As a result, findings of fact are necessary as to WAH's actions regarding the termination of Roberts's subsidy payments and related increase in her required rental payments, and whether the lease terms and federal law were followed. As these findings will necessarily bear on Roberts's UDTP counterclaim, that counterclaim would need to be reconsidered in light of these findings.

Conclusion

The Court of Appeals is reversed for the reasons explained above. The case is remanded to the Court of Appeals for further remand to the District Court, Forsyth County, for proceedings consistent with this opinion.

REVERSED AND REMANDED.

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

Justice NEWBY concurring in part and dissenting in part.

I concur with the majority's ultimate holding in this case that the landlord did not, by accepting rents during the notice period, waive the right to evict the tenant for violations of the lease agreement. I disagree with the majority's conclusion regarding the viability of the tenant's unfair and deceptive trade practices (UDTP) claim. Instead, I agree with the determination of the Court of Appeals that the tenant has alleged no injury and therefore cannot legally proceed on a UDTP claim. On this issue, I respectfully dissent.

The district court concluded that the tenant did not present sufficient evidence to establish a UDTP claim based on the termination of her rental subsidy. The Court of Appeals affirmed the trial court, concluding that the tenant presented "insufficient evidence in this case of an injury proximately caused by the alleged act or practice" and thus failed to prove her claim. *Winston Affordable Housing, LLC v. Roberts*, No. COA18-553, 2019 WL 2510879 at *4 (N.C. Ct. App. June 18, 2019) (unpublished). The Court of Appeals correctly affirmed the trial court's dismissal of the tenant's UDTP claim.

> We review a dismissal under Rule 12(b)(6) de novo, "view[ing] the allegations as true and . . . in the light most favorable to the non-moving party." *Kirby v. N.C. DOT*, 368 N.C. 847, 852, 786 S.E.2d 919, 923 (2016) (quoting *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008)). Dismissal is proper when the complaint "fail[s] to state a claim upon which relief can be granted." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 7 (2015) (alteration in original) (quoting N.C.G.S. § 1A-1, Rule 12(b)(6) (2013)). "When the complaint on its face reveals that no law supports the claim . . . or discloses facts that necessarily defeat the claim, dismissal is proper." *Id.* at 448, 781 S.E.2d at 8 (citing *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)).

Christenbury Eye Ctr., P.A. v. Medflow, Inc., 370 N.C. 1, 5, 802 S.E.2d 888, 891 (2017) (alterations in original).

"Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C.G.S. § 75.1.1(a) (2019). "In order to establish a prima facie claim for unfair trade practices, a plaintiff must show: (1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Bumpers v. Cmty. Bank of N. Virginia*, 367 N.C. 81, 88, 747 S.E.2d 220, 226 (2013) (alterations in original) (quoting *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001)). Here, even if we assume the landlord committed an unfair and deceptive trade practice, the tenant is unable to show that the action caused injury. Therefore, dismissal is proper.

The tenant has continuously remained in the apartment; thus, she has not been injured by eviction. Based on the evidence presented, the

magistrate set the amount of rent at the market rate of the apartment with the money to be paid to the clerk of court, and the district court denied the tenant's motion to reduce it. The tenant began making those payments beginning 24 February 2017. If, on remand, the trial court determines that the rent bond amount exceeds the actual rent she owed, the money will be returned. Therefore, the trial court properly dismissed the UDTP claim for failing to allege an injury. I respectfully dissent.

DELLINGER v. LINCOLN CTY.

[374 N.C. 411 (2020)]

GARY DELLINGER, VIRGINIA DELLINGER AND TIMOTHY S. DELLINGER	)	
v.	)	LINCOLN COUNTY
LINCOLN COUNTY, LINCOLN COUNTY BOARD OF COMMISSIONERS, AND STRATA SOLAR, LLC, and MARK MORGAN, BRIDGETTE MORGAN, TIMOTHY MOONEY, NADINE MOONEY, ANDREW SCHOTT, WENDY SCHOTT, ROBERT BONNER, MICHELLE BONNER, JEFFREY DELC, LISA DELUCA, MARTHA McLEAN, CHARLEEN MONTGOMERY, ROBERT MONTGOMERY, DAVID WARD, INTERVENORS	)	

No. 321P19

ORDER

Intervenors' petition for discretionary review is decided as follows: The Court allows the Intervenors' petition for discretionary review for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decision in PHG Asheville, LLC v. City of Asheville, No. 434PA18 (N.C. Apr. 3, 2020). Intervenors' Petition for Writ of Supersedeas is allowed.

By Order of the Court in Conference, this 29th day of April 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

DTH MEDIA CORPORATION, CAPITOL BROADCASTING COMPANY, INC., THE CHARLOTTE OBSERVER PUBLISHING COMPANY, AND THE DURHAM HERALD COMPANY	)	
v.	)	From Wake County
CAROL L. FOLT, IN HER OFFICIAL CAPACITY AS CHANCELLOR OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, AND GAVIN YOUNG, IN HIS OFFICIAL CAPACITY AS SENIOR DIRECTOR OF PUBLIC RECORDS FOR THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL	)	

No. 142PA18

ORDER

The Court hereby allows a limited temporary stay of issuance of its mandate in this case until such time as the Supreme Court of the United States rules on a motion for a stay, provided defendant-appellants file such motion with that Court within twenty-one days of the date of this Order. Defendant-appellants' application to stay issuance of the mandate is otherwise denied.

By Order of the Court in Conference, this 20th day of May, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 20th day of May, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
Clerk

JOHNSTON CTY. BD. OF EDUC. v. BD. OF TRS., TEACHERS' AND STATE EMPS.' RET. SYS.

[374 N.C. 413 (2020)]

JOHNSTON COUNTY BOARD OF EDUCATION	)	
v.	)	WAKE COUNTY
BOARD OF TRUSTEES, TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM; DALE R. FOLWELL, STATE TREASURER (IN OFFICIAL CAPACITY ONLY); STEVEN C. TOOLE, DIRECTOR, RETIREMENT SYSTEMS DIVISION (IN OFFICIAL CAPACITY ONLY)	)	

No. 376P18

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for discretionary review for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decisions in Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer, No. 369PA18 (N.C. Apr. 3, 2020), and Cabarrus Cty. Bd. of Educ. v. Bd. of Trs. Teachers' and State Emps.' Ret. Sys., No. 371PA18 (N.C. Apr. 3, 2020).

By Order of the Court in Conference, this 29th day of April 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

JOHNSTON COUNTY BOARD OF EDUCATION	)	
v.	)	WAKE COUNTY
DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; DALE R. FOLWELL, STATE TREASURER (IN OFFICIAL CAPACITY ONLY); STEVEN C. TOOLE, DIRECTOR, RETIREMENT SYSTEMS DIVISION (IN OFFICIAL CAPACITY ONLY)	)	

No. 373P18

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for discretionary review for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decisions in Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer, No. 369PA18 (N.C. Apr. 3, 2020), and Cabarrus Cty. Bd. of Educ. v. Bd. of Trs. Teachers' and State Emps.' Ret. Sys., No. 371PA18 (N.C. Apr. 3, 2020).

By Order of the Court in Conference, this 29th day of April 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, DISABILITY RIGHTS NORTH CAROLINA, AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, ALBERTA ELAINE WHITE, KIM T. CALDWELL, JOHN E. STURDIVANT, SANDARA KAY DOWELL, AND CHRISTINA RHODES	)	
v.	)	WAKE COUNTY
ROY COOPER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF NORTH CAROLINA; AND ERIK A. HOOKS, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY	)	

No. 160P20

ORDER

Upon consideration of the petitioners' Motion to Expedite Response to Petition for *Writ of Mandamus* filed by petitioners on the 8th day of April, 2020, and given that the parties agree with the schedule proposed by respondents, the Court allows the Motion to Expedite Response to Petition for *Writ of Mandamus*. Accordingly, the respondents' response shall be filed by noon on 13 April 2020; and the petitioners' reply to respondents' response shall be filed by 5:00 pm on 15 April 2020. In addition, Amicus briefs should be filed by 5:00 pm on 15 April 2020.

By Order of the Court in Conference, this 9th day of April 2020.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of April 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
Clerk

STATE v. BEAL

[374 N.C. 416 (2020)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Lincoln County
	)	
REGGIE JOE BEAL	)	

No. 104P20

ORDER

Defendant's Petition for Writ of Certiorari to Review Order of Court of Appeals is allowed for the limited purpose of remanding the matter to the Court of Appeals for a determination of the case on its merits.

By order of the Court in Conference, this 29th day of April, 2020.

Ervin, J. recused.

s/ Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May, 2020.

AMY L. FUNDERBURK

s/Amy L. Funderburk
Clerk of the Supreme Court

STATE v. BELL

[374 N.C. 417 (2020)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Onslow County
	)	
BRYAN CHRISTOPHER BELL	)	

No. 86A02-2

ORDER

The State's Motion to Hold Defendant's Petition for Writ of Certiorari Prematurely Filed in Violation of this Court's Order Dated 25 January 2013 is denied. The State shall have thirty days from the date upon which the Chief Justice's emergency order extending filing deadlines expires in which to file its response to defendant's petition for writ of certiorari.

By Order of the Court in Conference, this 29th day of April, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May, 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

STATE v. WYNN

[374 N.C. 418 (2020)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Dare County
	)	
GREGORY JEROME WYNN, JR.	)	

No. 126P19

ORDER

Defendant's petition for discretionary review and motion in the alternative to remand are decided as follows: The Court allows defendant's petition for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Golder*, No. 79PA18 (N.C. Apr. 3, 2020). Defendant's motion to amend his petition for discretionary review is dismissed as moot.

By Order of the Court in Conference, this 29th day of April, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May, 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

UNION COUNTY BOARD OF EDUCATION	)	
v.	)	WAKE COUNTY
BOARD OF TRUSTEES, TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM; DALE R. FOLWELL, STATE TREASURER (IN OFFICIAL CAPACITY ONLY); STEVEN C. TOOLE, DIRECTOR, RETIREMENT SYSTEMS DIVISION (IN OFFICIAL CAPACITY ONLY)	)	

No. 375P18

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for discretionary review for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decisions in Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer, No. 369PA18 (N.C. Apr. 3, 2020), and Cabarrus Cty. Bd. of Educ. v. Bd. of Trs. Teachers' and State Emps.' Ret. Sys., No. 371PA18 (N.C. Apr. 3, 2020).

By Order of the Court in Conference, this 29th day of April 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

UNION COUNTY BOARD OF EDUCATION	)	
v.	)	WAKE COUNTY
DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; DALE R. FOLWELL, STATE TREASURER (IN OFFICIAL CAPACITY ONLY); STEVEN C. TOOLE, DIRECTOR, RETIREMENT SYSTEMS DIVISION (IN OFFICIAL CAPACITY ONLY)	)	

No. 374P18

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for discretionary review for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decisions in Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer, No. 369PA18 (N.C. Apr. 3, 2020), and Cabarrus Cty. Bd. of Educ. v. Bd. of Trs. Teachers' and State Emps.' Ret. Sys., No. 371PA18 (N.C. Apr. 3, 2020).

By Order of the Court in Conference, this 29th day of April 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

WILKES COUNTY BOARD OF EDUCATION	)	
v.	)	WAKE COUNTY
BOARD OF TRUSTEES, TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM; DALE R. FOLWELL, STATE TREASURER (IN OFFICIAL CAPACITY ONLY); STEVEN C. TOOLE, DIRECTOR, RETIREMENT SYSTEMS DIVISION (IN OFFICIAL CAPACITY ONLY)	)	

No. 370P18

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for discretionary review for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decisions in Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer, No. 369PA18 (N.C. Apr. 3, 2020), and Cabarrus Cty. Bd. of Educ. v. Bd. of Trs. Teachers' and State Emps.' Ret. Sys., No. 371PA18 (N.C. Apr. 3, 2020).

By Order of the Court in Conference, this 29th day of April 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

WILKES COUNTY BOARD OF EDUCATION	)	
v.	)	WAKE COUNTY
DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; DALE R. FOLWELL, STATE TREASURER (IN OFFICIAL CAPACITY ONLY); STEVEN C. TOOLE, DIRECTOR, RETIREMENT SYSTEMS DIVISION (IN OFFICIAL CAPACITY ONLY)	)	

No. 372P18

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for discretionary review for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decisions in Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer, No. 369PA18 (N.C. Apr. 3, 2020), and Cabarrus Cty. Bd. of Educ. v. Bd. of Trs. Teachers' and State Emps.' Ret. Sys., No. 371PA18 (N.C. Apr. 3, 2020).

By Order of the Court in Conference, this 29th day of April 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

29 APRIL 2020

5P20	State v. Rocky Dustin Nance	Def's PDR Under N.C.G.S. § 7A-31	Denied
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 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. Allowed 3. Allowed
36P20	State v. Bartholomew R. Scott	1. Def's Notice of Appeal Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
47P20	State v. Anthony Dewan Moore	Def's PDR Under N.C.G.S. § 7A-31	Denied
48P20	State v. Lyneil Antonio Washington, Jr.	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/06/2020** Dissolved **04/29/2020** 2. Denied 3. Denied
51P20	Sarah E. Riopelle (Cooper), Plaintiff v. Jason B. Riopelle, Defendant v. Lindsey and Avery Fuller, Intervenors	1. Def's Pro Se Motion for Temporary Stay 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA	1. Denied **02/10/2020** 2. Denied 3. Denied
54A19-3	State v. Rogelio Albino Diaz-Tomas	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas	1. Allowed **04/21/2020** 2.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

29 APRIL 2020

61P20	Crop Production Services, Inc., Plaintiff v. Matthew C. Pearson and Helen F. Pearson, Defendants and Third-Party Plaintiffs v. Perdue Agribusiness LLC, d/b/a Perdue-Agrirecycle, and Perdue-Agrirecycle, LLC, Third-Party Defendants	1. Defs' Notice of Appeal Based Upon a Constitutional Question 2. Defs' PDR Under N.C.G.S. § 7A-31 3. Third Party Def's (Perdue) Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
69P18-3	State v. Nell Monette Baldwin	1. Def's Pro Se Motion to Proceed Without Prepaying Costs 2. Def's Pro Se Motion to Consolidate the Civil Case and Criminal Case 3. Def's Pro Se Motion for an Order of Judicial Notice 4. Def's Pro Se Motion to Disqualify Opposing Counsel 5. Def's Pro Se Motion for Judicial Disciplinary Action 6. Def's Pro Se Motion for Discretionary Review 7. Def's Pro Se Motion in the Alternative for Petition for Writ of Certiorari (Civil and Criminal) 8. Def's Pro Se Motion for Appropriate Relief	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed 8. Dismissed **Beasley, C.J., recused** **Morgan, J., recused**
72P20	Cynthia Clark, Employee v. US Airways, Inc., Employer, American Insurance Group Plan, Carrier (Sedgwick CMS, Third-Party Administrator)	Plt's PDR Under N.C.G.S. § 7A-31	Denied
81P20	State v. Tamika Latonya Horne	Def's PDR Under N.C.G.S. § 7A-31	Denied

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82P20	Debbie Thompson Hampton; as Executrix of the Estate of Delacy Beatrice Thompson Miles, Deceased v. Andrew Taylor Hearn, M.D.	Plt's PDR Under N.C.G.S. § 7A-31	Denied
83P20	State v. Jerry Leon Phifer	Def's PDR Under N.C.G.S. § 7A-31	Denied
86A02-2	State v. Bryan Christopher Bell	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Onslow County 2. State's Motion to Hold Defendant's Petition for Writ of Certiorari Prematurely Filed in Violation of this Court's Order Dated 25 January 2013	1. 2. Special Order
90P20	Kristen Martin v. Hillary Irwin and Erinviene Holdings, LLC	Plt's PDR Under N.C.G.S. § 7A-31	Denied
101P20	Necus A. Jackson, Employee v. General Electric Company, Employer and Electric Insurance Company, Carrier	1. Plt's Pro Se Motion for Notice of Appeal 2. Plt's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Motion to Dismiss Appeal	1. --- 2. Allowed 3. Allowed
102P20	Chester Taylor, III, Ronda and Brian Warlick, Lori Mendez, Lori Martinez, Crystal Price, Jeanette and Andrew Aleshire, Marquita Perry, Whitney Whiteside, Kimberly Stephan, Keith Peacock, Zelmon McBride v. Bank of America, N.A.	Plts' PDR Prior to a Determination by the COA	Denied
104P20	State v. Reggie Joe Beal	Def's Petition for Writ of Certiorari to Review Order of the COA	Special Order **Ervin, J., recused**

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107P20	Lennar Carolinas, LLC v. County of Union	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Union County	1. Denied 2. Denied
108P20	True Homes, LLC v. County of Union	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Union County	1. Denied 2. Denied
109P20	Shea Homes, LLC, et al. v. County of Union	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Union County	1. Denied 2. Denied
110P20	Shops at Chestnut, LLC v. County of Union	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Union County	1. Denied 2. Denied
111P20	M/I Homes of Charlotte, LLC v. County of Union	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Union County	1. Denied 2. Denied
112P20	Calatlantic Group, Inc., et al. v. County of Union	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Union County	1. Denied 2. Denied
113P20	McInnis Construction Co., et al. v. County of Union	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Union County	1. Denied 2. Denied
114P20	Eastwood Construction Co., Inc., et al. v. County of Union	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Union County	1. Denied 2. Denied
115P20	Pace/Dowd Properties LTD., et al. v. County of Union	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Union County	1. Denied 2. Denied
118P20	Joseph L. Carrington, Jr. v. Carolina Day School, Inc.	Plt's PDR Under N.C.G.S. § 7A-31	Denied

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124P20	State v. Donovan Burney	Def's Pro Se Motion to Appoint Counsel	Dismissed **04/06/2020**
125P20	State v. Alexander Asanov	1. Def's Petition for Writ of Certiorari to Review Order of the COA 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Wake County 3. Def's Petition for Writ of Certiorari to Review Decision of District Court, Wake County	1. Dismissed 2. Dismissed 3. Dismissed
126P19	State v. Gregory Jerome Wynn, Jr.	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Motion to Amend PDR Under N.C.G.S. § 7A-31 3. Def's Motion in the Alternative to Remand	1. Special Order 2. Special Order 3. Special Order
128A20	James Rickenbaugh and Mary Rickenbaugh, Husband and Wife, Individually and on Behalf of All Others Similarly Situated v. Power Home Solar, LLC, a Delaware Limited Liability Company	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas	1. Allowed **03/20/2020** 2. Allowed **04/03/2020**
131P20	State v. Kevin Lamonte White	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied
143P20-2	Henderson v. Vaughn	1. Petitioner's Pro Se Petition for Writ of Habeas Corpus 2. Petitioner's Pro Se Motion for Order to Show Cause and to Prove Personal and Subject Matter Jurisdiction	1. Denied **04/06/2020** 2. Dismissed **04/06/2020** **Ervin, J., recused**
143P20-3	Henderson v. Vaughn	Petitioner's Pro Se Motion for PDR	Denied **04/14/2020** **Ervin, J., recused**
146P20	State v. Charles Edgerton	Def's Pro Se Motion to Appeal	Dismissed *ex mero motu*

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147P20	Nathan Nathaniel v. State of North Carolina, Vance County District Court	Petitioner's Pro Se Petition for Writ of Mandamus	Dismissed
148P20	In re James Wilson	Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA	Denied
155P20	State v. John D. Graham	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas	1. Allowed **04/03/2020** 2.
156P20	State v. David Warren Taylor	1. State's Motion for a Temporary Stay 2. State's Petition for a Writ of Supersedeas	1. Allowed **04/07/2020** 2.
160P20	North Carolina State Conference of the NAACP, Disability Rights North Carolina, American Civil Liberties Union of North Carolina Legal Foundation, Alberta Elaine White, Kim T. Caldwell, John E. Sturdivant, Sandara Kay Dowell, and Christina Rhodes v. Roy Cooper, in his official capacity as Governor of North Carolina; and Erik A. Hooks, in his official capacity as Secretary of the North Carolina Department of Public Safety	1. Petitioners' Emergency Petition for Writ of Mandamus 2. Petitioners' Motion to Expedite Response to Petition for Writ of Mandamus 3. North Carolina Justice Center's Motion for Leave to File Amicus Brief 4. Petitioners' Motion to Substitute Corrected Affidavit	1. Dismissed Without Prejudice **04/17/2020** 2. Special Order **04/09/2020** 3. Allowed **04/15/2020** 4. Allowed **04/17/2020**
163P20	State v. Wilmer de Jesus Cruz	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Petition for Writ of Mandamus 4. Def's Petition for Writ of Certiorari to Review Order of District Court, Lee County	1. Denied **04/15/2020** 2. Denied **04/15/2020** 3. Dismissed **04/15/2020** 4. Dismissed **04/15/2020**

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164P20	State v. Wilmer de Jesus Cruz	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Petition for Writ of Certiorari to Review Order of the COA 4. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Hoke County	1. Denied **04/15/2020** 2. Denied **04/15/2020** 3. Denied **04/15/2020** 4. Denied **04/15/2020**
184A20	State v. Fabiola Rosales Chavez	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas	1. Allowed **04/24/2020** 2.
218P19	Wanda Stathum-Ward v. Wal-Mart Stores, Inc. d/b/a Wal-Mart Supercenter Store #5254; Wal-Mart Real Estate Business Trust; Wal-Mart Stores East, LP; Wal-Mart Stores East, Inc.; Wal-Mart Louisiana, LLC; and Wal-Mart Stores Texas, LLC	Plt's PDR Under N.C.G.S. § 7A-31	Denied
219P17-3	Courtney NC, LLC d/b/a Oakwood Raleigh at Brier Creek v. Monette Baldwin a/k/a Nell Monette Baldwin	1. Def's Pro Se Motion to Proceed Without Prepaying Costs 2. Def's Pro Se Motion to Consolidate the Civil Case and Criminal Case 3. Def's Pro Se Motion for an Order of Judicial Notice 4. Def's Pro Se Motion to Disqualify Opposing Counsel 5. Def's Pro Se Motion for Judicial Disciplinary Action 6. Def's Pro Se Motion for Discretionary Review 7. Def's Pro Se Motion in the Alternative for Petition for Writ of Certiorari (Civil and Criminal) 8. Def's Pro Se Motion for Appropriate Relief	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed 8. Dismissed **Beasley, C.J., recused** **Morgan, J., recused**

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306P18-2	Hunter F. Grodner v. Andrzej Grodner (now Andrew Grodner)	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 2. Def's Pro Se Motion for Temporary Suspension of N.C.R.A.P. Rule 11 Pending Review of Petition for Writ of Certiorari 3. Def's Pro Se Motion of Expedited Review 4. Plt's Motion to Tax Costs and Attorney Fees 5. Def's Pro Se Motion to Disqualify Opposing Counsel	1. Denied 2. Dismissed as moot 3. Dismissed as moot 4. Denied 5. Dismissed as moot
312P18-2	State v. Aaron Lee Gordon	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/02/2020** 2. 3.
321P19	Gary Dellinger, Virginia Dellinger, and Timothy S. Dellinger v. Lincoln County, Lincoln County Board of Commissioners, and Strata Solar, LLC and Mark Morgan, Bridgette Morgan, Timothy Mooney, Nadine Mooney, Andrew Schott, Wendy Schott, Robert Bonner, Michelle Bonner, Jeffrey Deluca, Lisa Deluca, Martha McLean, Charleen Montgomery, Robert Montgomery, David Ward, Intervenors	1. Intervenors' Motion for Temporary Stay 2. Intervenors' Petition for Writ of Supersedeas 3. Intervenors' PDR Under N.C.G.S. § 7A-31	1. Allowed **08/16/2019** 2. Special Order 3. Special Order
339A19	In the Matter of D.M., M.M., D.M.	1. Petitioner and Guardian *ad Litem*'s Motion to Dismiss Appeal 2. Petitioner and GAL's Motion for Guidance Concerning Petition for Writ of Certiorari	1. Dismissed **04/06/2020** 2. Denied **04/06/2020**

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370P18	Wilkes County Board of Education v. Board of Trustees, Teachers' and State Employees' Retirement System; Dale R. Folwell, State Treasurer (in official capacity only); Steven C. Toole, Director, Retirement Systems Division (in official capacity only)	1. Respondents' PDR Under N.C.G.S. § 7A-31 2. Respondent's Motion to Withdraw as Counsel of Record	1. Special Order 2. Allowed **03/30/2020**
372P18	Wilkes County Board of Education v. Department of State Treasurer, Retirement Systems Division; Dale R. Folwell, State Treasurer (in official capacity only); Steven C. Toole, Director, Retirement Systems Division (in official capacity only)	1. Respondents' PDR Under N.C.G.S. § 7A-31 2. Respondent's Motion to Withdraw as Counsel of Record	1. Special Order 2. Allowed **03/30/2020**
373P18	Johnston County Board of Education v. Department of State Treasurer, Retirement Systems Division; Dale R. Folwell, State Treasurer (in official capacity only); Steven C. Toole, Director, Retirement Systems Division (in official capacity only)	1. Respondents' PDR Under N.C.G.S. § 7A-31 2. Respondent's Motion to Withdraw as Counsel of Record	1. Special Order 2. Allowed **03/30/2020**

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374P18	Union County Board of Education v. Department of State Treasurer, Retirement Systems Division; Dale R. Folwell, State Treasurer (in official capacity only); Steven C. Toole, Director, Retirement Systems Division (in official capacity only)	1. Respondents' PDR Under N.C.G.S. § 7A-31 2. Respondent's Motion to Withdraw as Counsel of Record	1. Special Order 2. Allowed **03/30/2020**
375P18	Union County Board of Education v. Board of Trustees, Teachers' and State Employees' Retirement System; Dale R. Folwell, State Treasurer (in official capacity only); Steven C. Toole, Director, Retirement Systems Division (in official capacity only)	1. Respondents' PDR Under N.C.G.S. § 7A-31 2. Respondent's Motion to Withdraw as Counsel of Record	1. Special Order 2. Allowed **03/30/2020**
376P18	Johnston County Board of Education v. Board of Trustees, Teachers' and State Employees' Retirement System; Dale R. Folwell, State Treasurer (in official capacity only); Steven C. Toole, Director, Retirement Systems Division (in official capacity only)	1. Respondents' PDR Under N.C.G.S. § 7A-31 2. Respondent's Motion to Withdraw as Counsel of Record	1. Special Order 2. Allowed **03/30/2020**
378P18-6	State v. Napier Sandford Fuller	Def's Pro Se Motion for Disability Access Policy	Dismissed as moot
384P19	State v. Shenika Chennel Shamberger	Def's PDR Under N.C.G.S. § 7A-31	Denied

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385P19	Raleigh Housing Authority v. Patricia Winston	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/04/2019** 2. Allowed 3. Allowed **Davis, J., recused**
387P19	State v. Larry McCann	Def's PDR Under N.C.G.S. § 7A-31	Denied
399P19	State v. Stevenson Gulberto Trice	Def's PDR Under N.C.G.S. § 7A-31	Denied
410P19	In the Matter of K.J.	Respondent's PDR Under N.C.G.S. § 7A-31	Denied
414A19	Lisa Gurkin, as Executrix for the Estate of Robert Gurkin and the Estate of Robert Gurkin v. Robert Thomas Sofield, Jr.; Equity Investments Associates, LLC; Southeast Property Acquisitions, LLC f/k/a Appalachian Property Holdings, LLC; Carolina Forests, LLC; Appalachian Property Holdings, LLC; Pine Forest Development Company, LLC; SPG Property, LLC; GPS Holdings, LLC; Sofield Holdings Management, Inc.; RTS-DMC 1, LLC; HS Green Family Irrevocable Trust; HS Portante Family Irrevocable Trust; and RT Sofield III Irrevocable Trust	1. Defs' Motion to Dismiss Appeal 2. Plts' Motion for Extension of Time to Respond to Motion to Dismiss Appeal 3. Plts' Motion to Supplement the Record on Appeal 4. Plts' Amended Motion to Supplement the Record	1. Allowed 2. Allowed **02/26/2020** 3. Dismissed as moot 4. Denied
419P19	Lisa A. Garrett, Employee v. The Goodyear Tire & Rubber Co., Employer, Liberty Mutual Insurance Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31	Denied

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423P19	In Re Moorehead I, LLC, Foreclosure of that Deed of Trust Dated March 8, 2007, Recorded in Book 7393 at Page 19, Cabarrus County Registry, Under Foreclosure by H.L. Ruth, III, Substitute Trustee	Intervenors' PDR Under N.C.G.S. § 7A-31	Denied
435P19	State v. Joseph Odell Spencer	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied
444P19	State v. Garry Joseph Gupton	1. Def's PDR Under N.C.G.S. § 7A-31 2. State's Motion to Dismiss Request for Discretionary Review	1. Denied 2. Dismissed as moot
465P19	State v. Christopher Willis Jenkins	Def's PDR Under N.C.G.S. § 7A-31	Denied
466P19	Jorge Macias, Employee v. BSI Associates, Inc. d/b/a Carolina Chimney, Employer, Travelers Insurance Company, Carrier	1. Defs' Motion for Temporary Stay 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **12/10/2019** Dissolved **04/29/2020** 2. Denied 3. Denied **Davis, J., recused**
470A19	U.S. Bank National Association, as Trustee for the Holders of the Sami II Inc., Bear Sterns Arm Trust, Mortgage Pass-Through Certificates, Series 2005-12 v. Estate of John G. Wood, III a/k/a John G. Wood, Jr., Annette F. Wood, Edward W. Wood, and Mary G. Wood	1. Def's (Mary G. Wood) Notice of Appeal Based Upon a Dissent 2. Def's (Mary G. Wood) Motion to Dismiss Appeal	1. --- 2. Allowed **04/20/2020**
481P13-2	State v. Danny Lamont Thomas	Def's PDR Under N.C.G.S. § 7A-31	Denied

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485P19	State v. Cashaun K. Harvin	1. State's Motion for Temporary Stay	1. Allowed **12/20/2019**
		2. State's Petition for Writ of Supersedeas	2. Allowed
		3. Def's Motion to Lift the Stay	3. Denied
		4. State's Motion to Maintain the Stay	4. Allowed
		5. State's Petition for Writ of Certiorari to Review Decision of the COA	5. Allowed
		6. State's Second Petition for Writ of Certiorari to Review Decision of the COA	6. Denied
542P11-3	State v. Jeffrey Harliss Freeman	Def's Pro Se Motion for PDR Under N.C.G.S. § 7A-31	Dismissed **Ervin, J., recused**

CHRISTOPHER CHAMBERS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED
v.
THE MOSES H. CONE MEMORIAL HOSPITAL; THE MOSES H. CONE MEMORIAL HOSPITAL OPERATING CORPORATION D/B/A MOSES CONE HEALTH SYSTEM AND D/B/A CONE HEALTH; AND DOES 1 THROUGH 25, INCLUSIVE

No. 147PA18

Filed 5 June 2020

Class Actions—mootness—relation back rule—named plaintiff's claim moot—before fair opportunity to pursue class certification—no undue delay

Where plaintiff-patient filed a class action alleging that defendant-hospital had overcharged the class members for emergency services, the hospital's subsequent waiver of plaintiff's bill—before discovery or a ruling on plaintiff's motion for class certification—did not render the entire class action moot. The Supreme Court adopted a rule allowing relation back of the claim to the date of the filing of the complaint for mootness purposes, where the named plaintiff's individual claim becomes moot before the plaintiff has had a fair opportunity to pursue class certification and has otherwise acted without undue delay in pursuing class certification. The matter was remanded to the trial court for application of the new legal standard.

Justice NEWBY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 259 N.C. App. 8, 814 S.E.2d 864 (2018), affirming an order entered on 16 March 2017 by Judge James L. Gale, Chief Business Court Judge, in Superior Court, Guilford County. Heard in the Supreme Court on 18 November 2019 in session in the Old Guilford County Courthouse in the City of Greensboro, pursuant to section 18B.8 of Chapter 57 of the 2017 North Carolina Session Laws.

Higgins Benjamin, PLLC, by John F. Bloss, for plaintiff-appellant.

Womble Bond Dickinson, LLP, by Philip J. Mohr and Brent F. Powell, for defendant-appellees The Moses H. Cone Memorial Hospital and The Moses H. Cone Memorial Hospital Operating Corporation.

Patterson Harkavy LLP, by Burton Craige and Narendra K. Ghosh, for North Carolina Advocates for Justice; Carol L. Brooke,

Jack Holtzman, and Clermont F. Ripley for North Carolina Justice Center; and William R. Corbett and Deborah Goldstein for Center for Responsible Lending, amici curiae.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Deputy Solicitor General, Daniel T. Wilkes, Assistant Attorney General, and Matthew C. Burke, Solicitor General Fellow, for the State of North Carolina, amicus curiae.

Linwood Jones for North Carolina Healthcare Association, amicus curiae.

EARLS, Justice.

Christopher Chambers and his wife were sued in May 2012 by The Moses H. Cone Memorial Hospital Operating Corporation seeking collection of $14,358.14 plus interest, allegedly owed for emergency room services. Around the same time, Christopher Chambers filed a class action complaint against The Moses H. Cone Memorial Hospital and The Moses H. Cone Memorial Hospital Operating Corporation (Moses Cone) seeking a declaratory judgment that the contract he signed as an uninsured patient needing emergency medical treatment entitled Moses Cone to recover no more than the reasonable value of the services it provided. We must now decide whether Moses Cone's subsequent, unilateral action dismissing its claims against Chambers and his wife and ceasing all other attempts to collect the debt, prior to certification of the class in Chambers's declaratory judgment action, renders the entire class action moot. Following the logic of the Third Circuit Court of Appeals decision in *Richardson v. Bledsoe*, 829 F.3d 273 (3d Cir. 2016), we hold that the relation back doctrine "may be applied to relate a now-moot individual claim back to the date of the class action complaint" when the event that moots the plaintiff's claim occurs before the plaintiff has had a fair opportunity to seek class certification and provided that the plaintiff has not unduly delayed in litigating the motion for class certification. *Id.* at 285. Therefore, "when 'satisfaction of the plaintiff's individual claim [occurs] before the court can reasonably be expected to rule on the class certification motion,' the plaintiff's stake in the litigation is not extinguished," and the case is not moot. *Id.* (quoting *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1250 (10th Cir. 2011)).

I. Factual Background

On or about 23 August 2011, Chambers was treated at Moses Cone's emergency room where he underwent an emergency appendectomy. He was uninsured at the time. In his complaint, Chambers alleged that the $14,358.14 he was charged by Moses Cone (separate from independent physicians' and other non-hospital charges) was "far more than the payment amount required from the vast majority" of Moses Cone's patients receiving similar services, and he alleged that the bill was grossly excessive, out of proportion to Moses Cone's actual cost, and much greater than the reasonable value of such services.

Chambers sought to bring this action on behalf of a class, defined as follows:

> All individuals (or their guardians or representatives) who within four years of the date of the filing of the Complaint in this action and through the date that the Court certifies the action as a class action (a) received emergency care medical treatment at Moses H. Cone Memorial Hospital or another Cone Health Hospital; (b) whose bills were not paid in whole or part by commercial insurance or a governmental healthcare program; and (c) who were not granted a full discount or waiver under Defendants' charity care policies or otherwise had their bills permanently waived or written off in full by Defendants.

According to Moses Cone's standard contract in force at the time Chambers had his appendectomy, the patient was obligated to pay the Moses Cone's bill "in accordance with the regular rates and terms of Cone Health." Chambers contended he expected to pay the same as other emergency care patients who sign the same contract but that, as an uninsured patient, he was charged 100% of Moses Cone's Chargemaster rates, which he alleges are artificial, grossly inflated rates.

Chambers initially filed suit on 11 May 2012. Moses Cone filed an answer and counterclaim on 3 August 2012 denying all class allegations, asserting seventeen affirmative defenses, bringing counterclaims against Chambers and his wife seeking compensatory damages and attorneys' fees, and asking the trial court to consolidate the action with Moses Cone's original lawsuit seeking payment of the $14,358.14 bill. Shortly after Moses Cone filed its answer and counterclaim, Robin D. Hayes sought to intervene as a plaintiff, individually and as a class representative. More than a year later, on 27 September 2013, the trial court ordered that "further consideration of the [m]otion [to intervene] should

be delayed until after the Court rules on Plaintiff's motion for class certification." On 2 July 2014, the case was assigned to a new judge and thereafter a status conference was held "at which the parties agreed to . . . stay further proceedings in this case until the Court issued an opinion on related matters in *Hefner v. Mission Hosp., Inc.*, No. 12 CVS 3088." The plaintiff's claims in *Hefner* eventually were ruled moot when the defendant hospital in that case "unequivocally bound itself to seek no payment" of its bill from the plaintiff. This case then was reactivated, and Chambers filed an Amended Class Action Complaint. Moses Cone then dismissed its claims for the remainder of its bill and on the following day, filed a motion to dismiss the case. The trial court granted the motion to dismiss on 16 March 2017 and, citing *Hefner*, noted that "[s]imilar to the hospital defendant in *Hefner*, Moses Cone has voluntarily dismissed with prejudice its collection action against Chambers, meaning that Moses Cone has no right to recover any additional payments from Chambers." In addition, the trial court went on to deny Hayes' motion to intervene, leaving no plaintiff to maintain the class action claims.

Chambers filed a notice of appeal, and the Court of Appeals affirmed the trial court's order dismissing the case. *Chambers v. Moses H. Cone Mem'l Hosp.*, 259 N.C. App. 8, 13, 814 S.E.2d 864, 869 (2018). The Court of Appeals concluded that because Chambers' bill was permanently waived, he was no longer a member of the proposed class and, therefore, it was appropriate to apply the general rule that an appeal presenting a question that has become moot will be dismissed. *Id.* at 12, 814 S.E.2d at 868. Because the class had not yet been certified and the sole class representative no longer had "a genuine personal interest in the outcome of the case," the Court of Appeals concluded that it "need not determine if the class action is now moot based on the conduct of Moses Cone or the public interest." *Id.* at 13, 814 S.E.2d at 868. This Court granted discretionary review pursuant to N.C.G.S. § 7A-31 (2019).

Chambers' original class action complaint alleged that uninsured patients receiving emergency medical care at Moses H. Cone Memorial Hospital or another Cone Health hospital who were charged 100% of the hospital's Chargemaster rates numbered "at least hundreds, if not thousands, of persons." Chambers further alleged (1) that there were questions of law and fact common to the class, which predominate over any questions affecting only individual class members; (2) that he will fairly and adequately represent the interests of the class; and (3) that a class action is the superior method for the fair and efficient adjudication of the claims. The complaint asserted the following:

> Most losses are modest in relation to the expense and burden of individual prosecution of the litigation necessitated by the Defendants' wrongful conduct. It would be virtually impossible for the Class members to efficiently redress their wrongs individually. Even if all Class members could afford such individual litigation themselves, the court system would benefit from a class action. Individualized litigation would present the potential for inconsistent or contradictory judgments. Individualized litigation would also magnify the delay and expense to all parties and the court system presented by the issues of the case.

However, before these allegations could be tested at the class certification stage, Moses Cone sought to end the litigation by dismissing its claims against Chambers and suspending its attempts to collect the debt it alleged was owed by Chambers and his wife for the emergency appendectomy.

II. Class Action Context

Class action lawsuits have long been a feature of our justice system. The class action lawsuit originated in the middle ages. *See Shaw v. Toshiba Am. Info. Sys.*, 91 F. Supp. 2d 942, 948 (E.D. Tex. 2000) (tracing the history of class actions). "In order to facilitate the adjudication of disputes involving common questions and multiple parties in a single action, the English Court of Chancery developed the bill of peace." 7A Charles Alan Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure: Civil* § 1751 (3d ed. 1986). The English bill of peace became the basis for class actions in the United States, including North Carolina's early class action decisions in the late 1800's. *See Bronson v. Wilmington N.C. Life Ins. Co.*, 85 N.C. 411, 414 (1881) (describing the class action mechanism as a feature of civil procedure, citing Joseph Story's treatise on English equity jurisprudence).

Thus, it is well-established that class actions can be an efficient and fair way to resolve in one case disputes that may affect a large number of people. *Maffei v. Alert Cable TV of N.C., Inc.*, 316 N.C. 615, 620, 342 S.E.2d 867, 871 (1986); *see also Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 284, 354 S.E.2d 459, 466 (1987) (stating that class actions serve many purposes, including "preventing a multiplicity of suits or inconsistent results"); *Fisher v. Flue-Cured Tobacco Coop. Stabilization Corp.*, 369 N.C. 202, 216, 794 S.E.2d 699, 710 (2016) (same). By consolidating numerous individual claims with common factual and legal issues into a single proceeding, "the class-action device saves the resources of both

the courts and the parties." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982). Moreover, courts have also recognized the deterrent effect of class action lawsuits, which hold defendants accountable for conduct that may be unlawful and widespread but difficult to address when the conduct does not harm any single individual enough to make it economically expedient to bring a lawsuit. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (explaining that the class action mechanism was designed to overcome the problem that small recoveries do not provide incentive for any single individual to bring an action to vindicate his or her rights); James Grimmelmann, *Future Conduct and the Limits of Class-Action Settlements*, 91 N.C. L. Rev. 387, 421–22 (2013) (explaining the deterrent effect of class action lawsuits on other potential defendants in similar situations).

One potential obstacle to the efficient and equitable administration of the class action procedure occurs when defendants settle the claims of individual plaintiffs prior to class certification and contend that therefore the entire case has become moot. The U.S. Supreme Court described the problem as follows:

> Requiring multiple plaintiffs to bring separate actions, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.

Roper, 445 U.S. at 339. Under federal law, where a named plaintiff's individual claim is mooted after the plaintiff-class has already been certified, it does not moot the entire case. *See Sosna v. Iowa*, 419 U.S. 393, 401–02 (1975). Similarly, even where class certification has been denied, a named plaintiff whose individual claim is moot retains the right to appeal the denial of class certification. *See Roper*, 445 U.S. at 339–40; *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980). The question raised in this case is whether the unilateral action by Moses Cone to moot the named plaintiff's individual claim renders the entire case moot when there has been no discovery or ruling on plaintiff's motion for class certification. The U.S. Supreme Court has not directly resolved this question.

In *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), the defendant made an offer of judgment to satisfy the named plaintiff's individual

claim prior to class certification, which was not accepted by the plaintiff, and then the defendant moved to dismiss the case on mootness grounds. The U.S. Supreme Court held that the plaintiff's class action complaint "was not effaced by [the defendant's] unaccepted offer to satisfy his individual claim." *Id.* at 670. Thus, "an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case." *Id.* at 672. However, "[t]he Supreme Court, therefore, did not need to reach the arguably more difficult question: whether a named plaintiff who did in fact lack a personal stake in the outcome of the litigation could continue to seek class certification even though his claim became moot before filing a motion for class certification." *Richardson*, 829 F.3d at 282. Here, we must decide an issue expressly left open in *Campbell-Ewald*. *See Campbell-Ewald Co.*, 136 S. Ct. at 672 ("We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount.").

Ten federal circuit courts of appeals have reached this arguably more difficult question. Eight of those ten circuits have ruled that when a defendant acts to moot the claims of individual named plaintiffs before the court has ruled on a class certification motion, the entire action is not yet moot, and the named plaintiff retains the representative capacity to pursue class certification and a ruling on the merits.[1] This exception

1. The Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh circuits have some form of a pick off exception to mootness in the class action context. *See Unan v. Lyon*, 853 F.3d 279, 285–86 (6th Cir. 2017) (claims were not moot where government was "picking off" named plaintiffs, retroactively determining them to be eligible for comprehensive Medicaid coverage shortly after lawsuit was filed); *Richardson v. Bledsoe*, 829 F.3d at 284–86 (reviewing federal circuit court precedent and based in part "upon consideration of the well-reasoned approaches of our sister circuits, [ ] reaffirm[ing] the validity of the picking off exception"); *Wilson v. Gordon*, 822 F.3d 934, 947–51 (6th Cir. 2016), *reh'g en banc denied Wilson v. Gordon*, No. 14-6191, 2016 U.S. App. LEXIS 15697 (6th Cir. Aug. 1, 2016) (evidence was sufficient for trial court "to conclude that 'picking off' exception applies in this case"); *Chapman v. First Index, Inc.*, 796 F.3d 783, 787 (7th Cir. 2015) (rejecting a claim of mootness because following recent Supreme Court cases, "no one thinks (or should think) that a defendant's offer to have the court enter a consent decree renders the litigation moot and thus prevents the injunction's entry"); *Fontenot v. McCraw*, 777 F.3d 741, 751 (5th Cir. 2015) (pick off exception to mootness applies where class certification motion has been filed even if it has not yet been ruled on); *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 705–07 (11th Cir. 2014) (exception to mootness in class actions applies even where plaintiffs' individual claims become moot before plaintiffs move to certify a class); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011) (even where plaintiff's claim is not inherently transitory, class certification relates back to the date the case was filed, and the case does not become moot because "a claim transitory by its very nature and one transitory by virtue of the defendant's litigation strategy share the reality

to mootness has been adopted by federal courts because "[i]n recent years, this stratagem [of picking off the named plaintiff] has become a popular way to try to thwart class actions." *Bais Yaakov of Spring Valley v. ACT, Inc.*, 798 F.3d 46, 48 (1st Cir. 2015). Even the two circuits that do not explicitly adopt a "pick off" exception to mootness leave open the door to permit a plaintiff whose claims are moot to continue as a class representative under either a "capable of repetition, yet evading review" theory,[2] or when the class certification motion was pending but not ruled on at the time that the plaintiff's claim became moot.[3] The Fourth Circuit Court of Appeals has not yet addressed this issue, but several federal district courts have applied precedent from other circuits to find a "pick off" exception to mootness in putative class action cases. *See, e.g.*, *Reyna v. Fiott*, No. 1:17-cv-01192, 2018 U.S. Dist. LEXIS 123949, at *8 (E.D. Va. Mar. 20, 2018) (holding case not moot, applying relation back doctrine to pick off exception in immigrant detention case following *Richardson*), *aff'd*, *Reyna v. Hott*, 921 F.3d 204 (4th Cir. 2019); *In re Monitronics Int'l, Inc., Tel. Consumer Prot. Act. Litig.*, No. 1:13-MD-2493-JPB-MJA, 2016 U.S. Dist. LEXIS 191414, at *13 (N.D. W. Va. June 27, 2016) ("[A] complete settlement offer made before the plaintiff files a motion for class certification does not moot the putative class action provided that the plaintiff move for class certification within

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that both claims would evade review"); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1249–50 (10th Cir. 2011) (exception to mootness applies where defendant seeks to moot individual claim prior to ruling on class certification); *Comer v. Cisneros*, 37 F.3d 775, 799 (2d Cir. 1994) (when claims of the named plaintiffs become moot prior to class certification, the case is not moot if circumstances suggest class certification may relate back to filing of the complaint).

2. The Eighth Circuit has held that where the defendant acts to moot a named plaintiff's claim in a putative class action, the claim is capable of repetition, yet evading review. *See, e.g.*, *Inmates of Lincoln Intake & Det. Facility by Windes v. Boosalis*, 705 F.2d 1021, 1023 (8th Cir. 1983) ("[A] court may address on appeal the issue of whether the district court ruled properly on the class certification issue, even though the named plaintiff's claim became moot prior to the district court's consideration of the issue."); *Owens v. Heckler*, 753 F.2d 675, 677 (8th Cir. 1985) (holding that the class action could proceed even though the plaintiff's individual claim had become moot).

3. In *Cruz v. Farquharson*, 252 F.3d 530 (1st Cir. 2001), the court held that "[d]espite the fact that a case is brought as a putative class action, it ordinarily must be dismissed as moot if no decision on class certification has occurred by the time that the individual claims of all named plaintiffs have been fully resolved." *Id.* at 533. However, *Cruz* left open the question of whether mooting the named plaintiff's claim also moots the entire action if the class certification motion has been filed but not yet ruled on. *Id.* at 534 n.3; *see also Bais Yaakov of Spring Valley v. ACT, Inc.*, 798 F.3d 46, 51 (1st Cir. 2015) ("*Cruz* also left open the possibility that a putative class action may not be moot if a motion for certification was pending when the plaintiff's individual claims became moot . . . .").

a reasonable time after discovery."); *Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, LLC*, 974 F. Supp. 2d 856, 864 (D. Md. 2013) ("[A] complete settlement offer made before class certification does not moot the putative class claims."); *Shifflett v. Kozlowski*, No. 92-0072-H, 1993 U.S. Dist. LEXIS 997, at *10 (W.D. Va. Jan. 25, 1993) ("[E]ven if the named plaintiffs' claims become moot before a class has been certified, the district court may nonetheless certify a class and the action may be maintained as a class action."). While this federal case law is not binding precedent for this Court, it is instructive to observe the weight of precedent in the federal class action context.

Similarly, numerous state courts have also found an exception to mootness where a defendant acts to moot the claim of the named plaintiff prior to class certification. *See, e.g.*, *Growden v. Good Shepherd Health Sys.*, 550 S.W.3d 716, 727 (Tex. App. 2018) (applying an exception to mootness where defendant waived plaintiff's medical bill prior to the court considering class certification); *Frazier v. Castle Ford, Ltd.*, 59 A.3d 1016, 1024 (Md. 2013) (holding that providing individual relief to the putative class representative does not moot a class action if the individual plaintiff has not had the opportunity for reasonable discovery and to seek class certification); *Jones v. S. United Life Ins. Co.*, 392 So. 2d 822, 823 (Ala. 1981) (holding that when plaintiff's individual case was mooted by defendant paying her claim prior to class certification, plaintiff was not thereby ousted as a proper class representative).

Several cases from other state courts arise in factually similar circumstances. For example, in *Growden*, the plaintiff was charged hospital fees of $25,308.92 for a brief emergency room visit to treat her daughter, who was uninsured. *Growden*, 550 S.W.3d at 720. The plaintiff's complaint sought only declaratory relief on behalf of herself and others similarly situated. *Id.* at 720–21. After the lawsuit was filed, but before a ruling on class certification, the defendant hospital executed an affidavit stating that it waived and had written off the charges, and that it would make no further attempt to collect the plaintiff's bills. At the same time, the defendant sought dismissal of the lawsuit, which was granted by the trial court. *Id.* On appeal, the Court of Appeals of Texas held that while the plaintiff's individual claim became moot when the hospital waived her bill, her class action claims were not mooted, applying a pick off exception to mootness. *Id.* at 727.

Another similar case involved a bank's attempt to enforce a "due-on-encumbrance" acceleration clause in a mortgage contract when the plaintiff-homeowner took out a second lien on the home. *See La Sala v. Am. Sav. & Loan Ass'n*, 5 Cal. 3d 864 (1971). Upon receiving notice

of the bank's intent to accelerate the mortgage unless the homeowner agreed to a waiver fee and an increase in the loan's interest rate, the homeowner filed a class action complaint for declaratory relief. *Id.* at 869–70. Before any class was certified, the bank voluntarily waived its right to accelerate against the named plaintiffs and sought dismissal of the action for lack of a representative plaintiff. *Id.* at 870. While not explicitly calling this a pick off exception to mootness, the Supreme Court of California ruled that the plaintiffs could continue to pursue class action certification even though their individual claims had been resolved by the bank's actions. *Id.* at 871 ("Even if the named plaintiff receives all the benefits that he seeks in the complaint, such success does not divest him of the duty to continue the action for the benefit of others similarly situated.").

III. *Richardson* and the Relation Back Doctrine

In *Richardson*, the Court recognized that Article III mootness doctrine in class action cases is more "flexible" than other federal justiciability requirements and that " '[i]n the class action context, special mootness rules apply' for determining at what point in time a named plaintiff must still have a personal stake in the litigation to continue seeking to represent a putative class action." *Richardson*, 829 F.3d at 278–79 (quoting *Brown v. Phila. Hous. Auth.*, 350 F.3d 338, 343 (3d Cir. 2003)). Thus, class certification may, in certain circumstances, relate back to the filing of the complaint, permitting a named plaintiff to serve as a putative class representative, even though his individual claims are no longer justiciable. Most commonly, this applies to claims that are "inherently transitory" or "capable of repetition, yet evading review." *See Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991); *Geraghty*, 445 U.S. at 398–99. The facts in *Richardson* presented a different application of the relation back doctrine, which that court called "the picking off exception to mootness." *Richardson*, 829 F.3d at 279.

The plaintiff in *Richardson* was a former inmate at a federal penitentiary, USP Lewisburg, who sought relief for violations of his Fifth and Eighth Amendment rights and on behalf of dozens of other inmates who he alleged suffered similar unconstitutional treatment. Richardson was transferred to another federal facility after his complaint was filed but before he moved for class certification. "Richardson *had* standing to seek injunctive relief when he filed his amended complaint (as he was still housed . . . at USP Lewisburg), [so the court] must ask whether his claims for injunctive relief are now moot because he is no longer housed there." *Id.* at 278. Neither Richardson's nor Chamber's individual claims

were inherently transitory. However, their individual claims became moot as a result of actions over which they had no control.

Applying its own precedent in *Weiss v. Regal Collections*, 385 F.3d 337, 347–48 (3d Cir. 2004) (applying relation back doctrine to produce "picking off" exception in debt collection context where the defendant made Rule 68 offer for full amount of potential recovery before the plaintiff moved for class certification), *abrogated on other grounds by Campbell-Ewald Co.*, 136 S. Ct. 663, and after a careful review of similar cases across the country, the *Richardson* court held that the relation back doctrine can be applied to relate a now-moot individual claim back to the date of the class action complaint where a would-be class representative is not given a fair opportunity to show that class certification is warranted and provided that the plaintiff has not unduly delayed seeking class certification. *Richardson*, 829 F.3d at 286.

Thus, in applying this standard, a trial court must look to "two separate but related considerations." *Id.* First, it is necessary to examine whether the plaintiff was given a "fair opportunity" to show that class certification is appropriate. *Id.* at 283 (citing *Campbell-Ewald Co.*, 136 S. Ct. at 672 ("[A] would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted.")). Second, a trial court must next consider whether the plaintiff submitted the issue of class certification to the trial court without "undue delay." *Id.* at 287 (citing *Weiss*, 385 F.3d at 348).

In *Richardson*, there was no showing of any purpose or design on the part of the defendant to intentionally relocate the plaintiff to another facility in order to moot the putative class action case. Also, it was irrelevant to the analysis that the plaintiff there, as with Chambers here, had not actually filed a class certification motion prior to the event that mooted the plaintiff's individual claim. Applying the pick off exception, the court concluded that the case was not moot because only six weeks had passed between the filing of the amended class action complaint and Richardson's transfer to another facility, the event that allegedly mooted his individual claim, and because Richardson "could not be expected to have presented the class certification issue to the District Court within that amount of time." *Richardson*, 829 F.3d at 289. The *Richardson* court also noted that, in fairness, either party may raise the issue of class certification, concluding that "[n]othing in the plain language of Rule 23(c)(1)(A) [of the Federal Rules of Civil Procedure] either vests plaintiffs with the exclusive right to put the class certification issue before the district court or prohibits a defendant from seeking early resolution of the class

certification question." *Id.* at 288 (quoting *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939–40 (9th Cir. 2009)).

We previously have held that "Rule 23 [of the North Carolina Rules of Civil Procedure] should receive a liberal construction" to ensure that the class action mechanism remains a viable procedure when applicable. *Crow*, 319 N.C. at 280, 354 S.E.2d at 464 (quoting *English v. Holden Beach Realty Corp.*, 41 N.C. App. 1, 9, 254 S.E.2d 223, 230–31, *disc. rev. denied*, 297 N.C. 609, 257 S.E.2d 217 (1979)). In state court, mootness is "a form of judicial restraint," rather than a jurisdictional concern, as it is in federal court. *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978). In the class action context, where absent class members may have unresolved claims, any prudential concerns that may guide the exercise of that constraint are outweighed by the value of serving the multiple purposes of the class action procedure, including " 'the efficient resolution of the claims or liabilities of many individuals in a single action' and 'the elimination of repetitious litigation and possible inconsistent adjudications involving common questions, related events, or requests for similar relief.' " *Crow*, 319 N.C. at 280, 354 S.E.2d at 464. Therefore, it is appropriate to adopt the *Richardson* standard in these circumstances to allow relation back of the plaintiff's claim to the date of the filing of the complaint for purposes of the justiciability analysis in class action cases under Rule 23 of the North Carolina Rules of Civil Procedure.

Further support for this interpretation of North Carolina class action law comes from this Court's prior decision in *Reep v. Beck*, 360 N.C. 34, 619 S.E.2d 497 (2005). There, we held that while it is not error as a matter of law to rule on a motion to dismiss prior to ruling on a class certification motion, "[t]his Court is confident that, in determining the sequence in which motions will be considered, North Carolina judges will continue to be mindful of longstanding exceptions to the mootness rule and other factors affecting traditional notions of justice and fair play." Id. at 40, 619 S.E.2d at 501 (citing *Simeon v. Hardin*, 339 N.C. 358, 371, 451 S.E.2d 858, 867 (1994); *Cty. of Riverside*, 500 U.S. at 52; 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.64[1][b] (3d ed. 2005)). It is such a notion of justice and fair play that motivates the Court to adopt the pick off exception and allow the relation back of the plaintiff's claim for justiciability purposes.

Requiring that a named plaintiff have a fair opportunity to present the issue of class certification to the trial court ensures that class representatives will not be picked off at the dawn of the litigation before they have had a chance to engage in appropriate discovery and otherwise

prepare to seek class certification from the trial court. It will prevent both a "race to pay off named plaintiffs" before they can pursue class certification and premature class certification determinations before the development of the factual record necessary for a trial court's rigorous analysis of the issues involved in a class certification motion. *Richardson*, 829 F.3d at 282, 288. The question of what constitutes a fair opportunity in this context naturally will vary from case to case based on considerations such as the complexity of the case, the nature of discovery required to determine class certification, the stage at which the named plaintiff's individual claims become moot, and other relevant factors.

The *Richardson* test also provides fairness to the defendant by incorporating an important corollary to the fair opportunity requirement—that is the notion that the plaintiff must present the issue of class certification to the trial court without "undue delay." *Richardson*, 829 F.3d at 287. In other words, a class representative, while taking advantage of the fair opportunity to seek class certification, cannot be dilatory and instead must "act[ ] diligently to pursue the class claims." *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 707 (11th Cir. 2014). In cases where the trial court finds the named plaintiff was, in fact, dilatory in seeking class certification, the pick off "exception should not apply and 'courts [should] adhere to the general rule that the mooting of [the] named plaintiff's claim prior to class certification moots the entire case.' " *Richardson*, 829 F.3d at 286 (first alteration in original) (quoting *Lucero*, 639 F.3d at 1249); *see Stein*, 772 F.3d at 707 ("A named plaintiff who does not act diligently may not have what it takes to adequately present the issues. But to act diligently, a named plaintiff need not file a class-certification motion with the complaint or prematurely; it is enough that the named plaintiff diligently takes any necessary discovery, complies with any applicable local rules and scheduling orders, and acts without undue delay."). The guiding principle underlying the adoption of a pick off exception is fairness to the putative class members. However, the defendant, too, must be shielded from vexatious or unfair litigation tactics. The *Richardson* test provides the appropriate balance between the interests of the respective parties in this regard.

Moses Cone's argument that the U.S. Supreme Court has rejected any exception to mootness in these circumstances is unavailing for several reasons. First, the case Moses Cone relies on, *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66 (2013), emphasized that the Fair Labor Standards Act proceeding at issue in that case was "fundamentally different" from a Rule 23 class action. 569 U.S. at 74. Unlike class

certification under Rule 23, "conditional certification" under the FLSA "does not produce a class with an independent legal status, or join additional parties to the action." *Id.* at 75. Therefore, conclusions about a plaintiff's claim becoming moot before certification under the FLSA cannot be transplanted to the Rule 23 class action context. *Cf. United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1539 (2018) (stating that cases in the class certification context are inapposite to FLSA actions "because 'Rule 23 actions are fundamentally different from collective actions under the FLSA' " (quoting *Genesis HealthCare*, 569 U.S. at 74)). The outcome in *Genesis Healthcare* turned on the unique implications of conditional certification under the FLSA, and is not controlling here.

Second, the U.S. Supreme Court has noted that the question presented here is unresolved. *See Campbell-Ewald Co.*, 136 S. Ct. at 672 (noting "we . . . do not [ ] now decide" whether actually mooting the plaintiff's claim before class certification would moot the entire case). In *Campbell-Ewald*, the Court left for another day the question of whether unilateral action by the defendant that satisfied the named plaintiff's individual claim before class certification could moot the entire case. *Id.* Thus, the U.S. Supreme Court has not explicitly endorsed or rejected a pick off exception to mootness in class action cases.

Finally, even if federal law were settled in this area, this Court is required to decide how mootness applies under state law to class actions brought under the North Carolina Rules of Civil Procedure. *See, e.g.*, *Scarvey v. First Fed. Sav. and Loan Ass'n of Charlotte*, 146 N.C. App. 33, 41, 552 S.E.2d 655, 660 (2001) (federal class action cases are not binding on the Court of Appeals). Federal precedents are instructive and we are indeed following the Third Circuit's lead in articulating the pick off exception, but ultimately federal precedent is not binding on how this Court should interpret North Carolina class action law.

Moses Cone further contends that the pick off exception to mootness cannot be applied in this case because the trial court specifically found that there was no evidence that Moses Cone wrote off Chambers' debt in order to prevent the trial court from ever reaching the question of whether a class should be certified. Given the standard that we utilize here, defendant's motive is not relevant to the inquiry. The pick off exception to mootness that we have adopted does not rely on any finding of bad faith or improper motive on the part of any party. It is perfectly reasonable that in order to minimize its exposure and limit its liability, a defendant would seek to end a class action lawsuit as quickly as possible before class certification. The pick off exception is not a penalty for bad actions, it is simply necessary to protect the class action

mechanism as a means of promoting judicial economy, fairness, deterrence, and efficiency in the determination of disputed claims, particularly where the amount in controversy in any particular case is small, but the number of potentially impacted plaintiffs is large.

Further, in light of the *Richardson* standard, there is no required showing of a pattern of repeated picking off of numerous individual plaintiffs, time and again, before the pick off exception applies. It was this type of evidence that the trial court held was missing in this case. The trial court reasoned in its legal analysis of defendants' motion to dismiss that

> [p]erhaps if Moses Cone were to continue to dismiss its collection actions against all patients who challenge the validity of the Contract, the Court could consider whether Moses Cone is taking action to evade judicial review of its Contract. But at this time, the action does not fit within the narrow capable-of-repetition exception.

However, where the pick off exception to mootness applies, rather than the capable of repetition, yet evading review exception, the question is whether the plaintiff had a reasonable opportunity to pursue class certification and did so without undue delay. The defendant's actions in other cases is not relevant to that inquiry.

The dissent's proposed solution to the mootness problem, namely that other putative class members can now file their own new lawsuit, ignores the fact that the statute of limitations might continue to run against class members who, while Chambers' claims were pending, would have no need to file separately. Additionally, the dissent takes us to task for improperly legislating, but in fact, mootness is a court-made doctrine and this Court previously has adopted several exceptions to mootness absent any action by the legislature. *See*, *e.g.*, *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (per curiam) (adopting the exception to mootness where a case involves "a question that involves a matter of public interest, is of general importance, and deserves prompt resolution" (citations omitted)); *Simeon*, 339 N.C. at 371, 451 S.E.2d at 867 (adopting an exception to mootness where the "case belongs 'to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class' " and where "[t]he claim . . . is one that is distinctly 'capable of repetition, yet evading review.' " (quoting *Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11 (1974)); *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977) (adopting the exception to mootness where "collateral

legal consequences of an adverse nature can reasonably be expected to result therefrom" (citing *Sibron v. New York*, 392 U.S. 40, 57 (1968)). There still are countless ways that a class action matter may become moot after the original complaint is filed, depending on the nature of the case and the allegations of the complaint. We have determined that the *Richardson* standard for evaluating whether an individual plaintiff's claim should or should not relate back to the date the complaint was filed for the purpose of determining mootness, commonly called a pick off exception, is a fair balance of the rights of all parties.

IV. Conclusion

Accordingly, we conclude that a remand to the trial court to apply the appropriate legal standard is warranted. *See*, *e.g.*, *Worley v. Moore*, 370 N.C. 358, 368, 807 S.E.2d 133, 140–41 (2017) (reversing and remanding for an application of the proper legal standard where the trial court applied an incorrect test). Our holding today recognizes a narrow exception to the doctrine of mootness when a named plaintiff's individual claim becomes moot before the plaintiff has had a fair opportunity to pursue class certification and has otherwise acted without undue delay regarding class certification. In these limited circumstances, the named plaintiff's claim relates back to the filing of the complaint for mootness purposes, and he retains the legal capacity to pursue class certification and class-wide relief, even though his individual claim may have been satisfied.[4] The decision of the Court of Appeals is reversed, and this case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Justice NEWBY dissenting.

The rule of law provides the consistency and predictability citizens need to plan their daily affairs. Under the rule of law, courts generally apply existing precedent and allow the citizens to make significant changes through their elected representatives in the legislature. When a court purports to act under its common-law authority, but in doing so ignores the requirements of a controlling statute, it usurps a role for

4. To be sure, even applying the relation back doctrine, obtaining class certification still requires Chambers to meet the stringent requirements of Rule 23 of the North Carolina Rules of Civil Procedure. *See generally Faulkenbury v. Teachers' & State Emps. Ret. Sys. of N.C.*, 345 N.C. 683, 697, 483 S.E.2d 422, 431 (1997) (describing prerequisites for bringing a class action).

which it was not designed. Historically, this Court has recognized, as a matter of judicial restraint, that mootness renders a case nonjusticiable. And the General Assembly has declared that class representative plaintiffs must adequately represent the interests of the class. Today, the majority leaves behind both of these well-established legal principles. The majority adopts an exception to mootness that is neither supported by this Court's precedent nor justified by the policy considerations the majority attempts to address. It thus gives judicial life support to class action claims led by named plaintiffs who have no personal interest in the case and are in no position to adequately represent the interests of the rest of the class claimants. I respectfully dissent.

Stated objectively, the procedural facts here do not justify the majority's departure from our longstanding precedent. On 23 August 2011, the named plaintiff, Christopher Chambers, came to defendant hospital for emergency treatment. He, like every other patient, was given a form on which he was asked to agree to pay for the hospital's services in full. He was not asked whether he was insured, presumably because federal law restricts a hospital's ability to consider the insurance status of a patient who needs emergency medical care. *See*, *e.g.*, 42 U.S.C. § 1395dd (2011); 42 C.F.R. § 489.24(d)(4). After Chambers left the hospital, the hospital billed him for the services based on the "Chargemaster," a document commonly used by hospitals to standardize rates for various medical services. On 11 May 2012, Chambers filed his original class complaint against the hospital claiming, among other things, breach of contract and breach of the covenant of good faith and fair dealing. The hospital filed a counterclaim against Chambers for payment of its bill.[1] The trial court dismissed some of Chambers's claims, leaving only the contract-related claims intact.

The attorneys representing the plaintiffs here had also filed a similar class action complaint in *Hefner v. Mission Hospital Inc.*, No. 12 CVS 3088, 2015 NCBC LEXIS 115 (N.C. Super. Ct. Dec. 15, 2015). The parties agreed to allow the trial court to address those claims first because they appeared to be virtually identical to the ones filed in this case, and because the plaintiffs' attorneys were the same.[2] In *Hefner*, the trial court denied the plaintiff's class action certification motion because the unique factual issues among the various individual plaintiffs' claims

1. The hospital sought to consolidate into the action against Chambers a separate collection action it had filed against him.

2. Though the class action allegations in *Hefner* and this case present similar issues, the factual bases for the claims in *Hefner* are unrelated to the facts of this case.

made determination of liability on a class-wide basis inappropriate. After denying class certification the trial court dismissed Hefner's individual claim as moot, finding there was no longer an actual controversy between the hospital and him because the hospital dismissed its counterclaim, binding itself not to seek payment from him.

After the denial of class certification and dismissal in *Hefner*, Chambers filed an amended complaint on 1 April 2016, voluntarily dropping his contract-related claims against the hospital and seeking class action declaratory relief under a new theory. The amended complaint explained that Chambers was acting as a representative of all individuals who, within four years of the original complaint's filing, received emergency care at the hospital, the cost of which was not covered by insurance, and who were not granted a discount or waiver by the hospital. The amended complaint asserted that this class of individuals "consists of at least hundreds, if not thousands, of persons." After Chambers's decision not to pursue his individual contract claims, the hospital dismissed with prejudice its counterclaim for payment from Chambers.[3] Accordingly, Chambers was no longer a member of the class he purported to represent; he owed the hospital nothing. The hospital then moved to dismiss the class action for lack of subject matter jurisdiction because of mootness.

The trial court found that Chambers's claim for declaratory relief was moot because he had no individual interest in the action. In considering the then-recognized exceptions to mootness, the trial court found no evidence that the hospital's billing practices were illegal, that any patient would be subject to the same billing terms in the future, or that the hospital would forgive the debt of any other patient in order to avoid judicial review of its billing practices. These facts are uncontested and therefore binding on appeal. The trial court then concluded that no exception to mootness applied. It also determined that because Chambers and the hospital both dismissed their breach of contract claims, "Chambers no longer has a live claim that warrants his representing an ongoing class." The court dismissed his class claim for declaratory relief.

On appeal, a unanimous panel of the Court of Appeals affirmed, applying the language of the class action rule and the longstanding precedent of this Court that parties must have a personal stake in the outcome of a case to adequately represent a class. Chambers successfully petitioned this Court for discretionary review.

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3. According to the hospital, its dismissal of its counterclaim for payment was in response to Chambers's dropping of his individual contract claims.

Rule 23 of the North Carolina Rules of Civil Procedure provides that "[i]f persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, *as will fairly insure the adequate representation of all* may, on behalf of all, sue or be sued." N.C.G.S. § 1A-1, Rule 23(a) (2019) (emphasis added). This Court has therefore held that to bring a class action, a party must show (1) "the existence of a class"; (2) that "the named representatives . . . will fairly and adequately represent the interests of all members of the class"; and (3) "that the class members are so numerous that it is impractical to bring them all before the court." *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 282–83, 354 S.E.2d 459, 465–66 (1987) (citations omitted). To satisfy the second requirement, the named plaintiff or plaintiffs must have a "genuine personal interest, not a mere technical interest, in the outcome of the action." *Id.* at 283, 354 S.E.2d at 465.

Chambers does not have a genuine personal interest in the outcome of this case. Chambers chose to dismiss his contract claims, and the hospital then dismissed with prejudice its counterclaim against him for payment of its bill. Chambers therefore has no personal stake in seeing the hospital's billing practices invalidated. The trial court thus appropriately found that Chambers's claim was moot.

Because there is no dispute that Chambers's claim is moot, the central question in this case is whether any exception to mootness applies to his claim such that the class action can nonetheless proceed with him as the class representative. In other words, the question is whether Chambers will fairly and adequately represent all members of the class. Before today's opinion, traditional exceptions to mootness have included when the defendant voluntarily ceases the challenged practice, *see*, *e.g.*, *City of Mesquite v. Aladdin's Castle*, *Inc.*, 455 U.S. 283, 289, 102 S. Ct. 1070, 1074, 71 L. Ed. 2d 152, 159 (1982); when the issue presented in the case is "capable of repetition, yet evading review," *Simeon v. Hardin*, 339 N.C. 358, 371, 451 S.E.2d 858, 867 (1994); and when the question involved is a matter of public interest, *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977). None of these exceptions apply to this case.[4]

4. First, the hospital has not voluntarily ceased its billing such that no indebted party could challenge the practice. Clearly there are other individuals who are able to challenge the practice, as the amended complaint states that there are "at least hundreds" of class members. Neither does this case present an issue that is capable of repetition, yet evading review. The hospital's billing and collections practices against some of these alleged victims appears to be ongoing. Thus, it seems that numerous other individuals with active claims could represent the class now that Chambers's claim is moot. Finally, this case does not involve a matter of public interest as the courts of this State have understood that exception. In this case, the parties most affected by the hospital's billing practices are only

The express language of Rule 23, and our precedent, requires that a named plaintiff must adequately represent the class. If a named plaintiff's claim is moot, he does not adequately represent a class of individuals with claims that are not moot. Chambers's claim here is moot, and no mootness exception applies. If the majority followed this Court's precedent and adhered to the rationale of class actions, that would be the end of the matter.

The majority, however, crafts a new exception to mootness, a "pick off" exception, and discards the well-established requirement that a named representative of a class must have a genuine personal interest in the outcome of the case.[5] *See Faulkenbury v. Teachers' and State Emps.' Ret. Sys. of N.C.*, 345 N.C. 683, 697, 483 S.E.2d 422, 431 (1997). The majority's broadly applicable exception effectively eliminates mootness in the class action context, but, ironically, the majority characterizes its holding as "narrow." Expanding upon the reasoning of the Third Circuit in *Richardson v. Bledsoe*, 829 F.3d 273 (3d Cir. 2016), the majority holds that a class action is not moot "when the event that moots the [named] plaintiff's claim occurs before the [named] plaintiff has had a fair opportunity to seek class certification and provided that the [named] plaintiff has not unduly delayed in litigating the motion for class certification."

This new rule, transplanted from federal law, is unworkable in this case.[6] Chambers originally filed a class complaint on 11 May 2012. Four years later, on 1 April 2016, after it was clear that his alleged class claim was doomed to fail and was adversely affected by his personal claim, he filed an amended class complaint based on an entirely different legal theory and dropped his personal claim. How is a court to apply the majority's test? In other words, when considering whether Chambers has had a "fair opportunity" to file a class certification motion and whether he has "unduly delayed" in bringing such a motion, is the key point in time when the 2012 complaint was filed, when the 2016 complaint was filed,

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those in the alleged class itself. Moreover, since the facts giving rise to this case occurred, the hospital has changed its billing practices, in accordance with federal law, to no longer reference a standard rate system like the one to which Chambers objects.

5. This Court has the authority to develop the common law. But it does not have the authority to contravene statutory directives. Moreover, when the contemplated change is so drastic as to contravene a long-established and wide-reaching legal doctrine like mootness, this Court should allow the people to decide what sort of change, if any, is necessary and carry out that change through the legislature.

6. In general, given dissimilarities between state and federal civil procedural rules, this Court should hesitate to transplant whole cloth procedural principles from federal law.

or some other time? A court could not determine what sort of delay is "undue" after years of litigation has passed during which Chambers was permitted to completely change his legal theory.

For similar reasons, the new rule is manifestly unfair to defendants. The class Chambers purports to represent includes people who received care at the hospital within four years of the filing of the complaint. The complaint was originally filed on 11 May 2012. Thus, his class action references events that happened as early as 2008. This passage of time raises issues about potential class members who are now immune from collection actions because of statutes of limitations and other considerations. Forcing the hospital to defend itself under such circumstances is unduly burdensome and unfair. The majority's new rule is thus unworkable with such class action complaints that have been amended.

The majority also claims that its new pick-off exception promotes "justice and fair play" to class claimants. It is unclear how that is so. It does not serve the interests of class claimants to allow actions to proceed with named plaintiffs who cannot satisfy the requirements that "the named representatives . . . will fairly and adequately represent the interests of all members of the class; [and] . . . have a genuine personal interest, not a mere technical interest, in the outcome of the case." *Faulkenbury*, 345 N.C. at 697, 483 S.E.2d at 431. Such named plaintiffs likely would not be poised to adequately vindicate the interests of the "at least hundreds, if not thousands," of class members. Therefore, the majority's new rule is unfair not only to defendants, but also to putative class members who need a named plaintiff who will fully vindicate their interests. To put it in terms of the majority's new test, the delay in this case certainly would seem "undue" from the perspective of the members of the purported class whose interests have taken the backseat while Chambers has spent years fighting to be the one who leads the class.

The majority does not even discuss the traditional requirement of class actions that the named plaintiff must adequately represent the interests of class members. It merely makes a passing statement that even under its new rule class actions ultimately must still satisfy the requirements of Rule 23 to obtain certification. The majority thus apparently thinks that all of Rule 23's requirements could be met even if the named plaintiff has no personal stake in the outcome of the case. Perhaps the implication is that when a named plaintiff has shown reasonable diligence to bring a class certification motion, that party has demonstrated some commitment to pursuing the interests of the class claimants as required by Rule 23(a).

If that is the majority's assumption, it is a misguided one. If the named plaintiff no longer has a personal interest in the outcome of the case, that party *cannot* fairly and adequately represent the interests of all class members. The named plaintiff's interest is, to quote *Faulkenbury*, "mere[ly] technical." 345 N.C. at 697, 483 S.E.2d at 431. Particularly in cases like this one, in which hundreds of other parties may more adequately represent the class interests than a party who has no personal stake in the outcome, there is no policy justification for keeping the class action alive with the original named plaintiff as the class representative.

Finally, the majority's apparent concern, that a defendant could inhibit a class claim from ever reaching satisfactory resolution, is unwarranted. The majority claims that its new rule "ensures that class representatives will not be picked off at the dawn of the litigation before they have had a chance to engage in appropriate discovery and otherwise prepare to seek class certification from the trial court." The majority believes its rule "will prevent . . . a 'race to pay off named plaintiffs' before they can pursue class certification . . . ." (Quoting *Richardson*, 829 F.3d at 282).

That concern is unfounded both in this case and as a general matter. In this case, the trial court specifically found there "is no record to support the argument" that the hospital intended to "pick off" Chambers. Indeed, it only dismissed its counterclaim against him after Chambers dismissed his individual contract claims. Thus, even if in theory some sort of "pick-off" exception should be created, the facts of this case do not warrant it here. Pending since 2012, this case does not present a good vehicle for the Court to create a new rule.

In general, repeated "picking off" of named plaintiffs is not a strategy that defendants are likely to vigorously pursue. When a named plaintiff's claim is mooted and the class action is therefore dismissed, the class action can be refiled with a new named plaintiff.[7] For a defendant to fully resolve all claims against it, it either must settle the claims of a sufficient number of class members individually until no "class" remains, or it must eventually deal with the class as a whole. Thus, a defendant would likely have to settle many individual claims to make the issues raised by class action finally disappear. This strategy often

7. Again, that observation holds true in this case, in which Chambers has alleged that there are "at least hundreds, if not thousands," of class members. Many of them may be available to pursue this case as a named representative.

will be cost-prohibitive, and, even if a defendant can afford it, it will lead to most class members receiving a satisfactory resolution of their claims.

Chambers independently dismissed his contract claims against the hospital. Only after that did the hospital dismiss its counterclaim against Chambers, rendering his claim moot and removing his personal stake in the case. Rather than resuscitating old class actions with inadequate representation, the best course is our historic one, which allows parties to find mutually beneficial paths forward, accepts any consequences to justiciability, and allows classes to regroup and return with proper representation. Not only could this encourage settlements that give relief to individual claimants, but it would also help ensure that the interests of those still in the class are vindicated by the attorneys dealing primarily with the named plaintiffs, who must have an active interest in the case. The majority's expansive new path is both unnecessary and contrary to North Carolina law. I respectfully dissent.

CARLOS CHAVEZ AND LUIS LOPEZ, PETITIONERS
v.
GARY McFADDEN, SHERIFF, MECKLENBURG COUNTY, RESPONDENT

No. 437PA18

Filed 5 June 2020

1. Appeal and Error—mootness—public interest exception—immigration-related arrest or detainment—habeas corpus petitions

The public interest exception to the mootness doctrine applied to an otherwise moot appeal, where the issue was whether state courts—specifically, those sitting in counties where the sheriff had entered into a 287(g) agreement with the federal government—lack authority to grant habeas corpus petitions for and order the release of aliens held pursuant to immigration-related arrest warrants and detainers.

2. Habeas Corpus—immigration-related arrest or detainment—pursuant to 287(g) agreement—habeas corpus petitions in state court—federal preemption

The trial court erred by failing to summarily deny petitioners' applications seeking a writ of habeas corpus, where the sheriff who

detained petitioners was a party to a 287(g) agreement with the federal government and was holding petitioners pursuant to immigration-related arrest warrants and detainers. Local sheriffs acting under 287(g) agreements operate as de facto federal immigration officers; therefore, state court judges cannot interfere with detentions made pursuant to those agreements given the preemptive effect of federal immigration laws.

3. Habeas Corpus—immigration-related arrest or detainment—authority to detain absent a 287(g) agreement—analysis unnecessary

The portion of the Court of Appeals opinion addressing whether state sheriffs who had not entered into 287(g) agreements with the federal government lacked authority to detain individuals pursuant to immigration-related arrest warrants and detainers—or whether those detained individuals would be entitled to release in a habeas corpus proceeding—was vacated where the local sheriff who detained petitioners in this case had entered into a 287(g) agreement.

4. Courts—writ of prohibition issued—delivery of opinion to Judicial Standards Commission and Disciplinary Hearing Commission—unnecessary

In a habeas case involving undocumented immigrants where the Court of Appeals issued a writ of prohibition, which precluded the trial court from ruling on habeas corpus petitions of individuals held under immigration-related detainers or arrest warrants, the Court of Appeals erred by ordering that a certified copy of its opinion in the case be delivered to the Judicial Standards Commission and to the Disciplinary Hearing Commission of the North Carolina State Bar. Concern that the trial court may not have followed the writ in similar habeas cases was unwarranted.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 262 N.C. App. 196, 822 S.E.2d 121 (2018), vacating and remanding orders entered on 13 October 2017 by Judge Yvonne Mims Evans in Superior Court, Mecklenburg County. Heard in the Supreme Court on 4 November 2019.

Goodman Carr, PLLC, by Rob Heroy, and Sejal Zota, for petitioners-appellants.

Womble Bond Dickinson (US) LLP, by Sean F. Perrin, for respondent-appellee.

Deborah M. Weissman, for Law Scholars and National Immigrant Justice Center, amici curiae.

Raul A. Pinto, for North Carolina Justice Center, amicus curiae.

Irena Como, Katrina Braun, Omar Jadwat, Cody Wofsy, Daniel Galindo, and Spencer Amdur, for American Civil Liberties Union Foundation (ACLU) and ACLU of North Carolina, et al., amici curiae.

Joshua S. Press and Gill P. Beck, for United States Department of Justice, amicus curiae.

ERVIN, Justice.

The question before us in this case is whether state judicial officials acting in counties in which the Sheriff has entered into a 287(g) agreement with the federal government have the authority to grant applications for the issuance of writs of habeas corpus for and to order the release of individuals held pursuant to immigration-related arrest warrants and detainers. After a thorough review of the record, briefs, and arguments made by the parties, we conclude that the trial court erred by ordering the release of petitioners Carlos Chavez and Luis Lopez because the record establishes that petitioners were held under a claim of federal authority that the trial court was required to respect. In light of that and other determinations, we modify and affirm the decision of the Court of Appeals, in part; reverse that decision, in part; vacate that decision, in part; and remand this case to the Court of Appeals with instructions that this case be remanded to the Superior Court, Mecklenburg County, with instructions to deny petitioners' requests for the issuance of writs of habeas corpus and to be discharged from custody.

On 28 February 2017, then-Sheriff of Mecklenburg County, Irwin Carmichael, entered into a written agreement with the United States Immigration and Customs Enforcement, an entity housed within the Department of Homeland Security, pursuant to § 287(g) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1357(g) (1996), as amended by the Homeland Security Act of 2002, Public Law 107-296. In accordance with the provisions of this agreement, certified Mecklenburg County deputies, subject to the direction and supervision of the Attorney General of the United States, were authorized to perform specific immigration enforcement functions, including, among others,

the investigation, apprehension, and detention of undocumented aliens "to the extent consistent with State and local law." 8 U.S.C. § 1357(g)(1)–(3), (5) (2018).

On 5 June 2017, petitioner Lopez was being held in pretrial detention in the Mecklenburg County Jail based upon common law robbery, conspiracy, resisting a public officer, and misdemeanor breaking or entering charges. On 5 July 2017, the District Attorney's office voluntarily dismissed the common law robbery, conspiracy, and resisting a public officer charges on the grounds of insufficient evidence. At that point, petitioner Lopez remained subject to a $400.00 secured bond in connection with the misdemeanor breaking or entering charge, which was the only charge that was still pending against him. On 13 August 2017, petitioner Chavez was arrested and placed in pretrial detention in the Mecklenburg County Jail subject to a $100.00 cash bond for driving while impaired, driving without an operator's license, interfering with emergency communications, and assault on a female. At approximately 9:00 a.m. on 13 October 2017, both petitioners became eligible for release when petitioner Lopez's $400.00 bond was modified from a secured to an unsecured bond and someone posted petitioner Chavez's $100.00 bond. Even so, the Sheriff continued to hold both petitioners in the Mecklenburg County Jail pursuant to immigration-related arrest warrants and detainers.[1]

On the morning of 13 October 2017, an investigator employed by the Public Defender's Office sent an e-mail to the Sheriff's General Counsel bearing the subject line "Heads up-Important" for the purpose of informing the General Counsel that emergency writs of habeas corpus relating to petitioners would be submitted later that day. At 9:12 a.m., both petitioners filed petitions seeking the issuance of a writ of habeas corpus based upon assertions that their continued detention in the Mecklenburg County Jail was unlawful because: (1) "the detainer[s] lack[ed] probable cause, [were] not [ ] warrant[s], and ha[d] not been reviewed by a judicial official" in violation of the Fourth Amendment to

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1. A Form I-200, which is entitled "Warrant of Arrest," is an administrative arrest warrant issued against aliens for civil immigration violations by an authorized immigration officer. 8 C.F.R. § 236.1(b)(1) (2019); *see also* 8 U.S.C. § 1226 (2018). A Form I-247A is an "Immigration Detainer-Notice of Action" that "serves to advise another law enforcement agency that [DHS] seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien," and "request[s] that such agency advise [DHS], prior to release of the alien, in order for [DHS] to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible." 8 C.F.R. § 287.7(a) (2019). As a general proposition, the detaining "agency shall maintain custody of the alien for a period not to exceed 48 hours." *Id.* § 287.7(d).

the United States Constitution; (2) the Sheriff "lack[ed] authority under North Carolina General Statutes to continue to detain [p]etitioner[s] after all warrants and sentences ha[d] been served"; and (3) the Sheriff's "honoring of ICE's request[s] for detention violate[d] the anti-commandeering principles of the Tenth Amendment."

At 9:30 a.m., the General Counsel forwarded the investigator's e-mail to Sheriff Carmichael; Sean Perrin, the Sheriff's outside legal counsel; Donald Belk, a captain serving in the Mecklenburg County Jail; and eight other individuals in which the General Counsel stated that "I do not acknowledge receipt of [the investigator's] emails on this topic." At 9:37 a.m., Captain Belk responded to the General Counsel's e-mail by indicating that the office of the Clerk of Superior Court of Mecklenburg County had advised him that the cases "are on in [Courtroom] 5350 this morning," that petitioner Lopez remained in the Sheriff's custody, and that, since petitioner Chavez had already been turned over to ICE, he "should not go to court."

On the same morning, the trial court issued writs of habeas corpus ordering that petitioners be "immediately brought before a judge . . . to determine the legality of [their] confinement" and requiring the Sheriff to "immediately appear and file a return." Following the issuance of the trial court's order, the investigator attempted to serve it at the Sheriff's office. After the front desk employee at the Sheriff's Office refused to accept service, the investigator left the trial court's orders at the front desk. In addition, the investigator served copies of the trial court's orders upon the personnel working at Mecklenburg County jail, the Sheriff's outside legal counsel, the office of ICE's Chief Counsel, and an assistant district attorney.

At 11:57 a.m., a further hearing was held before the trial court at which the Sheriff did not appear, either in person or through counsel. In addition, the Sheriff did not file a return or produce either petitioner before the trial court. At 12:08 p.m., the trial court entered orders finding that both petitioners were being unlawfully detained and ordering that they be discharged from the Sheriff's custody.

At 2:58 p.m., the Sheriff filed written returns relating to both petitioners. The return filed with respect to petitioner Chavez stated that, while he was being held in "exclusive" federal custody, he was physically incarcerated in the Mecklenburg County Jail. The return filed with respect to petitioner Lopez stated that, "[a]t the time of the [p]etitioner's filing," he was being held in state custody and detained in the Mecklenburg County Jail pursuant to a $400.00 secured bond for

misdemeanor breaking or entering and an arrest warrant and detainer that had been issued by DHS. The Sheriff declined to release either petitioner and eventually delivered them to ICE custody.

On 6 November 2017, the Sheriff filed petitions seeking the issuance of writs of certiorari with the Court of Appeals authorizing review of the trial court's orders and the issuance of a writ of prohibition to preclude the trial court from ruling upon any further habeas corpus petitions relating to the lawfulness of the continued detention of persons subject to immigration-related detainers or arrest warrants. On 22 December 2017, the Court of Appeals entered an order allowing the Sheriff's certiorari petitions and prohibiting "the trial court . . . from issuing a writ of habeas corpus ordering the release of a person detained by the Sheriff" pursuant to a 287(g) agreement and "from entering any orders or sanctions limiting the authority of the Sheriff and his officers or agents, or any officer or agent of the United States, from carrying out the acts permitt[ed] by the agreement."

In seeking relief from the trial court's orders before the Court of Appeals, the Sheriff argued that the trial court lacked "jurisdiction to rule on federal immigration matters." In addition, the Sheriff contended that the trial court had erred by ordering that petitioners be released "because [they] were being exclusively detained on United States Department of Homeland Security detainers and administrative warrants." In response, petitioners contended that the Court of Appeals should dismiss the Sheriff's appeal on the grounds that the Sheriff had waived the right to assert the arguments that he was now seeking to make on appeal given that he had failed to raise them before the trial court and, in the alternative, because the case was moot. In attempting to persuade the Court of Appeals to uphold the challenged trial court orders, petitioners argued that the trial court had ample authority to rule upon the merits of their petitions because neither petitioner was being held in federal custody at the time that the relevant orders had been entered. More specifically, petitioners contended that: (1) the 287(g) agreement was not properly before the court; (2) neither federal nor state law authorized the Sheriff to detain petitioners for civil immigration purposes; (3) both petitioners remained in state custody when the trial court authorized their release; and (4) the record evidence failed to demonstrate that either petitioner was being lawfully held in DHS custody. Finally, petitioners argued that the Court of Appeals should dismiss the Sheriff's appeal because his continued detention of petitioners violated their rights under North Carolina law and the state and federal constitutions.

On 6 November 2018, the Court of Appeals filed an opinion vacating the challenged trial court orders on the grounds that the trial court "lacked any legitimate basis and was without jurisdiction to review, consider, or issue writs of *habeas corpus* for alien [p]etitioners not in state custody and held under federal authority, or to issue any orders related thereon to the Sheriff." *Chavez v. Carmichael*, 262 N.C. App. 196, 216, 822 S.E.2d 131, 145 (2018). As an initial matter, the Court of Appeals determined that the Sheriff's appeal was not subject to dismissal for mootness on the grounds that this case was subject to the public interest exception to the mootness doctrine. *Id.* at 203–04, 822 S.E.2d at 137–38 (stating that "[t]he Sheriff's appeal presents significant issues of public interest because it involves the question of whether our state courts possess jurisdiction to review *habeas* petitions of alien detainees ostensibly held under the authority of the federal government"). According to the Court of Appeals, "[p]rompt resolution of this issue [wa]s essential because it is likely other *habeas* petitions will be filed in our state courts, which impacts ICE's ability to enforce federal immigration law." *Id.* at 204, 822 S.E.2d at 138.

The Court of Appeals concluded, in addressing the merits, that the trial court lacked subject matter jurisdiction to issue writs of habeas corpus in instances like this one. *Id.* at 206–09, 822 S.E.2d at 139–41. In reaching this conclusion, the Court of Appeals held that "North Carolina law does not forbid state and local law enforcement officers from performing the functions of federal immigration officers" and that "the policy of North Carolina as enacted by the General Assembly, expressly authorizes sheriffs to enter into 287(g) agreements to permit them to perform such functions." *Id.* at 209, 822 S.E.2d at 140 (citing N.C.G.S. § 128-1.1 (2017)). In addition, the Court of Appeals held that the trial court lacked jurisdiction to issue writs of habeas corpus in these cases because "[a] state court's purported exercise of jurisdiction to review the validity of federal detainer requests and immigration warrants infringes upon the federal government's exclusive federal authority over immigration matters." *Id.* at 211, 822 S.E.2d at 142. The Court of Appeals also held that North Carolina courts lacked the authority to entertain petitions seeking the issuance of writs of habeas corpus applicable to individuals held in federal custody even if the relevant sheriff had not entered into a 287(g) agreement with ICE given that any such review of the lawfulness of immigration-related detentions "constitute[d] prohibited interference with the federal government's supremacy and exclusive control over matters of immigration." *Id.* at 211–12, 822 S.E.2d at 142. Finally, the Court of Appeals held that petitioners had the status of detainees being held in federal custody and that the trial court lacked jurisdiction to

order their release because the Sheriff, in detaining petitioners, was acting under the actual authority of the United States granted to him pursuant to the 287(g) agreement, under color of federal authority arising from the warrants and detainer requests, and as a federal officer for purposes of the 287(g) agreement. *Id.* at 213–16, 822 S.E.2d at 143–45. As a result, the Court of Appeals held that the trial court had been "without jurisdiction, or any other basis, to receive, review, or consider [p]etitioners' *habeas* petitions, other than to dismiss for want of jurisdiction, to hear or issue writs of *habeas corpus*, or intervene or interfere with [p]etitioner[s'] detention in any capacity," and remanded this case with instructions that petitioners' habeas corpus petitions be dismissed. *Id.* at 216–17, 822 S.E.2d at 145. On 27 March 2019, this Court allowed petitioners' petition seeking discretionary review of the Court of Appeals' decision.[2]

In seeking to convince us that the Court of Appeals erred by vacating the challenged trial court orders, petitioners argue that the Court of Appeals effectively "issued an advisory opinion in a moot case." More specifically, petitioners contend that, "[a]fter refusing to respond to the noticed-writ issued by the superior court, and handing [p]etitioners over to ICE custody for deportation in contravention of that court's release order, the sheriff appealed the very release order it had willfully mooted in an attempt to obtain an after-the-fact advisory opinion supporting its conduct." According to petitioners, the Court of Appeals erred by holding that the public interest exception to the mootness doctrine applied in this case, with petitioners expressing the inability to "imagine worse-suited circumstances for application of the discretionary public-interest exception" given that "the public interest exception does not overrule the long-standing rule . . . that our state's appellate courts are not the proper forum for seeking advisory opinions." In addition, petitioners assert that the Court of Appeals erred by reaching the merits of the Sheriff's challenge to the relevant trial court orders on the grounds that "the sheriff did not preserve his arguments" and had "defaulted by willfully failing to appear and to present evidence in the trial court."

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2. On 4 December 2018, Gary McFadden was sworn in as Sheriff of Mecklenburg County and terminated his office's 287(g) agreement with ICE on the following day. *See* Jane Webster, *New sheriff tells ICE he'll end controversial jail immigration program in Mecklenburg*, The Charlotte Observer (Dec. 5, 2018 11:11 AM), https://perma.cc/RY8K-MXUW. Sheriff McFadden is substituted for former Sheriff Carmichael as the named respondent in this case pursuant to N.C.R. App. P. 38(c) (stating that, "[w]hen a person is a party to an appeal in an official or representative capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the person's successor is automatically substituted as a party"). Sheriff McFadden did not oppose the allowance of petitioners' discretionary review petition.

As far as the merits of this case are concerned, petitioners argue that the trial court "retained jurisdiction to determine if [p]etitioners were in lawful state custody, and correctly found no evidence of federal custody." According to petitioners, the trial court had "the jurisdiction to review a habeas petition to determine whether the individual is in lawful state custody," with the trial court having "correctly determined that [petitioners] were not in federal custody because the sheriff brought no evidence to support that claim." Finally, petitioners argue that "the Court of Appeals erred in concluding that the trial court lacked jurisdiction even if the 287(g) agreement was invalid" on the grounds that its decision to this effect "was unnecessary to its conclusions." In support of this assertion, petitioners contend that "the trial court had subject matter jurisdiction to review the habeas petitions under state law" and that it "correctly determined that [p]etitioners were not in lawful state custody because state law does not authorize detainer arrests in the absence of a 287(g) agreement."

In seeking to convince this Court to uphold the Court of Appeals' decision in his favor, the Sheriff argues that the Court of Appeals "correctly addressed the merits of the case" on the grounds that "the public interest exception to mootness applies." In addition, the Sheriff contends that the exception to the mootness doctrine applicable to cases that are "capable of repetition, yet evading review," is applicable to this case as well. Moreover, the Sheriff argues that "the Court of Appeals' holding that a state trial court cannot rule on the legality of a federal immigration arrest warrant and detainer in the absence of a 287(g) agreement was dicta" given that both petitioners were detained pursuant to a 287(g) agreement. The Sheriff denies having waived the right to challenge the lawfulness of the trial court's orders on appeal given that any party can raise the issue of jurisdiction at any time and given that the Court of Appeals allowed the Sheriff's certiorari petitions.

In addressing the merits of petitioners' challenge to the Court of Appeals' decision, the Sheriff argues that "the trial court did not have subject matter jurisdiction to rule on the legality of administrative immigration arrest warrants and detainers." In the Sheriff's view, when local officers act pursuant to a 287(g) agreement, they are functioning "as federal immigration officials," with a state judicial official lacking any authority to "issue writs against federal officials." The Sheriff contends that "the federal government has exclusive jurisdiction over immigration issues in both 287(g) jurisdictions and non 287(g) jurisdictions" and that, since individuals detained pursuant to immigration arrest warrants and detainers are being held in federal custody, "state habeas statutes

cannot be used to undermine the federal government's exclusive jurisdiction over immigration issues."

[1] As a general proposition, North Carolina appellate courts do not decide moot cases. *In re A.K.*, 360 N.C. 449, 452, 628 S.E.2d 753, 755 (2006) (stating that this Court will usually "decide a case only if the controversy which gave rise to the action continues at the time of appeal" (citing *In re Peoples*, 296 N.C. 109, 148, 250 S.E.2d 890, 912 (1978)). "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 398–99, 474 S.E.2d 783, 787 (1996) (quoting *Moot Case*, *Black's Law Dictionary* (6th ed. 1990)); *see also Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307, 132 S. Ct. 2277, 2287, 183 L. Ed. 2d 281, 295 (stating that "[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party" (cleaned up) (quoting *City of Erie v. Pap's A. M.*, 529 U.S. 277, 287, 120 S. Ct. 1382, 1390, 146 L. Ed. 2d 265, 277 (2000))). "In state courts the exclusion of moot questions from determination is not based on a lack of jurisdiction but rather represents a form of judicial restraint." *Cape Fear River Watch v. N.C. Envtl Mgmt. Comm'n*, 368 N.C. 92, 100, 772 S.E.2d 445, 450 (2015) (quoting *Peoples*, 296 N.C. at 147, 250 S.E.2d at 912). Our purpose in exercising such restraint is to ensure that this Court does not "determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions." *Little v. Wachovia Bank & Tr. Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960), *overruled on other grounds by Citizens Nat'l Bank v. Grandfather Home for Children, Inc.*, 280 N.C. 354, 185 S.E.2d 836 (1972). As a general proposition, cases that have become moot should be dismissed. *Benvenue Parent-Teacher Ass'n v. Nash Cty. Bd. of Educ.*, 275 N.C. 675, 679, 170 S.E.2d 473, 476 (1969).

The mootness doctrine is subject to exceptions, including the public interest exception, upon which the Court of Appeals relied, and the "capable of repetition, yet evading review" exception, to which the Sheriff has referred in his brief before this Court. According to the first of these two exceptions, "this court may, if it chooses, consider a question that involves a matter of public interest, is of general importance[,] and deserves prompt resolution." *Cape Fear*, 368 N.C. at 100, 772 S.E.2d at 450 (quoting *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (per curiam)). A case is "capable of repetition, yet

evading review," when the underlying conduct upon which the relevant claim rests is necessarily of such limited duration that the relevant claim cannot be fully litigated prior to its cessation and the same complaining party is likely to be subject to the same allegedly unlawful action in the future. *Cooper v. Berger*, 370 N.C. 392, 421, 809 S.E.2d 98, 116 (2018) (citing *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 286, 292, 517 S.E.2d 401, 405 (1999)).

As all parties have conceded, the fact that both petitioners have already been turned over to federal immigration authorities renders this case moot. However, we agree with the Court of Appeals that this case comes within the scope of the public interest exception to the mootness doctrine. There can be no question but that issues relating to both lawful and unlawful immigration have become the subject of much debate in North Carolina in recent years.[3] In addition, publicly available information provided by ICE indicates that it continues to maintain 287(g) agreements with six North Carolina law enforcement agencies.[4] As a result of the public interest surrounding this issue and the fact that several law enforcement agencies across our State continue to operate pursuant to 287(g) agreements, we believe that the Court should reach the merits of the issues that are before us in this case given the likelihood that issues similar to those that have been debated by the parties to this case will continue to arise in the future. Moreover, while the "capable of repetition, yet evading review" exception to the mootness doctrine is technically not available in this case given the absence of any indication that petitioners are likely to find themselves in the same situation that

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3. The General Assembly has considered legislation addressing the issue of whether North Carolina sheriffs should be required to cooperate with immigration-related arrest warrants and detainers. *See* H.B. 370, An Act to Require Compliance with Immigration Detainers and Administrative Warrants, N.C. Gen. Assemb., 2019 Sess. (N.C. 2019), https://perma.cc/8PR3-SNH7. On 20 August 2019, the General Assembly ratified H.B. 370. *Id.* On the following day, however, Governor Roy Cooper vetoed that piece of legislation. *Governor Cooper Vetoes HB 370*, NC Governor Roy Cooper (Aug. 21, 2019), https://perma.cc/6SR9-H9Q8. In addition, news media reports reflect that a number of candidates for sheriff "in North Carolina's largest counties won election in 2018 after making high-profile promises not to work with federal immigration agents" by ending 287(g) agreements. Will Doran and Virginia Bridges, *Some NC sheriffs won't work with ICE. This GOP-backed bill would force them to*, The News & Observer (March 15, 2019, 5:16 PM), https://perma.cc/C8TB-SVSN.

4. According to the ICE website, "[a]s of May 2020," the agency has 287(g) agreements with eight law enforcement agencies in North Carolina: Alamance County, Cabarrus County, Cleveland County, Gaston County, Henderson County, Nash County, Randolph County, and Rockingham County. *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. Immigration and Customs Enforcement, https://perma.cc/JQC3-SBFC (last updated May 27, 2020).

they confronted in this case in the future, the fact that the same issues could arise in the future in jurisdictions that continue to be parties to 287(g) agreements with ICE provides additional support for our conclusion that the public interest exception to the mootness doctrine exists in this case. As a result, we will now proceed to address the merits of the substantive issues that are before us in this case.

[2] The North Carolina Constitution provides that "[e]very person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the restraint if unlawful, and that remedy shall not be denied or delayed," N.C. Const. art. I, § 21; *see also* N.C.G.S. § 17-1 (2019), with the "privilege of the writ of habeas corpus" not being subject to suspension. N.C. Const. art. I, § 21; *see also* N.C.G.S. § 17-2 (2019). "Every person imprisoned or restrained of his liberty within this State, for any criminal or supposed criminal matter, or on any pretense whatsoever . . . may prosecute a writ of habeas corpus." N.C.G.S. § 17-3 (2019). A petition seeking the issuance of a writ of habeas corpus "is the proper method by which a prisoner may challenge his incarceration as being unlawful." *State v. Parks*, 290 N.C. 748, 751, 228 S.E.2d 248, 250 (1976) (citing *In re Burton*, 257 N.C. 534, 540, 126 S.E.2d 581, 586 (1962)).

An application for the issuance of a writ of habeas corpus, made by a party or any other person on that person's behalf, N.C.G.S. § 17-5 (2019), directed to any superior court or appellate judge in this State, *id.* § 17-6, must allege, among other things, that the party "is imprisoned or restrained of his liberty," the location of the party's imprisonment, the person restraining the imprisoned party, "[t]he cause or pretense of such imprisonment or restraint," and any supporting documents. *Id.* § 17-7(1)–(3). After a party applies for the writ, any judge empowered to do so "shall grant the writ without delay, unless it appear from the application itself or from the documents annexed that the person applying or for whose benefit it is intended is, by this Chapter, prohibited from prosecuting the writ." *Id.* § 17-9. If the judge issues the writ of habeas corpus, "[t]he person or officer on whom the writ is served must make a return thereto in writing," either immediately or within a certain period of time as designated by the judge, *id.* §§ 17-13, -14, stating whether the individual upon whom the writ is served "has or has not the party in his custody or under his power or restraint" and, if so, "the authority and the cause of such imprisonment or restraint" along with any documents supporting the imprisonment or restraint. *Id.* § 17-14(1)–(3). After the return has been made, the judge shall

> examine into the facts contained in such return, and into the cause of the confinement or restraint of such party,

> whether the same has been upon commitment for any criminal or supposed criminal matter or not; and if issue be taken upon the material facts in the return, or other facts are alleged to show that the imprisonment or detention is illegal, or that the party imprisoned is entitled to his discharge, the court or judge shall proceed, in a summary way, to hear the allegations and proofs on both sides, and to do what to justice appertains in delivering, bailing or remanding such party.

Id. § 17-32. A party petitioning for the issuance of a writ of habeas corpus shall be discharged "[i]f no legal cause is shown for such imprisonment or restraint, or for the continuance thereof." *Id.* § 17-33. Although no appeal as of right lies from an order entered in a habeas corpus proceeding, appellate review of such orders is available "by petition for certiorari addressed to the sound discretion of the appropriate appellate court." *State v. Niccum*, 293 N.C. 276, 278, 238 S.E.2d 141, 143 (1977) (citations omitted).

Any examination of the nature and extent of a state court's authority to entertain an application for the issuance of a writ of habeas corpus made by an individual detained by a local law enforcement agency pursuant to immigration-related arrest warrants and detainers necessarily involves recognition of the fact that federal law is entitled to take precedence over state law, particularly in the immigration arena. According to the Supreme Court of the United States, "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens," *Arizona v. United States*, 567 U.S. 387, 394, 132 S. Ct. 2492, 2498, 183 L. Ed. 2d 351, 366 (2012) (citing *Toll v. Moreno*, 458 U.S. 1, 10, 102 S. Ct. 2977, 2982, 73 L. Ed. 2d 563, 571–72 (1982)), with this "broad, undoubted power" having its source in the constitutional provision authorizing Congress "[t]o establish [a] uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. Acting in reliance upon this grant of authority, Congress has enacted "extensive and complex" legislation concerning immigration, *Arizona*, 567 U.S. at 395, 132 S. Ct. at 2499, 183 L. Ed. 2d at 366, with those laws constituting "the supreme Law of the Land," U.S. Const. art. VI, cl. 2, and having the effect of preempting state law. *Arizona*, 567 U.S. at 399, 132 S. Ct. at 2500, 183 L. Ed. 2d at 368 (citations omitted).

Just as a state cannot enact laws that interfere with "the preeminent role of the Federal Government with respect to the regulation of aliens within our borders," *Toll*, 458 U.S. at 10, 102 S. Ct. at 2982, 73 L. Ed. 2d at 571, state court judges cannot interfere with the custody

and detention of individuals held pursuant to federal authority. The Supreme Court of the United States outlined the applicable principles over a century ago. On 10 August 1869, a court commissioner in Dane County, Wisconsin issued a writ of habeas corpus ordering the discharge of Edward Tarble, who was held in the custody of Lieutenant Stone, a recruiting officer for the United States Army, on the grounds that Mr. Tarble had attempted to enlist in the Army while under the age of eighteen and without the consent of his father. *Tarble's Case*, 80 U.S. 397, 397–98, 20 L. Ed. 597, 598 (1872). After ordering Lieutenant Stone to bring Mr. Tarble before him at once and to provide a justification for his detention, *id.* at 398, 20 L. Ed. at 598, the commissioner, following a hearing, "held that the prisoner was illegally imprisoned and detained by Lieutenant Stone, and commanded that officer forthwith to discharge him from custody." *Id.* at 399, 20 L. Ed. at 598. Following a decision of the Wisconsin Supreme Court affirming the commissioner's discharge order, *id.* at 399–400, 20 L. Ed. at 598, the United States sought and obtained review by the Supreme Court, *id.* at 400, 20 L. Ed. at 598, which held that "no State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent government," *id.* at 405, 20 L. Ed. at 600, and that, "although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States." *Id.* at 405–06, 20 L. Ed. at 600. The Supreme Court further noted that, while the federal and state governments exercise their powers "within the same territorial limits," they "are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres." *Id.* at 406, 20 L. Ed. at 600. Although "[n]either government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other," when any conflict arises between the two governments, federal law is "the supreme law of the land." *Id.* In light of these fundamental legal principles, the Supreme Court stated that;

> State judges and State courts, authorized by laws of their States to issue writs of *habeas corpus*, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment,

> and ascertain by what authority the person is held within the limits of the State; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition or oppression on his part. And the process or orders, under which the prisoner is held, should be produced with the return and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer, in good faith, under the authority, or claim and color of the authority, of the United States, and not under the mere preten[s]e of having such authority.
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> . . . But, after the return is made, and the State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus* nor any other process issued under State authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress.
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> . . . [T]he State judge or State court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States; that is, an authority, the validity of which is to be determined by the Constitution and laws of the United States. If a party thus held be illegally imprisoned it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release.

Id. at 409–11, 20 L. Ed. at 601–02 (cleaned up). *See also Ex parte Royall*, 117 U.S. 241, 249, 6 S. Ct. 734, 739, 29 L. Ed. 868, 870–71 (1886) (stating that "the courts and judges of the several States . . . cannot, under any

authority conferred by the States, discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the General Government acting under its laws" (citations omitted)). As a result, the Supreme Court reversed the decision of the Wisconsin Supreme Court on the grounds that "[t]he commissioner was, both by the application for the writ and the return to it, apprised that the prisoner was within the dominion and jurisdiction of another government, and that no writ of *habeas corpus* issued by him could pass over the line which divided the two sovereignties." *Tarble's Case*, 80 U.S. at 412, 20 L. Ed. at 602.

In the exercise of its constitutional power over immigration, Congress enacted the Immigration and Nationality Act. 8 U.S.C. §§ 1101–1537 (2018). According to that congressional enactment, state officers and employees are authorized to perform the functions of a federal immigration officer pursuant to an agreement between the federal government and a state or local law enforcement agency. *Id.* § 1357(g)(1) (stating that "the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law"). Any such agreement shall provide that any local officer acting pursuant to such an agreement "shall have knowledge of, and adhere to, Federal law relating to the function, and shall contain a written certification that the officers or employees performing the function under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws." *Id.* § 1357(g)(2). While acting pursuant to such an agreement, the officer "shall be subject to the direction and supervision of the Attorney General." *Id.* § 1357(g)(3). The General Assembly has, in turn, determined that "any State or local law enforcement agency may authorize its law enforcement officers to also perform the functions of an officer under 8 U.S.C. Section 1357(g) if the agency has a Memorandum of Agreement or Memorandum of Understanding for that purpose with a federal agency," with "[s]tate and local law enforcement officers authorized under this provision [being] authorized to hold any office or position with the applicable federal agency required to perform the described functions." N.C.G.S. § 128-1.1(c1) (2019). As a result, local and state law enforcement officers performing

certain federal immigration functions pursuant to a 287(g) agreement between the federal government and a local law enforcement agency are acting under color of federal authority and, while acting in accordance with such an agreement, should be treated as federal, rather than state, officers. *See United States v. Sosa-Carabantes*, 561 F.3d 256, 257 (4th Cir. 2009) (stating that "[t]he 287(g) Program permits ICE to deputize local law enforcement officers to perform immigration enforcement activities pursuant to a written agreement"); *see also City of El Cenizo v. Texas*, 890 F.3d 164, 180 (5th Cir. 2018) (stating that "[u]nder these [287(g)] agreements, state and local officials become de facto immigration officers, competent to act on their own initiative").[5]

According to well-established North Carolina law, a trial judge to whom an application for the issuance of a writ of habeas corpus has been submitted has jurisdiction to determine whether it has the authority to act. *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964) (stating that "every court necessarily has inherent judicial power to inquire into, hear and determine the questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the question of its jurisdiction"). In determining whether it has the authority to proceed when asked to issue a writ of habeas corpus at the request or on behalf of a person who might conceivably be held on the basis of an immigration-related arrest warrant or detainer, the trial

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5. **[3]** The decision of the Court of Appeals contained a discussion of the extent to which a sheriff who had not entered into a 287(g) agreement with the federal government was entitled to detain individuals pursuant to immigration-related arrest warrants or detainers. However, the question of whether a trial court had the authority to entertain an application for the issuance of a writ of habeas corpus petition seeking the release of an individual held under immigration-related arrest warrants and detainers by sheriffs who were not parties to a 287(g) agreement was not before the Court of Appeals in this case given that former Sheriff Carmichael had entered into a 287(g) agreement and allegedly claimed to have been acting pursuant to that agreement at the time that he detained petitioners. As a result, any portion of the Court of Appeals' opinion that addresses the authority of sheriffs who had not entered into 287(g) agreements with the federal government to act on the basis of immigration-related arrest warrants and detainers constitutes mere dicta that has no binding effect in future cases. *See Hayes v. City of Wilmington*, 243 N.C. 525, 536–37, 91 S.E.2d 673, 682 (1956) (stating that statements in an opinion which are "superfluous and not needed for the full determination of the case" are dicta and "not entitled to be accounted a precedent" (citation omitted)). As a result, in the interest of clarity, we vacate those portions of the Court of Appeals' opinion that address the authority of North Carolina sheriffs who have not entered into a 287(g) agreement with the federal government to detain individuals pursuant to immigration-related arrest warrants and detainers and express no opinion concerning the extent, if any, to which an individual held in the custody of a sheriff who has not entered into a 287(g) agreement with the federal government on the basis of an immigration-related arrest warrant or detainer is entitled to discharge in a habeas corpus proceeding conducted pursuant to North Carolina state law.

judge should proceed in the manner delineated by the Supreme Court in *Tarble's Case*. If, when considering an application for the issuance of a writ of habeas corpus, the trial judge determines that the application alleges that the petitioner is being held on the basis of an immigration-related arrest warrant or detainer by a custodian that is a party to a 287(g) agreement with the federal government, it must summarily deny the application for the issuance of the writ.[6] *See Tarble's Case*, 80 U.S. at 409, 20 L. Ed. at 601 (stating that, in the event that a petition asserts that petitioners were "confined under the authority, or claim and color of the authority, of the United States, by an officer of the government[,] . . . the writ should be refused"). If, on the other hand, the trial judge determines that the application does not allege that the petitioner is being held on the basis of an immigration-related arrest warrant or detainer by a custodian operating pursuant to a 287(g) agreement, or on any other valid grounds, the trial judge has the authority to issue the writ and require the custodian to make a return. *Id.* (stating that, if the application does not disclose that the petitioner is held on the basis of federal authority, the court may "inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the State"). In the event that the custodian makes a return claiming that the petitioner is being held on the basis of an immigration-related arrest warrant or detainer based upon a 287(g) agreement between the custodian and the federal government, the trial judge must deny the petitioner's request for discharge.[7] *Id.* at 410, 20 L. Ed. at 601 (stating that, "after the return is made, and the State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further" and must deny the writ). On the other hand, if the custodian's return shows no valid basis for the petitioner's detention, the trial judge is required to order that the petitioner be discharged. N.C.G.S. § 17-33 (2019).

In their brief before this Court, petitioners argue that the trial court had the ability to "inquire into the legality" of petitioners' detention and

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6. To be absolutely clear, the trial judge should deny, rather than dismiss, the application given that its inability to issue the requested writ stems from the fact that the petitioner is allegedly being held pursuant to an immigration-related arrest warrant or detainer by a sheriff who is a party to a 287(g) agreement with the federal government rather than because the trial judge lacks any authority at all to entertain an application for the issuance of a writ of habeas corpus submitted by that applicant.

7. Again, for the reasons set forth in more detail above, the application for habeas corpus should be denied rather than dismissed, given that the obstacle to discharge is the applicable substantive law rather than the extent of the trial judge's jurisdiction.

"make [a] threshold factual determination" concerning the extent to which they were lawfully detained pursuant to federal authority. As we understand their argument, petitioners appear to be asserting that the trial court had the authority to determine the lawfulness of the alleged immigration-related arrest warrants or detainers upon which the Sheriff purported to be acting and to determine if the sheriff was acting in accordance with any applicable 287(g) agreement. However, *Tarble's Case* makes it clear that a state court simply has no power, in light of the preemptive effect of federal immigration laws, to look behind a sheriff's claim that the petitioner is being held pursuant to a valid immigration-related process, such as an arrest warrant or ICE detainer, by an entity operating under a 287(g) agreement with the federal government given that the Sheriff claims to be operating as a de facto immigration officer in such circumstances. For that reason, a trial judge who has been presented with an application for the issuance of a writ of habeas corpus lacks the authority to make any determination concerning the validity of any immigration-related process upon which a custodian who has entered into a 287(g) agreement with the federal government claims to be holding the petitioner, including whether the petitioner is the person named in the immigration-related process, whether the process is facially valid, whether the personnel employed by the custodian are properly certified, or whether the process has sufficient factual support, since attempting to make such determinations would place the trial judge in the position of making decisions that have been reserved for federal, rather than state, judicial officials and potentially interfering with the manner in which federal immigration laws are administered.[8] *Nyquist v. Mauclet*, 432 U.S. 1, 10, 97 S. Ct. 2120, 2126, 53 L. Ed. 2d 63, 71 (1977) (stating that "[c]ontrol over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere"); *Arizona*, 567 U.S. at 395, 132 S. Ct. at 2498, 183 L. Ed. 2d at 366 (stating that the federal government's "well-settled" power over immigration rests in "one national sovereign, not the 50 separate states"). As a result, in the event that a petitioner contends that he or she is being held unlawfully by a sheriff who is a party to a 287(g) agreement with the federal government on the basis of a defective immigration-related arrest warrant or detainer, his or her exclusive remedy lies with the federal, rather than the state, courts. *Tarble's Case*, 80 U.S. at 410,

8. The trial judge would, of course, have the authority to inquire into the issue of whether the custodian in whose custody the petitioner is being detained has, in fact, entered into a 287(g) agreement with the federal government that is presently in effect, with the actual validity of that agreement or the manner in which it is being implemented being an issue for the federal, rather than the state, courts.

20 L. Ed at 601 (stating that, if a petitioner is "within the dominion and exclusive jurisdiction of the United States. . . . [and] wrongly imprisoned, their judicial tribunals can release him and afford him redress").[9]

In this case, petitioners' applications for the issuance of a writ of habeas corpus clearly reflect that former Sheriff Carmichael, who had entered into a 287(g) agreement with the federal government, claimed to be detaining both petitioners on the basis of an immigration-related arrest warrant or detainer. More specifically, the applications for the issuance of a writ of habeas corpus filed by both petitioners alleged that they were being "held at the Mecklenburg County Jail pursuant to an immigration detainer and I-200 Form" and "a municipal practice of honoring civil immigration detainers" and that the Sheriff "will likely claim that his authority is derived from" a 287(g) agreement.[10] In view of the fact that the applications presented to the trial court in this case alleged that petitioners were being held on the basis of an immigration-related process by a custodian that was a party to a 287(g) agreement with the federal government, the applications, on their face, informed the trial court that its state law authority to inquire into the lawfulness of petitioners' detentions had been superseded by federal law. As a result, although the trial court did have the authority to make an initial determination concerning whether it had the authority to grant petitioners' applications, an examination of the applications themselves should have led the trial court to summarily deny petitioners' habeas corpus petitions.

Thus, for the reasons set forth above, we hold that, while a trial judge presented with an application for the issuance of a writ of habeas corpus has the authority to determine whether it is entitled to act upon any

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9. To repeat what has been said earlier, we reiterate that we are expressing no opinion concerning the extent, if any, to which a state or local law enforcement agency that is not a party to a 287(g) agreement with the federal government is entitled to detain a person on the basis of an immigration-related arrest warrant or detainer.

10. The language in which the petitions are couched makes it clear that both petitioners conceded that the 287(g) agreement to which they alluded did, in fact, exist. Instead of denying that any 287(g) agreement between former Sheriff Carmichael and the federal government existed, petitioners argued that the Sheriff "must show some granting of authority from the state to allow him to enter into such an agreement" and that "[t]o allow [the Sheriff] to contract with a federal agency and expand his authority would violate the dual principles of federalism as specified in the Tenth Amendment of the U.S. Constitution." In other words, rather than denying that the Sheriff had entered into a 287(g) agreement with the federal government, petitioners asserted that the 287(g) agreement was invalid, which is an immigration-related issue that is reserved for decision by the federal, rather than the state, courts, particularly given that former Sheriff Carmichael was clearly entitled pursuant to North Carolina law to enter into the relevant agreement by N.C.G.S. § 128-1.1(c1).

such petition, it should (1) summarily deny an application seeking the issuance of a writ of habeas corpus that alleges that the petitioner is being held pursuant to an immigration-related arrest warrant or detainer by a sheriff who is a party to a 287(g) agreement with the federal government and (2) deny a petitioner's request for discharge in the event that the return filed by a sheriff who has entered into a 287(g) agreement with the federal government claims that the petitioner is being held pursuant to an immigration-related arrest warrant or detainer. For that reason, we further hold that the trial court erred by failing to summarily deny the applications for the issuance of a writ of habeas corpus submitted by petitioners for its consideration in this case.[11] On the other hand, while the Court of Appeals correctly determined that petitioners were not entitled to be discharged from the Sheriff's custody, it erred to the extent that (1) it held that the trial court lacked the jurisdiction to determine whether the Sheriff, who had clearly entered into a 287(g) agreement with the federal government, claimed to be holding petitioners on the basis of an immigration-related arrest warrant or detainer and (2) by addressing the extent to which habeas corpus relief is available to petitioners who are allegedly being held on the basis of immigration-related arrest warrants or detainers by sheriffs who are not parties to 287(g) agreements. As a result, the decision of the Court of Appeals is modified and affirmed, in part; reversed, in part; and vacated, in part, with this case being remanded to the Court of Appeals for further remand to the Superior Court, Mecklenburg County, with instructions to deny petitioners' requests for the issuance of writs of habeas corpus and to be discharged from custody.[12]

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

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11. In view of the fact that petitioners' applications disclosed the existence of the 287(g) agreement, petitioners' argument that the Sheriff waived the right to challenge the trial court's orders is not persuasive.

12. **[4]** At the conclusion of its opinion, the Court of Appeals ordered that "[a] certified copy of this opinion and order shall be delivered to the Judicial Standards Commission and to the Disciplinary Hearing Commission of the North Carolina State Bar." *Chavez*, 262 N.C. App. at 217, 822 S.E.2d at 145. In a concurring opinion, Judge Dietz, who was a member of the Court of Appeals panel that decided this case, stated that the panel was "concerned that our writ of prohibition [preventing the superior court from ruling on habeas petitions] may not have been followed with respect to other undocumented immigrants involved in other habeas cases not before the Court" and that copies of its opinion had been sent to the Judicial Standards Commission and the North Carolina State Bar to make them "aware of it, should there be any allegations that this Court's writ of prohibition was ignored." *Id.* (Dietz, J., concurring). Aside from the fact that we are not inclined to assume that members of the trial bench or bar will knowingly refuse to follow orders of either

DRAUGHON v. EVENING STAR HOLINESS CHURCH OF DUNN

[374 N.C. 479 (2020)]

MILTON DRAUGHON SR., PLAINTIFF
v.
EVENING STAR HOLINESS CHURCH OF DUNN, DEFENDANT/THIRD-PARTY PLAINTIFF, AND DAFFORD FUNERAL HOME, INC., THIRD-PARTY DEFENDANT

No. 216A19

Filed 5 June 2020

Premises Liability—open and obvious condition—contributory negligence—exterior steps—trip and fall—summary judgment

Defendant church had no duty to warn a visitor (plaintiff) about an allegedly dangerous condition on its exterior steps where the condition was open and obvious—the top step of five steps was visibly higher than the other steps and made of noticeably different materials. Further, plaintiff failed to take reasonable care when he ascended the steps, which he had just descended, as he walked sideways carrying a casket and looking at the door rather than the steps. The trial court properly granted summary judgment in favor of defendant.

Justice EARLS dissenting.

Justices HUDSON and MORGAN 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, 828 S.E.2d 176 (N.C. Ct. App. 2019), reversing and remanding a summary judgment order entered on 4 June 2018 by Judge Beecher R. Gray in Superior Court, Harnett County. On 25 September 2019, the Supreme Court allowed defendant's petition for discretionary review as to additional issues. Heard in the Supreme Court on 10 March 2020.

Brent Adams & Associates, by Brenton D. Adams and Mark R. McGrath, for plaintiff-appellee.

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this Court or the Court of Appeals, we have no hesitation in concluding that the issues before the Court of Appeals and this Court in this case were both novel and complex and that trial judges could not be expected to have predicted how either this Court or the Court of Appeals would decide how immigration-related habeas corpus petitions should be handled in advance of our decisions. As a result, we vacate those portions of the Court of Appeals' decision requiring that a copy of its opinion be delivered to the Judicial Standards Commission and the Disciplinary Hearing Commission of the North Carolina State Bar.

Yates McLamb & Weyher, by Sean T. Partrick, for defendant/third-party plaintiff-appellant.

No brief filed by third-party defendant-appellee.

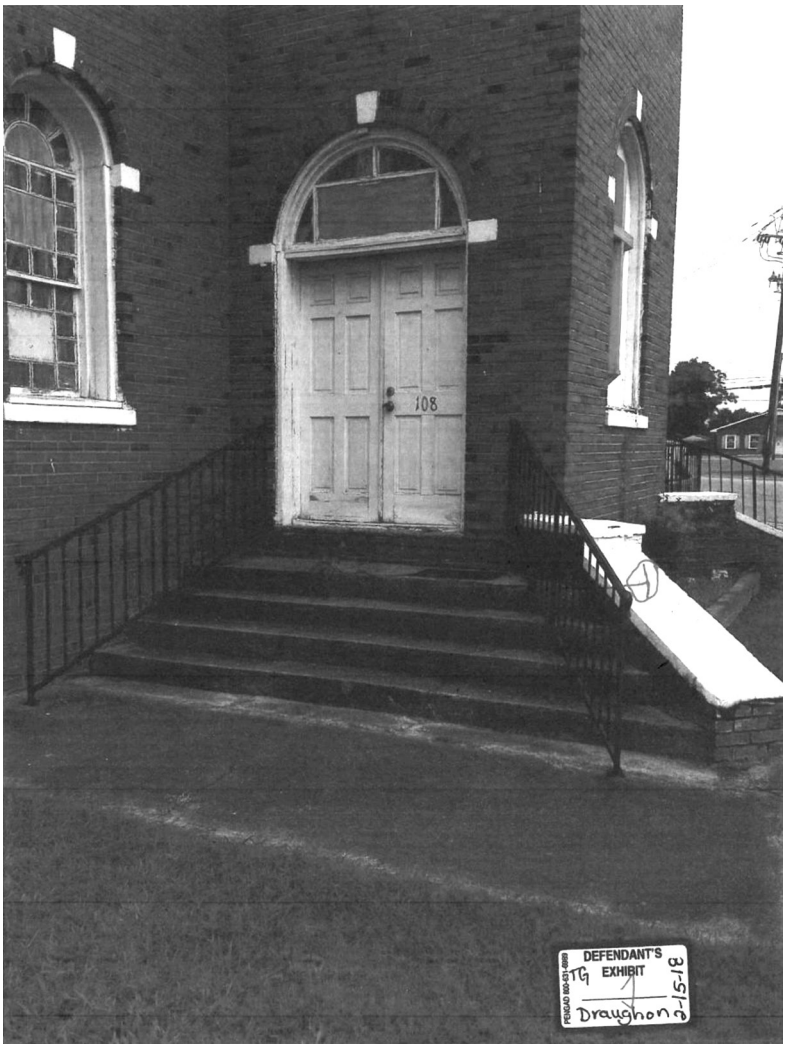
NEWBY, Justice.

North Carolina common law establishes a duty of each person to take reasonable care to not harm others and a corresponding duty of each person to take reasonable care to not harm oneself. Recognizing this reasoned balance, this Court has explained that a landowner does not have a duty to warn a visitor about a condition on the landowner's property that is open and obvious. This Court likewise has emphasized that a defendant is not liable for injuries to a plaintiff when the plaintiff does not take reasonable care to protect himself. Our precedent requires courts to apply an objective reasonable person standard. In this case plaintiff used a set of stairs with a top step that was visibly higher than the other steps and made of noticeably different materials. When plaintiff used the set of stairs a second time, he failed to take the precautions a reasonable person would have taken to avoid tripping on the higher step. Because the alleged defect was open and obvious and thus should have been evident to plaintiff, and because plaintiff did not take reasonable care, the trial court correctly granted summary judgment in favor of defendant. The decision of the Court of Appeals is reversed.

Plaintiff visited defendant's church property for a funeral, and employees of the funeral home asked him to help carry the casket. After plaintiff agreed, he was led through a section of the church building and then outside, down a small set of stairs. He and three others carried the casket from a hearse into the church building, taking the same set of stairs he had just descended. Plaintiff walked sideways as he carried the casket. He watched the doorway instead of where he was stepping. He tripped near the top of the steps, fell into the church building, and was injured.

The set of stairs was fully visible as plaintiff approached it with the casket. It is pictured here:[1]

1. Defendant introduced this picture as an exhibit. It was used in plaintiff's deposition, during which plaintiff indicated that he tripped on the last of the concrete steps of normal height and not on the elevated top step. He marked the picture of the set of stairs accordingly when asked to identify where he began to trip. Yet, addressing that causation issue is unnecessary because the evidence establishes that summary judgment in favor of defendant was appropriate on the issues of no duty (because the alleged defect was open and obvious) and contributory negligence.



The set of stairs includes five steps. Each of the bottom four steps is made of gray concrete and rises about six and one-half inches, or slightly more. The fifth and final step is made of both red brick and gray concrete, initially rising about nine and one-half inches, with a white, wooden platform on top, set a few inches back from the edge, that adds just over an inch to that height. The total rise of the top step is thus about four inches greater than that of the other steps, constituting about a sixty-one percent increase in rise.

Plaintiff filed a complaint against defendant to recover for his injuries alleging, among other things, that defendant failed to keep its premises in a reasonably safe condition and failed to warn plaintiff of a dangerous and defective condition on the property. Defendant filed an answer, and the parties conducted discovery, including plaintiff's deposition. Defendant then moved for summary judgment, arguing, among other things, that any dangerous condition on the property was open and obvious and that plaintiff was contributorily negligent. The trial court evaluated the evidence presented and decided that, even viewing the facts in the light most favorable to the plaintiff, there was no issue of material fact and that defendant was entitled to summary judgment. A divided panel of the Court of Appeals reversed. It held that genuine issues of material fact existed regarding whether the condition of the top step was open and obvious, whether the top step caused plaintiff's fall, and whether plaintiff was contributorily negligent. *Draughon v. Evening Star Holiness Church of Dunn*, 828 S.E.2d 176, 179–81 (N.C. Ct. App. 2019). The dissent claimed defendant was entitled to judgment as a matter of law because plaintiff was contributorily negligent. *Id.* at 182–83 (Dillon, J., dissenting).

Defendant appealed as of right to this Court based on the dissent, and also filed a petition for discretionary review for this Court to consider additional issues, including whether the condition of the top step was open and obvious. This Court allowed the petition on 25 September 2019.

We reverse the decision of the Court of Appeals and uphold the trial court's grant of summary judgment. Courts should hesitate to find negligence as a matter of law. But when, as here, uncontroverted facts viewed from an objective standpoint establish that the plaintiff encountered an open and obvious risk, it is appropriate for courts to find as a matter of law that the defendant had no duty to warn the plaintiff or that the plaintiff's claim is barred by contributory negligence.

In a classic negligence action like the one in this case, a plaintiff must present sufficient evidence of four elements to survive a motion to dismiss: (1) that the defendant owed a duty of care toward the plaintiff, (2) that the defendant breached that duty, (3) that the defendant's breach proximately caused harm to the plaintiff, and (4) that the plaintiff has thereby suffered damages. *See*, *e.g.*, *Hairston v. Alexander Tank and Equip. Co.*, 310 N.C. 227, 232, 311 S.E.2d 559, 564 (1984).

The summary judgment standard requires the trial court to construe evidence in the light most favorable to the nonmoving party. Nonetheless, our case law has made it clear that when the condition that allegedly

caused the injury, viewed objectively, is open and obvious, judgment as a matter of law is appropriate. *See*, *e.g.*, *Deaton v. Bd. of Trs. of Elon Coll.*, 226 N.C. 433, 439–40, 38 S.E.2d 561, 565–66 (1946) (upholding the trial court's dismissal of the plaintiff's action because, whether or not the plaintiff put on evidence of the defendant's negligence, the condition that caused the plaintiff's injury was open and obvious).

In North Carolina, a landowner has a duty to warn visitors of any hidden danger on its property of which the landowner should be aware. *See*, *e.g.*, *id.* at 438, 38 S.E.2d at 564–65 ("The rule applies only to latent dangers which the [visitors] could not reasonably have discovered and of which the [defendant] knew or should have known."). A landowner does not, however, have a duty to warn anyone of a condition that is open and obvious. *Garner v. Atl. Greyhound Corp.*, 250 N.C. 151, 161, 108 S.E.2d 461, 468 (1959) ("Where a condition of premises is obvious . . . generally there is no duty on the part of the owner of the premises to warn of that condition." (alteration in original) (quoting *Benton v. United Bank Bldg. Co.*, 223 N.C. 809, 813, 28 S.E.2d 491, 493 (1944))); *see also Branks v. Kern*, 320 N.C. 621, 624, 359 S.E.2d 780, 782 (1987) (explaining that the duty to warn applies to "*hidden* dangers known to or discoverable by the defendants" (emphasis added)), *abrogated on other grounds by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998). A condition is open and obvious if it would be detected by "any ordinarily intelligent person using his eyes in an ordinary manner." *Coleman v. Colonial Stores*, *Inc.*, 259 N.C. 241, 242, 130 S.E.2d 338, 340 (1963). If the condition is open and obvious, a visitor is legally deemed to have equal or superior knowledge to the owner, and thus a warning is unnecessary. *See Branks*, 320 N.C. at 624, 359 S.E.2d at 782 ("[T]here is no duty to warn . . . of a hazard obvious to any ordinarily intelligent person using his eyes in an ordinary manner, or one of which the plaintiff had equal or superior knowledge.").

North Carolina common law also recognizes the defense of contributory negligence; thus, a plaintiff cannot recover for injuries resulting from a defendant's negligence if the plaintiff's own negligence contributed to his injury. *See*, *e.g.*, *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 677, 268 S.E.2d 504, 509 (1980). This rule is closely related to the principle that a defendant has no duty to warn of an open and obvious condition because a plaintiff is negligent if he fails to reasonably adjust his behavior in light of an obvious risk. *See*, *e.g.*, *id.* at 673, 268 S.E.2d at 507 ("Plaintiff may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety.").

Contributory negligence also implicates proximate cause if a visitor's own lack of ordinary care is a cause of the accident. With contributory negligence, a plaintiff's actual behavior is compared to that of a reasonable person under similar circumstances. *See*, *e.g.*, *Holland v. Malpass*, 266 N.C. 750, 752–53, 147 S.E.2d 234, 236–37 (1966) (explaining that the invitee of a business must use reasonable care to avoid harm).

Applying these principles, this Court has, on multiple occasions, upheld judgment as a matter of law for the defendant in cases with facts similar to the facts of this case. In *Coleman*, a customer was exiting a grocery store when he tripped on a metal screen jutting out at a right angle from the exit door. 259 N.C. at 242, 130 S.E.2d at 339. The metal screen was in the shape of a right triangle with a base width of about thirty-four inches, a top width of about eight inches, and a height of four and one-half to five feet. *Id.* This Court held that, even though "[t]here was nothing there to call [the customer's] attention to the metal screen," *id.*, the condition would have been obvious to the ordinary person and so judgment in favor of the defendant was appropriate, *id.* at 242–43, 130 S.E.2d at 340.

In *Garner*, the plaintiff entered the defendant's store at an area where the sidewalk and the floor of the store entryway sat at nearly the same level. 250 N.C. at 153, 108 S.E.2d at 463. After spending about thirty minutes in the store, the plaintiff exited at an area where there was a significant drop-off from the floor of the store to the sidewalk—about six inches. *Id.* She fell and was injured. *Id.* This Court first noted that "[g]enerally, in the absence of some unusual condition, the employment of a step by the owner of a building because of a difference between levels is not a violation of any duty to invitees." *Id.* at 157, 108 S.E.2d at 466 (quoting *Reese v. Piedmont, Inc.*, 240 N.C. 391, 395, 82 S.E.2d 365, 368 (1954)). The plaintiff nonetheless contended that the sidewalk and entryway created a "camouflaging effect," hiding the drop-off. *Id.* at 159, 108 S.E.2d at 467. But this Court went on to hold that the defendant had no duty to warn of the drop-off because it was obvious. *Id.* at 161, 108 S.E.2d at 468. So, a condition may be open and obvious even if the particular plaintiff found it difficult to notice.

Summary judgment is further supported when the plaintiff has had the opportunity to become familiar with the condition that contributes to his injury. In *Dunnevent v. Southern Railroad Co.*, 167 N.C. 232, 233–34, 83 S.E. 347, 347–48 (1914), the plaintiff fell off of the defendant's railroad platform at night. This Court held that because the plaintiff had become familiar with the platform previously during the day, but chose to walk without his lantern in an area he should have known had no railing, his

recovery was barred. *Id.* Likewise, in *Holland*, this Court barred recovery to the plaintiff, an automobile mechanic, who tripped on a common piece of garage equipment that sat on the floor in an area through which the plaintiff had already walked multiple times shortly before the accident. 266 N.C. at 751, 147 S.E.2d at 235–36.

In this case the Court of Appeals majority relied on *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 395 S.E.2d 112 (1990), but that case is easily distinguishable. In *Lamm*, the plaintiff walked down a three-step set of brick stairs outside the defendants' office building and slipped after stepping down from the final step. *Id.* at 413–14, 395 S.E.2d at 113. The bottom step had a rise of between seven and one-half and eight and one-half inches, compared to the six and one-half inch rise of the preceding steps. *Id.* at 414, 395 S.E.2d at 114. The plaintiff claimed to have slipped on an asphalt ramp gradually sloping downward away from the bottom step. *Id.* at 414–15, 395 S.E.2d at 114. The Court noted that, though there was an unresolved factual issue about whether the plaintiff's fall was caused by the slant of the asphalt ramp or by the increased rise of the final step, *id.* at 417–18, 395 S.E.2d at 115–16, the depth of the final step could not be said as a matter of law to be open and obvious to someone descending the steps, *id.* at 416–17, 395 S.E.2d at 115.

Though *Lamm* affirms that summary judgment in negligence actions is fairly rare, the facts in this case make such a judgment markedly more appropriate. Whereas in *Lamm* the difference in rise between the final step and the other steps was one or two inches, here the difference is about four inches. In addition, all of the steps in *Lamm* were made of brick, but the heightened step at issue in this case is made of visibly different materials than the others. Whether summary judgment is appropriate in a given case is driven by the facts of that case. In *Lamm*, the condition of the final step was not sufficiently obvious to warrant summary judgment, but in this case it is.

The task in this case is to determine, based on our precedent, whether the top step outside of defendant's church building was an open and obvious condition such that a reasonably prudent person would have recognized it and taken appropriate care to avoid injury while using it. The distinct height and appearance of the step, the clear visibility of the set of stairs, and plaintiff's previous experience walking down the set of stairs show that a reasonable person in plaintiff's position would have been aware of the step's condition and taken greater care.

The top step is obviously different in height than the other steps. First, the visible part of that step is made mostly of red brick, making its

appearance starkly different than that of the other gray concrete steps. The wood on top of that step, which was painted white, only accentuates its distinctiveness. Second, that step rises about nine and one-half inches to the top of the brick, and about ten and one-half inches including the wooden portion on top, compared to the about six and one-half inch rise of the other steps. All in all, the top step is thus about four inches, or about sixty-one percent, higher than the others. This great difference would be readily apparent to a reasonable person.

At the time of the fall, plaintiff had just walked down the set of stairs, experiencing the difference in the height of the steps firsthand. A reasonable person in plaintiff's position would have become aware of the approximately four-inch difference. Moreover, the top step sits a few feet above the ground; thus, it is at a height plainly visible to someone walking towards the steps and then using them. Common experience dictates that a reasonable person would recognize the starkly different condition of the top step and thus understand that he would have to step up higher when he arrived at it. Viewed objectively, the condition was open and obvious, visible to a reasonable person in plaintiff's situation. Thus, defendant had no duty to warn plaintiff of the condition of the top step.

Relatedly, plaintiff did not take the care that an ordinary person would have taken while carrying the casket up the set of stairs and so was contributorily negligent. As noted, plaintiff had walked down the steps just before his accident, and the set of stairs was fully visible as he and the other individuals carried the casket toward the church building. A reasonable person would have looked and noticed the condition of the top step either before arriving at the stairs or while on the stairs before stepping on the top step. But plaintiff, by his own admission, kept his eyes on the doorway and was not looking at the steps on which he was walking. Common experience again dictates that a reasonable person would have been aware of the condition and taken greater care. Because plaintiff turned sideways as he walked up the steps, even greater care was required to reasonably ensure a safe ascension. Thus, plaintiff's own negligence contributed to his injury.

We therefore reject plaintiff's contention that based on the evidence issues of fact exist as to whether the condition of the top step was open and obvious and as to whether plaintiff was contributorily negligent. Plaintiff's argument rests largely on his own subjective assertion that the condition of the top step was not open and obvious. He references the opinion of an expert witness he submitted to essentially argue that because the steps leading up to the top step are all of the same height,

which is less than the top step, someone walking up the steps could reasonably expect this uniformity in height to continue.

Plaintiff's position, however, gives improper weight to his subjective perspective about the top step instead of recognizing the objective evidence of the true visual appearance of the stairs. The top step stands out both because it is made of strikingly different materials of a different color than the other steps and because it is about four inches higher than the others. Further, because the set of stairs only includes five steps, a reasonable person could easily see the distinctive top step and church entrance before beginning to walk up the steps.

For similar reasons, this Court's opinion in *Garner* undermines plaintiff's concealment argument. In that case, this Court held the defendant had no duty to warn of a drop-off from the store entryway to the sidewalk even though the plaintiff claimed that the structure of the sidewalk and the entryway concealed the drop-off. 250 N.C. at 159, 161, 108 S.E.2d at 467–68. If the drop-off in *Garner* was open and obvious as a matter of law, regardless of any concealing effect the plaintiff claimed was inherent in its design, so too is the top step here. It is obviously different in height and structure than the other steps. No lulling effect that plaintiff claims is present within the stairs' design changes that. Overall, instead of assessing the condition of the set of stairs from the perspective of an objectively reasonable person as our case law mandates, plaintiff's position wrongly treats as determinative plaintiff's subjective opinion about the visual appearance of the alleged defect.

Because the condition of the top step would be open and obvious to a reasonable person, defendant had no duty to warn plaintiff. Similarly, because plaintiff, after his previous descent of the steps, did not heed the risk obviously presented by the distinct appearance of the top step, and because he carried the casket while walking sideways without looking at the steps, his own negligence contributed to his fall. The Court of Appeals' decision vacating the trial court's grant of summary judgment is reversed.

REVERSED.

Justice EARLS dissenting.

The plaintiff in this case thought he was merely going to attend a funeral, but when asked to help carry the casket up the stairs into the church, his generosity of spirit went badly awry. Falling on the top step, he was injured. As with most cases alleging negligence, questions

concerning what caused the fall, whether he should have been warned or should have seen the alleged hazard himself, and whether a reasonable person would have avoided the fall are all questions for a jury of his peers to decide after hearing all the evidence in court.

However, the majority concludes that the evidence is uncontested and establishes as a matter of law both that the allegedly defective condition of the steps at defendant's church was open and obvious and that plaintiff was contributorily negligent. On that basis, the majority reverses the decision of the Court of Appeals reversing the trial court's entry of summary judgment in favor of defendant. In my view, this is not the exceptional negligence case in which summary judgment is appropriate. *See Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E.2d 666, 668 (1980) ("[I]t is only in exceptional negligence cases that summary judgment is appropriate, since the standard of reasonable care should ordinarily be applied by the jury under appropriate instructions from the court." (citing *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972))). Rather, viewing the evidence in the light most favorable to the nonmoving party, as we are bound to do, I conclude that the evidence is sufficient to raise questions for the jury as to whether the allegedly defective condition of the steps was open and obvious and whether plaintiff was contributorily negligent. It is for the jury, not this Court, to decide what a reasonable person in plaintiff's position would have seen, and it is for the jury, not this Court, to decide whether a reasonable person would have taken precautions to avoid the alleged hazard. Accordingly, I would affirm the decision of the Court of Appeals. Therefore, I respectfully dissent.

Background

On 20 February 2015, plaintiff arrived at defendant's church in Dunn, North Carolina, for a funeral service and entered the church through an entrance facing Sampson Avenue. Before the service began, the minister, who would be conducting the service, asked plaintiff if he would be willing to help carry the casket into the church, and plaintiff declined. Shortly afterwards, plaintiff was again asked to help carry the casket by an employee of third-party defendant, Dafford Funeral Home, Inc. (Dafford). Plaintiff reconsidered and agreed to help.

Plaintiff followed the Dafford employee out of the church through a doorway facing U.S. Route 421. It was daytime, and the weather was sunny. The doorway opened onto a set of steps, which plaintiff descended before walking to the nearby hearse where the casket was located. Plaintiff and three other men carried the casket back to that same entrance and began lifting the casket up the steps, with plaintiff

positioned on the front left side of the casket. Before reaching the doorway, plaintiff tripped at the top of the steps and fell into the church, suffering injuries to both of his knees. Plaintiff testified in his deposition that he "tripped on the top step and fell into the church."

As viewed from the ground level outside the church, the stairway at issue has five steps—that is, five risers and five treads, with the fifth riser and tread (the top step) constituting the threshold and the floor of the church. *See Merriam-Webster's Collegiate Dictionary* 1223 (11th ed. 2003) (defining "step" as "a rest for the foot in ascending or descending," including "one of a series of structures consisting of a riser and a tread"); *see also*, *e.g.*, *Bohannon v. Leonard-Fitzpatrick-Mueller Stores Co.*, 197 N.C. 755, 755, 150 S.E. 356, 356 (1929) ("The steps of said stairway are constructed of wood. Each step has a tread of nine inches, and a rise of eight inches."). The first four steps are concrete, and the risers have a relatively uniform height of six and one-half to seven inches. The riser of the top step, however, is brick and concrete with a height of nine and one-half inches. The fifth riser also has "an additional one and one[-]eighth inches of wood on the top position a few inches back from the edge."

On 22 August 2017, plaintiff filed suit against defendant alleging that defendant was negligent in failing to keep its premises in a reasonably safe condition and failing to warn plaintiff of the dangerous and defective condition of the steps leading into the church. Plaintiff alleged that he "was walking up the steps of the church building, when his left foot caught onto the lip of the top step leading into the church," causing him to fall. In response, defendant filed an answer in which it alleged that plaintiff was contributorily negligent, and defendant also filed a third-party complaint against Dafford for contribution and indemnification. Plaintiff filed an amended complaint on 5 March 2018. Plaintiff testified in a deposition on 15 February 2018.

On 19 April 2018, defendant filed a motion for summary judgment arguing, *inter alia*, that if the steps constituted a dangerous condition, it was an open and obvious condition of which plaintiff had equal or superior knowledge. Plaintiff filed a response in opposition to defendant's motion, as well as an affidavit in which he averred the following:

> 5. That the defect in the stairs leading up to the church sanctuary and described in the Complaint, which is incorporated herein by reference, is not open and obvious and cannot be perceived by the naked eye at a reasonable distance while climbing those stairs.

> 6. That the defective condition of the stairs could not be perceived while walking down the stairs or while walking up the stairs.
>
> 7. As I stated in my deposition on Page 76, I tripped on the top step and fell into the church.
>
> 8. I did not say, as incorrectly alleged in the Defendant's motion for summary judgment, that I could not say what caused my slip and fall. On the contrary, I testified on Page 76 of my deposition that I fell because I tripped on the top stairs of entrance to the sanctuary of the church and fell into the church.
>
> . . . .
>
> 15. The only difficulty I had with respect to moving the casket into the church was the top stair, which was unusually high, and I did not anticipate that I would need to lift my foot higher than I was required to lift my feet in order to climb the other stairs.
>
> 16. That the weight of the casket had actually nothing to do with my fall. My fall occurred solely because I tripped on the top stair of the staircase leading into the sanctuary as alleged in the complaint.

Plaintiff also submitted an affidavit from an engineering expert, Dr. Rolin F. Barrett, P.E., who examined the steps at issue and averred the following:

> 9. . . . I measured the steps and it was found that the risers (vertical component of steps) on the first four steps were relatively uniform and measured six and one half inches to seven inches high. However the riser of the top step leading to the door had nine and one half inches of brick and concrete plus an additional one and one eighth inches of wood on the top position a few inches back from the edge.
>
> 10. That based upon my examination of the premises in question, which includes the steps leading into the sanctuary of the Evening Star Holiness Church of Dunn, I have made the following findings and hold the opinions set out below.

11. Risers of steps need to be uniform and building codes state that risers of steps should be uninform [sic]. The date the steps were built was not available to me. Several building codes were examined spanning the last fifty years and all codes state that risers should be uniform. Some of these building codes specify a maximum height for the risers and for those that do, the maximum height noted was seven and three fourths inches. The stairs that Mr. Draughon fell upon did not comply with any of the building codes I reviewed.

12. That aside from the issues arising from the violation of the building codes I reviewed, and in addition thereto, it is my opinion as a professional licensed engineer that the stairs in question were defective by virtue of the fact that the top step was significantly higher than the lower steps.

13. From a human factors engineering standpoint, the public who use the stairs become accustomed to the height of the first four steps and is entitled to assume that the last step would be of a height equal to the first four (4) steps.

14. Furthermore, it is my opinion that the stairway that Milton Draughon fell upon:

a. was defective,
b. was not constructed in a workman like manner,
c. was in an unsafe condition,
d. was unreasonably unsafe,
e. had steps that created an unsafe structural defect,
f. was not in a fit and habitable condition,
g. failed to provide the service for which they were intended.

Following a hearing held on 21 May 2018, the trial court entered an order on 4 June 2018 granting defendant's motion for summary judgment. Plaintiff appealed.

At the Court of Appeals, plaintiff argued that the trial court erred in ruling that there was no genuine issue of material fact and that defendant was entitled to judgment as a matter of law. The Court of Appeals majority agreed with plaintiff, concluding first that, taking the evidence

in the light most favorable to plaintiff, there were genuine issues of material fact regarding whether the steps constituted a hidden defect of which defendant had a duty to warn plaintiff and whether plaintiff, having descended the steps shortly before falling, had equal or superior knowledge of the alleged defect. *Draughon v. Evening Star Holiness Church of Dunn*, 828 S.E.2d 176, 179–80 (N.C. Ct. App. 2019). The majority rejected defendant's comparisons to prior decisions of the Court of Appeals, determining that the case is more similar to this Court's decision in *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 395 S.E.2d 112 (1990). Further, the majority concluded that while portions of plaintiff's deposition testimony tended to indicate that plaintiff tripped on the non-defective fourth step, plaintiff testified that he "tripped on the top step and fell into the church," and therefore, the "testimony concerning the cause of Plaintiff's fall and the role of the fourth step and defective top riser in it raises a factual question for the jury to resolve." *Draughon*, 828 S.E.2d at 180.

Additionally, the majority at the Court of Appeals addressed defendant's argument that plaintiff was contributorily negligent in failing to use a nearby ramp, failing to ask for help in carrying the casket or suggesting the use of a trolley, and climbing the steps sideways while carrying the casket. *Id.* at 181. The majority determined that these assertions of fact are disputed by plaintiff's evidence, which tended to show that the danger was not the carrying of the casket up the steps, "but was instead a hazardous difference in height between the top step and the ones below it." *Id.* The majority noted that plaintiff averred that he is strong and "had no difficulty lifting the casket or carrying the casket." *Id.* According to the majority, a "reasonable and prudent person would not believe taking the adjacent ramp to be necessary, nor feel the need to seek additional help or use a trolley, and we do not believe that carrying a casket up the church steps into the sanctuary for a funeral is an indisputably negligent act." *Id.* Thus, the majority concluded that when the evidence was viewed in the light most favorable to plaintiff, plaintiff was not contributorily negligent as a matter of law. *Id.* at 180–81.

Writing separately, one member of the panel dissented, agreeing with the majority that plaintiff's evidence was sufficient to reach the jury on the question of whether defendant's negligence was a proximate cause of plaintiff's fall, but concluding that plaintiff's deposition testimony established, as a matter of law, that plaintiff's contributory negligence was a proximate cause of the fall. *Id.* at 182 (Dillon, J., dissenting). The dissenting judge also opined that the alleged defect in the stairway was open and obvious and, noting that the incident occurred during the

daytime, determined that plaintiff "had walked down these same steps just minutes prior to the fall, surely noticing the height differential as he stepped from the Church building to the top step." *Id.* at 183.

On 10 June 2019, defendant filed a notice of appeal as of right based on the dissenting opinion in the Court of Appeals pursuant to N.C.G.S. § 7A-30(2). Defendant simultaneously filed a petition for discretionary review as to additional issues, which this Court allowed on 25 September 2019.

Standard of Review

We review appeals from summary judgment de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). We review decisions of the Court of Appeals to determine whether there are errors of law. N.C. R. App. P. 16(a).

Analysis

Defendant argues that the Court of Appeals majority erred in determining that defendant was not entitled to summary judgment on the issues of whether defendant had a duty to warn plaintiff of the allegedly defective condition of the steps and whether plaintiff's contributory negligence was a proximate cause of his injuries. With respect to these issues, I conclude the Court of Appeals majority correctly determined that at this stage of the litigation genuine issues of material fact exist and that defendant was not entitled to judgment as a matter of law.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2019). "When considering a motion for summary judgment, the trial [court] must view the presented evidence in a light most favorable to the nonmoving party." *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576 (quoting *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001)); *see also Singleton v. Stewart*, 280 N.C. 460, 465, 186 S.E.2d 400, 403 (1972) ("The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded." (citations omitted)).

In order to establish a claim of negligence, a plaintiff must show "that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff, under the

circumstances in which they were placed," and further, that this breach of duty "was the proximate cause of the injury—a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." *Mattingly v. N.C. R.R. Co.*, 253 N.C. 746, 750, 117 S.E.2d 844, 847 (1961) (citing *Ramsbottom v. Atl. Coast Line R.R. Co.*, 138 N.C. 38, 41, 50 S.E. 448, 449 (1905)); *see also Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 177–78 (1992) ("Actionable negligence is the failure to exercise that degree of care which a reasonable and prudent person would exercise under similar conditions. A defendant is liable for his negligence if the negligence is the proximate cause of injury to a person to whom the defendant is under a duty to use reasonable care." (citations omitted)). If a plaintiff is contributorily negligent, however, such "contributory negligence is a bar to recovery from a defendant who commits an act of ordinary negligence." *Sorrells v. M.Y.B. Hosp. Ventures of Asheville*, 332 N.C. 645, 648, 423 S.E.2d 72, 73–74 (1992) (citing *Adams ex rel. Adams v. State Bd. of Educ.*, 248 N.C. 506, 511, 103 S.E.2d 854, 857 (1958)); *see also Badders v. Lassiter*, 240 N.C. 413, 417, 82 S.E.2d 357, 360 (1954) ("Plaintiff's negligence need not be the sole proximate cause of the injury to bar recovery. It is enough if it contribute[s] to the injury as a proximate cause, or one of them." (citing *Marshall v. S. Ry. Co.*, 233 N.C. 38, 42, 62 S.E.2d 489, 492 (1950))).

Relevant to the applicable duty owed by defendant here as the owner of the church, owners and occupiers of property have a "duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998). "This duty includes a duty to maintain the premises in a condition reasonably safe for the contemplated use and a duty to warn of hidden dangers known to or discoverable by the defendants." *Branks v. Kern*, 320 N.C. 621, 624, 359 S.E.2d 780, 782 (1987) (citing *Hedrick v. Tigniere*, 267 N.C. 62, 147 S.E.2d 550 (1966)), *abrogated by Nelson*, 349 N.C. 615, 507 S.E.2d 882.[1] Yet, "there is no duty to warn . . . of a

1. *Branks v. Kern*, 320 N.C. 621, 359 S.E.2d 780 (1987), as well as several other decisions cited herein, were abrogated by this Court's decision in Nelson in the sense that the Court abolished the former distinctions between "invitees" and "licensees." *Nelson v. Freeland*, 349 N.C. 615, 631–33, 507 S.E.2d 882, 892–93 (1998). Yet, as *Branks* and the other cases cited involved invitees, these cases are still applicable because the former duty owed by owners and occupiers of land to invitees now applies to all lawful visitors. *See, e.g.*, *Cobb ex rel. Knight v. Town of Blowing Rock*, 213 N.C. App. 88, 94, 713 S.E.2d 732, 736–37 (2011) (stating that "*Nelson* thus abolished the distinction between 'licensees' and 'invitees' and applied the same standard to all lawful visitors" and that, "[i]n other words,

hazard obvious to any ordinarily intelligent person using his eyes in an ordinary manner, or one of which the plaintiff had equal or superior knowledge." *Branks*, 320 N.C. at 624, 359 S.E.2d at 782 (citations omitted). "Reasonable persons are assumed, absent a diversion or distraction, to be vigilant in the avoidance of injury in the face of a known and obvious danger." *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 66, 414 S.E.2d 339, 344 (1992) (citing *Walker v. Randolph County*, 251 N.C. 805, 112 S.E.2d 551 (1960)), *abrogated by Nelson*, 349 N.C. 615, 507 S.E.2d 882.

Notably, "[s]ummary judgment should rarely be granted in negligence cases." *Moore v. Crumpton*, 306 N.C. 618, 624, 295 S.E.2d 436, 440–41 (1982) (citing *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E.2d 419 (1979)). Rather, "it is only in exceptional negligence cases that summary judgment is appropriate, since the standard of reasonable care should ordinarily be applied by the jury under appropriate instructions from the court." *Ragland*, 299 N.C. at 363, 261 S.E.2d at 668 (citing *Page*, 281 N.C. at 706, 190 S.E.2d at 194). Similarly, "[i]ssues of contributory negligence, like those of ordinary negligence, are ordinarily questions for the jury and are rarely appropriate for summary judgment. Only where the evidence establishes the plaintiff's own negligence so clearly that no other reasonable conclusion may be reached is summary judgment to be granted." *Nicholson v. Am. Safety Util. Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997) (first citing *Lamm*, 327 N.C. at 418, 395 S.E.2d at 116; then citing *Norwood v. Sherwin–Williams Co.*, 303 N.C. 462, 468–69, 279 S.E.2d 559, 563 (1981)). Moreover, "[p]roximate cause is ordinarily a question for the jury. It is to be determined as a fact from the attendant circumstances. Conflicting inferences of causation arising from the evidence carry the case to the jury." *Olan Mills, Inc. of Tenn. v. Cannon Aircraft Exec. Terminal, Inc.*, 273 N.C. 519, 529, 160 S.E.2d 735, 743 (1968) (citing *Pruett v. Inman*, 252 N.C. 520, 526, 114 S.E.2d 360, 364 (1960)); *see also Lamm*, 327 N.C. at 418, 395 S.E.2d at 116 ("The issues of proximate cause and contributory negligence are usually questions for the jury." (citations omitted)).

I. Duty to Warn

Here, defendant first contends that it had no duty to warn plaintiff of the allegedly hazardous condition of the steps because any hazard created by the height of the top step was not hidden, but was open and obvious, and because plaintiff had equal or superior knowledge of the

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the present standard for *all* lawful visitors is the same as it was prior to *Nelson* for invitees" (citing *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 161, 516 S.E.2d 643, 646 (1999))), *rev'd sub nom. Cobb ex rel. Kight v. Town of Blowing Rock*, 365 N.C. 414, 722 S.E.2d 479 (2012).

purported hazard. While the majority agrees with defendant's contention, I cannot conclude, based on the evidence before the trial court, that the purportedly hazardous condition of the steps constitutes an open and obvious condition as a matter of law.

Plaintiff stated in his affidavit that the hazardous condition created by the top step "is not open and obvious and cannot be perceived by the naked eye at a reasonable distance while climbing [the] stairs," that the condition "could not be perceived while walking down the stairs or while walking up the stairs," and that he "did not anticipate that [he] would need to lift [his] foot higher than [he] was required to lift [his] feet in order to climb the other stairs." Moreover, the engineering expert retained by plaintiff stated in his affidavit that building codes generally require that the risers of steps be uniform, that the height of the top step exceeded any maximum height limit for steps that he had observed in available building codes, that the steps at issue were "defective" and "unreasonably unsafe," and that, "[f]rom a human factors engineering standpoint, the public who use the stairs become accustomed to the height of the first four steps and [are] entitled to assume that the last step would be of a height equal to the first four (4) steps." Certainly, the height of a single step, taken in isolation, is unlikely to amount to a hidden danger. Yet, the thrust of plaintiff's argument here is that the uniformity of the preceding steps lull an individual into instinctually expecting this uniformity in height to continue, leaving the individual unprepared for the unusual deviation in height of the final step, and thereby giving rise to the danger of a trip and fall. Viewing the evidence on this account in the light most favorable to plaintiff, as we are bound to do, I conclude that it is sufficient to raise a question for the jury as to whether the hazardous condition at issue would have been "obvious to any ordinarily intelligent person using his eyes in an ordinary manner." *Branks*, 320 N.C. at 624, 359 S.E.2d at 782 (citations omitted); *see also City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 655, 268 S.E.2d 190, 194 (1980) ("Negligence actions . . . are rarely suited for summary disposition because . . . the standard of care of a reasonably prudent person [ ]is thought to be a matter within the special competence of the jury." (citations omitted)).

The majority asserts that plaintiff's position in this respect is undermined by this Court's decision in *Garner v. Atl. Greyhound Corp.*, 250 N.C. 151, 108 S.E.2d 461 (1959), in which the plaintiff tripped on the raised, sloping entryway leading from the sidewalk into the defendant's shop. While the specifics of the entryway at issue there are somewhat

difficult to succinctly describe,[2] suffice it to say that *Garner* involved a single step in isolation, and therefore does not present the lulling effect allegedly produced here by a single variation in height in an otherwise uniform set of steps. As a result, I view *Garner* as inapposite and cannot agree with the majority's determination that "[i]f the drop-off in *Garner* was open and obvious as a matter of law, regardless of any concealing effect the plaintiff claimed was inherent in its design, so too is the top step here." Further, the majority concludes that "[n]o lulling effect that plaintiff claims is present within the stairs' design changes" the fact that the difference in height and structure of the top step would have been obvious to an objectively reasonable person. In light of the evidence presented, including the affidavit of plaintiff's engineering expert indicating that this lulling effect is the very purpose of uniformity requirements in building codes and stating that the set of steps here were "unreasonably unsafe," and taking the evidence in the light most favorable to plaintiff, the question of whether the allegedly defective condition of the top step would have been obvious to an objectively reasonable person should be decided by the jury. *See Lease-Afex*, 300 N.C. at 655, 268 S.E.2d at 194 ("Negligence actions, particularly, are rarely suited for summary disposition because one essential element of the action—the standard of care of a reasonably prudent person—is thought to be a matter within the special competence of the jury." (citations omitted)).

Regarding defendant's contention that plaintiff had equal or superior knowledge of the alleged hazard, plaintiff's evidence clearly raises an issue of fact on this issue. In his deposition, plaintiff testified that after descending the steps he was not aware of any dangerous condition and, when asked whether he had "any concern that [he] had to step too far to get to that first step," plaintiff stated, "[n]o, I didn't recognize that." Thus, plaintiff presented evidence showing that he was unaware

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2. The Court summarized the plaintiff's description of the entryway as follows:

> In front of the shop is an ordinary concrete sidewalk which slopes downwardly to the south. . . . The entryway is 12 feet wide at the sidewalk and 8 feet 2 inches at the shop doors. It has a depth of 42 inches from the doors to the sidewalk. At the south end of the entryway there is a 6-inch perpendicular drop-off to the sidewalk; in the middle a 3-inch drop-off; and at the north end the entryway and sidewalk are approximately flush. There is a downward slope from the doors toward the sidewalk. The slope is 6/10 of a foot from the doors to the sidewalk, 2 5/16 inches per foot or a slope of 18% to 19%. The entryway is of terrazzo construction and has strips of abrasive material cemented to the terrazzo at intervals of two to three inches to prevent slipping thereon.

Garner v. Atl. Greyhound Corp., 250 N.C. 151, 153, 108 S.E.2d 461, 463 (1959).

of the hazardous condition of the steps when he fell; his credibility and the reasonableness of his failure to perceive the alleged hazard are questions for the jury. *See Lease-Afex*, 300 N.C. at 655, 268 S.E.2d at 193–94 ("If there is any question as to the credibility of affiants in a summary judgment motion or if there is a question which can be resolved only by the weight of the evidence, summary judgment should be denied." (citing *Fieldcrest Mills*, 296 N.C. at 470, 251 S.E.2d at 422)).

Defendant's argument in this latter respect appears in earnest to be a contention not that plaintiff had equal or superior knowledge of the alleged hazard, but rather that plaintiff, based on his previous experience using the steps, *should have* had equal or superior knowledge of the hazard. I consider this question as one more properly addressed as an issue of contributory negligence,[3] rather than one of defendant's general duty as a property owner to warn lawful visitors of hidden defects—that is, it is an issue of whether a reasonably prudent person in plaintiff's position, having recently descended the steps without incident, would in the exercise of due care have perceived the danger posed by an otherwise hidden defect. *See, e.g.*, *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980) ("[C]ontributory negligence consists of conduct which fails to conform to an *objective* standard of behavior—'such care as an ordinarily prudent person would exercise *under the same or similar circumstances* to avoid injury.' " (second emphasis added) (quoting *Clark v. Roberts*, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965))); *e.g. Tyburski v. Stewart*, 204 N.C. App. 540, 546, 694 S.E.2d 422, 426 (2010) ("We conclude that a jury could reasonably find that an ordinarily prudent person *in plaintiff's position* would also have entered the sunroom without concern for the lock after having disengaged it." (emphasis added)). Nonetheless, these issues involve related inquiries. For example, if a hazardous condition is open and obvious,

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3. For instance, in *Holland v. Malpass*, the Court concluded that a "stiff-knee" (a type of car jack) on the floor of an automobile repair garage did not constitute a hidden danger given that "[w]alk spaces past work benches and around vehicles under repair in a busy automobile garage are not infrequently used as places for the temporary deposit of tools, equipment and parts." 266 N.C. 750, 752, 147 S.E.2d 234, 236 (1966). The Court then *also* concluded that the plaintiff, "an experienced garage worker," who worked for the defendant for four months in the same garage at issue, was contributorily negligent in that he "failed to look before he stepped where he should have anticipated some obstruction was likely." *Id.* at 752, 147 S.E.2d at 236–37. Defendant contends that *Holland* is controlling because it is "sufficiently analogous" to the case here. Given the substantial differences between aisles in a "busy automobile garage" and the steps entering a church, as well as the substantial experience of the plaintiff in *Holland* with respect to working in automobile garages, including working in the specific garage at issue for four months, I consider *Holland* inapposite to the issues presented here.

or if a plaintiff has equal or superior knowledge of the hazard, then not only does defendant owe no duty to warn of that hazard, *Branks*, 320 N.C. at 624, 359 S.E.2d at 782, but it is also contributory negligence for a plaintiff to proceed with knowledge of the hazard or to fail to perceive the obvious hazard through his or her failure to exercise due care, *see, e.g.*, *Dunnevent v. S. Ry. Co.*, 167 N.C. 232, 232, 83 S.E. 347, 348 (1914) (stating that the plaintiff was contributorily negligent where, "[w]ith full knowledge of the dangerous conditions, and with his own lantern that had lighted his way to the station sitting by his side, he voluntarily went to the east platform in the darkness, where he knew the conditions were dangerous"); *Allsup v. McVille, Inc.*, 139 N.C. App. 415, 416, 533 S.E.2d 823, 824 (2000) ("The doctrine of contributory negligence will preclude a defendant's liability if the visitor actually knew of the unsafe condition or if a hazard should have been obvious to a reasonable person." (citing *Pulley v. Rex Hosp.*, 326 N.C. 701, 705, 392 S.E.2d 380, 383 (1990))), *aff'd per curiam*, 353 N.C. 359, 543 S.E.2d 476 (2001). Ultimately, regardless of whether the issue raised by defendant here is addressed in the context of a defendant's duty to warn or in the context of a plaintiff's contributory negligence, "the facts must be viewed *in their totality* to determine if there are factors which make the existence of a defect[,] . . . in light of the surrounding conditions, a breach of the defendant's duty and less than 'obvious' to the plaintiff."[4] *Pulley*, 326 N.C. at 706, 392 S.E.2d at 384, *abrogated by Nelson*, 349 N.C. 615, 507 S.E.2d 882; *see also, e.g.*, *Dowless v. Kroger Co.*, 148 N.C. App. 168, 171, 557 S.E.2d 607, 609 (2001) ("Whether construed in terms of negating a defendant's duty to warn, or in terms of establishing a plaintiff's contributory negligence, it is clear that a plaintiff may not recover in a negligence action where the hazard in question should have been obvious to a person using reasonable care under the circumstances.").

Here, in viewing the evidence in the light most favorable to plaintiff, I cannot conclude that plaintiff's prior use of the steps renders the hazardous condition of the top step "obvious" as a matter of law. It is far from implausible that following a single descent of the steps, aided by

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4. Defendant argues that the Court of Appeals majority erred in applying this Court's decision in *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 395 S.E.2d 112 (1990), by requiring actual knowledge from a plaintiff in order for a condition to be open and obvious, disregarding the question of whether plaintiff had constructive knowledge of the hazardous condition based on his prior use of the steps. This appears to simply reflect confusion over whether such constructive notice should be analyzed alongside defendant's duty to warn or with plaintiff's alleged contributory negligence. The majority below clearly considered defendant's prior use of the steps in its analysis and I do not view the majority's decision as being in conflict with *Lamm*.

gravity, the allegedly inconspicuous variation in height of the fifth riser (or, when descending, the first riser) would escape the notice of a reasonably prudent person who was previously unfamiliar with the steps at issue. While a jury would certainly be free to make such a finding, just as it would be free to find that any danger posed by the top step is an open and obvious hazard regardless of plaintiff's prior experience using the steps, I would not remove the question from the jury's consideration at this stage of the litigation.

II. Contributory Negligence

Defendant next contends that the evidence before the trial court established plaintiff's contributory negligence as a matter of law. Plaintiff argues that the record reveals genuine issues of material fact regarding his contributory negligence that preclude the entry of summary judgment in this case. I conclude that the issue of plaintiff's contributory negligence is properly for the jury.

As an initial matter, defendant asserts that plaintiff was contributorily negligent "because he walked into a danger that was open and obvious." The majority here agrees. However, in light of the fact that the alleged danger was, in my view, not open and obvious as a matter of law, this argument too must fail.

Defendant, echoing the opinion of the dissenting judge below, further contends that plaintiff's deposition testimony establishes that plaintiff actually tripped on the non-defective fourth step, as opposed to the defective top step leading into the church, and therefore, plaintiff was contributorily negligent as a matter of law and the alleged defect was not the proximate cause of plaintiff's fall. Having found plaintiff contributorily negligent by not looking and noticing the condition of the top step, the majority does not consider this argument. Defendant focuses in particular on the following exchange from plaintiff's deposition:

> Q. What is shown in this photo?
>
> A. Okay, this is the step and the entry to the church. Now, when I'm saying top step, I'm saying right—right, you know what I mean, in this here. What I tripped on is this part right here going up into the church.
>
> Q. So I have got a blue pen and I'm going to write on the back here, make sure my pen is working. I'm going to hand you this blue pen and I would like you to make an X, a small X on the photo where you say you tripped.

A. Okay, I started tripping right along here. (Witness marking).

Q. Make it as dark as you can so we can see it. Can I see where you made the mark?

A. Okay.

Q. So are you saying you tripped on the brick or the white wooden door threshold?

A. I'm saying I started—started tripping right in here.

Q. So what you're saying is, you are pointing to the concrete is where you started tripping. There's a step that has a mat in there. Do you see that? You see the top step has a, looks like a rubber mat there?

A. Right.

Q. Are you tripping where that step begins, or are you tripping on the brick, or are you tripping on the white door threshold? What are you tripping on first?

A. I'm tripping on this step here, and this threshold, whatever you call it here. That's what I'm going down.

Q. Are you tripping on concrete or brick?

A. Both of them, really.

Q. Which one do you trip on first?

A. Well, it would have to be that one first because it comes first.

Q. Which one? The concrete?

A. Yeah, it would have to be that.

Q. Would it be the front of the concrete you trip on, that step of concrete?

A. No, it would have to be [the] front of it.

This portion of deposition testimony is ambiguous, and given the imprecise language and terminology used, as well as the area indicated by plaintiff on the photograph, it is unclear whether plaintiff, in attempting to communicate the step or the area where he "started tripping," was identifying the specific riser upon which his forward

foot first became entangled, as opposed to the tread upon which his rear leg would have been standing when he first "started tripping." The ambiguity in this portion of plaintiff's deposition testimony is further heightened given the fact that while the risers and treads of the first four steps are all concrete, the riser of the allegedly defective top step is brick *and* concrete, with an additional recessed portion of wood as well. Moreover, the tread of the top step—that is, the floor of the church—is also concrete. As plaintiff testified:

> A. When I went down, I went down on the inside. That's where I landed at.
>
> . . . .
>
> Q. And when you say your legs and knees hit the ground, did they come into contact with the ground outside the door entrance?
>
> A. No, inside.
>
> Q. Inside. That floor, I think, is that concrete?
>
> A. Concrete.

Significantly, I note that plaintiff also testified as follows:

> Q. And so is there any problem carrying this casket the 25 to 30 feet to the bottom of the stairs?
>
> A. No problem.
>
> Q. Describe for me what happens as you're going up the stairs.
>
> A. Then we started going up the stairs and I can remember hearing Mr. McCoy saying, you guys slow down. I can remember that. And as we went up the stairs, next thing I know I was missing, *stumbling across that first step*, and right down onto that concrete floor, both knees.
>
> Q. Let me go back and ask you this. Help me understand what happened here. Are you already on the top step and you're trying to then step into the church and that's when you trip? Or are you tripping on the top step?
>
> A. *I tripped on the top step and fell into the church.*

(Emphases added.) Plaintiff reiterated in his affidavit that, "[a]s [he] stated in [his] deposition on Page 76, [he] tripped on the top step and fell

into the church," and that "[t]he only difficulty [he] had with respect to moving the casket into the church was the top stair, which was unusually high, and [he] did not anticipate that [he] would need to lift [his] foot higher than [he] was required to lift [his] feet in order to climb the other stairs."

Viewing the evidence as a whole in the light most favorable to plaintiff, I cannot conclude that the portion of deposition testimony relied upon by defendant clearly establishes that plaintiff tripped on the riser of the non-defective fourth step or that plaintiff was contributorily negligent as a matter of law. *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182, 711 S.E.2d 114, 117 (2011) (stating that on review from summary judgment "we view the pleadings and all other evidence in the record in the light most favorable to the nonmovant and draw all reasonable inferences in that party's favor." (citing *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 662, 488 S.E.2d 215, 221 (1997))). Drawing such an inference would be contrary to the crux of plaintiff's entire case. As plaintiff alleged in both his original and amended complaint, he "was walking up the steps of the church building, when his left foot caught onto the lip of the top step leading into the church," causing him to fall.

Finally, defendant argues that plaintiff was contributorily negligent in: (1) failing to use a nearby ramp instead of the steps at issue; (2) agreeing to carry the casket with only four people; (3) failing to suggest the use of a trolley to move the casket into the church; and (4) turning sideways while climbing the steps with the casket. With respect to these contentions, I agree with the Court of Appeals majority below that in light of plaintiff's testimony that carrying the casket had no effect on his ability to climb the steps and that he could not, by the naked eye or by descending the steps previously, perceive the difference in height of the top step, a reasonable and prudent person would not know to take any precautions. Thus, unaware of the defect, a reasonably prudent person would not believe that it was necessary to take a ramp, seek additional help, use a trolley, or adjust his position. Therefore, because carrying a casket into a church for a funeral is not indisputably negligent, I "cannot conclude that, as a matter of law, Plaintiff was contributorily negligent in electing to utilize the apparently safe stairs." *Draughon*, 828 S.E.2d at 181. In short, these are all matters for a jury to decide.

Conclusion

In this case, when the evidence is viewed in the light most favorable to plaintiff, it does not establish as a matter of law that the allegedly defective condition of the steps was open and obvious or that plaintiff

was contributorily negligent. As such, this is not the "exceptional negligence case[ ]" in which "summary judgment is appropriate." *Ragland*, 299 N.C. at 363, 261 S.E.2d at 668 (citing *Page*, 281 N.C. at 706, 190 S.E.2d at 194). For the reasons stated herein, I would affirm the decision of the Court of Appeals reversing the trial court's entry of summary judgment in favor of defendant. Accordingly, I respectfully dissent.

Justices HUDSON and MORGAN join in this dissenting opinion.

IN THE MATTER OF A.J.T.

No. 230A19

Filed 5 June 2020

Termination of Parental Rights—disposition—best interests of child—no abuse of discretion

The trial court did not abuse its discretion by determining that termination of respondents' parental rights was in the juvenile's best interests. The trial court appropriately considered the factors stated in N.C.G.S. § 7B-1110(a), and the trial court's weighing of those factors was neither arbitrary nor manifestly unsupported by reason. Additionally, the findings of fact which respondents challenged on appeal were supported by competent evidence.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered 22 February 2019 by Judge Betty J. Brown in District Court, Guilford County. This matter was calendared in the Supreme Court on 18 May 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

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

Parker Poe Adams & Bernstein LLP, by E. Merrick Parrott and Kelsey Monk, for appellee guardian ad litem.

Edward Eldred for respondent-appellant mother.

J. Thomas Diepenbrock for respondent-appellant father.

HUDSON, Justice.

Respondents appeal from the trial court's order terminating their parental rights to their minor child, A.J.T. (Andy).[1] In this appeal, we consider whether the trial court abused its discretion in determining that it would be in Andy's best interests to terminate respondents' parental rights. We affirm.

Background

Respondents are the biological parents of Andy, who was born in April 2004. On 22 May 2015, the Guilford County Department of Health and Human Services (DHHS) took nonsecure custody of Andy and filed a petition alleging that he was a neglected and dependent juvenile. The petition alleged that DHHS received a report on 10 April 2015 that Andy's sister, Meg, was in intensive care after experiencing issues with asthma. Although she had been to the emergency room on at least twenty-eight occasions in the past year due to her asthma, neither respondent-mother nor Meg were able to provide the names of Meg's prescriptions, and respondent-mother and Meg's adult sibling smoked cigarettes in the home. The petition further alleged that respondent-mother was abusing drugs and alcohol and that Meg had been sexually abused by respondent-father on several occasions.[2] Respondent-father sent Andy outside to play during one of the sexual assaults. Respondent-mother entered a safety plan on 24 April 2015 wherein she agreed that Meg was not to have any contact with respondent-father, yet she allowed respondent-father into the home when Meg was there on multiple occasions.

On 14 January 2016, the trial court adjudicated Andy neglected and dependent. On 1 March 2016, the trial court entered a disposition order ceasing reunification efforts with respondents due to the nature of the criminal charges against them and because reunification efforts were "clearly futile and inconsistent" with Andy's health, safety, and need for a permanent home. The trial court ordered no visitation with respondents and continued custody with DHHS.

The trial court held a permanency planning hearing on 2 March 2016 and entered an order on 31 March 2016. The trial court found that respondents had been incarcerated since 10 September 2015. In connection with Meg's allegations, respondent-mother had been charged with

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

2. Respondent-father is not the biological father of Meg.

felony child abuse by sexual act and two counts of felony aiding and abetting, and respondent-father had been charged with statutory rape and two counts of first-degree sex offense. On 8 October 2015, Andy was placed in a therapeutic foster home. Although the foster parents were having "some difficulties" with him, they were very bonded with Andy, met his daily living needs, and continued to support him academically and emotionally. Andy was "struggl[ing] in school academically and behaviorally[,]" and since September 2015, he had been attending therapy and working on impulse control and anger management skills. The trial court established a primary plan of reunification with a concurrent secondary plan of adoption.

Over the next two years, the trial court held hearings and entered four successive permanency planning review orders. During this period, the trial court followed both respondent-mother and respondent-father through various unsuccessful but continuing efforts to receive parenting assessments and services, and in and out of incarcerations. Also, during this period, Andy was placed in different foster homes that were intended to be therapeutic, in attempts to address his various problematic behaviors. Throughout this period, up through the order entered 31 October 2017, the trial court maintained the primary permanent plan as reunification, with concurrent secondary plans of adoption and guardianship, and then just adoption.

The trial court held a permanency planning review hearing on 27 September 2017 and entered an order on 31 October 2017. Respondent-mother informed a social worker in August 2017 that her mother's home may be foreclosed upon. Her weekly individual therapy sessions were scheduled to start in October 2017. Respondent-father began sexual offender counseling in September 2017. The trial court found that since Andy's placement in a group home, his mood, anger, academic programming, respect towards adults, and manipulation had greatly improved. At a September 2017 treatment team meeting, the team discussed beginning the search for a therapeutic foster home. Prospective foster parents had been located, and a visit was scheduled.

On 14 March 2018, a permanency planning review hearing was held. The trial court entered an order on 23 April 2018, changing the primary permanent plan to adoption, with a secondary plan of guardianship. The trial court found that respondent-mother had not been receiving individual therapy on a regular basis and had last seen her therapist in January 2018. In violation of respondent-father's conditions of probation, respondent-mother had allowed respondent-father to stay with her. As a result, respondent-father was serving a ninety-day sentence for violating his

probation. The trial court found that on 3 November 2017, Andy entered a therapeutic foster home. He stayed in that home for only two weeks due to concerns with the foster parents' behaviors. He was placed in another foster home on 20 November 2017. The home appeared to be a "good fit" for Andy. He had formed a strong bond with the foster parents, especially the foster mother, and appeared to be very comfortable in the home. Andy expressed a strong desire to remain in his current placement. He was in the eighth grade and was having a "more successful" year in school, and he was refraining from demonstrating the "same aggressive and defiant behaviors that he ha[d] in the past." The trial court thus changed the primary permanent plan as noted above.

On 16 May 2018, DHHS filed a petition to terminate respondents' parental rights alleging that respondents: (1) neglected Andy, and such neglect was likely to recur if he were returned to respondents, *see* N.C.G.S. § 7B-1111(a)(1) (2019); (2) willfully left Andy in foster care or placement outside the home for more than twelve months without making reasonable progress to correct the conditions that led to his removal, *see* N.C.G.S. § 7B-1111(a)(2); and (3) willfully failed, "for a period of six continuous months immediately preceding the filing of the petition," to pay a reasonable portion of the cost of care for Andy although physically and financially able to do so, *see* N.C.G.S. § 7B-1111(a)(3).

The trial court held a permanency planning hearing on 18 January 2019 and entered an order on 1 February 2019. The trial court found that on 25 October 2018, Andy was placed in a Level II group home due to an increase in unsafe and defiant behaviors and was "responding relatively well." The trial court further found that, although historically Andy had a "very difficult time behaviorally in school[,]" he had begun to show improvement since the beginning of the 2018 to 2019 school year.

Following a hearing held on 29 January 2019, the trial court entered an order on 22 February 2019 finding all three grounds for termination alleged by DHHS. The trial court further concluded that it was in Andy's best interests that respondents' parental rights be terminated, and the court terminated respondents' parental rights. Respondents appeal.

Analysis

On appeal, respondents argue that the trial court abused its discretion by determining that termination of their parental rights was in Andy's best interests. Specifically, they challenge several of the dispositional findings of fact and contend that the findings do not support the conclusion that termination was in Andy's best interests. We disagree.

Our Juvenile Code provides for a two-step process for the termination of parental rights—an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110. At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination pursuant to section 7B-1111 of the North Carolina General Statutes. *Id.* § 7B-1109(e), (f). Here, the trial court adjudicated the existence of three grounds to terminate respondents' parental rights: neglect under N.C.G.S. § 7B-1111(a)(1), willfully leaving the juvenile in foster care or placement outside the home for more than twelve months without making reasonable progress to correct the conditions that led to the juvenile's removal under N.C.G.S. § 7B-1111(a)(2), and willful failure to pay a reasonable portion of the cost of care for Andy although physically and financially able to do so under N.C.G.S. § 7B-1111(a)(3). Respondents have not challenged the adjudicatory portion of the trial court's ruling, and thus this issue is not before us.

If the trial court finds grounds to terminate parental rights pursuant to N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage where it must "determine whether terminating the parent's rights is in the juvenile's best interest." *Id.* § 7B-1110(a). The trial court's assessment of a juvenile's best interest at the dispositional stage is reviewed only for abuse of discretion. *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re L.M.T.*, 367 N.C. 165, 171, 752 S.E.2d 453, 457 (2013) and *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984)). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). "The trial court's dispositional findings of fact are reviewed under a 'competent evidence' standard." *In re K.N.K.*, 839 S.E.2d 735, 740 (N.C. 2020) (citation omitted).

In deciding whether termination of parental rights is in the best interests of the juvenile,

> the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

N.C.G.S. § 7B-1110(a).

Here, the trial court made the following findings of fact addressing each of the factors in subsection 7B-1110(a):

> 25. It is in the best interest of the juvenile that the parental rights of [respondent-mother and respondent-father] be terminated, based upon the following factors:
>
> A. The juvenile is 14 years of age.
>
> B. The likelihood of his adoption is high. Despite some testimony about some challenging behavior, he is smart, very mature for his age, adaptable and pleasant. He presents today as stable and mature about why he is here and how he got to this point.
>
> C. Termination will aid in the adoption of the juvenile, which is the most permanent plan.
>
> D. The juvenile is very bonded with his mother. It is obvious to the Court that the mother loves the juvenile. There have been no authorized visits, even though there were a number of unauthorized visits. The juvenile seldom mentions his father, although he expresses his desire to go home and live with his mother.
>
> E. The juvenile has been living at his current group home since late October of 2018. He has had approximately 13 placements since he came into DHHS custody. Although he has not had time to create a bond in his current home, he has bonded with foster parents in previous placements, and he has easily adjusted to different settings.

First, in regards to Andy's age, respondents acknowledge that the trial court correctly found that Andy was fourteen years old at the time of the hearing. Yet, citing to *Mintz v. Mintz*, 64 N.C. App. 338, 341, 307 S.E.2d 391, 393 (1983)—which is not binding on this Court—respondent-mother

argues that due to Andy's age, the trial court should consider his "obvious" preference to live with her. In *Mintz*, the Court of Appeals stated that as a child approaches the age of fourteen, their custodial preference on visitation *may* be considered by the trial court, but that "his choice is not absolute or controlling." *Id.* at 340–41, 307 S.E.2d at 393. *Mintz*, however, is readily distinguishable from the case before us. In *Mintz*, the Court of Appeals addressed parental visitation rights in the context of a divorce action, not an assessment by the trial court of a child's best interest in a termination of parental rights proceeding. *Id.* at 338, 307 S.E.2d at 392. Moreover, the Court of Appeals affirmed that it remained the duty of the trial judge to determine "the weight to be accorded the child's preference, to find and conclude what is in the best interest of the child, and to decide what promotes the welfare of the child." *Id.* at 341, 307 S.E.2d at 394.

Respondent-mother further contends that "Andy's age and maturity level, and his obvious awareness of his and his family's circumstances, weigh against the termination decision." Here, the trial court made a dispositional finding that "[Andy] is smart, very mature for his age, adaptable and pleasant. He presents today as stable and mature about why he is here and how he got to this point." We have noted that

> an important aspect of the trial court's role as finder of fact is assessing the demeanor and credibility of witnesses, often in light of inconsistencies or contradictory evidence. It is in part because the trial court is uniquely situated to make this credibility determination that appellate courts may not reweigh the underlying evidence presented at trial.

In re J.A.M., 372 N.C. 1, 11, 822 S.E.2d 693, 700 (2019). Thus, any reasonable inferences the trial court drew based on Andy's age, demeanor, or attitude—and any determinations it made as to the weight of those inferences—were solely for the trial court to make. *See In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 66 (2019).

Respondent-father argues that Andy's age weighs against the trial court's determination that termination of his parental rights was in his best interest because a child over the age of twelve is required to consent to his adoption. *See* N.C.G.S. § 48-3-601 (2019). He asserts that, "Andy will have the right to object to the adoption, compounding the difficulty in procuring permanency for him." However, the court may waive the consent requirement "upon a finding that it is not in the best interest of the minor to require the consent." *Id.* § 48-3-603(b)(2). Thus, even

assuming *arguendo* that Andy fails to consent at the time of an adoption, his lack of consent would not preclude him from being adopted.

Second, respondents challenge the trial court's finding that the likelihood of Andy's adoption is high. While recognizing that the trial court appears to have based its finding on a report filed by the *guardian ad litem* (GAL) and the GAL's testimony at the termination hearing, they assert the report and testimony is "undercut" and "directly contradicted" by Andy's history while in DHHS custody. Respondent-mother contends that the trial court's finding is not based on convincing evidence and respondent-father argues that the trial court's finding is not based on competent evidence, given Andy's behavioral and psychiatric issues and multiple placements while in foster care for nearly four years.

The GAL's 29 January 2019 report, which was admitted into evidence, specifically stated that the "likelihood of adoption for [Andy] is high." The report further stated that, "[Andy] is a smart, charming young man who easily engages in conversation. Although [Andy] has often struggled to find stability since entering DHHS custody, this GAL fully believes that when the right family is found for [Andy], he will find permanence." In addition, at the termination hearing, the GAL testified that adoption was "likely, if he finds the right family . . . [b]ecause he is a very smart, charming young man who engages easily with adults, and I think that once he finds the right family, he would be able to find permanence." The court's finding of fact that Andy had a high likelihood of adoption is supported by record evidence and is thus binding on appeal. *See In re A.U.D.*, 373 N.C. 3, 12, 832 S.E.2d 698, 704 (2019) ("To be sure, evidence existed that would have supported a contrary decision. But this Court lacks the authority to reweigh the evidence that was before the trial court.").

Third, with respect to the trial court's finding that termination will aid in Andy's adoption, respondent-mother appears to suggest that this finding amounts to a mere conclusory recitation of "magic words." She cites to *In re B.C.T.*, 828 S.E.2d 50 (N.C. Ct. App. 2019), to support her contention. The Court of Appeals' decision in *In re B.C.T.* is not binding on this Court, and respondent-mother's reliance on it is otherwise misplaced because it is distinguishable. In *In re B.C.T.*, the trial court adjudicated that the respondent-mother's child was neglected and concluded "[t]hat it is in the best interests of the Juvenile for [Ms. Mitchell, a family friend,] to be granted the care, custody, and control of the Juvenile." *Id.* at 58. The Court of Appeals held that because there was almost no evidence regarding Ms. Mitchell, her home, or care of the child, a conclusory recitation of the best interest standard was insufficient to support

the trial court's conclusion. *Id.* In the instant case, we are not convinced that the trial court was making a conclusory recitation. The permanent plan was adoption, and termination of parental rights is undoubtedly a prerequisite to accomplishing that plan.

Fourth, while respondents do not challenge the trial court's finding that Andy "is very bonded" with respondent-mother and "seldom mentions" respondent-father, they contend that this factor does not support the trial court's conclusion that it is in Andy's best interest to terminate their parental rights. It is clear from the trial court's findings, however, that it considered several factors in making the best interests determination. "[T]he bond between parent and child is just one of the factors to be considered under N.C.G.S. § 7B-1110(a), and the trial court is permitted to give greater weight to other factors." *In re Z.L.W.*, 372 N.C. at 437, 831 S.E.2d at 66.

Finally, respondents challenge the trial court's finding regarding Andy's relationship with "the proposed adoptive parent, guardian, custodian, or other permanent placement." N.C.G.S. § 7B-1110(a)(5). Specifically, respondent-mother contends that DHHS failed to identify any permanent placement for Andy, "so Andy has no relationship with any proposed caretaker." We note that the absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights. *See In re A.R.A.*, 373 N.C. 190, 200, 835 S.E.2d 417, 424 (2019) (affirming the district court in terminating parental rights even though "[the child] was not currently in a pre-adoptive placement"); *See also In re D.H.*, 232 N.C. App. 217, 223, 753 S.E.2d 732, 736 (2014) ("[T]he absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights."). Thus, her argument is unavailing.

Respondent-mother additionally argues that the portion of the trial court's finding that provides Andy "easily adjusted to different settings" is not supported by the record. This portion of the trial court's finding, however, is supported by record evidence and the GAL's testimony. In the 31 March 2016 permanency planning order, the trial court found that Andy had been placed in a therapeutic foster home and "adjusted well," developing a close bond with the foster parents. In the 31 October 2017 permanency planning order, the trial court found that while in a group home, Andy had "shown great improvement with his mood, his anger, his academic program[m]ing, his respect towards adults, and his manipulation." In the 23 April 2018 permanency planning order, the trial court found that the foster home in which he was placed in November 2017 appeared to be a "good fit" for him. He formed a "strong

bond with the foster parents, especially the foster mother" and seemed "very comfortable" in the home. It was the "happiest the Social Worker has seen him since the start of this case." In a 29 January 2019 GAL report, the GAL stated that she had "observed [Andy] bond with previous caregivers." The GAL had also observed Andy bond with his foster parents in his most recent foster home. He "frequently teased and joked with his foster mother, demonstrating a level of comfort in the home and trust with her." When asked at the termination hearing as to how Andy was currently adjusting in a group home, the GAL testified that "[h]e's doing okay. . . . [O]nce he got into this home and kind of adjusted, his grades greatly improved and some behavioral issues improved." Based on the foregoing evidence, the trial court made the reasonable inference that Andy had the ability to easily adjust to different settings.

Respondent-father, on the other hand, argues that the portion of the trial court's finding stating that Andy had been in thirteen different placements since entering DHHS custody undermines the trial court's conclusion that termination was in Andy's best interests and "only emphasizes the point that there is no proposed adoptive parent, and underscores that no permanent proposed placement was in existence at the time of the hearing." He asserts that this case is similar to the circumstances found in *In re J.A.O*, 166 N.C. App. 222, 601 S.E.2d 226 (2004). We disagree.

As previously stated, the lack of a proposed adoptive placement for Andy at the time of the termination hearing is not a bar to terminating parental rights. *See In re A.R.A.*, 373 N.C. at 200, 835 S.E.2d at 424; *In re D.H.*, 232 N.C. App. at 223, 753 S.E.2d at 736. Furthermore, *In re J.A.O.* is not binding on this Court, and we find the circumstances here to be readily distinguishable. In *In re J.A.O.*, the juvenile was fourteen years old at the time of the termination hearing. He had been in foster care since he was eighteen months old and had been placed in nineteen treatment centers. *In re J.A.O.*, 166 N.C. App. at 227, 601 S.E.2d at 230. The juvenile's GAL opined that it was in the juvenile's best interests not to terminate the respondent's parental rights. *Id.* at 225, 601 S.E.2d at 229. The GAL testified that it was "highly unlikely that a child of [the juvenile's] age and physical and mental condition would be a candidate for adoption, much less selected by an adopted family." *Id.* at 228, 601 S.E.2d at 230. The Court of Appeals stated that although there was a small possibility that the juvenile would be adopted, the "remote chance of adoption in this case" did not "justif[y] the momentous step of terminating respondent's parental rights." *Id.* Accordingly, the Court of Appeals held that the trial court abused its discretion in determining

that it was in the juvenile's best interests to terminate the respondent's parental rights. *Id.* Here, the GAL distinctly testified that it was likely Andy would be adopted and included in her report that the likelihood of Andy's adoption was high. Notably, the GAL recommended termination of respondents' parental rights. Moreover, while the mother in *J.A.O.* had made reasonable progress towards correcting the conditions that led to the removal of her son from her care, respondents here failed to make such progress.

The remainder of respondents' arguments concern whether the statutory criteria of N.C.G.S. § 7B-1110 as a whole weigh against terminating their parental rights. The trial court's dispositional findings demonstrate it considered the relevant statutory criteria of N.C.G.S. § 7B-1110(a). The trial court gave due consideration to Andy's age, the likelihood of his adoption, whether termination would facilitate in the achievement of the permanent plan, Andy's bond with respondents, and the quality of the relationship between Andy and his current placement. Respondents essentially ask this Court to do something it lacks the authority to do—to reweigh the evidence and reach a different conclusion than the trial court. We are satisfied that the trial court's conclusion that termination of respondents' parental rights was in Andy's best interests was neither arbitrary nor manifestly unsupported by reason. For the reasons stated above, we affirm the 22 February 2019 order of the trial court terminating respondents' parental rights.

AFFIRMED.

IN RE A.L.S.

[374 N.C. 515 (2020)]

IN THE MATTER OF A.L.S.

No. 295A19

Filed 5 June 2020

1. Termination of Parental Rights—motion to continue—denied—abuse of discretion analysis

In a termination of parental rights (TPR) proceeding, the trial court did not abuse its discretion by denying a mother's motion to continue the hearing to allow her sixteen-year-old son (who was not the subject of the TPR hearing) to testify, where the court had already granted a month-long continuance on the same basis, the mother made no showing of extraordinary circumstances as required by N.C.G.S. § 7B-1109(d) to justify another continuance, and the mother's counsel did not tender an affidavit or other proof of the significance of the expected testimony.

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

The trial court's unchallenged findings of fact in a termination of parental rights proceeding were based on sufficient evidence and supported the court's conclusion of law that a mother willfully abandoned her child. The mother's complete failure to attempt any form of contact or communication with her daughter over several years was not excused by a prior custody order which did not grant her visitation rights.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 18 April 2019 by Judge William F. Fairley in District Court, Bladen County. This matter was calendared for oral argument in the Supreme Court on 18 May 2020 but determined on the record and brief without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief for petitioner-appellees Amber S. and Clinton S.

No brief for appellee Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, and J. Lee Gilliam, Assistant Parent Defender, for respondent-appellant mother.

BEASLEY, Chief Justice.

Respondent-mother appeals from the trial court's orders on adjudication and disposition, which terminated her parental rights to her daughter, A.L.S. (Anne).[1] The trial court also terminated the parental rights of Anne's biological father, who is not a party to this appeal. We affirm.

Anne was born on 5 November 2012. When Anne was nine weeks old, respondent-mother took a trip to the beach, ostensibly for the weekend, and left Anne in the care of petitioner Amber S., who is respondent-mother's third cousin. Respondent-mother did not return for Anne until three weeks later.

Amber S. married petitioner Clinton S. in March of 2013. In June of 2013, the Bladen County Department of Social Services (DSS) placed Anne in petitioners' care pursuant to a safety assessment and kinship care agreement. Anne has resided exclusively in petitioners' care since at least 2014.

In 2016, petitioners filed a civil complaint against respondent-mother and Anne's father (respondents) seeking custody of Anne. By order entered 1 December 2016, the District Court, Bladen County, found that respondents had "acted in a manner in consistent [sic] with their protected status as parents" of Anne and awarded petitioners "sole legal and physical care, custody and control of the minor child."

Petitioners filed a petition to terminate respondents' parental rights to Anne on 28 August 2018. Respondent-mother filed an answer denying the allegations contained in the petition and opposing the termination of her parental rights. The trial court held a hearing on the petition on 26 February and 27 March 2019. By separate adjudication and disposition orders entered on 18 April 2019, the trial court concluded that (1) grounds existed to terminate respondents' parental rights based on their willful abandonment of Anne, *see* N.C.G.S. § 7B-1111(a)(7) (2019); and (2) it was in Anne's best interests that respondents' parental rights be terminated. *See* N.C.G.S. §§ 7B-1109, -1110(a) (2019). Respondent-mother filed notice of appeal.

[1] Respondent-mother first claims the trial court erred in denying her motion to continue the termination hearing in order to allow her sixteen-year-old son to testify on her behalf. "Ordinarily, a motion to continue is

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

addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *State v. Walls*, 342 N.C. 1, 24, 463 S.E.2d 738, 748 (1995). "If, however, the motion is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law and the order of the court is reviewable." *State v. Baldwin*, 276 N.C. 690, 698, 174 S.E.2d 526, 531 (1970).

Respondent-mother did not assert in the trial court that a continuance was necessary to protect a constitutional right. We therefore review the trial court's denial of her motion to continue only for abuse of discretion. *See generally State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal."). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Moreover, "[r]egardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when defendant shows both that the denial was erroneous, and that he suffered prejudice as a result of the error." *Walls*, 342 N.C. at 24–25, 463 S.E.2d at 748.

The transcript shows that respondent-mother's counsel made an oral motion to continue at the beginning of the termination hearing on 26 February 2019. Counsel advised the trial court that respondent-mother had brought her sixteen-year-old son to counsel's office the previous day at 4:30 p.m. After speaking to the son, counsel determined his testimony was "necessary for the proper administration of justice" in that it "would not only corroborate . . . [respondent-mother's] testimony, it would also provide independent testimony as to negating some of the allegations against [her]." Counsel further advised the trial court that respondent-mother's son was in "SAT prep testing th[at] morning" and would not be able to appear in court until 2:00 p.m.

The trial court deferred a ruling on the motion to continue and proceeded to receive testimony from petitioners, the guardian *ad litem*, and respondents. After hearing from all of the witnesses in attendance, the trial court asked counsel when respondent-mother's son would be available. Respondent-mother's counsel replied that respondent-mother no longer had a ride to pick her son up at school and therefore, respondent-mother was renewing her motion to continue the termination hearing to another date. Counsel again characterized the son's expected testimony as "beneficial and crucial to [respondent-mother's] defense specifically

as to the willfulness allegation." Over petitioners' expressed wish to "handle this today[,]" the trial court granted respondent-mother's motion and continued the termination hearing until 27 March 2019.

When the termination hearing resumed on the morning of 27 March 2019, respondent-mother's counsel made another motion to continue on the ground that respondent-mother's son was not present to testify. Counsel stated he had "subpoenaed the residence [the son] resides at and subpoenaed the adult at that residence to produce him to court"[2] to no avail. Petitioners objected to respondent-mother's motion to continue, and the trial court denied it.

We conclude the trial court did not abuse its discretion in denying respondent-mother's second motion to continue the termination hearing in order to obtain her son's testimony. Respondent-mother was granted a month-long continuance for this purpose on the initial hearing date of 26 February 2019. As counsel for respondent-mother recognized, N.C.G.S. § 7B-1109(d) provides that "[c]ontinuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice." N.C.G.S. § 7B-1109(d). Petitioners filed their petition to terminate respondent-mother's parental rights in this case on 28 August 2018. Because respondent-mother made no showing that extraordinary circumstances existed requiring a second continuance of the termination hearing, the trial court did not act unreasonably in denying her request. *See In re C.J.H.*, 240 N.C. App. 489, 495, 772 S.E.2d 82, 87 (2015).

We further note that, despite two opportunities, respondent-mother's counsel offered only a vague description of the son's expected testimony and did not tender an affidavit or other offer of proof to demonstrate its significance. *See State v. Cody*, 135 N.C. App. 722, 726, 522 S.E.2d 777, 780 (1999) (deeming it "the better practice to support a motion for continuance with an affidavit"); *In re D.Q.W.*, 167 N.C. App. 38, 41–42, 604 S.E.2d 675, 677 (2004). Respondent-mother thus fails to demonstrate any prejudice arising from the trial court's denial of her motion to continue.

[2] Respondent-mother next claims the trial court erred in adjudicating grounds for the termination of her parental rights. She contends the evidence and the trial court's findings of fact do not support its conclusion that she willfully abandoned Anne for purposes of N.C.G.S. § 7B-1111(a)(7).

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2. The record shows respondent-mother's son resided with his maternal grandmother.

"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 C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)).

Under N.C.G.S. § 7B-1111(a)(7), the trial court may terminate the parental rights of a parent who "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). The "determinative" period in this case is the six months between 28 February 2018 and 28 August 2018. *See, e.g.*, *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997). The trial court may also "consider a parent's conduct outside the six-month window *in evaluating a parent's credibility and intentions*" within the relevant six-month period. *In re C.B.C.*, 373 N.C. at 22, 832 S.E.2d at 697 (citation omitted).

"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. at 251, 485 S.E.2d at 617 (citation omitted). The willfulness of a parent's conduct under N.C.G.S. § 7B-1111(a)(7) "is a question of fact to be determined from the evidence." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). We have repeatedly held that "[i]f a parent withholds [that parent's] presence, [ ] love, [ ] care, the opportunity to display filial affection, and willfully [sic] neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *In re C.B.C.*, 373 N.C. at 19, 832 S.E.2d at 695 (second through fifth alterations in original) (quoting *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608).

In support of its conclusion "[t]hat grounds exist for the termination of the respondents['] parental rights in that the respondents have abandoned the minor child for at least 6 months prior to the filing of this action," the trial court made the following findings of fact:

> 5. That the minor child has lived with the petitioners since she was approximately 9 weeks old, and has lived with the petitioners continuously subject to a custody order dated December 1, 2016.
>
> . . . .
>
> 9. That when the minor child was approximately nine weeks old, Respondent mother left [the] child with

Petitioner for the weekend to go to the beach and did not return for the child until three weeks later.

10. That custody of the minor child was granted to petitioners on December 1, 2016 in Bladen County District Court in file 16CVD364.

. . . .

12. That respondents have never sought to modify that custody order.

13. That the respondents have not seen the minor child in excess of three years.

14. That there have been no phone calls or contact between the respondents and the minor child during that time period.

15. That petitioners have resided at the same address since 2012.

16. That respondent mother has been to that address at least two times.

17. That respondent mother testified that she was unaware of where the petitioners resided, and that the court finds this testimony lacking in credibility.

18. That even if she was unaware of the petitioners[’] address, the court finds that petitioners had common relatives who did know the address.

19. That respondent[-mother’]s claim that these common relatives would not tell . . . her the respondent[s’] address lacked credibility.

. . . .

21. That the respondents made no effort to locate such an address.

22. That respondent mother suffers from no [disability] that made it impossible to find the petitioners[’] address.

. . . .

33. That respondent mother and father's lack of contact with [the] minor child evidences a subtle [sic] purpose to relinquish [their] legal obligation for care and support of the minor child.

34. That there is no evidence as to any physical or mental disability preventing the respondents from contacting the minor child.

35. That the court finds that the respondents willfully abandoned the minor child for at least 6 months prior to the filing of this action . . . .

Respondent-mother takes exception to the trial court's ultimate determination that her actions evince her willful abandonment of Anne as stated in finding of fact 35. *See generally In re N.D.A.*, 373 N.C. 71, 76, 833 S.E.2d 768, 773 (2019) ("[A]n 'ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact' and should 'be distinguished from the findings of primary, evidentiary, or circumstantial facts.' " (quoting *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491, 57 S. Ct. 569, 574, 81 L. Ed. 755, 762 (1937))). Because respondent-mother does not challenge evidentiary findings of fact 5 through 34, we are bound thereby. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

We hold that the facts found by the trial court support its adjudication of willful abandonment under N.C.G.S. § 7B-1111(a)(7). The findings of fact show respondent-mother made no effort to have contact with Anne during the determinative six-month period or in more than two years immediately preceding this period, despite knowing petitioners and Anne's location. *See In re C.B.C.*, 373 N.C. at 23, 832 S.E.2d at 697 (affirming adjudication under N.C.G.S. § 7B-1111(a)(7) where, "in the six months preceding the filing of the termination petition, respondent made no effort to pursue a relationship with [the child]"); *In re E.H.P.*, 372 N.C. 388, 394, 831 S.E.2d 49, 53 (2019) (same).

Respondent-mother notes she was subject to the trial court's 2016 custody order which granted petitioners sole custody of Anne and "which did [not] allow [respondent-mother] any visits" with Anne. Respondent-mother further cites Amber S.'s testimony at the termination hearing, in which Amber S. acknowledged she would avoid taking Anne to her grandmother's house if she knew respondent-mother would be there. Respondent-mother contends this evidence provides an alternative explanation for her own conduct that is "inconsistent with a willful intent to abandon Anne."

We find respondent-mother's argument unpersuasive. While there was evidence of ill will between petitioners and respondent-mother, this Court has held that "a parent *will not be excused from showing interest in [the] child's welfare by whatever means available*." *In re C.B.C.*, 373 N.C. at 20, 832 S.E.2d at 695 (citation omitted). Respondent-mother's failure to even attempt any form of contact or communication with Anne gives rise to an inference that she acted willfully in abdicating her parental role, notwithstanding any personal animus between her and petitioners. Although the 2016 custody order did not give respondent-mother a right to visitation, the order in no way prohibited respondent-mother from contacting Anne. *Cf. In re E.H.P.*, 372 N.C. at 390, 831 S.E.2d at 51 (addressing adjudication of abandonment where respondent was subject to a no-contact order). Moreover, as the trial court found, respondent-mother "never sought to modify that custody order" in order to gain visitation rights.

The cases cited by respondent-mother are distinguishable from the facts *sub judice*. In *In re Young*, this Court reversed an adjudication of willful abandonment where the evidence showed that respondent's lack of contact with her child was in part attributable to the "hostile relationship between respondent and petitioner's family members who cared for [the child]." 346 N.C. at 252, 485 S.E.2d at 617. However, the evidence further showed that respondent began visiting her son as soon as she was told of his whereabouts, that respondent underwent surgery and began radiation and chemotherapy treatments for breast cancer during the relevant six-month period, and that "respondent had asked to see [her son] before her surgery [but] petitioner had denied her request." *Id.* at 251–52, 485 S.E.2d at 617. The Court concluded that "[t]his conduct does not evidence a willful abandonment of her child on the part of respondent." *Id.* at 252, 485 S.E.2d at 617.

Respondent-mother also cites *In re E.H.P.*, a case in which the respondent-father was forbidden by a temporary custody judgment from having any contact with his child until authorized by the trial court. 372 N.C. at 390, 831 S.E.2d at 51. Despite this no-contact provision and the fact that the respondent-father was in prison "for almost the entirety of the six-month period" at issue, this Court affirmed the trial court's order terminating his parental rights on the basis of willful abandonment. *Id.* at 394, 831 S.E.2d at 53. "By his own admission," we observed that "respondent[-father] had no contact with his children during the statutorily prescribed time period. In addition, he made no effort to have any form of involvement with the children for several consecutive years following the entry of the [t]emporary [c]ustody [j]udgment." *Id.*

Unlike the respondent-father in *In re E.H.P.*, respondent-mother was neither incarcerated nor subject to a no-contact order during the six months immediately preceding petitioners' filing of the petition to terminate her parental rights. Accordingly, notwithstanding her testimony that she lacked the funds to hire an attorney and "f[i]ght for custody" of Anne, we are satisfied that respondent-mother's unwillingness to attempt any form of communication with Anne over a period of years supports the trial court's adjudication of willful abandonment.

Because respondent-mother does not contest the trial court's determination that terminating her parental rights was in Anne's best interests under N.C.G.S. § 7B-1110(a), we do not consider that issue. Accordingly, the trial court's orders are affirmed.

AFFIRMED.

IN THE MATTER OF C.R.B. AND C.P.B.

No. 292A19

Filed 5 June 2020

Termination of Parental Rights—no-merit brief—neglect and willful failure to make reasonable progress

The trial court's termination of a mother and father's parental rights on the grounds of neglect and willful failure to make reasonable progress was affirmed where their counsel filed a no-merit brief. The termination order was based on clear, cogent, and convincing evidence and based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 17 May 2019 by Judge Scott Etheridge in District Court, Randolph County. This matter was calendared for argument in the Supreme Court on 18 May 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Chrystal Kay for petitioner-appellee Randolph County Department of Social Services.

Winston & Strawn LLP, by Stacie C. Knight, for appellee Guardian ad Litem.

Vitrano Law Offices, PLLC, by Sean P. Vitrano for respondent-appellant mother.

J. Thomas Diepenbrock for respondent-appellant father.

NEWBY, Justice.

Respondents, the mother and father of the minor children C.R.B. (Rose) and C.P.B. (Patrick), appeal from the trial court's 17 May 2019 order terminating their parental rights.[1] Counsel for respondents have filed no-merit briefs pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude the issues identified by counsel in respondents' briefs are meritless and therefore affirm the trial court's order.

On 23 May 2017, Randolph County Department of Social Services (DSS) filed petitions alleging Rose and Patrick were neglected juveniles. DSS specifically alleged: (1) the children had been exposed to substance abuse in the home; (2) the children had been exposed to domestic violence between respondents; (3) respondents had violated prior safety plans for the children; and (4) respondents had not secured necessary mental health treatment for Patrick. The trial court entered an order adjudicating Rose and Patrick to be neglected juveniles on 15 December 2017.

By an order entered on 28 January 2019, the trial court set Rose's primary permanent plan as adoption and her secondary permanent plan as reunification with respondent-mother. Patrick had initially indicated he did not want to be adopted, but later changed his mind. After a hearing on 27 March 2019, the trial court entered an order setting his primary permanent plan as adoption and his secondary permanent plan as reunification with respondent-mother. DSS filed motions to terminate respondents' parental rights to the children on the grounds of neglect and willful failure to make reasonable progress to correct the conditions that led to the children's removal from their home. *See* N.C.G.S. § 7B-1111(a)(1), (2) (2019). After a hearing on 4 April 2019, the trial court entered an order on 17 May 2019 terminating respondents' parental rights based on both grounds alleged in the motions. Respondents appealed.

Counsel for respondents have filed no-merit briefs on their clients' behalf under Rule 3.1(e) of the Rules of Appellate Procedure. In their

1. The pseudonyms "Rose" and "Patrick" are used to protect the identity of the juveniles and for ease of reading.

briefs, each counsel identified three issues that could arguably support an appeal, but also stated why they believed each of the issues lacked merit. Counsel have advised respondents of their right to file pro se written arguments on their own behalf and provided them with the documents necessary to do so. Neither respondent has submitted written arguments to this Court.

We carefully and independently review issues identified by counsel in a no-merit brief filed pursuant to Rule 3.1(e) in light of the entire record. *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). After conducting this review, we are satisfied the trial court's 17 May 2019 order is supported by clear, cogent, and convincing evidence and based on proper legal grounds. Accordingly, we affirm the trial court's order terminating respondents' parental rights.

AFFIRMED.

IN THE MATTER OF C.V.D.C. AND C.D.C.

No. 314A19

Filed 5 June 2020

1. Termination of Parental Rights—best interests of child—disposition—standard of review—abuse of discretion

The Supreme Court reaffirmed that a trial court's determination of a child's best interest in a termination proceeding (under N.C.G.S. § 7B-1110(a)) is reviewed under the abuse of discretion standard of review.

2. Termination of Parental Rights—best interests of child—fact-finding requirements—statutory interpretation—standard of review—de novo

Whether the trial court complied with the fact-finding requirements of N.C.G.S. § 7B-1110(a) in determining a child's best interests was a question of statutory interpretation, which is reviewed de novo.

3. Termination of Parental Rights—best interests of child—statutory factors—no written findings—no conflict in evidence

There was no reversible error in the trial court's failure to make written findings of fact as to several of the factors in N.C.G.S.

§ 7B-1110(a) where there was no conflict in the evidence as to those statutory factors.

4. Termination of Parental Rights—best interests of child—bond between children and parent—written findings

The trial court's written findings of fact were sufficient to demonstrate its consideration of the evidence regarding the bond between the children and their mother in determining the children's best interests where the trial court found that the mother had not created a bond with her children, the mother did not visit or maintain regular contact with the children after they were placed with a kinship provider, and the mother had made no effort on her Out of Home Family Services Agreements—findings which the mother did not challenge on appeal. Further, the trial court was not required to make written findings on the children's feelings toward their mother because no evidence was presented on the matter, except for evidence that the children desired to remain with their foster parents.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 30 April 2019 by Judge Mike Gentry in District Court, Caswell County. This matter was calendared for argument in the Supreme Court on 4 May 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Stuart N. Watlington for petitioner-appellee Caswell County Department of Social Services.

Alston & Bird LLP, by Kelsey L. Kingsbery, for appellee Guardian ad Litem.

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

NEWBY, Justice.

Respondent appeals from the trial court's orders terminating her parental rights in the minor children C.V.D.C. (Carol),[1] born in September 2012, and C.D.C. (Cody), born in December 2013 (collectively, the children). We affirm.

1. Pseudonyms are used to protect the identity of the juveniles and for ease of reading.

The Caswell County Department of Social Services (DSS) received a report on 20 December 2016 that respondent had been kicked out of the residence where she and the children were staying and that she used the money from her child's disability check to purchase crack cocaine. Eight days later, DSS received a report that respondent had left the children with an individual who was unable to care for them. On 3 January 2017, DSS arranged a kinship placement for the children with a friend of respondent. Respondent acknowledged to DSS that she was homeless and had a significant history of substance abuse. After leaving them in kinship care, respondent did not visit or maintain regular contact with the children.

DSS filed a juvenile petition on 11 May 2017 alleging the children were neglected and dependent. The trial court held a hearing on the petition on 5 September 2017 and adjudicated the children to be neglected and dependent by order entered on 7 November 2017. At the time of the hearing, respondent was in jail awaiting trial on pending charges in Alamance County and had failed to maintain contact with DSS since leaving the children in kinship care. The trial court found that respondent

> ha[d] failed to seek services to eliminate her substance abuse problems and to obtain decent housing for the children. She ha[d] no stable living environment for herself or for the children. She ha[d] no income for the children, and she . . . had numerous opportunities to visit with the children since January 3rd of this year, but ha[d] failed to do so.

Respondent entered into an out-of-home family services agreement for each child with DSS on 15 September 2017, committing to a series of actions to address issues related to her substance abuse, mental health, parenting skills, and lack of stable housing and employment.

On 29 August 2018, DSS filed petitions to terminate respondent's parental rights. In September 2018, the children disclosed that they had been inappropriately disciplined by their caretaker, and DSS removed them from their kinship placement. On 3 October 2018, DSS placed the children together in a licensed foster home.

On 19 February 2019, by consent of the parties, the trial court held a combined hearing on both petitions. After receiving testimony from respondent and her DSS social worker, the court adjudicated grounds for terminating respondent's parental rights based on her neglect of the children and her willful failure to make reasonable progress to correct the conditions that led to their removal from her care. *See* N.C.G.S.

§ 7B-1111(a)(1), (2) (2019). At the dispositional stage, the trial court admitted without objection the written reports prepared by DSS and the guardian *ad litem* (GAL) and heard additional testimony from the DSS social worker. The trial court then concluded it was in the best interests of both children that respondent's parental rights be terminated. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent filed notices of appeal from the trial court's orders. *See* N.C.G.S. § 7B-1001(a1)(1) (2019).

On appeal respondent does not challenge the trial court's adjudication of grounds to terminate her parental rights under N.C.G.S. § 7B-1111(a)(1) and (2). She contends the trial court erred in making its dispositional determination that terminating her parental rights was in the children's best interests. Specifically, respondent claims the trial court failed to make the necessary findings of fact required by N.C.G.S. § 7B-1110(a) to support its decision.

The statute at issue, N.C.G.S. § 7B-1110(a), provides in pertinent part as follows:

> (a) After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. . . . In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a)(1)–(6).

[1] We begin by addressing respondent's position regarding the appropriate standard of appellate review for a disposition entered under N.C.G.S. § 7B-1110(a). Respondent recognizes this Court's well-established doctrine that "[t]he trial court's assessment of a juvenile's best

interest at the dispositional stage is reviewed only for abuse of discretion." *In re Z.L.W.*, 372 N.C. 432, 435, 831 S.E.2d 62, 64 (2019). She casts our deferential posture, however, as a vestige of such decisions as *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984), which predate the amendments to N.C.G.S. § 7B-1110(a) enacted by the legislature in 2005 and 2011 to safeguard the rights of parents. In light of these amendments, respondent "argues for a *de novo* standard of review as to the trial court's application of the factors enumerated in N.C.G.S. § 7B-1110."

We find respondent's argument unpersuasive. This Court has recently reaffirmed the abuse of discretion standard when reviewing the trial court's determination of a child's best interest under N.C.G.S. § 7B-1110(a). *See In re A.U.D.*, 373 N.C. 3, 6, 832 S.E.2d 698, 700 (2019); *In re Z.L.W.*, 372 N.C. at 435, 831 S.E.2d at 64; *In re L.M.T.*, 367 N.C. 165, 171, 752 S.E.2d 453, 457 (2013). Our application of the abuse of discretion standard in this context is consistent with this Court's long-standing deference to the trial courts in matters related to child custody. *See Pulliam v. Smith*, 348 N.C. 616, 624–25, 501 S.E.2d 898, 902 (1998) ("It is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody."); *Finley v. Sapp*, 238 N.C. 114, 116, 76 S.E.2d 350, 352 (1953). Having considered respondent's arguments, we again reaffirm our application of the abuse of discretion standard when reviewing the trial court's determination of "whether terminating the parent's rights is in the juvenile's best interest" under N.C.G.S. § 7B-1110(a). Under that standard, we defer to the trial court's decision unless it is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).

Respondent claims the trial court failed to make sufficient written findings under N.C.G.S. § 7B-1110(a) to support its conclusion that terminating her parental rights is in the children's best interests. She asserts that the trial court's findings address only the ages of the children under N.C.G.S. § 7B-1110(a)(1), while leaving unaddressed the remaining statutory criteria enumerated in N.C.G.S. § 7B-1110(a)(2)–(6).[2] With regard to "[t]he bond between the juvenile and the parent" under N.C.G.S. § 7B-1110(a)(4), respondent contends the trial court's finding "that neither parent has created a bond with the children" is insufficient because it fails to address "the bond the children had with her" and "whether

2. Respondent makes no specific argument regarding the trial court's failure to make findings under the "[a]ny relevant consideration" provision of N.C.G.S. § 7B-1110(a)(6).

there was a remaining bond" between them. As for the remaining factors in N.C.G.S. § 7B-1110(a)(2), (3) and (5), respondent notes that the trial court made no written findings regarding the likelihood of the children's adoption, whether terminating her parental rights will aid in accomplishing the children's permanent plan, or the quality of the bond between the children and their foster parents.

[2] Notwithstanding our conclusion that the trial court's determination of a child's best interests under N.C.G.S. § 7B-1110(a) is discretionary, respondent's contention that the trial court failed to comply with the fact-finding requirements of subsection 7B-1110(a) is a question of statutory interpretation, which we review de novo. *See State v. Davis*, 368 N.C. 794, 797, 785 S.E.2d 312, 314–15 (2016). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

[3] In *In re A.U.D.*, this Court held that "a trial court must *consider* all of the factors in [sub]section 7B-1110(a) . . . . [; t]he statute does not, however, explicitly require written findings as to each factor." 373 N.C. at 10, 832 S.E.2d at 702. Accordingly, we declined to find reversible error based on the trial court's failure to make written findings under N.C.G.S. § 7B-1110(a)(1)–(6) as to "uncontested issues"—i.e., factors for which "there was no conflict in the evidence." *Id.* at 10–11, 832 S.E.2d at 703; *see also In re H.D.*, 239 N.C. App. 318, 327, 768 S.E.2d 860, 866 (2015).

In the case *sub judice*, DSS and the GAL presented uncontested evidence that the children's ages made them "very adoptable"; that terminating respondent's parental rights was necessary to effect the children's permanent plan of adoption; and that the children were strongly bonded with their foster parents, who wish to adopt them. Accordingly, we decline to find reversible error based on the trial court's failure to make written findings under N.C.G.S. § 7B-1110(a)(2), (3) and (5). *See In re A.U.D.*, 373 N.C. at 10–11, 832 S.E.2d at 703.

[4] With regard to N.C.G.S. § 7B-1110(a)(4), which concerns the bond between the children and the parent, DSS advised the trial court that "there is little to no bond between the children and their mother [respondent]" inasmuch as the children had seen respondent only "once in the last 25 months. . . . for about 15 minutes in Court when the children's caregiver brought [them] to the courthouse for the Adjudication Hearing" on 5 September 2017. DSS further reported that, although respondent would occasionally telephone the children from jail during her periods of incarceration, she neither visited nor called the children

when she was not incarcerated. Moreover, both children had "expressed their desire to remain with [their foster parents]." The GAL informed the trial court that any bond between the children and respondent "would at least be greatly diminished, if not far worse," because the children had not seen respondent in more than seventeen months—a period described by the GAL as "a very long time in a young child's life"—or heard from her in more than fifteen months.

Respondent testified that she had raised the children from birth until they were placed in kinship care on 3 January 2017 at three and four years of age. She acknowledged she had not visited the children in "[a]pproximately a year," but claimed she spent Christmas with the children and kept them for two weekends while they were in kinship care. Respondent described her children as "all [she] live[s] for" and insisted the children would "never lose their bond with their mother."

We conclude the trial court's written findings are sufficient to demonstrate its consideration of the parties' evidence regarding the bond between the children and respondent under N.C.G.S. § 7B-1110(a)(4).[3] In addition to finding that respondent had not "created a bond with the children[,]" the trial court found that, "once the children were placed with the kinship provider facilitated by DSS in January 2017, [respondent] did not visit the children and failed to maintain regular contact with them." The trial court further found that respondent "made no efforts to complete the goals of the Out of Home Family Services Agreement for either child[,]" that she "abandoned her children," and that her actions toward the children were willful. As respondent does not challenge the evidentiary support for these findings, they are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

While the trial court made no findings about the children's current feelings toward respondent, the record offers no evidence on this specific issue, with the possible exception of DSS's report that the children had expressed a desire to remain with their foster parents. Respondent points to no evidence that would support a finding favorable to her.

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3. The trial court's statements to respondent in rendering its decision further demonstrate its consideration of the criterion in N.C.G.S. § 7B-1110(a)(4). *See In re A.U.D.*, 373 N.C. at 10, 832 S.E.2d at 702 ("Here, the transcript of the hearing demonstrates that the trial court did, in fact, carefully consider each of the statutory criteria . . . ."). The trial court acknowledged the inseverable bond between a mother and child and alluded to the efforts made by the judge's own adopted daughter to locate her biological mother. The trial court also emphasized to respondent, however, the necessity of accounting for "the children's day-to-day care and needs" and concluded that "[t]he best thing [the trial court] can do for them is to let a good, adoptive family adopt them so they'll have stability."

Because we are satisfied the trial court heard sufficient evidence to make a reasoned determination of the children's best interests, we decline to find reversible error based on the trial court's failure to make a written finding on a matter for which no evidence was offered. *See generally In re Shue*, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984) ("The essential requirement, at the dispositional hearing . . . , is that sufficient evidence be presented to the trial court so that it can determine what is in the best interest of the child.").

Having reviewed the trial court's orders in their entirety, we hold the findings of fact are sufficient to comply with the requirements of N.C.G.S. § 7B-1110(a) and to support the trial court's discretionary determination that the children's best interests would be served by the termination of respondent's parental rights. We repeat our admonition in *In re A.U.D.*, however, "encourag[ing] trial courts to make written findings on all of the statutory factors set out in N.C.G.S. § 7B-1110(a) in the dispositional portions of orders ruling on petitions to terminate parental rights." 373 N.C. at 10 n.4, 832 S.E.2d at 703 n.4.

AFFIRMED.

IN THE MATTER OF F.S.T.Y., A.A.L.Y.

No. 129A19

Filed 5 June 2020

Termination of Parental Rights—personal jurisdiction—nonresident parent—minimum contacts—status exception

In a case of first impression, the Supreme Court held that the status exception to the minimum contacts requirement of personal jurisdiction applied in termination of parental rights proceedings. Thus, due process did not require a nonresident father in a termination of parental rights case to have minimum contacts with the state of North Carolina in order for the trial court to exercise personal jurisdiction over him.

Appeal pursuant to N.C.G.S. § 7A-27(a)(5) from two orders entered on 13 December 2018 by Judge Mary F. Covington in District Court, Davidson County. Heard in the Supreme Court on 9 December 2019.

Sheri Woodyard, for petitioner-appellee Davidson County Department of Social Services.

Forrest Firm, P.C., by Brian C. Bernhardt, for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellant father.

BEASLEY, Chief Justice.

The issue before the Court is whether due process requires that a nonresident parent have minimum contacts with the State of North Carolina in order to establish personal jurisdiction over him or her for purposes of termination of parental rights proceedings. Because we hold that the status exception to the minimum contacts requirement applies to termination of parental rights proceedings, we affirm the trial court's order terminating respondent-father's parental rights.

I.

F.S.T.Y. (Florence) and A.A.L.Y. (Abigail)[1] are twin sisters who were born in South Carolina in August 2004. Their mother, Laura, and respondent-father were unmarried when the twins were born but eventually married two months following the twins' birth. In May 2007, respondent-father was incarcerated for burglary. Laura then moved Florence and Abigail to North Carolina. Davidson County Department of Social Services (DSS) became involved with Laura and the twins in January 2011, due to Laura's substance abuse, homelessness, and improper care of the children.

On 9 May 2016, a police officer conducted a traffic stop on a car containing Laura and the twins' maternal grandmother. Both were arrested for possession of drug paraphernalia, misdemeanor child abuse, possession of heroin, and possession of cocaine. On 11 May 2016, DSS filed juvenile petitions alleging neglect and dependency of the twins. After a hearing, the court issued an order adjudicating the twins as neglected, placed the children in DSS custody, and ordered their mother and respondent-father to comply with a case plan.

Respondent-father did not request representation and was not present at the adjudication hearing, but the court appointed an attorney to

1. A pseudonym is used to protect the juveniles' identities and for ease of reading.

appear on his behalf. During the hearing, the court acknowledged that respondent-father was a resident of South Carolina and ordered him to contact DSS upon his release from prison to set visitation. There were several hearings in the following months. Respondent-father was represented by an attorney at some of these proceedings; at others, he was not represented.

Reunification efforts ceased following a hearing on 3 May 2017, and DSS filed termination of parental rights petitions on 3 November 2017. Subsequently, respondent-father filed a motion to dismiss for lack of personal jurisdiction. The trial court ultimately denied respondent-father's motion to dismiss and terminated his parental rights. The court found that respondent-father had not provided substantial financial assistance or care for the children before they were placed into DSS custody. Furthermore, respondent-father's release date continued to be extended for infractions, and respondent-father failed to maintain contact with Florence and Abigail.

Respondent-father appealed the trial court's orders terminating his parental rights in both children, arguing that the trial court lacked personal jurisdiction to terminate his parental rights because he lacked minimum contacts with North Carolina.

II.

The Due Process Clause of the Fourteenth Amendment prevents states from rendering valid judgments against nonresidents. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) (citing *Kulko v. California Superior Court*, 436 U.S. 84, 91 (1978)). Due process requires that a nonresident against whom relief is sought be provided adequate notice of the suit and be subject to the personal jurisdiction of the court. *Id.* (citing *Mullane v. Cent. Hanover Tr. Co.*, 339 U.S. 306, 313–314 (1950) and *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

Personal jurisdiction refers to a court's authority to require an individual to appear in the forum and defend an action brought against the individual in that forum. Before a court can exercise power over the individual, due process generally requires that the nonresident possess sufficient "minimum contacts" with the forum state so "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "*Int'l Shoe Co.*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

The minimum contacts requirement furthers two goals: (1) "it safeguards the defendant from being required to defend an action

in a distant or inconvenient forum"; and (2) "it prevents a state from escaping the restraints imposed upon it by its status as a coequal sovereign in a federal system." *Miller v. Kite*, 313 N.C. 474, 477, 329 S.E.2d 663, 665 (1985) (citing *World-Wide Volkswagen*, 444 U.S. 286 (1980)). These protections are usually described in terms of "fairness" and "reasonableness." *World-Wide Volkswagen*, 444 U.S. at 292. The Supreme Court of the United States has explained that "reasonableness" requires that, while the burden on the nonresident is always a primary concern, other relevant factors, including the state's interest, will be considered when appropriate. *Id.*

In addition to satisfying the constitutional requirement, courts must also satisfy the state's statutory requirements in order to render a valid judgment against a nonresident. North Carolina's long-arm statute provides, in relevant part, that the State may exercise personal jurisdiction over a nonresident in actions "brought under Statutes of this State that specifically confer grounds for personal jurisdiction." N.C.G.S. § 1-75.4(2) (2019).

The North Carolina Juvenile Code provides that the courts of this State shall have "exclusive original jurisdiction" over termination of parental rights cases involving "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, provided that the requirements of N.C.G.S. §§ 50A-201, -203, or -204 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) are met. N.C.G.S. § 7B-1101 (2019).

The UCCJEA is a uniform state law that has been adopted by nearly all fifty states, including North Carolina. The relevant language in the UCCJEA as adopted by this State provides that "physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination." N.C.G.S. § 50A-201(c) (2019).

Respondent-father argues that although exercise of jurisdiction over him comports with North Carolina's statutory requirements, those requirements do not comport with constitutional due process requirements. We disagree.

This is an issue of first impression for the Court, and while this Court has not considered the requirements of due process as they relate to termination of parental rights, the Court of Appeals has developed a line of case law in which minimum contacts are required only in instances in which the child or children were born in wedlock. *Compare In re Finnican*, 104 N.C. App. 157, 162, 408 S.E.2d 742, 745 (1991), overruled

on different grounds by *Bryson v. Sullivan*, 330 N.C. 644, 663, 412 S.E.2d 327, 337 (1992) (holding that minimum contacts were required when the child was born in wedlock); *and In re Trueman*, 99 N.C. App. 579, 581, 393 S.E.2d 569, 570 (1990) (stating the same rule); *with In re Dixon*, 112 N.C. App. 248, 252, 435 S.E.2d 352, 354 (1993) (holding that minimum contacts are not required when the child is born out of wedlock and the father has not taken appropriate steps to legitimate the child, provide support for the child and mother, or establish paternity).

In *Trueman*, the father and mother were married and had a child. Later, the parties separated, and the mother moved to North Carolina with the child. *Trueman*, 99 N.C. App. at 581, 393 S.E.2d at 570. The district court in North Carolina entered a judgment awarding the mother custody of the child and an absolute divorce from the father. *Id.* at 580, 393 S.E.2d at 570. The mother then filed an action for child support, which was granted and transferred to Wisconsin where the father resided. *Id.* at 581, 393 S.E.2d at 570. The father failed to make any payments, so the mother initiated a termination proceeding against him, and the termination was granted. The father was not present for the custody, divorce, or termination proceedings. *Id.*

The Court of Appeals relied on this Court's decision in *Miller v. Kite*, 313 N.C. 474, 329 S.E.2d 663 (1985), which held that determining whether personal jurisdiction exists requires the court to employ a two-step analysis. "First, it should be ascertained whether the statutes of this State allow our courts to entertain the action the plaintiff has brought against the defendant." *Miller*, 313 N.C. at 476, 329 S.E.2d at 665. If so, the court must then determine if the minimum contact requirement is met. *Id.* at 476–77, 329 S.E.2d at 665.

Thus in *Trueman*, the Court of Appeals held that although a suit to adjudicate a "status" between a parent and child was an *in rem* proceeding, the constitutional requirement, as set out in *International Shoe*, requires that a state's exercise of jurisdiction over a nonresident be consistent with due process requirements.[2] *Trueman*, 99 N.C. App. at 581, 393 S.E.2d at 570. Thus, the father's "meager contacts" with the State were insufficient to support an exercise of personal jurisdiction over him for purposes of the termination proceeding. *Id.*

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2. The Court of Appeals continued to interpret due process in accordance with its decision in *Trueman* in cases involving children born in wedlock. *See, e.g.*, *In re Finnican*, 104 N.C. App. 157, 408 S.E.2d 742 (1991), *overruled on different grounds by Bryson v. Sullivan*, 330 N.C. 644, 663, 412 S.E.2d 327, 337 (1992) (looking to its earlier decision in *Trueman* to hold that the nonresident-father, who was previously married to the mother when the child was born, was required to have minimum contacts with the State).

In *In re Dixon*, however, the Court of Appeals began to recognize that in some circumstances " 'fair play and substantial justice' do not necessitate minimum contacts with the forum state or notice to the party." *In re Dixon*, 112 N.C. App. 248, 251, 435 S.E.2d 352, 353 (1993). Specifically, the court in *Dixon* held that a nonresident-father's parental rights can be terminated in the absence of minimum contacts with North Carolina if the child is born out of wedlock and the father has failed to establish paternity, legitimate his child, or provide substantial financial assistance or care to the child and mother. *Id.* at 251, 435 S.E.2d at 354.

The *Dixon* court reasoned that "a father's constitutional right to due process of law does not 'spring full-blown from the biological connection between parent and child' but instead arises only where the father demonstrates a commitment to the responsibilities of parenthood." *Id.* (quoting *Lehr v. Robertson*, 463 U.S. 248, 260 (1983)).

While this Court has not addressed the issue of minimum contacts in termination of parental rights cases, we have considered it in a child support case. In *Miller*, the father moved to set aside a child support order increasing his child support obligations after failing to appear for the hearing. *Miller*, 313 N.C. at 476, 329 S.E.2d at 664. The father's only contacts with the State were that his daughter had lived in North Carolina for nine years, he had sent child support payments into the State, and he came to the State several times to visit his daughter. *Id.* at 478, 329 S.E.2d at 665.

This Court focused on the concept of fairness and the "realization that a contrary result could prevent the exercise of visitation privileges of non-custodial parents." *Id.* at 480, 329 S.E.2d at 667. We explained that it would not be fair to subject a parent to litigation in a forum where he has done nothing more than merely acquiesce to his children's presence. *Id.* at 479, 329 S.E.2d at 666. Furthermore, we observed that while the State "has an important interest in ensuring that non-resident parents fulfill their support obligations to their children living here," if the minimum contacts standard were satisfied by merely visiting the child in the state or sending support payments into the State, non-resident parents would be forced to choose between fulfilling their obligations to their child or refraining from such contact with the child in order to avoid being subject to suit in the State. *Id.* at 480, 329 S.E.2d at 667.

The Court further explained that "defendant ha[d] engaged in no acts with respect to North Carolina by which he ha[d] purposefully availed himself of the benefits, protections and privileges of the laws of this State." *Id.* at 480–81, 329 S.E.2d at 667. For those reasons, we held

that the father's support payments and visits to the State were insufficient to establish minimum contacts. *Id.* at 479–80, 329 S.E.2d at 666–67.

The Supreme Court of the United States has long recognized that some cases warrant an exception to the traditional due process requirements. Specifically, the Court has held that "cases involving the personal status of the plaintiff, such as divorce actions, could be adjudicated in the plaintiff's home State even though the defendant could not be served within the State." *Shaffer v. Heitner*, 433 U.S. 186, 202 (1977) (citing *Pennoyer v. Neff*, 95 U.S. 714, 733–35 (1878)). The Court's recognition of the status exception implies that minimum contacts are not required in status cases because jurisdiction is established by the status of the plaintiff, rather than the location of the defendant.

The critical issue here is whether a child's relationship to her parents is sufficient to allow adjudication, based on status, in her home state even though the parents would not otherwise be subject to personal jurisdiction there. The Supreme Court of the United States has not defined the limits of the status exception or explicitly recognized its application outside of divorce proceedings; however, it briefly discussed the issue of status in a custody case, *May v. Anderson*, 345 U.S. 528 (1953).

In *May*, the mother and the father were married and domiciled in Wisconsin. *May*, 345 U.S. at 530. After marital troubles arose, the couple agreed that the mother should take the children to Ohio until the two could resolve their disputes. *Id.* The mother later informed the father that she had decided not to return to Wisconsin. *Id.* The father filed suit in Wisconsin, seeking absolute divorce and custody of the children. *Id.* The mother made no appearance in the Wisconsin proceedings and the father was awarded custody of the children. *Id.* at 531. The mother contested the validity of the custody decree. *May*, 345 U.S. at 530–31.

Although the Court held that personal jurisdiction was needed over the mother and reversed the custody decree, Justice Frankfurter, in a concurrence, emphasized the narrowness of the holding. *Id.* at 535 (Frankfurter, J., concurring) ("[T]he only thing the Court decides . . . is that the Full Faith and Credit Clause does not require Ohio, in disposing of the custody of children in Ohio, to accept, in the circumstances before us, the disposition made by Wisconsin.").

In a dissent, Justice Jackson recognized the burden placed on a state that cannot constitutionally adjudicate controversies surrounding guardianship, despite the child being domiciled there. Specifically, he noted:

> Personal jurisdiction of all parties to be affected by a proceeding is highly desirable, to make certain that they have had valid notice and opportunity to be heard. But the assumption that it overrides all other considerations and in its absence a state is constitutionally impotent to resolve questions of custody flies in the face of our own cases.

Id. at 541 (Jackson, J., dissenting).

Given the nature of the Court's reasoning, many state courts have not viewed the holding in *May* as an absolute bar to exercising status jurisdiction in custody cases. *See*, *e.g.*, *In re Marriage of Leonard*, 122 Cal. App. 3d 443, 451–452, 175 Cal. Rptr. 903, 907–08 (1981) (construing *May* as limited to whether a state is required to recognize a custody order under Full Faith and Credit Clause), *abrogated by McArthur v. Superior Court*, 235 Cal. App. 3d 1287, 1293, 1 Cal. Rptr. 2d 296, (1991) (holding that *May* and its progeny require personal jurisdiction to modify the custody order of another state which has maintained jurisdiction); *In re R.W.*, 2011 VT 124, ¶¶ 28–29, 191 Vt. 108, 123–24, 39 A.3d 682, 692–93 (2011) (construing Frankfurter's concurrence as a limitation to the reasoning of the majority). *But see* Rhonda Wasserman, *Parents*, *Partners*, *and Personal Jurisdiction*, 1995 U. Ill. L. Rev. 813, 874–79 (recognizing that Frankfurter's view of what the Court decided in *May* is "widely accepted," but arguing that the *May* majority opinion is incompatible with Frankfurter's view and is good law as applied to custody decisions).

Many courts have concluded that the Court would be receptive to applying the status exception in termination of parental rights cases. *See*, *e.g.*, *In re R.W.*, 2011 VT 124, ¶ 31, 191 Vt. at 124–25, 39 A.3d at 693 (holding that status jurisdiction applies to cases involving termination of parental rights); *In re Thomas J.R.*, 2003 WI 61 ¶ 2, 261 Wis. 2d 217, 220–21, 663 N.W.2d 734, 736 (2003) (holding that the status exception applies in all custody matters, including termination); *S.B. v. State*, 61 P.3d 6, 14–15 (Alaska 2002) (holding that using the status exception in termination proceedings does not violate that parent's rights to due process); *J.D. v. Tuscaloosa Cnty. Dep't of Human Res.*, 923 So. 2d 303, 310 (Ala. Civ. App. 2005) (holding that the "status exception to the requirement that the defendant have minimum contacts with the forum state applies to termination-of-parental-rights proceedings"). *But see In re John Doe*, 83 Haw. 367, 374, 926 P.2d 1290, 1297 (1996) (holding that exercising personal jurisdiction over the nonresident mother would not

comport with the notion of fair play and substantial justice given the absence of her contacts with the state).

The purpose of termination of parental rights proceedings is to address circumstances where parental care fails to "promote the healthy and orderly physical and emotional well-being of the juvenile," while also recognizing "the necessity for any juvenile to have a permanent plan of care at the earliest possible age." N.C.G.S. § 7B-1100. In North Carolina, the best interests of the child are the paramount consideration in termination of parental rights cases. *See In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984). Thus, when there is a conflict between the interests of the child and the parents, courts should consider actions that are within the child's best interests over those of the parents. N.C.G.S. § 7B-1100(3).

These considerations differ from the interests this Court considered in *Miller*, where the Court recognized that the notions of fair play and substantial justice dictate that minimum contacts are required to establish personal jurisdiction in custody proceedings between two parents, either of whom may be able to provide for the well-being of the child. In termination of parental rights proceedings, which necessarily involve a parent who does not provide appropriate care, fairness requires that the State have the power to provide permanence for children living within its borders.

In circumstances where termination proceedings are appropriate, a child who is removed from his or her parents could face years of waiting in foster care or group homes as the interested parties fight over jurisdiction. The inability to determine jurisdiction by favoring the child's home state contradicts the fundamental principle of acting in the best interests of the child and inhibits the child's home state from adjudicating termination of parental rights disputes. As another court has explained, "severance of a parent's legal relationship to his or her child requires state intervention and is a matter of state concern. Thus, a child's home state has jurisdiction to adjudicate the status of a child present even if the parent lacks minimum contact with the forum." *In re R.W.*, 2011 VT 124, ¶ 31, 191 Vt. at 125, 39 A.3d at 693 (2011).

If minimum contacts were mandatory in this case, the children would be required to travel to South Carolina where respondent-father resides and, pursuant to the UCCJEA, reside there for six months in order for South Carolina to obtain jurisdiction over the children. Thus, North Carolina would be required to relinquish departmental custody and remove the children from stable housing. Doing so would not only

frustrate the State's interest in promoting the best interests of the children but could also pose further complications regarding custody and make adoption impossible.

Here, it is undisputed that respondent-father lacks contacts with North Carolina such that he would not normally be subject to our courts' jurisdiction. However, his right to actively participate in the termination proceedings would not be eliminated by the Court's implementation of the status exception. Indeed, the burden imposed upon respondent-father, and nonresident parents in general, is mitigated by the State's appointment of counsel to nonresident parents and the right to request participation in proceedings via phone or other remote technologies. Thus, in the context of a termination of parental rights proceeding, the protections usually afforded by the minimum contacts requirement are outweighed by the State's interest in adjudicating the status of children who reside within the State.

Upon considering the conflicting interests of the parent and child in termination proceedings, we join those states that have applied the status exception to the minimum contacts requirement in termination of parental rights proceedings. In doing so, we overrule the Court of Appeals' decisions in *In re Finnican*, 104 N.C. App. 157, 408 S.E.2d 742 (1991) and *In re Trueman*, 99 N.C. App. 579, 393 S.E.2d 569 (1990). To protect the best interests of children residing in North Carolina, the process of providing them a permanent, stable home should be afforded at least the same efficiency as a divorce proceeding. A conclusion to the contrary would ignore the realities of termination of parental rights proceedings and leave children with no practical forum to have their status adjudicated.

Accordingly, we hold that due process does not require a nonresident parent to have minimum contacts with the State to establish personal jurisdiction for purposes of termination of parental rights proceedings.

AFFIRMED.

IN RE I.N.C.

[374 N.C. 542 (2020)]

IN THE MATTER OF I.N.C. AND E.R.C.

No. 281A19

Filed 5 June 2020

Termination of Parental Rights—disposition—best interests of children—factors

The trial court did not abuse its discretion by determining that termination of respondents' parental rights was in the best interests of their two minor children. The trial court's factual findings regarding the likelihood of the children's adoption, as well as the nature and extent of the mother's bond with the children (N.C.G.S. § 7B-1110(a)(2), (4)), were supported by sufficient evidence. Moreover, the trial court properly weighed all relevant statutory factors from section 7B-1110(a) when determining the children's best interests.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 8 April 2019 by Judge Monica M. Bousman in District Court, Wake County. This matter was calendared for argument in the Supreme Court on 4 May 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Mary Boyce Wells, for petitioner-appellee Wake County Human Services.

N.C. Administrative Office of the Courts Guardian Ad Litem Division, by Michelle FormyDuval Lynch, Staff Attorney, for appellee guardian ad litem.

Mary McCullers Reece for respondent-appellant father.

Sean P. Vitrano for respondent-appellant mother.

ERVIN, Justice.

Respondent-father Stephen C. and respondent-mother Ashley C. appeal from an order terminating their parental rights in their minor children I.N.C. and E.R.C.[1] After careful consideration of the record in

1. The minor children will be referred to throughout the remainder of this opinion as "Ivan" and "Edward," which are pseudonyms used to protect the children's identities and for ease of reading.

light of the applicable legal principles, we hold that the trial court did not abuse its discretion by determining that termination of the parents' parental rights would be in the children's best interests and, for that reason, affirm the trial court's termination order.

On 9 January 2014, Wake County Human Services filed a juvenile petition alleging that Ivan and Edward were abused and neglected juveniles and obtained the entry of an order authorizing WCHS to take the children into non-secure custody. In its petition, WCHS alleged that respondent-father had substance abuse problems, that respondent-mother had inappropriately disciplined the children and had violently shaken another child, and that the parents had a history of domestic violence that included a recent incident in which respondent-mother had attempted to run over respondent-father with a car in which the children were passengers.

On 11 February 2014, the trial court entered a consent adjudication and disposition order. In determining that Ivan and Edward were neglected juveniles, the trial court concluded that the children had not received proper care and supervision from the parents and that they lived in an environment that was injurious to their welfare. In light of this determination, the trial court ordered that the children remain in WCHS custody and directed WCHS to make reasonable efforts to eliminate the need for the children's placement outside of the family home. In addition, the trial court ordered respondent-mother to (1) visit with the children in accordance with a written visitation plan; (2) maintain adequate housing; (3) obtain and maintain suitable employment; (4) undergo a psychological evaluation that addressed her need for domestic violence and substance abuse treatment and comply with any treatment recommendations; (5) complete a parenting class and demonstrate the skills that she had learned during that class; and (6) maintain regular contact with WCHS. Similarly, the trial court ordered respondent-father to (1) visit with the children in accordance with a written visitation plan; (2) maintain adequate housing; (3) obtain and maintain suitable employment; (4) complete a substance abuse treatment program, follow any treatment recommendations that were made for him during that program, refrain from using illegal or impairing substances, and submit to random drug screens in order to permit a determination concerning whether he was using such substances; (5) complete a mental health assessment and comply with any treatment recommendations; (6) complete a domestic violence assessment and comply with any treatment recommendations; (7) complete a parenting class and demonstrate the skills that he had learned during that class; and (8) maintain regular contact with WCHS.

On 17 November 2014, the trial court entered an order providing that WCHS should cease efforts to reunify respondent-father with the children on the grounds that he had declined to participate in the services to which he had been referred by WCHS and that he had failed to demonstrate compliance with any aspect of his court-ordered case plan. On the other hand, the trial court directed WCHS to continue to make reasonable efforts to reunify the children with respondent-mother. On 29 May 2015, the trial court entered an order establishing a primary permanent plan of reunifying the children with respondent-mother. After respondent-father began to make efforts to comply with his case plan, the trial court entered an order on 30 November 2015 providing that WCHS should resume efforts to reunify the children with respondent-father as well and changing the permanent plan for the children to a primary plan of reunification with either parent and a secondary plan of adoption. On 17 May 2016, the trial court entered an order finding that the parents were making only limited progress toward complying with the provisions of their case plans, finding that it would be in Ivan and Edward's best interests to suspend their visitation with the parents in order to allow them to focus upon the therapy that they were being provided, and changing the permanent plan for the children to a primary plan of adoption and a secondary plan of reunification with either parent.

On 12 December 2016, WCHS filed a petition seeking to have the parents' parental rights in Ivan and Edward terminated on the grounds of neglect and failure to make reasonable progress toward correcting the conditions that had led to the children's removal from the family home. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019). After an eight-day hearing held during 2017, the trial court entered an order dismissing the termination petition on 5 February 2018. After finding that neither parent could demonstrate appropriate parenting skills and that both of the grounds for termination alleged in the termination petition existed, the trial court determined that there was not a strong probability that the children would be adopted and expressed the hope that, "with continued services," "adoption will become more likely in the future if the parents are not able to soon provide permanent care for the children." As a result, the trial court concluded that termination of the parents' parental rights in Ivan and Edward would not be in the children's best interests. In addition, the trial court required the parents to have weekly supervised visits with Ivan and Edward and ordered the parents to participate in the children's therapy as recommended by the children's therapists.

Shortly after the dismissal of the initial termination petition, the parents were involved in an incident of domestic violence that resulted in the

summoning of law enforcement officers to their residence. Respondent-mother claimed that respondent-father had choked her and thrown her into a couch, while respondent-father claimed that respondent-mother had choked him, scratched him, and hit him on the head with a coffee cup. In the aftermath of this incident, respondent-father obtained the entry of a domestic violence protective order against respondent-mother. On 8 March 2018, WCHS filed a motion seeking to have the nature and extent of the parents' visitation with the children reviewed. On 12 April 2018, the trial court entered an order suspending the parents' visitation with the children based upon determinations that the parents had continued to engage in inappropriate behavior in the presence of the children, that the behavior of the children had deteriorated since visitation with the parents had been resumed, and that Ivan's therapist believed that the children's significant and ongoing behavioral problems could be attributed to the long-term uncertainties that they faced.

On 8 June 2018, the trial court entered a permanency planning order providing that the primary permanent plan for the children continued to be adoption and that the secondary plan for the children would be reunification with either parent. In addition, the trial court ordered the parents to comply with the provisions of their case plans and ordered WCHS to take the steps necessary to obtain a permanent placement for the children.

On 14 June 2018, WCHS filed a second termination petition in which it alleged that the parents' parental rights in Ivan and Edward were subject to termination on the grounds of neglect, failure to make reasonable progress toward correcting the conditions that had led to the children's removal from the family home, and willful failure to pay a reasonable portion of the cost of the care that the children had received while in WCHS custody. *See* N.C.G.S. § 7B-1111(a)(1)–(3) (2019). After a hearing held on 13 February 2019, the trial court entered an order terminating the parents' parental rights in Ivan and Edward on 8 April 2019. In its termination order, the trial court concluded that the parents' parental rights in the children were subject to termination for neglect and failure to make reasonable progress and that WCHS had failed to show that the parents had willfully failed to pay a reasonable portion of the cost of the children's care. In addition, the trial court concluded that the termination of the parents' parental rights would be in the children's best interests. Respondent-father and respondent-mother both noted appeals to this Court from the trial court's termination order.

The termination of a parent's parental rights in a juvenile is a two-stage process which involves both an adjudicatory and a dispositional

determination. *See* 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 grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6, 832 S.E.2d 698, 700 (2019) (quoting N.C.G.S. § 7B-1109(f) (2017)). "If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage," *id.* at 6, 832 S.E.2d at 700, at which it "determine[s] whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a). As a result of the fact that neither respondent-father nor respondent-mother has challenged the lawfulness of the trial court's adjudicatory decision, the only issues that we are required to consider in this case arise from the trial court's dispositional determination.

In determining whether the termination of a parent's parental rights in a child would be in that child's best interests,

> [t]he court may consider any evidence, including hearsay evidence as defined in [N.C.]G.S. [§]8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

Id. A trial court's determination concerning whether termination of parental rights would be in a juvenile's best interests "is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. at 6, 832 S.E.2d at 700 (citing *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016)). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the

result of a reasoned decision." *Id.* at 6–7, 832 S.E.2d at 700–01 (quoting *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015)).

In concluding that the termination of the parents' parental rights in Ivan and Edward would be in the children's best interests, the trial court found:

> 42. The children and the parents have a bond, but that bond is not healthy. The children miss their parents, but they are now optimistic about finding permanent homes with other appropriate families and moving forward. The children no longer look to either parent to provide basic care, meet their needs, or keep them safe. The parents are more like playmates than parents who can appropriately love, discipline, and accept each child's mental health need[s] and ensure that those issues are treated appropriately.
>
> 43. [Edward], age 10 and [Ivan], age 9, have been in WCHS custody since 2014 and need permanence. The ongoing uncertainty about their placements and false hopes of returning home only exacerbates the children's behaviors.
>
> 44. [Edward] was hospitalized at Holly Hill Hospital in Raleigh, NC in November-December 2018 following an emotional outburst and threats of self-harm. He was discharged to another foster home and was soon thereafter hospitalized again in early February [2019]. He is currently a patient at Strategic PRTF in Leland, NC where he receives ongoing therapy and treatment. [Edward] will likely not return to the same placement as his brother.
>
> 45. [Ivan] has made considerable progress and his behaviors have improved. He remains in the same licensed therapeutic foster home and has adapted well to the separation from [Edward].
>
> 46. The Children's Home Society has initiated child-specific recruitment for both boys. The adoption worker, Wendy Tarlton, has met with both children and began an extensive search for preadoptive homes that would be capable of addressing the needs of each child, even if the boys have to be adopted separately.

The likelihood of finding a preadoptive home would increase significantly if the boys were free for adoption and legal risk was removed.

47. Both children are capable of forming positive, permanent bonds with new caregivers and both want to find safe, permanent homes. Each child has accepted that reunification with either parent is not possible because of the parent's behaviors which they have witnessed both [prior to] removal from the parent's custody and on multiple occasions since removal.

48. The Court finds that there is a likelihood of adoption as long as the children continue to receive appropriate services and that termination of parental rights would aid in the accomplishment of the permanent plan of adoption. The children have been in the custody of Wake County Human Services for more than five years and should have the opportunity to achieve permanence that can only be possible with the termination of the parental rights of each parent.

49. The parents do not appear to fully understand the boys' behaviors and the necessity for comprehensive ongoing treatment. The parents deny that the children need medication despite the recommendations of all treatment providers and downplay each child's diagnosed conditions. Neither parent accepts any responsibility for the children's mental health needs even though the children express vivid memories of domestic violence and inappropriate discipline while in the care of either parent.

According to the parents, the trial court's dispositional findings fail to support its determination that termination of their parental rights in Ivan and Edward would be in the children's best interests. More specifically, the parents argue that the trial court's finding that there is a likelihood that Ivan and Edward would be adopted lacks sufficient evidentiary support given the children's history of behavioral problems. On the contrary, respondent-mother asserts that the record evidence showed nothing more than a speculative possibility that the children would be adopted, while respondent-father asserts that the record evidence failed to demonstrate any significant likelihood that adoption would occur. We do not find the parents' arguments to be persuasive.

As we read the record, the trial court's finding concerning the likelihood that the children would be adopted is supported by testimony provided by the guardian *ad litem*, the social worker, and the adoption specialist. The adoption specialist testified that her efforts to place Ivan and Edward in an adoptive home were currently limited and that the termination of the parents' parental rights in the children was a necessary prerequisite to the making of more specific efforts to find adoptive homes for the children, such as posting photos and videos of them on line, setting up meetings and "matching events" with potential adoptive parents, and reviewing the qualifications of potential adoptive parents to determine if they would be able to meet the needs of the children. After acknowledging that it is more difficult to find adoptive homes for "older children," the adoption specialist testified that locating adoptive families for Ivan and Edward was just a matter of finding "the right fit" for them and asserted that the termination of the parents' parental rights in the children would increase the children's chances for adoption "a great deal." In addition, the social worker testified that both Ivan and Edward wanted a home that they could call their own and that, even though both children had certain behavioral issues, they were adoptable. Similarly, a social worker expressed the opinion that the children had lost confidence that they would be able to return to their parents' care and would "like to move on." Finally, the guardian *ad litem* testified that the children were able to form the bonds with other people necessary to facilitate adoption and that they were adoptable. As a result, we hold that the trial court's finding relating to the likelihood that Ivan and Edward would be adopted has the requisite evidentiary support and is binding for purposes of appellate review in spite of the fact that no witness attempted to quantify the likelihood that the children would be adopted with mathematical precision. *See Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998) (noting that, in cases in which the trial court sits as the trier of fact, its "findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary" (quoting *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975))); *In re Montgomery*, 311 N.C. 101, 110–11, 316 S.E.2d 246, 252–53 (1984) (stating that "our appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary" (citing *Williams*, 288 N.C. at 342, 218 S.E.2d at 371)).

In addition, respondent-mother contends that the trial court's findings of fact relating to the nature and extent of her bond with the children lack support in the record evidence. After conceding that the findings

that the trial court did make with respect to this subject rested upon testimony provided by the social worker, respondent-mother claims that other evidence shows that the trial court's determination with respect to the bonding issue was incorrect. In view of the fact that the trial court's findings relating to the nature and extent of respondent-mother's bond with the children are supported by the social worker's testimony, they are, for the reasons stated above, binding upon this Court for purposes of appellate review regardless of the fact that the record contains evidence that might be sufficient to support a contrary determination. *Id.*

In addition to their challenges to certain of the trial court's findings of fact, the parents assert that the trial court erred by finding that a number of the statutory criteria set out in N.C.G.S. § 7B-1110(a) weighed in favor of, rather than against, the termination of their parental rights in Ivan and Edward. After conceding that the trial court accurately identified the children's ages, the parents argue that the trial court should have found that the children's ages weighed against a determination that the termination of their parental rights would be in the children's best interests given that older children are typically more difficult to place in adoptive homes than younger children and given that, after reaching the age of twelve, children have to consent to any proposed adoption. In addition, respondent-father argues that, in light of his bond with the children, the trial court erroneously failed to consider the "inherent value of an affectionate relationship with a parent" and "the uncertainty inherent in severing the parental relationship without having an identified adoptive placement." The parents also point to the fact that the trial court did not make any findings of fact regarding the bond between the children and any proposed adoptive parent or other permanent placement given that no such potential permanent placement existed at the time of the termination hearing. According to the parents, these "bonding" factors weigh against or, at least, do not support, the termination of their parental rights in Ivan and Edward in light of the fact that moving the children into potential adoptive homes would disrupt the bonds that the children have with their current foster parents.

The ultimate problem with this aspect of the parents' challenge to the trial court's termination order is that the responsibility for weighing the relevant statutory criteria delineated in N.C.G.S. § 7B-1110(a) lies with the trial court, which "is permitted to give greater weight to other factors," rather than with this Court. *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 66 (2019). To the extent that the parents are asking this Court to reweigh the evidence contained in the record developed at the termination hearing and to substitute our preferred weighing of the relevant

statutory criteria for that of the trial court, such an approach would be inconsistent with the applicable standard of review, which focuses upon whether the trial court's dispositional decision constitutes an abuse of discretion rather than upon the manner in which the reviewing court would weigh the evidence were it the finder of fact. *See*, *e.g.*, *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986) (stating that, in cases subject to review using an abuse of discretion standard, "the purpose of the reviewing court is not to substitute its judgment in place of the decision maker," with the reviewing court being limited to "insur[ing] that the decision could, in light of the factual context in which it is made, be the product of reason"). As a result, we decline to accept any invitation to reweigh the evidence and make an independent dispositional decision on appeal that the parents may be extending.

In arguing that the trial court's dispositional decision constituted an abuse of discretion, the parents place their principal reliance upon the Court of Appeals' decision in *In re J.A.O.*, 166 N.C. App. 222, 601 S.E.2d 226 (2004). The juvenile in *In re J.A.O.* had "a history of being verbally and physically aggressive and threatening" and had "been diagnosed with bipolar disorder, attention deficit hyperactivity disorder, pervasive developmental disorder, borderline intellectual functioning, non-insulin dependent diabetes mellitus, and hypertension." *Id.* at 228, 601 S.E.2d at 230. In addition, the juvenile in *J.A.O.* had "been placed in foster care since the age of eighteen months and ha[d] been shuffled through nineteen treatment centers over the last fourteen years." *Id.* at 227, 601 S.E.2d at 230. On the other hand, the juvenile's mother "had made reasonable progress to correct the conditions that led to the petition to terminate her parental rights." *Id.* at 224, 601 S.E.2d at 228. At the termination hearing, the guardian *ad litem* advised the trial court that the juvenile was unlikely to be adopted and that termination of parental rights would not be in the juvenile's best interests because it would "cut him off from any family that he might have." *Id.* at 227, 601 S.E.2d at 230. In spite of the fact that the trial court found that there was only a "small 'possibility' " that the juvenile would be adopted, it, nevertheless, concluded that termination would be in the juvenile's best interests. *Id.* at 228, 601 S.E.2d at 230. On appeal, however, the Court of Appeals held that the trial court had abused its discretion by determining that termination would be in the juvenile's best interests on the grounds that "the remote chance of adoption in this case [did not] justif[y] the momentous step of terminating [the mother's] parental rights." *Id.*

The facts set out in the record before us in this case are easily distinguishable from those at issue in *In re J.A.O.* Ivan and Edward were nine

and ten years old, respectively, at the time that the trial court's order was entered and are currently ten and eleven years old. On the other hand, the juvenile at issue in *In re J.A.O.* was fourteen years old at the time of the termination hearing and was sixteen years old at the time of the Court of Appeals' decision. *Id.* at 227 n.3, 601 S.E.2d at 229 n.3. Although Ivan and Edward both have mental health difficulties, their psychological and behavioral problems do not appear to be as severe as those from which the juvenile in *In re J.A.O.* suffered. *Id.* at 226–27, 601 S.E.2d at 229–30. In addition, while the guardian *ad litem* testified that Ivan and Edward were adoptable and that it would be in their best interests to terminate the parents' parental rights, the guardian *ad litem* in *In re J.A.O.* opposed termination. *Id.* Finally, while the evidence before the trial court in *In re J.A.O.* showed that the juvenile's mother had made reasonable progress toward correcting the conditions that led to the juvenile's removal from her care, *id.* at 224, 601 S.E.2d at 228, the same cannot be said for the parents of the children in this case. More specifically, the trial court found that, five years after the removal of the children from the family home, the parents still failed to fully understand their children's behaviors or the necessity for the children to receive comprehensive ongoing treatment and had not accepted any responsibility for meeting the children's mental health needs. As a result, we are not persuaded that this case bears any significant resemblance to *In re J.A.O.*

A careful review of the trial court's dispositional findings shows that the trial court considered all of the relevant statutory criteria set out in N.C.G.S. § 7B-1110(a) and made a reasoned determination that termination of the parents' parental rights in the children would be in the children's best interests, with this decision resting primarily upon the parents' failure to make progress in addressing their ability to deal with the children's needs, the children's relative youth, the likelihood that the children would be adopted, and the children's need for permanence after more than five years in WCHS custody. *See In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 251 (emphasizing that "the fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody [is] that the best interest of the child is the polar star"). The trial court's dispositional decision appears to us to rest upon a proper consideration of the appropriate criteria, a reasonable view of the record evidence, and a reasoned analysis of the children's best interests. As a result, since the trial court did not abuse its discretion in determining that the best interests of Ivan and Edward would be served by terminating the parents' parental rights, we affirm the trial court's termination order.

AFFIRMED.

IN RE J.M.J.-J.

[374 N.C. 553 (2020)]

IN THE MATTER OF J.M.J.-J.

No. 300A19

Filed 5 June 2020

1. Termination of Parental Rights—findings of fact—evidentiary support

Where a father challenged numerous findings of fact in the trial court's order terminating his parental rights to his child, several challenges were barred by collateral estoppel, many of the challenged findings were supported by the evidence, and several other challenged findings were disregarded because they were not supported by evidence.

2. Termination of Parental Rights—grounds for termination—neglect—support for conclusion

The trial court did not err by terminating a father's parental rights to his child where the findings of fact supported the conclusion that grounds for termination existed due to neglect. The father's failure to complete his case plan affected his fitness to parent his child because, even though he was not responsible for the mother's substance abuse and mental health problems, the prior adjudication of neglect resulted because the child could not be placed with the father. Further, the father failed to maintain any contact with the child even before he was incarcerated.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 16 May 2019 by Judge Wesley W. Barkley in District Court, Caldwell County. This matter was calendared for argument in the Supreme Court on 4 May 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Lucy R. McCarl, Staff Attorney, for petitioner-appellee Caldwell County Department of Social Services.

Poyner Spruill LLP, by Christopher S. Dwight and John M. Durnovich, for appellee Guardian ad Litem.

Mercedes O. Chut for respondent-appellant father.

MORGAN, Justice.

Respondent-father appeals from the trial court's order terminating his parental rights to J.M.J.-J. (Julie).[1] After careful consideration of respondent's challenges to the trial court's conclusion that grounds existed to terminate respondent's parental rights, we affirm.

On 22 August 2017, the Caldwell County Department of Social Services (DSS) obtained nonsecure custody of Julie and filed a juvenile petition alleging that Julie was a neglected and dependent juvenile. At that time, Julie was living with her mother, and DSS alleged that Julie had a Child Protective Services history which included allegations of living in a home with substance abuse, improper supervision, and improper care. DSS claimed that Julie's mother had failed to address serious issues of substance abuse and mental health concerns which had placed Julie at risk of harm, as well as that Julie lacked an appropriate alternative caregiver.

DSS filed an amended juvenile petition on 6 September 2017 that provided further details concerning the mother's substance abuse and mental health issues. It also contained allegations regarding respondent and his role in Julie's circumstances. DSS alleged that respondent had an extensive criminal history that included charges pertaining to domestic violence and controlled substances. Additionally, DSS claimed that respondent had reported to a social worker his "knowledge of [Julie's] mother['s] on-going substance use, and [her] failure to take any action in regards to [Julie's] safety."

On 29 November 2017, Julie was adjudicated to be a neglected and dependent juvenile. Respondent did not contest the allegations contained in either the original juvenile petition or the amended juvenile petition. On the same date as the adjudication, the trial court entered a separate disposition order. The trial court ordered that custody of Julie should remain with DSS. The trial court further ordered that respondent should complete a case plan and attend all visitation with Julie as ordered by the trial court, but conditioned visitation with Julie on respondent's completion of "one drug screening that is negative for all illegal and/or non-prescribed controlled substances, and begin[ning] participat[ion] in the activities of his case plan with [DSS] and as ordered by the court."

The trial court held a permanency planning hearing on 30 May 2018. At that time, respondent had visited with Julie only once since she had been in DSS custody. Respondent had not begun parenting education

1. The minor child, J.M.J-J., will be referred to throughout this opinion by the pseudonym "Julie" to protect the identity of the child and for ease of reading.

classes as required by his case plan. A hair follicle drug screen administered to respondent yielded a positive result for the presence of hydrocodone and oxycodone. A home study for respondent's residence had been completed but was denied. Consequently, on 14 June 2018, the trial court entered an order in which it authorized DSS to cease reunification efforts with both parents and changed the primary permanent plan for Julie to adoption.

On 2 August 2018, DSS filed a petition to terminate the parental rights of respondent and Julie's mother. DSS alleged grounds to terminate respondent's parental rights to Julie based on neglect and abandonment. *See* N.C.G.S. § 7B-1111(a)(1), (7) (2019). On 16 May 2019, the trial court entered an order concluding that grounds existed to terminate respondent's parental rights based on both grounds alleged in the petition. The trial court further concluded that termination of respondent's parental rights was in Julie's best interests.[2] Accordingly, the trial court terminated respondent's parental rights. Respondent appeals.

Respondent argues that several of the trial court's findings of fact are not supported by the evidence and that the trial court erred in concluding that grounds existed to terminate respondent's parental rights. A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of at least one ground for termination under Section 7B-1111(a) of the General Statutes of North Carolina. N.C.G.S. § 7B-1109(e)–(f). We review a trial court's adjudication "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. at 111, 316 S.E.2d at 253 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). If the petitioner meets its burden during the adjudicatory stage, "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, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110 (2015)).

In this case, the trial court concluded that the ground of neglect existed to terminate respondent's parental rights. The tribunal also

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

concluded that petitioner DSS had established the existence of the ground of abandonment. With only one ground being required to be present under N.C.G.S. § 7B-1111 in order to proceed to the dispositional stage of a termination proceeding, we begin our analysis here with a consideration of the ground of neglect. *See* N.C.G.S. § 7B-1111(a)(1) (2019). Section 7B-1111(a)(1) allows for termination of parental rights based upon a finding that "[t]he parent has . . . neglected the juvenile" within the meaning of N.C.G.S. § 7B-101(15). *Id.* A neglected juvenile, in turn, is statutorily defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019).

Generally, when a termination of parental rights is based upon a determination of neglect, "if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167 (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984)). "When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212, 835 S.E.2d. 425, 430 (2019) (citing *In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232).

In the order terminating respondent's parental rights, the trial court made unchallenged findings of fact including, *inter alia*, that Julie had been adjudicated to be a neglected and dependent juvenile in November 2017, that during the adjudication hearing respondent "stood mute," and that respondent had been employed at a furniture company prior to being incarcerated on 19 September 2018 for the sale and delivery of crack cocaine and for having attained the status of an habitual felon. "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citation omitted).

[1] While the aforementioned findings of fact are not disputed by respondent, he nonetheless challenges other specific findings of fact which are pertinent to the neglect basis for termination of parental rights. Firstly, we address his contention that the portion of Finding of Fact 14 that states that Julie's mother did not have placement options for Julie at the time that the juvenile petition was filed was not supported by the evidence. Respondent asserts that he consistently sought custody of Julie and that at the time of Julie's removal from the mother's home, respondent "had gainful employment, suitable housing, and no known

parenting deficiencies." Respondent claims, however, that DSS did not consider him for placement. We are not persuaded by this contention. In its prior adjudication order, the trial court found as a fact that when the juvenile petition and the amended juvenile petition were filed, Julie's mother lacked an appropriate alternative childcare arrangement. Respondent did not appeal from the trial court's adjudication order, and therefore he is bound by the doctrine of collateral estoppel from relitigating the challenged portion of Finding of Fact 14. *In re T.N.H.*, 372 N.C. at 409, 831 S.E.2d at 60 (citing *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973)) (stating that because the challenged findings of fact concerned facts that were stipulated to by the respondent-mother when the juvenile was adjudicated neglected, and the respondent-mother did not appeal from the adjudication order, she was bound by the doctrine of collateral estoppel from relitigating the findings of fact).

Respondent next challenges the portion of Finding of Fact 26 that describes his case plan as requiring him to "complete a Comprehensive Clinical Assessment (CCA) with RHA Behavioral Health, to *address* mental health, substance abuse, and domestic violence issues and comply with any and all recommendations." (Emphasis added). Respondent contends that this finding, as worded, suggests that he had mental health, substance abuse, and domestic violence issues that needed to be addressed by his case plan. Respondent asserts that this implication is not supported by the evidence. In support of this contention, respondent cites the testimony of the foster care social worker who described the purpose of the CCA as being "to see *if* there were any mental health concerns, substance abuse concerns, [or] domestic violence concerns." (Emphasis added). Respondent's argument lacks support. Initially, we note that the disposition order entered on 29 November 2017 similarly stated that respondent was required to follow a case plan that included completing a CCA addressing "mental health, substance abuse, and domestic violence issues." Respondent is barred once again by the doctrine of collateral estoppel from relitigating this issue. *Id.* Secondly, in light of respondent's extensive criminal history, which included domestic violence, substance abuse, and pending drug-related charges, it was not unreasonable for the trial court to impose the requirements of his case plan, nor was it erroneous for the trial court to describe the case plan as addressing these issues in the event that the CCA showed that such issues were present.

Respondent next argues that Finding of Fact 27 is erroneous for several reasons. This finding states the following:

> 27. [Respondent] completed a CCA with RHA on February 26, 2018. At the time of the Assessment, Respondent father [ ] denied any substance abuse issues. He completed a hair follicle drug screen on February 21, 2018, which was positive for Oxycodone and Hydrocodone. [DSS] requested that Respondent father [ ] follow up with RHA in order to have a re-assessment. Respondent father [ ] refused to go back to RHA or engage in any substance abuse treatment due to his work schedule.

First, respondent contends that there was insufficient competent evidence that he tested positive for hydrocodone and oxycodone. Respondent argues that although the foster care social worker testified that she told respondent of his positive drug screen, she never actually testified that his hair sample on 21 February 2018 contained hydrocodone and oxycodone. Respondent further contends that DSS failed to lay a foundation for the social worker's knowledge of the results of the drug screen. Once again, we are not persuaded. The trial court took judicial notice of all prior orders in the court file, and the trial court's finding of fact at issue is supported by a permanency planning order entered on 14 June 2018 which found as a fact that respondent tested positive for hydrocodone and oxycodone. Although the permanency planning order is subject to a lower standard of evidentiary proof than a termination of parental rights determination, this Court has acknowledged that "[a] trial court may take judicial notice of findings of fact made in prior orders, even when those findings are based on a lower evidentiary standard because where a judge sits without a jury, the trial court is presumed to have disregarded any incompetent evidence and relied upon the competent evidence." *In re T.N.H.*, 372 N.C. at 410, 831 S.E.2d at 60 (citing *Munchak Corp. v. Caldwell*, 301 N.C. 689, 694, 273 S.E.2d 281, 285 (1981)).

Respondent also challenges the portion of Finding of Fact 27 that states that he "refused to go back to RHA or engage in any substance abuse treatment due to his work schedule." Respondent contends that there was no evidence that he was ever advised to engage in substance abuse treatment, nor was there clear, cogent, and convincing evidence that he had a substance abuse problem. Respondent additionally argues that there was insufficient evidence to support a finding that he refused to go back to RHA due to his work schedule. Respondent claims that he was given one opportunity to return to RHA, and on that particular day, he admits telling the social worker that he could not go to RHA due to work obligations. Respondent submits that DSS never attempted to

accommodate his work schedule and never consulted with him before arranging appointments for him. Respondent reasons that "[a] refusal to do something on one day is not a refusal *ever* to do it." We find that some of the elements contained in Finding of Fact 27 are supported by clear, cogent, and convincing evidence, although a portion of this finding was not sufficiently proven.

Based on respondent's positive drug screen for hydrocodone and oxycodone, coupled with his pending drug-related criminal charges at the time, the trial court could reasonably infer that respondent had a substance abuse problem. *See In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167–68 (2016) (stating that it is the trial court's duty to consider all of the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom); *see also Scott v. Scott*, 157 N.C. App. 382, 388, 579 S.E.2d 431, 435 (2003) (stating that when the trial court sits as fact-finder, it is the sole judge of the credibility and weight to be given to the evidence, and it is not the role of the appellate courts to substitute their judgment for that of the trial courts). Regarding respondent's refusal to go to RHA, the social worker testified that she called respondent following his positive drug screen and asked respondent to go to RHA to complete another assessment. The social worker stated that respondent told her that "[h]e was not going back to RHA to take drug classes because that would make him look bad." Based on this testimony, the trial court could reasonably infer that respondent refused to go back to RHA. We conclude, however, that the evidence does not support the specific portion of the finding of fact that states that respondent refused to return to RHA due to his work schedule. Thus, we disregard this particular portion of Finding of Fact 27.

Respondent next challenges the portions of Finding of Fact 28 that state that respondent "specifically refused" to submit to drug screens on 29 March 2018 and 27 June 2018. As to the 29 March 2018 drug screen, respondent represents that he was asked to "drop everything on a moment's notice, including leaving food in the oven, to get in a car operated by DSS employees, and be driven directly to a lab where he would receive [the] drug test." Respondent argues that this request by DSS was unreasonable, while his unwillingness to comply with the request was not unreasonable. As to the 27 June 2018 drug screen, the social worker testified that when asked to submit to the drug screen on said date, respondent told the social worker that he would not be able to pass the drug screen. Respondent opines that the trial court's finding of fact based on this testimony, that respondent refused to submit to the

drug screen that had been arranged, "suggests a desire to hide the truth," which he claims is misleading. We are not persuaded.

At the termination hearing, when asked whether DSS was able to screen respondent for the presence of controlled substances, the social worker testified that DSS was not able to do so because respondent "refused." As to the 29 March 2018 drug screen, the social worker testified that respondent stated "[h]e was just waking up and he was cooking." As to the 27 June 2018 drug screen, the social worker testified that respondent "said he would not be able to pass so he wasn't going to go." The social worker's testimony regarding respondent's reactions to these respective drug screen administrations clearly supports the trial court's finding that respondent "refused" to go with DSS for a drug screen on each of the two occasions. Although respondent contends that the circumstances of the drug screens should have led to a different finding, it was for the trial court to determine the reasonable inferences to be made from the social worker's testimony. *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68; *Scott v. Scott*, 157 N.C. App. at 388, 579 S.E.2d at 435.

Respondent further challenges the portion of Finding of Fact 28 that states that DSS had made eleven unsuccessful attempted drug screens. Respondent argues that there was insufficient evidence in the record to support the trial court's finding of fact. Respondent's rationale for his position is the layered argument that because there was no evidence of any actual contact between DSS and respondent concerning the nine drug screens other than the ones attempted on 29 March 2018 and 27 June 2018, and because there was no evidence that respondent was made aware of DSS's attempt to screen him for drugs on these dates, then the trial court had no basis to find that he refused those attempted drug screens. DSS concedes that the evidence presented on this matter only demonstrates that respondent was unavailable to be tested. Thus, we disregard this portion of Finding of Fact 28.

Respondent next challenges the portion of Finding of Fact 31 that states that he failed to approach his employer to request a modification of his work schedule so that respondent could visit with Julie. We note that respondent conceded during cross-examination at the termination hearing that he never went to his superior to ask for such a modification. Respondent's own testimony therefore directly supports this finding of fact.

Respondent further argues that there is no evidence to support the segment of Finding of Fact 31 that states that the trial court would have been inclined to grant weekend visitation with Julie to respondent in

order to accommodate his work schedule. We disagree. We agree with the Court of Appeals that "[i]t is well-established that a trial court may take judicial notice of its own proceedings." *In re J.C.M.J.C.*, 834 S.E.2d 670, 676 (N.C. Ct. App. 2019). Here, the same assigned trial judge presided over this case's proceedings from the time of the adjudication hearing through the termination hearing. As a result, the assigned trial judge had actual knowledge, in his capacity as the trial court, of his own inclinations and therefore could take judicial notice regarding whether the trial court would have granted weekend visitation to respondent. Consequently, we overrule respondent's challenge to this finding of fact.

Respondent argues that Finding of Fact 32 is not supported by the evidence. That finding of fact states the following:

> 32. Respondent father [ ] has willfully failed and refused to correct any of the conditions which led [Julie] to come into the care of [DSS]. These conditions still exist as of this hearing. Respondent father [ ] has not attended a parenting class nor has he sought and/or obtained any domestic violence treatment and/or counseling. In addition, the conditions which led [Julie] to come into the care of [DSS] will in all likelihood continue to exist in the reasonably foreseeable future such that [Julie] will be unable to safely come into the care of Respondent father [ ].

Respondent contends that nearly all of the allegations relating to Julie's removal from the home concerned Julie's mother. He asserts that no evidence indicated that he "willfully failed and refused" to correct substance abuse and mental health problems of Julie's mother, and further asserts that his case plan never required domestic violence counseling or treatment. We are not persuaded. While it may be true that respondent had no role in the mother's substance abuse and mental health issues, Julie's placement in foster care after her removal from the mother's home was predicated on the fact that she could not be placed with respondent. As stated previously herein, to address the issues which prevented Julie's placement with respondent, the trial court first ordered that respondent must engage in a case plan which included domestic violence, mental health, and substance abuse components and comply with all recommendations. Second, in the order ceasing reunification efforts, the trial court found as a fact that respondent "informed the social worker on October 17, 2017, that he was waiting until he goes to court for pending drug charges before he begins services identified on his case plan." Third, as indicated earlier, respondent tested positive for hydrocodone and oxycodone and refused to complete two drug screens.

Consequently, we conclude that the evidence in the record supports this finding of fact.

Respondent next challenges the portions of Findings of Fact 34 and 35 that state that his only requirement before resuming visits with Julie was the attainment of negative drug screens. Respondent claims that this determination is inaccurate, because the dispositional order suspended his visits until respondent began to participate in the activities of his case plan. Respondent contends that DSS never referred him to parenting classes, therefore he was unable to complete that part of his case plan. Respondent goes on to conclude that there was never a time that he had the ability to participate in all of the activities of his case plan and to therefore gain visitation privileges. We agree in part and disagree in part with respondent's position on these two findings of fact.

The disposition order entered on 29 November 2017 states that respondent could engage in visitation with Julie upon his completion of "one drug screening that is negative for all illegal and/or non-prescribed controlled substances, *and* [*upon*] *begin*[*ning*] *participating in the activities of his case plan*." (Emphasis added.). Thus, the portion of Finding of Fact 34 that states that the *only* requirement for respondent to visit with Julie prior to 30 May 2018 was the attainment of a negative drug screen is incorrect.

Finding of Fact 35 states that the only requirement for respondent to visit with Julie from 30 May 2018 until his incarceration was the completion of two negative drug screens. This finding is supported by the record. The permanency planning order entered on 14 June 2018 expressly shows that respondent's completion of two negative drug screens was the sole prerequisite to visitation and that respondent's visitation was not conditioned upon respondent participating in the activities of his case plan. Regardless of whether respondent was required to engage in the activities of his case plan prior to being allowed to visit with Julie, the record is clear that respondent never completed any negative drug screens, and therefore never satisfied this condition precedent to visitation. Thus, DSS's purported failure to refer respondent to parenting classes had no effect on his ability to visit with Julie.

Respondent further argues that even if he had complied with the trial court's prerequisites to visitation, Julie was living in Anson County and New Hanover County prior to the termination hearing and the distance from his residential county of Caldwell County to where Julie was located made visitation less feasible. It is worthy to note, however, that respondent testified at the termination hearing that he did not learn of

Julie's whereabouts until the termination hearing. Because respondent was unaware of Julie's residential placements and her geographical distance from respondent, these issues could not have had a dampening effect on respondent's desire to visit with Julie or on his ability to see her.

In Findings of Fact 34 and 35, the trial court again found that respondent had refused to complete drug screens on 29 March 2018 and 27 June 2018. The trial court also found that respondent was "not at home during other times when [DSS] attempted to drug screen him." We have already determined that the trial court could reasonably infer, based on competent evidence adduced at the termination hearing, that respondent refused to submit to the drug screens. The trial court additionally found as a fact that respondent was "not at home" during additional attempts by DSS to obtain a drug screen from him. As observed earlier in our analysis, DSS concedes that the evidence demonstrates respondent's unavailability to be tested for the presence of controlled substances. Ultimately, we conclude that these portions of Findings of Fact 34 and 35 properly reflect the evidence in the record.

Respondent next argues that the portions of Finding of Fact 36 that state that he had no contact with Julie and failed to send her cards or gifts were not supported by the record. Respondent asserts that the record contains no evidence that he had the ability to write to Julie or to send her cards or gifts after his incarceration. Respondent also contends that there was no evidence that Julie's foster parents would allow him to contact her or send her cards or gifts. We note that the trial court did not make any finding of fact regarding whether respondent did or did not have the ability to contact Julie or to send her cards or gifts; the trial court's finding of fact merely states that respondent did not do so. This finding is supported by the social worker's testimony that following respondent's incarceration, respondent never sent Julie any cards or gifts and never asked DSS to forward any letters to the child. The social worker further testified that respondent's last visit with Julie occurred on 1 September 2017. Respondent's argument does not relate to the sufficiency of the evidence to support this finding of fact, but instead relates to the legal conclusion of his neglect and willful abandonment of Julie. *See In re N.D.A.*, 373 N.C. 71, 82, 833 S.E.2d 768, 776 (2019) ("[T]he trial court failed to make any findings of fact regarding whether respondent-father had the ability to contact [DSS] and [his daughter] while he was incarcerated, with such findings being necessary in order for the trial court to make a valid determination regarding the extent to which respondent-father's failure to contact [his daughter] and [DSS] . . .

was willful."). Finding of Fact 36 reflects the social worker's testimony, and we thus conclude it is supported by clear, cogent, and convincing evidence.

Respondent also challenges Findings of Fact 7 and 33. Finding of Fact 7 concerns respondent's last known address; Finding of Fact 33 relates to the ground of willful abandonment. However, because we conclude these findings were not necessary to support the trial court's conclusion that grounds existed to terminate respondent's parental rights for neglect, we refrain from engaging in an unnecessary review of respondent's challenges to those two findings of fact. *In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58–59 (citing *In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133).

[2] Respondent next argues that the trial court's findings of fact do not support its conclusion that grounds existed to terminate his parental rights due to neglect. Respondent represents that he had no role in Julie's removal from the mother's home. Respondent contends that there was no evidence that he lacked parenting skills or that he suffered from any condition arising from mental health, substance abuse, or domestic violence concerns that could harm Julie or place her at a substantial risk of harm. Thus, respondent asserts that his failure to complete his case plan does not affect his fitness to parent Julie and consequently is not relevant to the conclusion of neglect. Respondent further contends that the findings of fact do not support a conclusion of neglect by abandonment because no evidence was presented and no findings of fact were made regarding his ability to remain in contact and communication with Julie while he was incarcerated. We disagree with respondent's position.

First, we do not accept respondent's contention that the trial court's conclusion of neglect was erroneous because he was not responsible for the conditions that resulted in Julie's placement in DSS custody. This Court has explained that "[i]n determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *In re M.A.W.*, 370 N.C. at 154, 804 S.E.2d at 517 (quoting *In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252). In *In re M.A.W.*, this Court held that a prior adjudication of neglect based on a mother's substance abuse and mental health issues was "appropriately considered" by the trial court as "relevant evidence" in proceedings to terminate the parental rights of a father who was incarcerated at the time of the prior adjudication. *Id.* at 153, 804 S.E.2d at 517; *see also In re C.L.S.*, 245 N.C. App. 75, 78–79, 781

S.E.2d 680, 682–83 (affirming termination of a father's parental rights on the ground of neglect where the father was incarcerated and paternity was not established until after a prior adjudication of neglect based on the mother's substance abuse), *aff'd per curiam*, 369 N.C. 58, 791 S.E.2d 457 (2016). It is therefore not necessary that the parent whose rights are subject to termination be responsible for the prior adjudication of neglect.

Furthermore, we do not agree with respondent's claim that he played no part in the prior adjudication of neglect. As we stated previously, although respondent may have had no role in the mother's substance abuse and mental health issues, Julie's removal from the mother's home and resulting placement in foster care were also largely due to the fact that the juvenile could not be placed with respondent. To address the issues which prevented Julie's placement with respondent, the trial court ordered respondent to engage in a case plan which included domestic violence, mental health, and substance abuse components and to comply with all recommendations. Respondent failed to comply with the requirements of the order.

Second, we are not persuaded by respondent's claim that there was no evidence that he had the ability to remain in contact and communication with Julie while he was incarcerated but chose not to do so, to the extent that his incarceration contributed to his lack of interaction with the child. This Court has stated:

> A parent's incarceration may be relevant to the determination of whether parental rights should be terminated, but "[o]ur precedents are quite clear—and remain in full force—that '[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.' " Thus, respondent's incarceration, by itself, cannot serve as clear, cogent, and convincing evidence of neglect. Instead, the extent to which a parent's incarceration . . . support[s] a finding of neglect depends upon an analysis of the relevant facts and circumstances, including the length of the parent's incarceration.

In re K.N., 373 N.C. 274, 282–83, 837 S.E.2d 861, 867–68 (2020) (citations omitted). In the present case, similar to the circumstances in *In re K.N.*, the trial court failed to conduct such an analysis. However, pertinent aspects of respondent's incarceration here distinguish this case from *In re K.N.* In *In re K.N.*, the father was already incarcerated at the time that he entered into his case plan. *Id.* at 276, 837 S.E.2d at 864. Respondent

here, on the other hand, was not incarcerated until 19 September 2018, almost twelve months after he entered into his case plan and more than twelve months since he last visited Julie.

The trial court's findings in this case reveal circumstances similar to those in *In re M.A.W.* In *In re M.A.W.*, this Court found that "the evidence of [the father's] prior neglect does not stand alone," noting the father's long history of criminal activity and substance abuse and his stipulation to the allegations of neglect that led to the juvenile's adjudication as a neglected juvenile. 370 N.C. at 154, 804 S.E.2d at 517. The father in *In re M.A.W.* also admitted to being aware of the mother's substance abuse issues. *Id.* Similarly, in the instant case, respondent has an extensive criminal history, with many of his past offenses involving controlled substances. The trial court also found, as previously mentioned, that respondent "stood mute" when the allegations in the amended juvenile petition were presented. Furthermore, the amended juvenile petition contains an allegation that respondent was aware of the mother's ongoing substance abuse and took no action to ensure Julie's safety.

Additional facts supporting the trial court's conclusion that there was a likelihood of repetition of neglect included its finding of fact that respondent had last visited with Julie in September 2017 and took no action to be a part of Julie's life. Thus, respondent had not developed a relationship with Julie and had not demonstrated an ability to care for her. Furthermore, prior to his incarceration, respondent made no attempt to comply with his case plan or to address the barriers to reunification that had been identified by the trial court. Respondent tested positive for hydrocodone and oxycodone, refused two drug screens, and failed to go to RHA. We therefore conclude that "[t]he trial court properly found that past neglect was established by DSS and that there was a likelihood of repetition of neglect[,]" *id.* at 156, 804 S.E.2d at 518, because the trial court's findings of fact demonstrate that respondent's circumstances had not changed so as to render him fit to care for Julie at the time of the termination hearing. *See In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232 (explaining that the trial court must consider evidence of changed circumstances since the adjudication of past neglect, and that the determinative factors are the best interests of the child and the fitness of the parent to care for the child at the time of the termination hearing). Thus, we hold that the trial court did not err in adjudicating neglect as a ground to terminate respondent's parental rights to Julie pursuant to N.C.G.S. § 7B-1111(a)(1).

The trial court's conclusion that a ground for termination existed pursuant to N.C.G.S. § 7B-1111(a)(1) is sufficient in and of itself to support the termination of respondent's parental rights. *In re T.N.H.*, 372 N.C. at 413, 831 S.E.2d at 62. Furthermore, respondent does not challenge the trial court's conclusion that termination of his parental rights was in Julie's best interests. *See* N.C.G.S. § 7B-1110(a). Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF L.T.

No. 274A19

Filed 5 June 2020

Termination of Parental Rights—jurisdiction—UCCJEA—home state—record evidence

The trial court had jurisdiction to terminate a father's parental rights to his daughter, even though a prior custody order had been entered in Delaware, where the record reflected that the daughter had lived in North Carolina for more than six months prior to the filing of the juvenile petition, marking North Carolina as the minor's "home state" under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) when the proceedings commenced.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 22 March 2019 by Judge Aretha V. Blake in District Court, Mecklenburg County. This matter was calendared for argument in the Supreme Court on 18 May 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Keith T. Roberson for petitioner-appellee Mecklenburg County Department of Social Services.

Matthew D. Wunsche, GAL Appellate Counsel, for appellee Guardian ad Litem.

J. Thomas Diepenbrock for respondent-appellant father.

BEASLEY, Chief Justice.

Respondent-father appeals from the trial court's order terminating his parental rights to his daughter, Laurie.[1] After careful consideration of respondent-father's challenge to the trial court's jurisdiction, we affirm the termination order.

On 17 March 2017, the Mecklenburg County Department of Social Services (DSS) filed a petition alleging that Laurie was a neglected and dependent juvenile. The petition also alleged that Laurie's mother lived in Ohio and that Laurie lived with respondent-father in Charlotte, North Carolina. DSS believed Laurie was at a substantial risk of injury if she remained in respondent-father's care.

On 12 June 2017, the trial court entered a continuance order. It found that prior to the scheduled adjudication hearing on 23 May 2017, respondent-father's attorney and the guardian ad litem (GAL) attorney advocate informed the court that Laurie had not lived in North Carolina for six months before the juvenile petition was filed and that there appeared to be a valid custody order from Delaware in effect that granted sole custody to respondent-father. The trial court also found that neither Laurie's mother nor respondent-father was still living in Delaware. The court continued the case in order to investigate whether it had jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA or the Act).

The matter came on for adjudication and disposition on 26 July and 3 August 2017. On 21 September 2017, the trial court entered an order concluding that Laurie was a neglected and dependent juvenile. In the order, the court also found that Laurie and respondent-father had resided in Charlotte since September 2016 and concluded that it had jurisdiction over the case.

On 19 September 2018, DSS filed a motion in the cause to terminate respondent-father's parental rights on the grounds of neglect and willfully leaving Laurie in foster care for more than twelve months without making adequate progress to correct the removal conditions. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019). On 22 March 2019, the trial court entered an order terminating respondent-father's rights pursuant to N.C.G.S. § 7B-1111(a)(2). The court also concluded that termination was in Laurie's best interest. Respondent-father appealed.

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1. Pseudonyms are used to protect the identity of the juvenile and for ease of reading.

Respondent-father argues that the trial court lacked jurisdiction to enter its termination order. He contends that the trial court failed to comply with the requirements of the UCCJEA when it learned of the Delaware custody order at the beginning of this case and that all the proceedings involving Laurie in North Carolina are therefore void. We disagree.

Because a court must have subject matter jurisdiction in order to adjudicate the case before it, "a court's lack of subject matter jurisdiction is not waivable and can be raised at any time." *In re K.J.L.*, 363 N.C. 343, 346, 677 S.E.2d 835, 837 (2009) (citations omitted). This Court presumes the trial court has properly exercised jurisdiction unless the party challenging jurisdiction meets its burden of showing otherwise. *In re S.E.*, 838 S.E.2d 328, 331 (N.C. 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. *Id.*; *see also* N.C.G.S. § 7B-1101 (2019). The trial court is not required to make specific findings of fact demonstrating its jurisdiction under the UCCJEA, but the record must reflect that the jurisdictional prerequisites in the Act were satisfied when the court exercised jurisdiction. *See In re T.J.D.W.*, 182 N.C. App. 394, 397, 642 S.E.2d 471, 473, *aff'd per curiam*, 362 N.C. 84, 653 S.E.2d 143 (2007).

The parties agree that Laurie was the subject of a valid Delaware child custody order when DSS filed the initial neglect and dependency petition on 17 March 2017. Their dispute is whether the trial court had jurisdiction to modify the Delaware order. Respondent-father contends that the record shows the trial court lacked modification authority under the Act.

Section 50A-203 of the North Carolina General Statutes governs when the trial court has jurisdiction to modify an out-of-state custody order under the UCCJEA. It sets out a two-part test for establishing modification jurisdiction: first, the trial court must have jurisdiction to make an initial custody determination under N.C.G.S. § 50A-201(a)(1) or (2), and second, one of the following must have occurred:

> (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
>
> (2) A court of this State or a court of the other state determines that the child, the child's parents, and any

> person acting as a parent do not presently reside in the other state.

N.C.G.S. § 50A-203 (2019). Here, it is undisputed that the second part of this test was met when the trial court made unchallenged findings that Laurie's mother, respondent-father, and Laurie no longer resided in Delaware when DSS filed the juvenile petition. However, respondent-father argues that the trial court did not satisfy the first part of the test because it did not have jurisdiction to make an initial child-custody determination under N.C.G.S. § 50A-201(a).

Section 50A-201(a)(1) states that North Carolina courts have jurisdiction to make an initial custody determination if North Carolina is the "home state" of the child when the proceedings commence. The UCCJEA defines "home state" as "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).

Respondent-father argues that North Carolina was not Laurie's home state at the time DSS filed the neglect and dependency petition. His argument relies primarily on the following finding from the trial court's 12 June 2017 order continuing adjudication of the juvenile petition:

> 2. Prior to the hearing, the GAL Attorney Advocate and the attorney for the Father voiced concerns regarding jurisdiction of the Court in this matter. At the time the petition was filed the juvenile was not residing in North Carolina for the previous six months.

While this finding suggests that North Carolina was not Laurie's home state at the time these proceedings began, it was based on preliminary information provided to the trial court by the GAL attorney advocate and respondent-father's attorney. That initial information was superseded by more accurate information as the case progressed. In its adjudication and disposition order entered on 21 September 2017, the trial court found, "by clear and convincing evidence," that Laurie and respondent-father had been residing in Charlotte "since September 2016[,]" which was more than six months before DSS filed the juvenile petition. This finding was further supported by respondent-father's testimony at the termination hearing. He stated that he moved to Charlotte on 31 August 2016, and that prior to that time, Laurie was living with her aunt in North Carolina for another one to three months. He further testified that Laurie began living with him as soon as he moved to Charlotte. Thus, the record

reflects that Laurie had lived in North Carolina for more than six months by the time DSS filed the juvenile petition on 17 March 2017. Accordingly, North Carolina was Laurie's home state under the UCCJEA, and the trial court had jurisdiction under N.C.G.S. § 50A-203 to modify the Delaware custody order and preside over this case. *See In re S.E.*, 838 S.E.2d at 332 (concluding the trial court had jurisdiction under the UCCJEA based on "stipulations and other record facts" demonstrating that North Carolina was the child's home state).

Respondent-father has not met his burden of showing the trial court lacked jurisdiction under the UCCJEA. We affirm the trial court's order terminating his parental rights.

AFFIRMED.

JOHN TYLER ROUTTEN
v.
KELLY GEORGENE ROUTTEN

No. 455A18

Filed 5 June 2020

1. Child Visitation—dispute between two parents—denial of visitation—best interests of child—statutory requirement

In a child custody dispute between two biological parents, the trial court did not err by granting full custody to the father and denying visitation to the mother where it entered a written finding of fact, pursuant to N.C.G.S. § 50-13.5(i), that visitation with the mother was not in the best interests of the children. By the plain language of the statute, the trial court was not required to find that the mother was an unfit person to visit the children, and *Moore v. Moore*, 160 N.C. App. 569 (2003), which the Court of Appeals relied upon to hold otherwise, was expressly overruled.

2. Child Visitation—dispute between two parents—denial of visitation—delegation of discretion to one parent

In a child custody dispute between two biological parents, the trial court did not err by denying visitation to the mother yet also giving the father discretion to allow some visitation by the mother. In light of the trial court's authority to deny visitation pursuant to

N.C.G.S. § 50-13.5(i), the trial court could delegate discretion to the father to allow some visitation.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, *Routten v. Routten*, 262 N.C. App. 436, 822 S.E.2d 436 (2018), affirming an order entered by Judge Michael J. Denning on 6 March 2017 in District Court, Wake County. Heard in the Supreme Court on 6 November 2019.

Jackson Family Law, by Jill Schnabel Jackson, for plaintiff-appellant.

Stam Law Firm, by R. Daniel Gibson, for defendant-appellee.

MORGAN, Justice.

In this appeal involving a child custody dispute between two biological parents, we hold that a trial court may grant full custody to one parent and deny visitation to the other parent, so long as the trial court has entered a written finding of fact that such a custody award is in the best interests of the children, without the need to have determined that the parent who has been denied visitation is a person deemed by the trial court to be unfit to spend time with the children. We therefore reverse the majority decision of the Court of Appeals to the extent that it vacated the trial court's order regarding custody and the lower appellate court remanded the matter for further proceedings.

Factual Background and Procedural History

Plaintiff John Tyler Routten and defendant Kelly Georgene Routten were married on 23 March 2002 and became separated on 26 July 2014. This appeal focuses on the custodial arrangement for the two children who were born to the parties during the marriage: a daughter who was born on 2 June 2004 and a son who was born on 17 July 2012.

On 4 August 2014, plaintiff-father filed a complaint against defendant-mother for child custody and equitable distribution, along with a motion for defendant to submit to psychiatric evaluation and psychological testing. The parties entered into a consent order on 13 August 2014, in which they agreed to a temporary child custody schedule. After defendant filed her answer to plaintiff's complaint on 6 October 2014, asserting several counterclaims, the parties engaged in mediation.

On 24 September 2015, at the conclusion of the court proceeding on the parties' claims for permanent child custody support, and on defendant's counterclaims for alimony and attorney fees, the trial court directed defendant to undergo a neuropsychological evaluation prior to a decision on permanent child custody. On 21 December 2015, the trial court entered a custody and child support order which established a temporary custody schedule, ordered defendant to "take whatever steps are necessary to obtain a complete neuropsychological evaluation no later than June 15, 2016," and scheduled a review hearing on 5 April 2016 and a "subsequent hearing for review of custody and entry of final/permanent orders in July or August of 2016." On 5 April 2016, the scheduled date for the review hearing set by the 21 December 2015 order, the trial court conducted an in-chambers conference on the status of the neuropsychological evaluation in which defendant had been ordered to participate. On 27 April 2016, the trial court entered an order scheduling a hearing on 4 August 2016 to address the results of defendant's neuropsychological evaluation and other matters relating to the best interests of the children. The trial court further directed defendant to obtain the neuropsychological evaluation no later than 15 June 2016 and to submit any resulting written report to plaintiff's counsel at least ten days before the scheduled 4 August 2016 hearing. On 29 July 2016, defendant moved for a continuance and a protective order, stating that she had complied with the orders to obtain a neuropsychological evaluation. She did not submit any written report resulting from the evaluation to plaintiff's counsel, as directed by the trial court's order of 27 April 2016.

At the final custody hearing on 4 August 2016, defendant admitted that although Duke Clinical Neuropsychology Service had performed a neuropsychological evaluation of defendant on 21 April 2016, she had not disclosed this fact to plaintiff prior to the 4 August 2016 hearing. Defendant further admitted that earlier she had informed plaintiff that Pinehurst Neuropsychology, rather than Duke, would perform the evaluation and had implied in the motions that she filed in the months of June and July of 2016 that her neuropsychological evaluation had not yet been performed. On 9 December 2016, the trial court entered a permanent child custody order awarding sole physical custody of the children to plaintiff. The trial court also entered an order for alimony and attorney fees.

Defendant subsequently filed pro se motions for a new trial and for relief from judgment pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure. She also obtained the issuance of numerous

subpoenas on her own behalf. As a result of these filings, plaintiff sought and received a temporary restraining order on 13 December 2016. At the succeeding hearing on plaintiff's preliminary injunction motion on 3 January 2017, the trial court ordered defendant to calendar for hearing her Rule 59 and Rule 60 pro se motions within ten days. Defendant scheduled her motions to be heard on 1 March 2017; and on 20 February 2017, counsel filed amended Rule 59 and Rule 60 motions on her behalf. On 6 March 2017, the trial court entered an amended permanent child custody order which included additional findings of fact and conclusions of law. The amended permanent child custody order included provisions which granted sole legal custody and physical custody of the children to plaintiff, denied visitation by defendant, authorized plaintiff to "permit custodial time between the children and [d]efendant within his sole discretion," and allowed defendant to have telephone conversations with the children twice each week. On 4 April 2017, defendant filed a notice of appeal of the 6 March 2017 amended permanent child custody order "and all related interim or temporary orders and ancillary orders."

While defendant brought forward numerous arguments in her appeal to the Court of Appeals, there are two issues presented to us for resolution after the rendered decision of the lower appellate court: (1) whether the trial court erred in denying defendant's ability to have visitation with her children as the non-custodial parent without a determination that she was unfit to have visitation with them, and (2) whether the trial court erred in authorizing plaintiff, as the custodial parent, to exercise discretion in allowing visitation between defendant and the children. *See generally Routten v. Routten*, 262 N.C. App. 436, 822 S.E.2d 436 (2018).

In determining these two issues, the Court of Appeals majority agreed with defendant's contention that "the trial court violated her constitutionally protected interest as parent by awarding sole legal and physical custody of the children to Plaintiff without making a finding that she was unfit or had acted inconsistently with her constitutionally protected status as parent." *Id.* at 445, 822 S.E. 2d at 443. It also held that "[t]he trial court erred and abused its discretion by delegating its authority to determine Defendant's visitation rights." *Id.* at 444, 822 S.E. 2d at 442–443. On these issues, the dissenting Court of Appeals judge disagreed with the majority's view on the basis that the analysis was both in conflict with the precedent of this Court and was reached in reliance upon a prior Court of Appeals decision, *Moore v. Moore*, 160 N.C. App. 569, 587 S.E.2d 74 (2003), that had been expressly disavowed by an earlier panel of the Court of Appeals and therefore violated our

directive in *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). *Routten*, 262 N.C. App. at 458–65, 822 S.E.2d at 451–55 (Inman, J., dissenting in part).

On 27 December 2018, defendant filed a notice of appeal in this Court on the basis of her contention that this case involved a substantial constitutional question and that this matter warranted the exercise of our discretionary review. Each of these filings was dismissed *ex mero motu* by this Court in orders entered on 14 August 2019. On 3 January 2019, plaintiff filed a notice of appeal as a matter of right based upon the Court of Appeals dissent.

Analysis

[1] The resolution of the issue regarding the trial court's decision to deny visitation by defendant with the children without a determination that she was unfit to have visitation with them is governed by North Carolina General Statutes Section 50-13.5(i). As between two parents seeking custody and visitation of their children, the cited statutory provision states, in pertinent part, that

> the trial judge, *prior to denying a parent the right of reasonable visitation*, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child *or* that such visitation rights are not in the best interest of the child.

N.C.G.S. § 50-13.5(i) (2019) (emphasis added). A plain reading of this subsection reveals two points critical to the resolution of the issues in the matter here. First, this provision contemplates the authorized prospect of the denial to a parent of a right to visitation. Second, that such a denial is permitted upon a trial court's written finding of fact that the parent being denied visitation is deemed unfit to visit the child *or* that visitation would not be in the child's best interests. The unequivocal and clear meaning of the statute identifies two different circumstances in which a parent can be denied visitation, and the disjunctive term "or" in N.C.G.S. § 50-13.5(i) establishes that either of the circumstances is sufficient to justify the trial judge's decision to deny visitation. *See, e.g.*, *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) ("Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.") (citation omitted). Thus, contrary

to the majority view and consistent with the dissenting view in the lower appellate court, in a dispute between two parents if the trial court determines that visitation with one parent is not in a child's best interests, then the trial court is authorized to deny visitation to said parent without a requirement to find the existence of the alternative circumstance that the parent in question is unfit. *See Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 519, 597 S.E.2d 717 722 (2004) (citing *Grassy Creek Neighborhood Alliance, Inc. v. City of Winston-Salem*, 142 N.C. App. 290, 297–98, 542 S.E.2d 296, 301 (2001) for the proposition "that the natural and ordinary meaning of the disjunctive 'or' permits compliance with either condition"). In the present case, there is no dispute that the trial court found that visitation with defendant would not be in the best interests of the children. Pursuant to N.C.G.S. § 50-13.5(i), this was a proper standard to apply in resolving the custody and visitation matters before the trial court. *See, e.g.*, *Adams v. Tessener*, 354 N.C. 57, 61, 550 S.E.2d 499, 502 (2001) ("In a custody proceeding between two natural parents (including biological or adoptive parents), or between two parties who are not natural parents, the trial court must determine custody based on the 'best interest of the child' test.").

The majority decision of the Court of Appeals in this matter went astray due to its reliance upon *Moore*. The *Moore* case, as accurately recounted by the dissenting judge, "held that in a custody dispute between a child's natural or adoptive parents 'absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally protected paramount right of parents to custody, care, and control of their children must prevail.' " *Routten*, 262 N.C. App. at 458, 822 S.E.2d at 451 (citation omitted). The dissent notes that the Court of Appeals in *Moore* excerpted this language from our opinion in *Petersen v. Rogers*, 337 N.C. 397, 403–04, 445 S.E.2d 901, 905 (1994), "which established a constitutionally based presumption favoring a parent in a custody dispute with a non-parent," as controlling authority for the outcome in *Moore*. *Routten*, 262 N.C. App. at 459, 822 S.E.2d at 451. However, the *Moore* court misapplied our decision in *Petersen*. The *Petersen* case established a presumption favoring a parent in a custody dispute *with a non-parent*; *Moore* wrongly employed this presumption in a custody dispute between two parents. This presumption is not implicated in disputes between parents because in such cases, a trial court must determine custody between two parties who each have, by virtue of their identical statuses as parents, the same "constitutionally-protected paramount right to custody, care, and control of their children." *Petersen*, 337 N.C. at 400, 445 S.E.2d at 903. Therefore, no constitutionally based presumption favors custody for one parent or the other nor

bars the award of full custody to one parent without visitation to the other. The dissent here went on to astutely analyze the snarl that was created by the misapplication of our *Petersen* presumption by the Court of Appeals in *Moore*, and the error that this introduced into the majority decision of the lower appellate court in the present case:

> But unlike *Moore*, *Petersen* involved a custody conflict between parents and non-parents. *Moore* did not acknowledge that factual distinction or provide any analysis to support extending the *Petersen* holding to a dispute between two parents. Nor did *Moore* acknowledge controlling Supreme Court precedent expressly holding that *Petersen* does not apply to custody disputes between two parents, such as the case we decide today [of Routten v. Routten].

Routten, 262 N.C. App at 459, 822 S.E.2d at 451 (citation omitted).

Shortly before the Court of Appeals issued its decision in *Moore*, we recognized the crucial distinction regarding a custody dispute between a parent and a non-parent and a custody dispute between two parents. In *Owenby v. Young*, the parents of two children had divorced, and primary custody had been awarded to the mother with visitation to the father. 357 N.C. 142, 142, 579 S.E.2d 264, 265 (2003). Several years later, the mother was killed in a plane crash. After this occurrence, the children resided with their father for several weeks before the children's maternal grandmother sought primary custody of them, contending that the father was not a fit and proper person to have the care, custody, and control of the children as a result of his alcohol abuse. *Id.* at 143, 579 S.E.2d at 265. In determining *Owenby*, we acknowledged the *Petersen* presumption and reaffirmed that "unless a natural parent's conduct has been inconsistent with his or her constitutionally protected status, application of the 'best interest of the child' standard in a custody dispute with a nonparent offends the Due Process Clause of the United States Constitution." *Id.* at 145, 579 S.E.2d at 266–67 (citations omitted). This Court went on to observe, however, that this "protected right *is irrelevant in a custody proceeding between two natural parents*, whether biological or adoptive, or between two parties who are not natural parents. In such instances, the trial court must determine custody using the 'best interest of the child' test." *Id.* at 145, 579 S.E.2d at 267 (citation omitted).

Although our decisions in *Petersen* and *Owenby* both preceded the decision of the Court of Appeals in *Moore*, with both *Petersen* and

Owenby involving custodial disputes between a parent and a non-parent and being consistent with one another in the recognition of a constitutionally based presumption favoring a parent in a custody dispute with a non-parent, nonetheless the result in *Moore* was inconsistent with this line of cases in that the Court of Appeals erroneously applied this presumption in a custody dispute between two parents. The Court of Appeals duplicates this mistake in the instant case and compounds the error by misinterpreting the disjunctive clause of N.C.G.S. § 50-13.5(i) to have required the trial court here to find that defendant was an unfit person to visit the children, when the statute authorized the alternative ground found by the trial court that such visitation was not in the best interests of the children.

We therefore utilize this opportunity to reiterate and to apply the principle which this Court enunciated in *Petersen* that where parents are each seeking custody of their children, each has a full and equal "constitutionally-protected paramount right . . . to custody, care, and control of their children" and there exists no presumption regarding custody merely on the basis of either party's parental status. *Petersen*, 337 N.C. at 403–04, 445 S.E.2d at 905. Furthermore, in light of statutory and case law, in a dispute between two parents with equal parental rights, the trial court must apply the "best interest of the child" standard to determine custody and visitation questions, *see Adams*, 354 N.C. at 61, 550 S.E.2d at 502, and if the court determines that one parent should not be awarded reasonable visitation, the court "shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child *or* that such visitation rights are not in the best interest of the child." N.C.G.S. § 50-13.5(i) (emphasis added). We also expressly overrule *Moore v. Moore*, and any other Court of Appeals decisions purporting to apply the *Petersen* presumption in custody disputes between two parents.

[2] As to the second issue which we consider upon this review, the lower appellate court's majority vacated the portion of the trial court's conclusion of law stating that "[p]laintiff may permit custodial time between the children and [d]efendant within his sole discretion, taking into account the recommendations of [the parties' daughter's] counselor as to frequency, location, duration, and any other restrictions deemed appropriate by the counselor for permitting visitation between [the parties' daughter] and [defendant]." *See Routten*, 262 N.C. App at, 443–44, 822 S.E.2d at 442. This determination by the Court of Appeals majority was based upon the holdings in two Court of Appeals decisions, each of which held that "the award of visitation rights is a judicial function

which may not be delegated to the custodial parent[.]" *Brewington v. Serrato*, 77 N.C. App. 726, 733, 336 S.E.2d 444, 449 (1985). (citing *In re Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971)).

Here we agree with the view of the dissent, that in light of the trial court's authority to deny *any* visitation to defendant pursuant to N.C.G.S. § 50-13.5(i), any delegation of discretion to plaintiff to allow *some* visitation "is mere surplusage, albeit admittedly confusing." *Routten*, 262 N.C. App. at 465, 822 S.E.2d at 455. The trial court had already determined that it was not in the children's best interests to have visitation with defendant. Although it is curious that the trial court would afford an opportunity for defendant to have visitation with the children at the discretion of plaintiff after denying visitation rights to her, nonetheless we choose to interpret the trial court's openness to the potential prospect of defendant's ability to see her children as a humane accommodation rather than as an error of law.

Conclusion

For the reasons cited above, we reverse those portions of the Court of Appeals decision that were raised in this appeal based upon the dissenting opinion of the lower appellate court. We also reverse those portions of the Court of Appeals decision which would have vacated the custody award and remanded for further proceedings.

REVERSED.

STATE OF NORTH CAROLINA
v.
CORY DION BENNETT

No. 406PA18

Filed 5 June 2020

1. Jury—jury selection—Batson claim—waiver of appellate review—sufficiency of the record

In a prosecution for multiple drug charges, defendant did not waive appellate review of his *Batson* claim because the record sufficiently established the race of each prospective juror that the prosecutor peremptorily challenged at trial. Defendant's trial counsel, the prosecutor, and the trial court each agreed that these

prospective jurors were African American, and this agreement amounted to a stipulation in the record.

2. Jury—jury selection—Batson analysis—prima facie case

Where a criminal defendant raised a *Batson* claim at trial, he satisfied the first step of the *Batson* analysis by making a prima facie showing of racial discrimination during jury selection. The prosecutor's acceptance rate for white prospective jurors was 100%, the prosecutor used 100% of his peremptory challenges to excuse African American prospective jurors, and there was no obvious justification for the peremptory challenges based on the prospective jurors' answers to questions during voir dire.

Justice NEWBY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 262 N.C. App. 89, 821 S.E.2d 476 (2018), affirming judgments entered on 16 March 2017 by Judge John E. Nobles, Jr., in Superior Court, Sampson County. On 27 March 2019, the Supreme Court allowed the State's conditional petition for discretionary review as to an additional issue. Heard in the Supreme Court on 3 February 2020.

Joshua H. Stein, Attorney General, by Kristin J. Uicker and Brent D. Kiziah, Assistant Attorneys General, for the State-appellee.

Franklin E. Wells, Jr., for defendant-appellant.

Donald H. Beskind, Robert S. Chang, and Taki V. Flevaris for Fred T. Korematsu Center for Law and Equality, amicus curiae.

David Weiss, James E. Coleman, Jr., and Elizabeth Hambourger for Coalition of State and National Criminal Justice and Civil Rights Advocates, amici curiae.

ERVIN, Justice.

This case requires us to determine whether the record developed before the trial court sufficed to permit appellate review of a *Batson* challenge lodged by defendant Cory Dion Bennett and, if so, whether defendant established the existence of the prima facie case of discrimination necessary to require the trial court to undertake a complete

Batson analysis. After careful review of the record, transcript, and briefs in light of the applicable law, we conclude that defendant presented a sufficient record to allow this Court to conduct a meaningful review of his contention that he did, in fact, establish the necessary prima facie case of discrimination and that he made a sufficient showing to require the performance of a complete *Batson* analysis. As a result, we reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for further remand to the Superior Court, Sampson County, for a hearing to be conducted in accordance with the final two steps of the analysis delineated by the Supreme Court of the United States in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

On 25 April 2016, the Sampson County grand jury returned bills of indictment charging defendant with three counts of possessing a precursor chemical with the intent to manufacture methamphetamine, one count of manufacturing methamphetamine, one count of trafficking in methamphetamine by possession, one count of trafficking in methamphetamine by manufacture, and one count of possession of a firearm by a felon. On 6 June 2016, the Sampson County grand jury returned a bill of indictment charging defendant with two additional counts of possessing a precursor chemical with the intent to manufacture methamphetamine.

The charges against defendant came on for trial before the trial court and a jury at the 13 March 2017 criminal session of the Superior Court, Sampson County. Among the first twelve persons seated in the jury box during the voir dire process was Roger Smith, who occupied Seat No. 10. Mr. Smith, an unmarried man, lived off H.B. Lewis Road and worked as a termite supervisor in Clinton. In response to the prosecutor's inquiry concerning whether any prospective juror had "ever been the victim of a crime," Mr. Smith responded that he had been the victim of a breaking or entering that had occurred approximately two years earlier; that, while law enforcement officers had investigated the incident, no one had ever been charged with the commission of the crime; and that Mr. Smith believed that the investigating officers had handled the incident in a satisfactory manner. In addition, Mr. Smith informed the prosecutor that, while he recognized one of the other prospective jurors, who worked at a local bank, his connection with this other prospective juror would not affect his ability to decide the case fairly and impartially in the event that he was selected to serve as a member of the jury.

Mr. Smith responded to prosecutorial inquiries concerning whether anything would make it difficult for him to be a fair and impartial juror and whether there was anything going on in his life that would make

it difficult for him to serve on the jury in the negative. Similarly, Mr. Smith denied having any religious, moral, or ethical concerns that would prevent him from voting to return a guilty verdict. After questioning other prospective jurors, the prosecutor exercised a peremptory challenge to remove Mr. Smith from the jury being selected to decide the issue of defendant's guilt or innocence.

After a ten-minute recess, Virginia Brunson was called to replace Mr. Smith in Seat No. 10. Ms. Brunson responded to the trial court's initial questions by stating that she was not aware of any reason that she would be unable to be fair to either the State or defendant. Ms. Brunson, who was not married, lived near Ingold and owned a beauty salon that was located across the street from the courthouse. After stating that she did not know anyone involved in the prosecution or defense of the case or any of the other prospective jurors, Ms. Brunson told the prosecutor that she had never been the victim of crime, a defendant or witness in a case, or a juror. In addition, Ms. Brunson stated that she did not have any strong feelings, either favorable or unfavorable, concerning the law enforcement profession; that she had not heard anything about the charges against defendant before arriving for jury selection; and that she would be able to be impartial to both sides. Similarly, Ms. Brunson expressed no reservations concerning the fact that possession of a firearm by a felon is unlawful and said that she was not confused by the distinction between the concepts of actual and constructive possession.

Ms. Brunson stated that she would be able to listen to and fairly consider the testimony of a witness who had entered into a plea agreement with the State, that she did not know any of the other prospective jurors who were seated in the jury box with her, and that she understood that legal dramas on television were not realistic. To Ms. Brunson's knowledge, neither she, a member of her family, nor a close friend had ever had a negative experience with a member of the law enforcement profession or a member of the District Attorney's staff or had ever been charged with committing an offense other than speeding.

In response to further prosecutorial questioning, Ms. Brunson stated that she understood that defendant was presumed to be innocent; that he possessed the rights to a trial by jury, to call witnesses to testify in his own behalf, and to refuse to testify; and that any refusal on his part to testify in his own behalf could not be held against him. Moreover, Ms. Brunson stated that she understood the difference between direct and circumstantial evidence, that she understood that the State was required to establish defendant's guilt beyond a reasonable doubt, and that she

would be required as a member of the jury to assess the credibility of the witnesses.

Ms. Brunson assured the prosecutor that she could listen to all of the evidence, keep an open mind, and follow the law in accordance with the trial court's instructions; agreed with the prosecutor's comment that "the law is not always what we think it is or what we would like it to be"; and acknowledged that, in the event that she was selected to serve as a juror in this case, she would be required to follow the law and apply the law set out in the trial court's instructions to the facts. At that point, the following colloquy occurred between the prosecutor and Ms. Brunson:

> MR. THIGPEN: Do you think you could reach a verdict based only on hearing the evidence from the witness stand, or do you feel like in order to reach a verdict or to make a decision you would have to actually watch the alleged event happen?
>
> MS. BRUNSON: Yeah.
>
> MR. THIGPEN: Okay. You looked confused. Some people—I have had jurors before that have said, "I can't make a decision until I see it happen."
>
> MS. BRUNSON: Uh-huh.
>
> MR. THIGPEN: Okay. Do you feel like you could base your decision on just what the witnesses say, or do you feel like you have to watch it happen?
>
> MS. BRUNSON: Kind of on both.
>
> MR. THIGPEN: What do you mean?
>
> MS. BRUNSON: Sometimes, I guess, it's better to not have hearsay.
>
> MR. THIGPEN: Well, if you watched it happen, you would be a witness; right?
>
> MS. BRUNSON: Right.
>
> MR. THIGPEN: And if you were a witness, you can't be a juror. Does that make sense?
>
> MS. BRUNSON: Yes.

MR. THIGPEN: So the only thing we have is witness testimony.

MS. BRUNSON: Okay.

MR. THIGPEN: So do you feel like you could make a decision based only on hearing the testimony of the witnesses or before you could make that decision would you actually want to watch it happen?

MS. BRUNSON: Yeah.

MR. THIGPEN: Okay. What you said was, "Yeah."

MS. BRUNSON: Yeah, I could make that decision through—

MR. THIGPEN: Based on the testimony?

MS. BRUNSON: Uh-huh.

After reiterating that nothing would make it difficult for her to be fair and impartial to either side and that nothing was going on in her life outside of the courtroom that would render jury service unduly burdensome, Ms. Brunson stated that she did not have any religious, moral, or ethical concerns about voting for a guilty verdict in the event that the State satisfied its burden of proof. At the conclusion of this line of questioning, the State peremptorily challenged Ms. Brunson.

At that point, Rita Corbett took Ms. Brunson's place in Seat No. 10. In responding to the trial court's initial questions, Ms. Corbett stated that there was no reason that she could not be fair to either the State or defendant. Ms. Corbett lived in Clinton, worked as a child nutrition supervisor for the Clinton City Schools, and was married to a person who had retired from his employment with Duke Energy. In response to prosecutorial questions, Ms. Corbett said that she did not know the prosecutor, defendant, or defendant's attorney. Ms. Corbett denied having ever been the victim of a crime, a defendant, or a witness in a case. However, Ms. Corbett had served as a member of a criminal jury in Sampson County about thirty years earlier. According to Ms. Corbett, the jury upon which she served had deliberated on the case, she had not served as the foreperson of the jury, and nothing about that experience would impact her ability to serve on the present jury.

Ms. Corbett denied having strong feelings, either favorable or unfavorable, about the law enforcement profession and indicated that she had not read, heard, or seen anything about the charges against

defendant before arriving in court for jury service. In addition, Ms. Corbett denied having any reservations about the fact that felons are prohibited from possessing firearms and expressed no confusion about the difference between actual and constructive possession. During a colloquy with the prosecutor, Ms. Corbett gave the following answers:

> MR. THIGPEN: Okay. Now, Ms. Corbett, a witness may testify on behalf of the State as a result of a plea agreement with the State in exchange for [a] sentence concession. Based on that fact and that fact alone, would you not be able to consider that person's testimony along with all other evidence that you would hear in the case?
>
> MS. CORBETT: Yes, sir. No, sir.
>
> MR. THIGPEN: Do you understand my question?
>
> MS. CORBETT: Say it again.
>
> MR. THIGPEN: A witness may testify under a plea agreement in exchange for a sentence concession.
>
> MS. CORBETT: Okay.
>
> MR. THIGPEN: Now if that person were to testify, are you just going to go, [t]his person's made a deal; I don't care what they are going to say, or would you listen to it and consider it just like anybody else?
>
> MS. CORBETT: I would listen to their testimony and consider it.

Ms. Corbett did not know any of the other prospective jurors and understood that legal dramas were not based upon reality.

Ms. Corbett told the prosecutor that neither she, a member of her family, nor a close friend had ever had an unpleasant experience with a law enforcement officer or a member of the District Attorney's staff. Ms. Corbett acknowledged that certain drug charges involving her brother had been resolved, stated that she felt that the law enforcement officers involved in that situation had treated her brother fairly, and said that nothing about that experience would affect her ability to be a fair and impartial juror. Ms. Corbett understood that defendant was presumed to be innocent until proven guilty beyond a reasonable doubt; that he possessed the right to trial by jury, to call witnesses in his own behalf, and to refuse to testify; and that any decision that he might make to refrain from testifying in his own behalf could not be held against him.

Ms. Corbett told the prosecutor that she understood the difference between direct and circumstantial evidence and that, as a member of the jury, she would be required to assess the credibility of the witnesses. Ms. Corbett expressed confidence in her ability to listen to all of the evidence, keep an open mind, and follow the law in accordance with the trial court's instructions. Ms. Corbett agreed with the prosecutor that "the law is not always what we think the law is or what you think it should be" and that, as a juror, she would be required to use common sense, follow the law, and apply the law to the facts. In addition, Ms. Corbett stated that she "would not have to see the event happen"; that she could reach a verdict based upon the testimony of witnesses; and that she did not know of anything that would make it difficult for her to be fair and impartial to both the State and defendant.

When the prosecutor inquired whether there was anything occurring in her life outside of the courtroom that would make jury service difficult, Ms. Corbett mentioned her work-related obligations and stated that she was supposed to take her daughter-in-law to a doctor's appointment. On the other hand, Ms. Corbett agreed that the other prospective jurors probably had similar employment-related concerns and acknowledged that her daughter-in-law could use some other means to get to her appointment. Finally, Ms. Corbett stated that she did not have any religious, moral, or ethical concerns that would prevent her from voting to return a guilty verdict. At the conclusion of this line of questioning, the State accepted Ms. Corbett as a juror.

After the State announced this decision, defendant's trial counsel informed the trial court that she wished to make a *Batson* motion and asked to be heard. In response, the trial court inquired of defendant's trial counsel concerning whether the motion could be heard after a break. After agreeing that the *Batson* motion could be heard after the court broke for lunch, defendant's trial counsel proceeded to question the prospective jurors. After excusing the prospective jurors for lunch, the trial court allowed defendant's trial counsel to make a *Batson* motion.

In seeking relief pursuant to *Batson*, defendant's trial counsel stated that "the basis of my motion goes to the fact that in Seat Number[ ] 10, we had two jurors, [Mr. Smith] and [Ms. Brunson], both of whom were black jurors, and both of whom were excused." According to defendant's trial counsel, the voir dire examination of both Mr. Smith and Ms. Brunson indicated that "there was no overwhelming evidence, there was nothing about any prior criminal convictions, any feelings about—towards or against law enforcement, there's no basis, other than the fact that those two jurors happen to be of African[ ]American

de[s]cent [and] they were excused." In response, the prosecutor stated that "I don't think [defendant's trial counsel] made a prima facie showing [of] discriminatory intent, which is required under Batson," and that "[t]he simple fact that both jurors happen to have been African[ ] American and I chose to excuse them peremptorily, is not sufficient to raise a Batson challenge."

At the conclusion of the prosecutor's remarks, the trial court inquired, with reference to the prosecutor's pattern of exercising the State's peremptory challenges, that it "[s]eems to me that you excused two, but kept three African[ ]Americans. Am I right?" After agreeing with the trial court's observation, the prosecutor identified the three African American prospective jurors that he had accepted. At that point, the trial court stated that "I don't see where you've overcome or made a prima facie showing of lack of neutrality" and asked defendant's trial counsel why she had excused three "White Americans, I guess." In responding to the trial court's question, defendant's trial counsel asserted that her decision to exercise those challenges "had nothing to do with [the jurors'] race" and stated that she had peremptorily challenged one prospective juror because the juror had been the victim of a crime and had served on a jury. At that point, the prosecutor claimed that those reasons applied equally to another prospective juror who had not been the subject of a peremptory challenge, leading the trial court to respond, "[t]hat's what I was talking about." After stating that there were additional reasons for the peremptory challenges that she had exercised, defendant's trial counsel reiterated that "race was not a part of it." In denying defendant's *Batson* motion, the trial court stated that:

> Madam Clerk, the Court, from the evidence, the arguments of counsel on the record, the Court finds there is no evidence of a showing of prejudice based on race or any of the contentions in *Batson* . . . . The Court further finds that out of the five jurors who were African[ ]American, three still remain on the panel and have been passed by the State. The Court concludes there is no prima facie showing justifying the *Batson* challenge; therefore, the defendant's motion is denied.

On 16 March 2017, the jury returned verdicts convicting defendant of five counts of possessing a precursor chemical, one count of manufacturing methamphetamine, one count of trafficking in methamphetamine by possession, and one count of trafficking in methamphetamine by manufacture and acquitting defendant of possession of a firearm by a felon. After accepting the jury's verdicts, the trial

court consolidated three of defendant's convictions for possessing a precursor chemical for judgment and entered a judgment sentencing defendant to a term of 28 to 43 months imprisonment; entered a second judgment based upon defendant's conviction for manufacturing methamphetamine sentencing defendant to a concurrent term of 120 to 156 months imprisonment; consolidated defendant's remaining two convictions for possessing a precursor chemical for judgment and entered a third judgment sentencing defendant to a concurrent term of 28 to 43 months imprisonment; and consolidated defendant's two convictions for trafficking in methamphetamine for judgment and entered a fourth judgment sentencing defendant to a concurrent term of 90 to 117 months imprisonment. Defendant noted an appeal from the trial court's judgments to the Court of Appeals.

In seeking relief from the trial court's judgments before the Court of Appeals, defendant argued that the trial court had erred by denying his *Batson* motion on the grounds that "there was prima facie evidence that the prosecutor's use of peremptory strikes was racially motivated." In defendant's view, "[t]he trial [court] . . . based [its] denial of the motion on an apparent belief that because the prosecutor had accepted some black jurors, the exercise of the challenged peremptory strikes could not possibly have been improper." According to defendant, the prosecutor had utilized 100% of his peremptory challenges to excuse African American prospective jurors while the prosecutor accepted 100% of the white jurors that he had questioned. The State responded that the trial court's conclusion with respect to defendant's *Batson* motion was "not clearly erroneous" and that "the record is insufficient to permit proper appellate review of the *Batson* issue" because "neither the [r]ecord nor [t]ranscript reveals that [d]efendant at any time made a motion to record the race of prospective jurors."[1]

In an opinion finding no error in the proceedings leading to the entry of the trial court's judgments, the Court of Appeals held that defendant had "failed to make a *prima facie* case that the State's challenges were racially motivated." *State v. Bennett*, 262 N.C. App. 89, 90, 821 S.E.2d 476, 479 (2018). As an initial matter, the Court of Appeals addressed the

1. In addition, defendant argued before the Court of Appeals that the trial court had erred "by giving an acting in concert instruction when the evidence failed to support an inference that [defendant and another individual] were acting together in the commission of any crime." In view of the fact that the Court of Appeals rejected defendant's challenge to the trial court's acting in concert instruction and that defendant has made no effort to bring that issue forward for our consideration, we will refrain from discussing the acting in concert issue any further in this opinion.

issue of whether the record contained sufficient information to permit a proper determination of the merits of defendant's challenge to the trial court's *Batson* ruling, with its inquiry into this issue focusing upon the extent to which the record sufficiently established the race of each of the relevant prospective jurors. *Id.* at 92–98, 821 S.E.2d at 481–84. After noting that defendant's trial counsel had identified Mr. Smith and Ms. Brunson as African American in the course of making the *Batson* motion, that the prosecutor had agreed with the assertion of defendant's trial counsel, and that the trial court had found that Mr. Smith and Ms. Brunson were African American in its findings of fact, the Court of Appeals stated that, "[f]or proper review of [the] denial of a *Batson* challenge, it is necessary that the record establishes the race of any prospective juror that the defendant contends was unconstitutionally excused for [a] discriminatory purpose by peremptory challenge." *Id.* at 93, 821 S.E.2d at 481.

In making this determination, the Court of Appeals referenced this Court's decision in *State v. Mitchell*, in which we held that

> [i]f a defendant in cases such as this believes a prospective juror to be of a particular race, *he can bring this fact to the trial court's attention and ensure that it is made a part of the record*. Further, *if there is any question as to the prospective juror's race*, this issue should be resolved by the trial court based upon questioning of the juror *or other proper evidence*.

Bennett, 262 N.C. App. at 93, 821 S.E.2d at 481 (cleaned up) (quoting *State v. Mitchell*, 321 N.C. 650, 656, 365 S.E.2d 554, 557 (1988)). The Court of Appeals reasoned that, "[i]f there is *not* any question about a prospective juror's race, neither the defendant nor the trial court is required to make inquiry regarding that prospective juror's race." *Id.* (citation omitted). After noting that a "trial court has broad discretion in overseeing *voir dire*" and that *Batson* challenges are reviewed for whether the trial court's findings are clearly erroneous, the Court of Appeals stated that, "[w]here the record is silent upon a particular point, it will be presumed that the trial court acted correctly in performing his judicial acts and duties." *Id.* at 94–95, 821 S.E.2d at 482 (citations omitted) (stating that "the *judge's* subjective impressions are not only relevant, but an integral part of the judge's duties"). As a result, the Court of Appeals held that, "if the trial court determines that it can reliably infer the race of a prospective juror based upon its observations during *voir dire*, and it thereafter makes a finding of fact based upon its observations, a defendant's burden of preserving that prospective

juror's race for the record has been met," and, "[a]bsent evidence to the contrary, it will be presumed that the trial court acted properly—i.e. that the evidence of the prospective juror's race was sufficient to support the trial court's finding in that regard." *Id.* at 95, 821 S.E.2d at 482 (citation omitted). In view of the fact that "[n]othing in the appellate opinions of this State require[s] the trial court to engage in needless inquiry if a prospective juror's race is 'clearly discernable' without further inquiry," the Court of Appeals stated that "the record demonstrates that it was 'clearly discernable' to the trial court, and the attorneys for the State and [d]efendant, that five of the [twenty-one] prospective jurors questioned on *voir dire* were African[ ]American, and that two prospective jurors were excused pursuant to peremptory challenges by the State." *Id.* at 96, 821 S.E.2d at 482–83. On the other hand, after concluding that defendant had properly preserved his *Batson* challenge for purposes of appellate review, the Court of Appeals simply stated with respect to the merits of defendant's claim that, "[a]ssuming, *arguendo*, that defendant's argument is properly before us, we find no error in the ruling of the trial court and affirm." *Id.* at 98, 821 S.E.2d at 484.

In an opinion concurring in the Court of Appeals' decision to reject defendant's *Batson* claim, Judge Berger stated that he would have concluded that defendant "waived review of his *Batson* challenge because he failed to preserve an adequate record setting forth the race of the jurors." *Bennett*, 262 N.C. App. at 100, 821 S.E.2d at 485 (Berger, J., concurring) (stating that "findings as to the race of jurors may not be established by the subjective impressions or perceptions of 'the defendant, *the court*, counsel' or other court personnel" (cleaned up) (quoting *Mitchell*, 321 N.C. at 655, 365 S.E.2d at 557)). According to Judge Berger, this Court has required "further inquiry regarding each juror's race . . . because perceptions and subjective impressions—standing alone—are insufficient to establish jurors' races." *Id.* at 102, 821 S.E.2d at 486. On 27 March 2019, this Court allowed defendant's petition for discretionary review to address the issue of whether the Court of Appeals had erred by upholding the trial court's decision to deny defendant's *Batson* motion and allowed the State's conditional petition for discretionary review to determine whether the Court of Appeals had erred by concluding that the record provided sufficient evidence of the race of the relevant prospective jurors to permit appellate review of the denial of defendant's *Batson* motion.

In seeking to convince this Court that the trial court and the Court of Appeals erred by concluding that defendant had failed to establish a prima facie case of discrimination, defendant argues that "[t]he

prosecutor's exercise of 100 percent of his peremptory challenges to remove black jurors while accepting 100 percent of white jurors raised a *prima facie* case of purposeful discrimination under *Batson* and required the trial court and Court of Appeals to engage in further analysis and investigation." According to defendant, "[t]here was sufficient evidence of the race of the jurors excused by improper peremptory challenges to permit meaningful review" given that "there was no dispute about the race of jurors questioned by the parties" and that "[t]he prosecutor, defense lawyer, and judge were unanimous in their determination of the races of the potential jurors during the first round of [jury selection]." According to defendant, this Court held in *Mitchell* "that if there is no question about a prospective juror's race, no further inquiry is required." Moreover, defendant asserts that he did, in fact, make out a prima facie case of discrimination as required by *Batson* and contends that the trial court "failed to conduct any serious analysis of the claim" because it "focused on the number of black jurors accepted by the State, to the exclusion of any discussion or consideration of the two black jurors excluded"; "ignored the statistical disparity between strike and acceptance rates for black and white jurors"; and "misunderstood the law."

In seeking to convince us that defendant's challenge to the rejection of his *Batson* claim lacks merit, the State begins by contending that "[d]efendant makes no argument that the Court of Appeals erred" and asserts that we should dismiss defendant's appeal because "[d]efendant's assertion that the Court of Appeals analyzed the issue 'in a summary fashion' does not show the Court of Appeals erred." In addition, the State argues that "[d]efendant waived review . . . by failing to establish an adequate record" on the grounds that a "juror's self-identification of his or her race is an approved method of establishing a sufficient record" while "[t]he subjective impressions of court personnel are not an approved method for establishing a juror's race," citing *State v. Payne*, 327 N.C. 194, 198, 394 S.E.2d 158, 160 (1990), and *State v. Brogden*, 329 N.C. 534, 546, 407 S.E.2d 158, 166 (1991). According to the State, this Court's precedent supports a "common-sense conclusion that the best source of information about a person's race is asking that person directly," with the absence of such information in this case being sufficient to preclude meaningful appellate review. The State further contends that "[d]efendant's arguments based on statistics, made for the first time on appeal, are not properly before this Court." Finally, assuming that this Court reaches the merits of defendant's *Batson* claim, the State asserts that "[d]efendant failed to establish a *prima facie* case of intentional discrimination against prospective jurors based

on race" given the absence of "sufficient evidence to draw an inference that discrimination occurred" and defendant's failure to point to any "circumstances showing race to be a relevant factor" in the prosecutor's peremptory challenges.

Thirty-four years ago, the Supreme Court deemed purposeful discrimination in jury selection to be an equal protection violation in *Batson*, 476 U.S. at 88–89, 106 S. Ct. at 1718–19, 90 L. Ed. 2d at 82–83. A court required to determine whether a prosecutor impermissibly exercised a peremptory challenge based upon a prospective juror's race in violation of *Batson* must engage in the following three-step analysis:

> First, the party raising the claim must make a prima facie showing of intentional discrimination under the totality of the relevant facts in the case. Second, if a prima facie case is established, the burden shifts to the State to present a race-neutral explanation for the challenge. Finally, the trial court must then determine whether the defendant has met the burden of proving purposeful discrimination.

State v. Waring, 364 N.C. 443, 474–75, 701 S.E.2d 615, 636 (2010) (cleaned up) (citations omitted). A trial court's findings with respect to the issue of whether a defendant has made out a prima facie case of discrimination "will be upheld on appeal unless they are clearly erroneous," *State v. Taylor*, 362 N.C. 514, 528, 669 S.E.2d 239, 254 (2008), with such a "clear error" being deemed to exist when, "on the entire evidence [the Court is] left with the definite and firm conviction that a mistake has been committed." *Id.* (cleaned up) (quoting *State v. Chapman*, 359 N.C. 328, 339, 611 S.E.2d 794, 806 (2005)). As a result, while a reviewing court is not entitled to choose between "two permissible views of the evidence," *State v. Lawrence*, 352 N.C. 1, 14, 530 S.E.2d 807, 816 (2000), "deference does not by definition preclude relief" under the "clearly erroneous" standard. *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 240, 125 S. Ct. 2317, 2325, 162 L. Ed. 2d 196, 214 (2005) (cleaned up) (quoting *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322, 340, 123 S. Ct. 1029, 1041, 154 L. Ed. 2d 931, 952 (2003)).

[1] In order to preserve a *Batson* challenge for purposes of appellate review, "[a]n appellant must make a record which shows the race of a challenged juror." *State v. Willis*, 332 N.C. 151, 162, 420 S.E.2d 158, 162 (1992) (citing *Mitchell*, 321 N.C. at 650, 365 S.E.2d at 554). In *Mitchell*, the defendant had "filed a motion to require the court reporter to note the race of every potential juror examined to perfect the record and determine if there was a substantial likelihood that any jurors were

challenged on the basis of race." *Mitchell*, 321 N.C. at 653, 365 S.E.2d at 556. This Court upheld the trial court's decision to deny the defendant's motion on the grounds that, "[a]lthough this approach *might* have preserved a proper record from which an appellate court could determine if any potential jurors were challenged solely on the basis of race, we find it inappropriate," *id.* at 655, 365 S.E.2d at 557, given that "[t]o have a court reporter note the race of every potential juror examined would require a reporter alone to make that determination *without the benefit of questioning by counsel or any other evidence* that might tend to establish the prospective juror's race." *Id.* (emphasis added). According to this Court, "[t]he court reporter . . . is in no better position to determine the race of each prospective juror than the defendant, the court, or counsel" because "[a]n individual's race is not always easily discernible, and the potential for error by a court reporter acting *alone* is great." *Id.* at 655–56, 365 S.E.2d at 557 (emphasis added). Thus, we held that, in the event that a defendant "believes a prospective juror to be of a particular race, he can bring this fact to the trial court's attention and ensure that it is made a part of the record." *Id.* at 656, 365 S.E.2d at 557. "[I]f there is any question as to the prospective juror's race, this issue should be resolved by the trial court based upon questioning of the juror *or other proper evidence*, as opposed to leaving the issue to the court reporter who may not make counsel aware of the doubt." *Id.* (emphasis added). As a result, our decision in *Mitchell* prohibits a single individual, either a court reporter, the trial court, or an attorney, from determining the racial identification of a prospective juror based upon nothing more than that individual's subjective impressions, with the required racial identification determination having to rest upon the questioning of the juror at issue or other proper evidence developed in consultation with counsel for the parties and the trial court.

Subsequently, this Court refused to credit a subjective determination of the racial identification of prospective jurors that had been made by one of the defendant's attorneys in *Payne*, 327 N.C. at 194, 394 S.E.2d at 158. In *Payne*, "[t]he defendant requested that the courtroom clerk record the race and sex of the 'prospective' jurors who had already been seated or excused, but the trial court denied his request." *Id.* at 198, 394 S.E.2d at 159. "The next morning, the defendant renewed his objection via a written motion for the clerk to record the race and sex of jurors," with this request being "supported by an affidavit, subscribed by one of the defendant's attorneys, purporting to contain the name of each black prospective juror examined to that point, and whether the State had peremptorily excused, challenged for cause, or passed the prospective juror to the defense." *Id.* at 198, 394 S.E.2d at 159–60. After

"viewing the affidavit's allegations as true," the trial court "nonetheless ruled that the defendant had failed to make a prima facie showing" that the State exercised its peremptory challenges in a discriminatory manner. *Id.* at 198, 394 S.E.2d at 160. This Court however, did not reach the merits of whether the defendant had made out a prima facie case of discrimination and, instead, acting in reliance upon *Mitchell*, determined that "we are not presented with a record on appeal which will support the defendant's argument." *Id.* In light of the fact that the trial court had stated that, "had the defendant made his motion prior to jury selection, the court would have had each prospective juror state his or her race during the court's initial questioning," *id.* at 200, 394 S.E.2d at 160, this Court concluded that the trial court's proposed approach "would have provided the trial court with an accurate basis for ruling on the defendant's motion, and would also have preserved an adequate record for appellate review," *id.*, with the problem arising from the use of an after-the-fact affidavit executed by defendant's trial counsel to establish the racial identification of the prospective jurors being that it "contained only the perceptions of one of the defendant's lawyers concerning the races of those excused—perceptions no more adequate than the court reporter's or the clerk's would have been, as we recognized in *Mitchell*." *Id.* at 200, 394 S.E.2d at 161 (citing *Mitchell*, 321 N.C. at 655–56, 365 S.E.2d at 557).[2] *See also Brogden*, 329 N.C. at 546, 407 S.E.2d at 166 (holding that the defendant "failed to carry his burden of establishing an adequate record for appellate review" where "the only records of the potential jurors' race preserved for appellate review are the subjective impressions of [the] defendant's counsel and notations made by the court reporter of her subjective impressions with regard to race").

A careful review of the record presented for our consideration in this case satisfies us that the majority of the Court of Appeals correctly determined that the record contains sufficient information to permit us to review the merits of defendant's *Batson* claim. Unlike the situations at issue in *Mitchell*, *Payne*, and *Brogden*, in which the defendant attempted to establish the racial identities of each of the prospective jurors on the basis of the subjective impressions of a limited number of trial participants, the record in this case establishes that defendant's

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2. Our opinion in *Payne* makes no reference to the existence of a stipulation. Instead, the State refrained from commenting upon the sufficiency of the defendant's proof in the trial court and did not challenge the adequacy of defendant's showing of the racial identities of the prospective jurors before this Court. We are unable to conclude that *Payne* involved a stipulation in light of these facts and the applicable law, which is discussed later in this opinion.

trial counsel, the prosecutor, and the trial court each agreed that Mr. Smith and Ms. Brunson were African American. In other words, the record reveals the complete absence of any dispute among counsel for the parties and the trial court concerning the racial identity of the persons who were questioned during the jury selection process, with this agreement between counsel for the parties and the trial court making this case fundamentally different from *Mitchell*, *Payne*, and *Brogden* and resulting in what amounts to a stipulation of the racial identity of the relevant prospective jurors. *See Smith v. Beasley*, 298 N.C. 798, 800, 259 S.E.2d 907, 909 (1979) (stating that "[a] stipulation is an agreement between the parties establishing a particular fact in controversy" (citing *Rural Plumbing and Heating, Inc. v. H.C. Jones Constr. Co.*, 268 N.C. 23, 31, 149 S.E.2d 625, 631 (1966))). While "[a] stipulation must be 'definite and certain in order to afford a basis for judicial decision,' " *State v. Hurt*, 361 N.C. 325, 329, 643 S.E.2d 915, 918 (2007) (quoting *State v. Powell*, 254 N.C. 231, 234, 118 S.E.2d 617, 619 (1961)), "stipulations and admissions may take a variety of forms and may be found by implication." *Id.* at 330, 643 S.E.2d at 918 (citing *State v. Mullican*, 329 N.C. 683, 686, 406 S.E.2d 854, 855–56 (1991)); *see also State v. Alexander*, 359 N.C. 824, 826, 830, 616 S.E.2d 914, 916, 918 (2005) (holding that the defendant's trial counsel had stipulated to the accuracy of a prior record worksheet by stating that his client "is a single man and up until this particular case he had no felony convictions, as you can see from his worksheet"). "Where facts are stipulated, they are deemed established as fully as if determined by jury verdict" or the trial court. *Smith*, 298 N.C. at 800–01, 259 S.E.2d at 909 (citing *Moore v. Humphrey*, 247 N.C. 423, 430, 101 S.E.2d 460, 466–67 (1958)).

In accordance with this fundamental legal proposition, this Court has accepted without any adverse comment the use of a stipulation for the purpose of establishing the racial identities of prospective jurors for the purpose of reviewing a defendant's *Batson* challenge.[3] *See State v. Jackson*, 322 N.C. 251, 368 S.E.2d 838 (1988). In *Jackson*, which was decided almost two months after *Mitchell*, "[t]he selection of the jury at the trial of this case was not transcribed." *Id.* at 252, 368 S.E.2d at 838. Even so, "[t]he attorneys who represented the defendant at trial and [one of the State's attorneys] stipulated what happened at the trial," with these stipulated facts including a recognition "that the State used

3. *Jackson* contains no indication that the procedural posture in which the case was heard on remand from the Supreme Court of the United States had any bearing upon the acceptability of the method of proving the racial identities of the prospective jurors utilized in that case.

five peremptory challenges to remove four blacks and one white from the jury." *Id.* at 252–53, 368 S.E.2d at 838–39. On appeal, this Court used the stipulation of counsel for the parties, the notes taken by trial counsel for the parties, and an affidavit from one of the prosecutors who had represented the State at trial in order to evaluate the validity of defendant's *Batson* argument. *Id.* at 252, 368 S.E.2d at 839. We are unable to distinguish what this Court appears to have found acceptable in *Jackson* from the events depicted in the record before us in this case, in which defendant's trial counsel stated that Mr. Smith and Ms. Brunson "were black jurors," the prosecutor agreed to "[t]he simple fact that both jurors happen to have been African[ ]American and [he had] chose[n] to excuse them," the prosecutor claimed that he had passed three other African American prospective jurors, and the trial court found as a fact that, "out of the five jurors who were African[ ]American, three still remain on the panel and have been passed by the State." In view of the fact that the racial identification of the relevant prospective jurors was not in dispute between the parties, that the prosecutor acknowledged having peremptorily challenged two of the five African American prospective jurors that had been tendered for the State's consideration, that the agreement of the parties amounted to a stipulation concerning the racial identity of the relevant prospective jurors, and that the trial court's findings reflected the terms of this implicit agreement in its findings, there was nothing to be "resolved by the trial court based upon questioning of the juror or other proper evidence." *Mitchell*, 321 N.C. at 656, 365 S.E.2d at 557.[4] As a result, given that our prior decisions clearly allow for the use of methods other than self-identification[5] for the purpose of determining the racial identity of prospective jurors for the purpose of deciding the merits of a *Batson* claim and given our failure, during the course of our research, to find a decision from any other

4. The ultimate issue raised by a *Batson* challenge—whether the prosecutor is excluding people from a jury because of their race—involves "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson v. Kentucky*, 476 U.S. 79, 93, 106 S. Ct. 1712, 1721, 90 L. Ed. 2d 69, 85 (1986) (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266, 97 S. Ct. 555, 564, 50 L. Ed. 2d 450, 465 (1977)). At oral argument, counsel for the State argued that "[w]hether the prosecutor accurately or inaccurately assesses [a juror's] race is . . . irrelevant to the reason that they have chosen or not chosen to strike them" on the grounds that, "in using the peremptory challenge, if [the prosecutor] ha[s] decided that they want to strike this person because they believe them to be of X race but they are not in fact of that race, that would still be an impermissible challenge to that person." The logic upon which this argument rests provides further support for our conclusion that the record before us in this case is sufficient to permit appellate review of defendant's *Batson* claim.

5. A prospective juror's answer to a question concerning his or her racial identity contained on a jury questionnaire is simply another form of juror self-identification.

American jurisdiction precluding the use of any method for determining the racial identities of prospective jurors for purposes of evaluating the merits of a *Batson* claim other than the juror's racial self-identification, we hold that the record before us in this case is sufficient to permit us to review the merits of defendant's *Batson* claim.[6]

[2] This Court has stated that "[s]tep one of the *Batson* analysis, a *prima facie* showing of racial discrimination, is not intended to be a high hurdle for defendants to cross" and that "the showing need only be sufficient to shift the burden to the State to articulate race-neutral reasons for its peremptory challenge." *State v. Hoffman*, 348 N.C. 548, 553, 500 S.E.2d 718, 722 (1998). This Court has identified several factors that are relevant in considering whether a defendant has established the existence of the necessary prima facie case, including:

> the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State's acceptance rate of potential black jurors.

State v. Quick, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995). Although a numerical analysis of strike patterns "is not necessarily dispositive" in determining that the defendant has succeeded in making out a prima facie case, such an analysis "can be useful in helping us and the trial court determine whether a *prima facie* case of discrimination has been established." *State v. Barden*, 356 N.C. 316, 344, 572 S.E.2d 108, 127

6. According to the State, defendant has failed to argue that the Court of Appeals erred by upholding the trial court's *Batson* ruling and has improperly advanced statistical arguments that he failed to make in the courts below. We reject any contention that litigants must use any particular semantic formulation in the petitions or briefs that are filed with this Court in order to properly preserve a claim for appellate review. As the record clearly reflects, defendant's successful discretionary review petition raises the issue of "[w]hether the Court of Appeals erred in sustaining the trial court's ruling denying defendant's *Batson* motion," with the relatively limited analysis in which the Court of Appeals engaged before rejecting defendant's *Batson* claim on the merits being no barrier to consideration of defendant's claim before this Court. Moreover, the trial court raised the statistical issue in noting that the State had accepted three African American prospective jurors and asked defendant's trial counsel why she had peremptorily challenged three white prospective jurors. Finally, defendant advanced a statistics-based argument in his brief before the Court of Appeals. As a result, the merits of defendant's *Batson* claim are properly before this Court.

(2002). All in all, however, "the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' "[7] *Johnson v. California*, 545 U.S. 162, 168, 125 S. Ct. 2410, 2416, 162 L. Ed. 2d 129, 138 (2005) (quoting *Batson*, 476 U.S. at 93–94, 106 S. Ct. at 1721, 90 L. Ed. 2d at 86).

The Supreme Court has explicitly rejected the use of a "more likely than not" standard in determining whether a prima facie case of discrimination has been established on the grounds that such a test is "an inappropriate yardstick by which to measure the sufficiency of a prima facie case," *id.*, having reached this conclusion on the grounds that "a prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives 'rise to an inference of discriminatory purpose.' " *Id.* at 169, 125 S. Ct. at 2416, 162 L. Ed. 2d at 138 (footnote omitted) (quoting *Batson*, 476 U.S. at 94, 106 S. Ct. at 1721, 90 L. Ed. 2d at 86). The "wide variety of evidence" that can be utilized to establish a prima facie case of discrimination could appropriately consist "solely o[f] evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial," *id.* (quoting *Batson*, 476 U.S. at 96, 106 S. Ct. at 1723, 90 L. Ed. 2d at 87), with this stage of the required *Batson* analysis never having been intended "to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination." *Id.* at 170, 125 S. Ct. at 2417, 162 L. Ed. 2d at 139. Instead, the Supreme Court intended that "a defendant [would] satisf[y] the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred," *id.*, with the existence of such a permissible inference not being the same thing as an ultimate conclusion that impermissible discrimination has, in fact, taken place. *Id.* at 171, 125 S. Ct. at 2417–18, 162 L. Ed. 2d at 140 (stating that "[t]he first two *Batson* steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim" and that "[i]t is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination" (quoting *Purkett v. Elem*, 514

7. "An 'inference' is generally understood to be a 'conclusion reached by considering other facts and deducing a logical consequence from them.' " *Johnson v. California*, 545 U.S. 162, 168 n.4, 125 S. Ct. 2410, 2416 n.4, 162 L. Ed. 2d 129, 138 n.4 (quoting *Inference*, *Black's Law Dictionary* (7th ed. 1999)).

U.S. 765, 768, 115 S. Ct. 1769, 1771, 131 L. Ed. 2d 834, 839 (1995))). As a result, a court should not attempt to determine whether a prosecutor has actually engaged in impermissible purposeful discrimination at the first step of the *Batson* inquiry because "[t]he inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." *Id.* at 172, 125 S. Ct. at 2418, 162 L. Ed. 2d at 140–41.

A careful review of the numerical disparity between the relative acceptance rates for African American and white prospective jurors, coupled with other inferences that can be derived from the record, such as the absence of any significant dissimilarity between the answers given by Mr. Smith, Ms. Brunson, and Ms. Corbett or any apparent indication arising from the face of the record that either Mr. Smith or Ms. Brunson would not have been satisfactory jurors from a prosecutorial point of view, satisfies us that defendant made out the necessary prima facie case of purposeful discrimination in this case. Prior to the point at which defendant asserted his *Batson* challenge, the prosecutor had questioned fourteen jurors, five of whom were African American and nine of whom were not. During that time, the prosecutor exercised two peremptory challenges in order to excuse African American prospective jurors and utilized no peremptory challenges to excuse white jurors. In other words, the prosecutor's strike rate was 40% for African American prospective jurors and 0% for white prospective jurors, while his acceptance rate for African American prospective jurors was 60% and his acceptance rate for white prospective jurors was 100%. In addition, 100% of the peremptory challenges that the prosecutor exercised were utilized to excuse African American prospective jurors, while none were utilized to excuse a white prospective juror. The disparity in these numbers, when coupled, as was noted by defendant's trial counsel during the proceedings before the trial court, with the absence of any immediately obvious justification for the peremptory challenges directed to Mr. Smith and Ms. Brunson arising from the answers that they provided during the jury selection process, is sufficient to raise an inference that purposeful discrimination occurred. As a result, after considering all of the relevant factors disclosed in the record, we hold that the trial court's determination that defendant had failed to make out the required prima facie case was clearly erroneous and that the Court of Appeals erred by summarily affirming the trial court's determination with respect to this issue.[8]

8. As an aside, we note that the trial court's reference to the fact that the prosecutor had accepted three African American prospective jurors in finding that defendant had failed to make out a prima facie case of discrimination may rest upon a misapprehension

In seeking to persuade us that the Court of Appeals did not err by upholding the trial court's rejection of defendant's *Batson* claim, the State asserts that "[t]his Court's jurisprudence is replete with cases upholding the trial court's finding of no *prima facie* showing under *Batson* [with] acceptance rates of African[ ]American prospective jurors closely analogous to or lower than that alleged in this case." To be sure, "one factor tending to refute a showing of discrimination is the State's acceptance of black jurors." *State v. Thomas*, 329 N.C. 423, 431, 407 S.E.2d 141, 147 (1991) (citing *State v. Smith*, 328 N.C. 99, 121, 400 S.E.2d 712, 724 (1991)). Although such information "is relevant to our inquiry, . . . it is not dispositive." *Smith*, 328 N.C. at 121, 400 S.E.2d at 724. Moreover, in recent years, the Supreme Court has treated prosecutorial claims that the acceptance of other African American prospective jurors constituted a defense to a *Batson* claim with considerable skepticism. *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2246, 204 L. Ed. 2d 638, 659 (2019) (quoting *Miller-El II*, 545 U.S. at 250, 125 S. Ct. at 2330, 162 L. Ed. 2d at 220) (stating that, "[i]n *Miller-El II*, this Court skeptically viewed the State's decision to accept one black juror, explaining that a prosecutor might do so in an attempt 'to obscure the otherwise consistent pattern of opposition to' seating black jurors"). Finally, the State's attempt to derive a bright-line test from our prior decisions for the purpose of identifying those cases in which a defendant has or has not established a prima facie case of discrimination based solely upon the rate at which the prosecutor accepted other African American prospective jurors conflicts with the highly fact-specific nature of the inquiry required under *Batson* and its progeny, which requires consideration of all relevant factors. As a result, we do not find the State's argument that defendant failed to show the existence of the required prima facie case of

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of the manner in which *Batson* and its progeny should be applied, given that a single, racially motivated peremptory challenge directed to a qualified African American prospective juror may constitute grounds for a valid *Batson* claim regardless of the rate at which the prosecutor accepted African American prospective jurors over the course of the entire jury selection process. *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2241, 204 L. Ed. 2d 638, 653 (2019) (stating that, "[i]n the eyes of the Constitution, one racially discriminatory peremptory strike is one too many"). As the Supreme Court has stated, the acceptance of a small number of African American jurors could be intended "to obscure the otherwise consistent pattern of opposition to" seating other African American jurors. *Miller-El v. Dretke* (*Miller-El II)*, 545 U.S. 231, 250, 125 S. Ct. 2317, 2330, 162 L. Ed. 2d 196, 220 (2005). Similarly, the fact that defendant's trial counsel had peremptorily challenged three white jurors does not, standing alone, provide a non-discriminatory explanation for the prosecutor's decision to peremptorily challenge two African American prospective jurors at defendant's trial. *Flowers*, 139 S. Ct. at 2242, 204 L. Ed. 2d at 654 (stating that "[d]iscrimination against one defendant or juror on account of race is not remedied or cured by discrimination against other defendants or jurors on account of race").

discrimination based upon the fact that the prosecutor accepted three of the five African American prospective jurors that were tendered to him for questioning to be persuasive.

A careful analysis of the cases cited in support of the State's "acceptance rate" argument also establishes that these decisions are not, in almost all instances, susceptible to the interpretation that the State has sought to place upon them. In *Taylor*, this Court upheld the trial court's decision to refrain from finding a prima facie case of purposeful discrimination in a case in which the prosecutor peremptorily challenged seven white jurors and the peremptory challenge to which the defendant's *Batson* challenge was addressed involved a juror who had "expressed tremendous hesitation in being able to vote for the death penalty." 362 N.C. at 528–30, 669 S.E.2d at 254–55; *see also State v. Nicholson*, 355 N.C. 1, 23–24, 558 S.E.2d 109, 126 (2002) (upholding the trial court's determination that the defendant had failed to establish a prima facie case of purposeful discrimination when the peremptory challenges to which the defendant's *Batson* claim was directed had been exercised early in the jury selection process to excuse prospective jurors who had expressed serious reservations about the imposition of the death penalty); *see also State v. Fletcher*, 348 N.C. 292, 319, 500 S.E.2d 668, 683–84 (1998) (upholding the trial court's decision to refrain from finding the existence of a prima facie case of purposeful discrimination based upon the prosecutor's exercise of a peremptory challenge directed to a prospective juror who "indicated ambivalence towards the death penalty" given that the record reflected that the trial court "did not ignore all factors other than the number of blacks on the jury"). In *State v. Gregory*, this Court upheld the trial court's determination that the defendant had failed to establish a prima facie case of purposeful discrimination given that the prosecutor had exercised five peremptory challenges against white jurors and that the record "establish[ed] substantial reasons other than purposeful discrimination for each peremptory challenge at issue." 340 N.C. 365, 398–99, 459 S.E.2d 638, 657 (1995). In *State v. Ross*, this Court upheld the trial court's determination that the defendant had failed to establish a prima facie case of purposeful discrimination on the grounds that "[t]he only peremptory challenge exercised by the prosecutor excused a black man from the jury" and that there was no other evidence raising an inference of discrimination. 338 N.C. 280, 286, 449 S.E.2d 556, 561 (1994). Finally, in *State v. Beach*, this Court upheld the trial court's determination that the defendant failed to establish a prima facie case of purposeful discrimination on the basis of a record showing that, even though "[t]he State exercised peremptory challenges to ten [African American prospective jurors] or sixty-three

percent of them," it had also peremptorily challenged multiple white prospective jurors as well. 333 N.C. 733, 740, 430 S.E.2d 248, 252 (1993). Although this Court did uphold the trial court's determination in *State v. Abbott* that the defendant had failed to establish a prima facie case of purposeful discrimination because "[t]he State was willing to accept 40% [two out of five] of the blacks tendered" without any additional analysis of the record, 320 N.C. 475, 481, 358 S.E.2d 365, 369 (1987), the Court's description of the applicable inquiry as being whether the State "was determined not to let a black sit as a juror on account of the race of the defendant," *id.* at 482, 358 S.E.2d at 370, suggests that *Abbott* rests upon a misunderstanding of the applicable law as clarified in numerous subsequent decisions such as *Quick* and *Flowers*. As a result, none of the decisions upon which the State appropriately relies, when analyzed closely, indicate that acceptance rates, standing alone, suffice to preclude a finding that the defendant has made out a prima facie case of purposeful discrimination, particularly in the face of evidence that all of the State's peremptory challenges were directed to African American prospective jurors, that the State did not peremptorily challenge any white prospective juror, and that neither of the African American jurors that the State peremptorily challenged provided any answers during the course of the jury selection process that cast any doubt upon their ability to be fair and impartial to the State.[9]

The appropriate remedy for a trial court's erroneous failure to find the existence of a prima facie case at the first step of the required *Batson* analysis is a remand to the trial court for a hearing to be held for the purpose of completing the second and third steps of the required analysis. *See*, *e.g.*, *Barden*, 356 N.C. at 345, 572 S.E.2d at 128. At the required remand proceeding, the trial court shall afford the State an opportunity to proffer race-neutral reasons for the peremptory challenges that the prosecutor directed to Mr. Smith and Ms. Brunson. In the event that the trial court determines that the prosecutor has failed to offer race-neutral reasons for the peremptory challenges in question, it shall order that defendant receive a new trial. If the prosecutor offers race-neutral reasons for having peremptorily challenged Mr. Smith and Ms. Brunson,

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9. Any reliance upon this Court's decision in *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997), would be misplaced given our determination in *State v. Jackson*, 317 N.C. 1, 21, 343 S.E.2d 814, 826 (1986), that *Batson* was not entitled to retroactive application. The Supreme Court subsequently vacated *Jackson* in light of its decision in *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), holding that *Batson* applied retroactively on direct review. *Jackson v. North Carolina*, 479 U.S. 1077, 107 S. Ct. 1271, 94 L. Ed. 2d 133 (1987).

defendant shall be given an opportunity to establish that the reasons advanced by the prosecutor are pretextual. In the event that defendant satisfies the trial court on remand that the peremptory challenges directed to Mr. Smith or Ms. Brunson were substantially motivated by race, the trial court shall order that defendant receive a new trial. On the other hand, if the trial court determines 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. As a result, the Court of Appeals' decision in this case is reversed and this case is remanded to the Court of Appeals for further remand to the Superior Court, Sampson County, for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice NEWBY dissenting.

Our case law has emphasized that an adequate record on appeal is established by having jurors themselves identify their races. This Court has repeatedly rejected attempts to create a record of race based solely on observations of outward appearance. Nevertheless, the majority misreads our prior cases and takes a case that is a procedural anomaly out of context to conclude that subjective impressions of individuals are sufficient to identify race by appearance so long as the impressions are "stipulated" to by the parties.

Further, under the first step of a *Batson* challenge, the trial court considers the defendant's arguments and its own observations of various factors to determine if the defendant has made "a prima facie showing of intentional discrimination under the 'totality of the relevant facts' in the case." *State v. Waring*, 364 N.C. 443, 474, 701 S.E.2d 615, 636 (2010) (quoting *Batson v. Kentucky*, 476 U.S. 79, 94, 106 S. Ct. 1712, 1721 (1986)). Under our precedent, we review the trial court's decision under a deferential abuse of discretion standard. While correctly stating that standard, the majority usurps the role of the trial court by finding facts, reweighing various factors, and substituting its judgment for that of the trier of fact. It further creates arguments for defendant not presented to the trial court or the Court of Appeals, and then faults those courts for not considering them. In reversing the trial court, the majority ignores the totality of relevant circumstances and primarily focuses on one factor, the percentage of minority juror peremptory challenges exercised by the State. Essentially, the majority now holds that the prosecutor's use of a

single peremptory challenge against a minority satisfies a defendant's burden of showing intentional discrimination under *Batson*'s first prong, triggering a full *Batson* review. Because the *Batson* challenge was not properly preserved for appellate review and the trial court did not abuse its discretion in concluding that defendant failed to establish a prima facie showing under *Batson*'s first prong, I respectfully dissent.

Here defendant did not have the prospective jurors identify their races for the record. Defendant later challenged the State's sequential peremptory challenges of two prospective jurors, both of whom were assigned to seat number ten. The State used its first peremptory challenge to remove Roger Smith; defendant did not make a *Batson* challenge. Smith's replacement was Virginia Brunson. The State used its second peremptory challenge to remove her; defendant did not make a *Batson* challenge. Seat number ten was then filled by Rita Corbett. Only after the State passed Corbett did defendant raise a *Batson* challenge.

Later and outside the presence of the prospective jurors, defense counsel set forth her *Batson* argument:

> [Defense Counsel]: Judge, I do have a *Batson* motion. And Judge, the basis of my motion goes to the fact that in Seat Number[ ] 10, we had two jurors, [Roger] Smith and Virginia Brunson, both of whom were black jurors, and both of whom were excused. And, Judge, in the State's voir dire of both jurors, there was no overwhelming evidence, there was nothing about any prior criminal convictions, any feelings about—towards or against law enforcement, there's no basis, other than the fact that those two jurors happened to be of African-American de[s]cent they were excused.
>
> We heard from Mr. Smith who stated that he was a supervisor here in Clinton and had a breaking and entering two and a half years ago. Nobody was charged, but he had no feelings towards law enforcement, no negative experience with the DA's office. And, with Ms. Virginia Brunson, we heard that she owned a beauty salon that was next to ABC Insurance. She didn't know anyone in the audience or anyone in the case. There was nothing that was deduced during the jury voir dire that would suggest otherwise.

The State then countered that defense counsel's only argument, that both of the prospective jurors excused were black, was insufficient

to establish a prima facie showing of discriminatory intent. The trial court ruled:

> Madam Clerk, the Court, from the evidence, the arguments of counsel on the record, the Court finds there is no evidence of a showing of prejudice based on race or any of the contentions in *Batson*, [N.C.G.S. §] 912A, [N.C.G.S. §] 15A-958. The Court further finds that out of the five jurors who were African-American, three still remain on the panel and have been passed by the State. The Court concludes there is no prima facie showing justifying the *Batson* challenge; therefore, the defendant's motion is denied.

The ability to serve on a jury is one of "the most substantial opportunit[ies] that most citizens have to participate in the democratic process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019) (citing *Powers v. Ohio*, 499 U.S. 400, 407, 111 S. Ct. 1364, 1369 (1991)). The right to jury service is protected by the Equal Protection Clause of the federal constitution and Article I, Section 26 of the North Carolina Constitution.

In jury trials, however, attorneys are given the right to excuse a certain number of prospective jurors through discretionary strikes. "Peremptory strikes have very old credentials and can be traced back to the common law." *Id.* at 2238. "[P]eremptory strikes traditionally may be used to remove any potential juror for any reason—no questions asked." *Id.*; *see also* N.C.G.S. § 15A-1217 (2019) (codifying the availability of peremptory challenges in criminal cases by setting the number of peremptory challenges allowed based on the type of criminal proceeding).

The Equal Protection Clause, which prohibits discrimination, can clash with an attorney's ability to freely exercise peremptory challenges. *Id.* at 2238. Because of this tension, the Supreme Court of the United States recognized limitations on peremptory challenges to ensure that strikes are not used for a discriminatory purpose against a protected class. Thus, in *Batson* the Supreme Court set forth a three-prong test for trial courts to determine whether the State improperly discriminated by dismissing a prospective juror based on his race.

This Court expressly "adopted the *Batson* test for review of peremptory challenges under the North Carolina Constitution." *State v. Fair*, 354 N.C. 131, 140, 557 S.E.2d 500, 509 (2001) (citing *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000), *cert. denied*,

531 U.S. 1083, 121 S. Ct. 789 (2001); *State v. Mitchell*, 321 N.C. 650, 365 S.E.2d 554 (1988)). *Batson* sets forth a three-step analysis, placing the burden on each party at different points to protect both the State and the defendant:

> First, the party raising the claim must make a prima facie showing of intentional discrimination under the "totality of the relevant facts" in the case. Second, if a prima facie case is established, the burden shifts to the State to present a race-neutral explanation for the challenge. Finally, the trial court must then determine whether the defendant has met the burden of proving "purposeful discrimination."

Waring, 364 N.C. at 474–75, 701 S.E.2d at 636 (first quoting *Batson*, 476 U.S. at 94, 106 S. Ct. at 1721; then citing *Rice v. Collins*, 546 U.S. 333, 333, 126 S. Ct. 969, 970–71 (2010); and then quoting *Miller-El v. Dretke*, 545 U.S. 231, 239, 125 S. Ct. 2317, 2324 (2005)).

The first prong of the *Batson* test is relevant here. In order for an appellate court to review a *Batson* challenge, however, there must be a sufficient record establishing the jurors' races. Our precedent clearly holds that a subjective impression of a prospective juror's race by one or more court officials is insufficient to establish a record adequate for appellate review. When appealing a trial court's determination of a *Batson* challenge, a defendant has the burden to ensure that the prospective jurors' races are a part of the record. *Mitchell*, 321 N.C. at 656, 365 S.E.2d at 557. Only from an adequate record can an appellate court "determine whether jurors were improperly excused by peremptory challenges at trial." *Id.* at 654, 365 S.E.2d at 556.

Here the only information about the race of some of the prospective jurors arose from observations by defense counsel and then by the trial court. The facts presented here are very similar to those in *State v. Brogden*, 329 N.C. 534, 407 S.E.2d 158 (1991), where this Court held that the record was insufficient for appellate review. In *Brogden*, based upon our prior holdings in *Mitchell* and *State v. Payne*, 327 N.C. 194, 200, 394 S.E.2d 158, 161 (1990), *cert. denied*, 498 U.S. 1092, 111 S. Ct. 977 (1991), this Court specified the appropriate ways to preserve a prospective juror's race for the record. There the defendant requested, and the trial court allowed, defense counsel and the court reporter to record the race and sex of each prospective juror that the State peremptorily challenged. *Brogden*, 329 N.C. at 546, 407 S.E.2d at 166. The record is unclear if the trial court or the State were consulted about the race identifications made by defense counsel and the court reporter.

Relying on both *Mitchell* and *Payne*, this Court stated that the record only contained the subjective impressions of defense counsel and the court reporter about the jurors' races, which were insufficient to establish the record for appellate review of the merits. *Id.* Because the defendant had "fail[ed] to elicit from the jurors by means of questioning or other proper evidence the race of each juror," this Court concluded that the defendant "failed to carry his burden of establishing an adequate record for appellate review." *Id.*

Similarly, in *Payne* this Court emphasized the need for a defendant to establish prospective jurors' races for the record.[1] *Payne*, 327 N.C. at 198–200, 394 S.E.2d at 159–61. There, after jury selection had occurred, the defendant moved the trial court to require the clerk to record the race and sex of various jurors. *Id.* at 198, 394 S.E.2d at 159. The trial court denied the defendant's motion. *Id.* The next day, the defendant renewed his motion and, in support, submitted an affidavit from one of defendant's attorneys purporting to contain the name of each black prospective juror examined. *Id.* at 198, 394 S.E.2d at 159–60. In its ruling, the trial court made findings of fact, relying on the affidavit, but ultimately rejected the merits of the defendant's *Batson* challenge. *Id.* at 198, 394 S.E.2d at 160.

On appeal, neither party argued the record was inadequate. While before the trial court the State refrained from commenting on the racial identities of prospective jurors, the State acquiesced to what occurred in the trial court and did not raise the question of an inadequate record to this Court. On its own, this Court, however, held that appellate review of the *Batson* challenge was unavailable because defendant failed to preserve an adequate record. We stated that having a prospective juror specify his or her race for the record would have provided an accurate record needed for appellate review. *Id.* at 199–200, 394 S.E.2d at 160–61. The Court concluded that the defense counsel's affidavit containing his subjective impressions of each prospective juror's race, and the trial court's findings based on the affidavit were insufficient to preserve the record on appeal. The Court held that defense counsel's perceptions are "no more adequate than the court reporter's or the clerk's would have been, as we recognized in *Mitchell*." *Id.* at 200, 394 S.E.2d at 161. Despite there having been a stipulation, in that no one argued the record was inadequate and that the trial court made findings about various jurors' races, we found the appellate record was inadequate. We did not

1. One of the defendant's attorneys of record in *Payne* is the author of the majority opinion here.

suggest that a stipulation between the trial court and counsel would have overcome this deficiency.

In *Mitchell* this Court also rejected the idea that a subjective interpretation of a prospective juror's race would be sufficient to establish the record for appellate review. In *Mitchell* the defendant unsuccessfully moved to have the court reporter note the race of every prospective juror in order to establish the record for appeal. *Mitchell*, 321 N.C. at 655, 365 S.E.2d at 557. In considering preservation before reviewing the defendant's arguments on appeal, this Court noted that

> [a]lthough this approach *might* have preserved a proper record from which an appellate court could determine if any potential jurors were challenged solely on the basis of race, *we find it inappropriate*. To have a court reporter note the race of every potential juror examined would require a reporter alone to make that determination without the benefit of questioning by counsel or any other evidence that might tend to establish the prospective juror's race. The court reporter, however, is in no better position to determine the race of each prospective juror *than the defendant*, *the court*, *or counsel*. An individual's race is not always easily discernable, and the potential for error by a court reporter acting alone is great.

Id. at 655–56, 365 S.E.2d at 557 (second and third emphasis added). The Court further observed that defendant's proposed approach "would denigrate the task of preventing peremptory challenges of jurors on the basis of race to the reporter's 'subjective impressions as to what race they spring from.' " *Id.* at 656, 365 S.E.2d at 557 (quoting *Batson*, 476 U.S. at 130 n.10, 106 S. Ct. at 1740 n.10 (Burger, C.J., dissenting)).

Defendant here, unlike the defendants in *Mitchell*, *Payne*, and *Brogden*, made *no* effort to preserve the race of the jurors for the record. Defendant neither requested that anyone record the races of the challenged prospective jurors nor asked the jurors to identify their races. Moreover, defendant failed to include juror questionnaires in the record which would include each juror's racial self-identification. Defense counsel did not provide a sworn affidavit as the defense counsel did in *Payne*. Here defense counsel simply made an argument. Though defense counsel identified the two challenged prospective jurors as black and the trial court indicated that the State had passed three black prospective jurors to the defense, there is no record of the race of any other juror which is needed to give context and allow for a proper review of the

State's actions. Based on our precedent set forth in *Mitchell*, *Payne*, and *Brodgen*, defendant did not meet the burden to establish the race of the jurors, resulting in this Court not having a sufficient record to permit appellate review. Thus, this Court should not reach the merits of defendant's *Batson* claim.

The majority tries to distinguish *Mitchell*, *Payne*, and *Brogden* from this case by stating that in those cases "the defendant attempted to establish the racial identities of each of the prospective jurors on the basis of the subjective impressions of a limited number of trial participants." In other words, the majority believes the holding of these cases turns on the number of individuals who acquiesce in determining race based on outward appearances. This analysis fails, given that in *Brogden*, the prospective jurors' races were established by the subjective impressions of both defense counsel and the court reporter. Likewise, in *Payne* the prospective jurors' races were established by defense counsel's sworn affidavit with which the trial court agreed as it utilized the information contained in the affidavit to issue findings of fact about the race of the challenged jurors in order to conduct its *Batson* analysis. In doing so, the first step would have been for the court to make findings of the races of the jurors that were challenged. As noted in both cases, this Court held that the jurors' races were not properly established or preserved. Whether singly or collectively, our cases hold that it is improper for individuals to determine race based on appearance. The approved method of preservation is for each of the jurors to self-identify their races. Simply put, any other method, whether through stipulation or consensus, is based on the subjective view of an individual's outward appearance as opposed to a person's true racial identity, making these other methods improper under the rationale of this Court's precedent. The majority's holding that a record of juror's races is preserved simply because more than one person agrees on the races overturns our case law.

The majority seeks to bolster its holding that the identification of race based upon outward appearance should be accepted by characterizing the parties' arguments and the trial court's ruling as a "stipulation." This Court, however, rejected a similar approach in *Payne*. There, in order for the trial court to rule that defendant had failed to make a prima facie showing of discrimination, it first had to make findings of the races of various jurors. *See Payne*, 327 N.C. at 198, 394 S.E.2d at 159–60. Further, no one argued on appeal that the record was inadequate. Nothing in our controlling case law indicates that a stipulation based on outward appearance is adequate.

The majority relies on this Court's decision in *State v. Jackson*, 322 N.C. 251, 368 S.E.2d 838 (1988), to advance its theory that a "stipulation" may establish racial identities of prospective jurors. The majority boldly declares that "our prior decisions clearly allow for the use of methods other than self-identification for the purpose of determining the racial identity of prospective jurors." In doing so, however, the majority takes a single case out of context and ignores the fact that it is an anomaly based on its unique and nuanced procedural history. This Court decided the defendant's direct appeal in *Jackson* in 1986. *State v. Jackson*, 317 N.C. 1, 343 S.E.2d 814 (1986). The defendant in that case then filed a petition for writ of certiorari with the Supreme Court of the United States.

After the defendant's trial and approximately one month before this Court issued its decision in the case, in April of 1986 the Supreme Court of the United States decided *Batson v. Kentucky*, which established a new framework for defendants to challenge the exclusion of minority jurors on equal protection grounds. *See Batson*, 476 U.S. at 100, 106 S. Ct. at 1725. Notably, *Batson* overruled the Court's prior decision in *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824 (1965), which had created a much more difficult standard for a defendant to establish any sort of discrimination in jury selection sufficient to warrant relief. Following *Batson*, the Supreme Court of the United States in *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708 (1987), decided that the *Batson* framework would apply to litigation that was pending on direct review when *Batson* was decided. *Id.* at 316, 107 S. Ct. at 709. Since the defendant had petitioned the Supreme Court of the United States for a writ of certiorari and thus the case was pending at the time *Batson* was decided, the Supreme Court of the United States remanded *Jackson* to the North Carolina Supreme Court to consider the case in light of the newly established *Batson* principles. *Jackson v. North Carolina*, 479 U.S. 1077, 107 S. Ct. 1271 (1987).

Because *Batson* had not been decided at the time that the defendant in *Jackson* was tried, the parties did not preserve a record of the race of any of the jurors, including the excused jurors, nor did they record a transcript of the proceeding. Nonetheless, based on the express order from the Supreme Court of the United States and the further remand from our Supreme Court, the trial was required to consider the defendant's argument in light of the recently established *Batson* rules. Because of this unique procedural history, the trial could only use the limited information that was available to comply with the United States

Supreme Court's directive and reach the merits of the *Batson* challenge.[2] *Jackson*, 322 N.C. at 252, 368 S.E.2d at 839. Ultimately, the trial court was forced the rely on a stipulation between the State and the defendant about what happened at trial, an affidavit from one of the prosecutors who tried the case, and the trial notes of the attorneys. *Id.* Pursuant to the instructions from the Supreme Court of the United States, this Court then reviewed the trial court's decision.

The majority, however, ignores this procedural anomaly and instead utilizes a strained reading of the case to support its desired outcome. *Jackson* does not reflect a typical *Batson* case, i.e., one that arises after the Supreme Court of the United States established the *Batson* framework. Because there are more recent cases from this Court which reject the exact rationale that the majority advances here, that subjective impressions are sufficient to establish a juror's race for the record, the majority's rationale simply cannot withstand scrutiny without overruling our more recent cases.

Moreover, the majority here wrongly interprets the language of our cases which recognizes that there are methods other than questioning by counsel through which a juror may establish his race. As previously mentioned and consistent with this Court's rationale in prior cases, another method of establishing race other than questioning by counsel is the use of juror questionnaires. This Court, however, upends that rationale by now holding that subjective views of outward appearance are adequate to establish a juror's race so long as they are part of the trial court's findings. In our cases, this Court has had numerous opportunities to endorse the approach adopted today but did not do so.

Even if the issue had been properly preserved, the trial court did not clearly err in rejecting defense counsel's sparse argument that the State discriminated in exercising two peremptory challenges. The standard of review for *Batson* challenges is well-established. Because the trial court's determination on the first step of *Batson* involves its assessment of the prosecutor's credibility and other factors, the trial court's decision is reviewed for abuse of discretion. *See Jackson*, 322 N.C. at 255, 368 S.E.2d at 840 ("Since the trial court's findings will depend on credibility, a reviewing court should give those findings great deference." (citing

2. No one in *Jackson* objected to the procedure. Notably, it appears to be the only procedure that would have been open to the parties given that the Supreme Court of the United States would have just released *Batson* around that time, meaning that the courts would have had to develop a new system for handling cases falling within its purview. It would have been improper for this Court to have then disallowed *Batson* review based on how the record was recreated under these unusual circumstances.

Batson, 476 U.S. at 98 n.21, 106 S. Ct. at 1724 n.21)). As the majority recognizes, a trial court's ruling on a *Batson* challenge, including its determination of whether a defendant has made a prima facie showing of discrimination, "will be sustained 'unless it is clearly erroneous.' " *Waring*, 364 N.C. at 475, 701 S.E.2d at 636 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 1207 (2008)); *see State v. Taylor*, 362 N.C. 514, 528, 669 S.E.2d 239, 254 (2008) (stating that a trial court's findings on whether a defendant has made a prima facie showing of discrimination will be upheld "unless they are clearly erroneous"). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Lawrence*, 352 N.C. at 14, 530 S.E.2d at 816 (quoting *State v. Thomas*, 329 N.C. 423, 433, 407 S.E.2d 141, 148 (1991)). Moreover, the clearly erroneous standard of review "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511 (1985). "Trial judges, who are 'experienced in supervising voir dire,' and who observe the prosecutor's questions, statements, and demeanor firsthand, are well qualified to 'decide if the circumstances concerning the prosecutor's use of peremptory challenges create[ ] a prima facie case of discrimination against black jurors.' " *State v. Chapman*, 359 N.C. 328, 339, 611 S.E.2d 794, 806 (2005) (quoting *Batson*, 476 U.S. at 97, 106 S. Ct. at 1723).

Consistent with other equal protection challenges, *Batson* places the burden on the defendant, the opponent of the peremptory challenge, to make a prima facie showing that the State discriminated in exercising its peremptory challenge. A "government[ ] action claimed to be racially discriminatory 'must ultimately be traced to a racially discriminatory purpose.' " *Batson*, 476 U.S. at 93, 106 S. Ct. at 1721 (quoting *Washington v. Davis*, 426 U.S. 229, 240, 96 S. Ct. 2040, 2048 (1976)).

Importantly, in this first step the defendant has the burden to show that the prosecutor has acted with "intentional discrimination under the 'totality of the relevant facts' in the case." *Waring*, 364 N.C. at 747–75, 71 S.E.2d at 626 (quoting *Batson*, 476 U.S. at 94, 106 S. Ct. at 1721). "[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial [court] to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170, 125 S. Ct. 2410, 2417 (2005). Nevertheless, the first step is important in minimizing disruption to the jury selection process, limiting the number of trials within trials that occur with full *Batson* hearings. *See Jackson*, 322 N.C. at 258, 368 S.E.2d at 842 ("We do not believe we should have

a trial within a trial. The presiding judges are capable of passing on the credibility of prosecuting attorneys . . . ."). Several factors are relevant in determining whether a defendant has carried the burden to show an inference that the State discriminated in exercising peremptory challenges.

> Those factors include the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State's acceptance rate of potential black jurors.

State v. Quick, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995).

The majority cites but fails to apply the *Quick* factors here, which address the totality of relevant circumstances analysis *Batson* requires. When applying these factors, however, it is clear that the trial court did not abuse its discretion. Defendant was charged with committing drug offenses, crimes in which there were no discernible victims. There is no record of the races of the witnesses in this case. In the trial court's view and as supported by the record, the State did not engage in any disproportionate questioning or make any racially charged statements which would support an inference of discrimination. The State only exercised two peremptory challenges for seat number ten, both against black prospective jurors, but it passed at least three black prospective jurors to the defense, amounting to at least a 60% acceptance rate. Having exercised only two of the six available peremptory challenges, it cannot be said that there was any sort of "pattern of strikes" that the State exercised against any discernible group here. Thus, considering all of the circumstances required by our case law, there is more than adequate support for the trial court's ruling, which was explicitly based on the evidence presented and the arguments of counsel, and further supported by the State's minority acceptance rate.

At trial defense counsel's only argument to establish a prima facie showing of intentional discrimination was that two peremptory challenges had been exercised against black prospective jurors and that there was no obvious reason for their use. The majority accepts this argument, holding that the trial court's rejection of that argument amounted to an abuse of discretion. The majority states that "[a] careful

review of the numerical disparity between the relative acceptance rates for African American and white prospective jurors, coupled with other inferences that can be derived from the record . . . satisfies us that defendant made out the necessary prima facie case of purposeful discrimination in this case." While mentioning "other inferences that can be derived from the record," it focuses on what it characterizes as no "immediately obvious justification" for the State's use of the peremptory challenges. In searching to support its position with "other inferences," the majority impermissibly creates an argument not presented to the trial court or Court of Appeals: that there was an "absence of any significant dissimilarity between the answers given by Mr. Smith, Ms. Brunson, and Ms. Corbett." Thus, it strays from the role of appellate court by creating an argument for defendant and finding from a cold record facts to support it. The majority ignores the *Quick* factors and holds that the first step of *Batson* is met when the State exercises a peremptory challenge against a minority prospective juror without an "immediately obvious justification." Though the evidentiary bar for a defendant to establish a prima facie showing of discrimination is not high, this new first step clearly is inadequate under our existing case law.

Significantly, the only argument actually presented to the trial court was that the prosecutor had used its two peremptory challenges on black prospective jurors without "overwhelming evidence" as to why. The trial court, having observed the entire process and considered the evidence, defense counsel's presentation and the arguments of counsel on the record, found "there is no evidence of a showing of prejudice based on race or any of the contentions in *Batson*." It then itself noted, consistent with our prior case law, that another pertinent consideration was that the State had accepted 60% of the black prospective jurors. The trial court did not focus only on this statistic, as implied by the majority, but considered it with the other required factors.

As relied on by the trial court, this Court has consistently held that statistics are a pertinent factor in determining whether a defendant has met his burden to make a prima facie showing of intentional discrimination. *See State v. Barden*, 356 N.C. 316, 344, 572 S.E.2d 108, 127–28 (2002). In *Taylor*, 362 N.C. at 529, 669 S.E.2d at 255, this Court observed that the trial court properly concluded that the defendant failed to make a prima facie showing of intentional discrimination. At the time of the defendant's *Batson* challenge in that case, the State had accepted two out of five, or 40%, of the black prospective jurors. *Id.* "This Court has previously cited similar acceptance rates as tending to refute an allegation of discrimination." *Id.* (*citing State v. Fletcher*, 348 N.C.

292, 320, 500 S.E.2d 668, 684 (1998) (concluding that the defendant had not established a prima facie case of intentional discrimination when the State's acceptance rate of black prospective jurors was 40%); *State v. Abbott*, 320 N.C. 475, 480–82, 358 S.E.2d 365, 369–70 (1987) (same)).

In *State v. Beach*, 333 N.C. 733, 430 S.E.2d 248 (1993), this Court rejected the defendant's argument that the Court should not consider the number of black prospective jurors that the State accepted. The Court stated that "[i]n a case in which one of the methods the defendant uses in an attempt to show discrimination is the pattern of strikes, we cannot ignore the number of black jurors accepted by the State." *Id.* at 740, 430 S.E.2d at 252. Though the State exercised more peremptory challenges to excuse black prospective jurors than to excuse white prospective jurors, the Court concluded that even a 37% acceptance rate of black prospective jurors was insufficient alone to establish a prima facie case of discrimination. *Id.* Because the transcript revealed that the State had conducted "an evenhanded examination" of both white and black prospective jurors, the Court held that the trial court did not err in concluding that the defendant failed to establish a prima facie showing of intentional discrimination. *Id.*

In fact, this Court has "held that a defendant failed to establish a *prima facie* case of discrimination where the minority acceptance rate was 66%, 50%, 40%, and 37.5%." *Barden*, 356 N.C. at 344, 572 S.E.2d at 128 (first citing *State v. Ross*, 338 N.C. 280, 285–86, 449 S.E.2d 556, 561–62 (1994); then citing *State v. Nicholson*, 355 N.C. 1, 24, 558 S.E.2d 109, 127, *cert. denied*, 537 U.S. 845, 123 S. Ct. 178 (2002); then citing *State v. Belton*, 318 N.C. 141, 159–60, 347 S.E.2d 755, 766 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997); then citing *Fletcher*, 348 N.C. at 320, 500 S.E.2d at 684; then citing *Abbott*, 320 N.C. at 481–82, 358 S.E.2d at 369–70; and then citing *State v. Gregory*, 340 N.C. 365, 398, 459 S.E.2d 638, 657 (1995), *cert. denied*, 517 U.S. 1108, 116 S. Ct. 1327 (1996)).

For the first time, however, the majority of this Court holds that a 60% acceptance rate of prospective black jurors paired with no "immediately obvious justification" for the State's exercise of its peremptory challenges is sufficient to show that the trial court clearly erred in determining that defendant had not established a prima facie case of discrimination. In doing so, the majority *sub silentio* overrules this Court's *Batson* precedent which had held that much higher rejection rates of black prospective jurors standing alone were insufficient to establish a prima facie showing of intentional discrimination.

The majority essentially removes the defendant's burden and eliminates the first step of *Batson*. No longer must a defendant show intentional discrimination. Instead, the majority rewrites decades of *Batson* precedent to establish a framework in which the first step is met when the State excuses a minority prospective juror.

In the past this Court has recognized that jury selection "is 'more art than science' and that . . . a prosecutor may rely on legitimate hunches in the exercise of peremptory challenges." *State v. Barnes*, 345 N.C. 184, 212, 481 S.E.2d 44, 59 (1997) (first quoting *State v. Porter*, 326 N.C. 489, 501, 391 S.E.2d 144, 152 (1990); and then citing *State v. Rouse*, 339 N.C. 59, 79, 451 S.E.2d 543, 554 (1994), *overruled on other grounds by State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309 (2006)). The majority's conclusion here eliminates any ability for the State to exercise legitimate hunches or other nonverbal cues not evident in a cold record on appeal. The majority's analysis overrules this Court's stated standard of review of abuse of discretion. It gives no deference to the trial court, ignoring the extremely deferential and well-established standard of review. In effect, the majority usurps the role that clearly belongs to the trial court by reweighing the evidence gleaned from a cold record.

In finding that defendant did not present a prima facie case of discrimination, the trial court properly considered the evidence and arguments of counsel as well as the 60% minority passage rate. Its decision is supported by the record and is not clearly erroneous. Because defendant failed to preserve the record for appellate review, and because, regardless, the trial court did not abuse its discretion in concluding that defendant failed to carry his burden of establishing a prima facie showing of intentional discrimination required to satisfy the first step of the *Batson* analysis, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
RAYFORD LEWIS BURKE

No. 181A93-4

Filed 5 June 2020

1. Constitutional Law—ex post facto analysis—Racial Justice Act—repeal—amendments

For the reasons stated in *State v. Ramseur*, 374 N.C. 658 (2020), the retroactive application of the repeal of the Racial Justice Act (RJA) was unconstitutional as applied to defendant under both the state and federal constitutions. Further, only the procedural amendments made to the original RJA, under which defendant filed a claim, could be applied to defendant—substantive amendments to the evidentiary standards could not be applied.

2. Criminal Law—Racial Justice Act—motion for appropriate relief—denial without evidentiary hearing—abuse of discretion

The trial court abused its discretion by denying defendant's request for relief from his conviction for murder, made pursuant to the Racial Justice Act, without holding an evidentiary hearing. Defendant presented extensive evidence supporting his argument that race was a significant factor at multiple points during his prosecution.

Justice NEWBY dissenting.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review orders entered on 3 June 2014 and 31 July 2014 by Judge Joseph N. Crosswhite, Senior Resident Superior Court Judge, in Superior Court, Iredell County, dismissing the claims raised in defendant's motions for appropriate relief. Heard in the Supreme Court on 26 August 2019.

Joshua H. Stein, Attorney General, by Jonathan P. Babb and Danielle Marquis Elder, Special Deputy Attorneys General, for the State-appellee.

Center for Death Penalty Litigation, by Gretchen M. Engel; and Malcolm R. Hunter Jr. for defendant-appellant.

Cassandra Stubbs, Irena Como, Burton Craige, James Coleman, and Irv Joyner, for ACLU Capital Punishment Project, ACLU of North Carolina Legal Foundation, North Carolina Advocates for Justice, and North Carolina Conference of the NAACP, amici curiae.

ACLU Capital Punishment Project, by Brian Stull; and The 8th Amendment Project, by Henderson Hill, for Promise of Justice Initiative and 12 Former Judges, Justices and Law Enforcement Officials, amici curiae.

Glenn, Mills, Fisher & Mahoney, P.A., by Carlos E. Mahoney; and Jin Hee Lee and Kerrel Murray for NAACP Legal Defense & Educational Fund, Inc., amicus curiae.

EARLS, Justice.

Defendant, Rayford Lewis Burke, was convicted of one count of first-degree murder and sentenced to death in 1993. After we affirmed his conviction and sentence on direct appeal, defendant filed a motion for appropriate relief on 25 November 1997. The trial court denied that motion on 16 December 2011. We denied review.

Defendant filed a second motion for appropriate relief (RJA MAR) on 6 August 2010, pursuant to the North Carolina Racial Justice Act (RJA), arguing that he was entitled to a sentence of life imprisonment without the possibility of parole. The RJA was amended by the General Assembly in June 2012, and defendant filed an amendment to his RJA MAR on 30 August 2012. The General Assembly repealed the RJA on 19 June 2013. S.L. 2013-154 § 5(a), 2013 N.C. Sess. Laws 368, 372. On 3 December 2013, defendant filed a second amendment to his RJA MAR (Amended RJA MAR). After the State filed a motion to dismiss and a motion for judgment on the pleadings, the trial court dismissed and denied as being without merit defendant's claims under the RJA MAR and defendant's August 2012 amendments to the RJA MAR on 3 June 2014. On 31 July 2014, the trial court dismissed the claims asserted in defendant's Amended RJA MAR as procedurally barred and, in the alternative, denied defendant's claims as being without merit. Defendant appeals from both orders.

[1] For the reasons articulated in *State v. Ramseur*, No. 388A10 (N.C. Jun. 5, 2020), we vacate the orders of the trial court and remand for

further proceedings not inconsistent with this opinion and our opinion in *Ramseur*. The trial court concluded that the claims in defendant's RJA MAR and Amended RJA MAR were void due to the repeal of the RJA. However, the RJA repeal was unconstitutional under both the North Carolina Constitution and the Federal Constitution as applied to defendant and others similarly situated. Further, the General Assembly's amended RJA, enacted in 2012, can only be applied to defendant insofar as it affects the procedural aspects of the adjudication of his claims. As a result, the evidentiary provisions contained in the original, unamended RJA apply to the adjudication of defendant's RJA claims.

[2] The trial court also concluded, in the alternative, that the claims in defendant's RJA MAR and Amended RJA MAR were without merit and procedurally barred. The alleged procedural bars are negated by the language of the RJA. *See* North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1215 (codified at N.C.G.S. § 15A-2012(b) (repealed 2012) ("Notwithstanding any other provision or time limitation contained in Article 89 of Chapter 15A of the General Statutes, a defendant may seek relief from the defendant's death sentence upon the ground that racial considerations played a significant part in the decision to seek or impose a death sentence by filing motion seeking relief.").

As to the merits of defendant's claims, the trial court abused its discretion by summarily denying the claims without an evidentiary hearing. *See State v. McHone*, 348 N.C. 254, 258, 499 S.E.2d 761, 763 (1998) ("Under subsection (c)(4), read *in pari materia* with subsections (c)(1), (c)(2), and (c)(3), an evidentiary hearing is required unless the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor, or the motion presents only questions of law, or the motion is made pursuant to N.C.G.S. § 15A-1414 within ten days after entry of judgment."). To support each of his claims, defendant presented evidence that race was a significant factor in jury selection, sentencing, and capital charging decisions in the relevant jurisdictions at the time of his trial and sentencing. Defendant cited several statistical studies, including an extensive statistical study of capital charging, sentencing, and jury selection in North Carolina which was conducted by professors at Michigan State University College of Law. Defendant also cited that study's underlying data. Defendant cited to and analyzed data from voir dire transcripts and juror questionnaires from capital cases in his prosecutorial district. He also pointed to expert testimony and anecdotal evidence that was presented and considered in another RJA case, *State v. Robinson*. *See State v. Robinson*, No. 411A94 (N.C.

argued Aug. 26, 2019). Further, defendant pointed to evidence of race-based strikes during jury selection in his own case and alleged that the State offered pretextual reasons that were also used by the same office in connection with other litigation. In light of the evidence and arguments presented by defendant, the trial court's denial of his claims without a hearing was an abuse of discretion.

Consistent with our decision in *Ramseur*, we conclude that the RJA repeal and the 2012 amendments altering the evidentiary requirements for an RJA claim cannot be constitutionally applied in defendant's case. We also conclude that the trial court erred in ruling that defendant's claims lacked merit and were procedurally barred and erred by denying his RJA claims without a hearing. We remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

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

Justice NEWBY dissenting.

In January 1992, in cold blood in front of three eye witnesses, defendant shot and killed the victim, Timothy Morrison, because Morrison had testified against him in an earlier murder case. *State v. Burke*, 343 N.C. 129, 137–38, 469 S.E.2d 901, 904–05 (1996). The jury found defendant guilty of first-degree murder. In the sentencing phase the jury found that there were two statutory aggravating factors: that defendant had previously committed a violent offense and that he murdered someone who was a former witness against him. The jury sentenced defendant to death. Defendant appealed his conviction and sentence to this Court. After extensive review, this Court upheld defendant's conviction and sentence, concluding that no prejudicial error occurred and that the trial court properly imposed the death penalty. *Id.* at 163, 469 S.E.2d at 919.

Subsequently, defendant challenged his murder conviction by filing a Motion for Appropriate Relief (MAR) initially in 1997, amended in 2002, and amended again several times thereafter. The trial court ultimately denied defendant's MAR in 2011, and this Court denied further review of the trial court's decision in 2012.

In the interim, on 6 August 2010, defendant filed a second MAR, this time pursuant to the North Carolina Racial Justice Act (RJA). After

the General Assembly amended the RJA in June 2012, defendant filed an amendment to his RJA MAR on 30 August 2012 (first amendment to defendant's RJA MAR). On 19 June 2013, the General Assembly repealed the RJA. S.L. 2013-154, § 5(a), 2013 N.C. Sess. Laws 368, 372. After the State moved to dismiss defendant's RJA claims, defendant filed another amendment to his RJA MAR in December 2013 (second amendment to defendant's RJA MAR), raising additional constitutional claims not previously litigated.

Ultimately on 3 June 2014, the trial court dismissed, and in the alternative denied as being without merit, defendant's original RJA MAR and the first amendment to his RJA MAR. Subsequently, on 31 July 2014, the trial court also dismissed, and in the alternative denied as being without merit, defendant's second amendment to his RJA MAR. Defendant now appeals both of the trial court's orders denying relief.

This Court now reinstates defendant's RJA claims that the trial court previously dismissed and denied. For the reasons stated in the dissenting opinion in *State v. Ramseur*, No. 388A10 (N.C. June 5, 2020), I respectfully dissent.

STATE OF NORTH CAROLINA
v.
BEN LEE CAPPS

No. 206A19

Filed 5 June 2020

Criminal Law—pleadings—amendment—after arraignment—name of property owner

The trial court did not err by allowing the prosecutor to amend a warrant by filing a statement of charges form after arraignment to correct the name of the property owner for the charges of misdemeanor larceny and injury to personal property (from "LOVES TRUCK STOP" to "Love's Travel Stops & Country Stores Inc."). The change was in substance an amendment to the arrest warrant, and it did not change the nature of the offense charged and was otherwise authorized by law.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 828 S.E.2d 733 (N.C. Ct. App.

2019), vacating a judgment entered on 24 October 2017 by Judge Stanley L. Allen in Superior Court, McDowell County, and remanding for resentencing. Heard in the Supreme Court on 3 February 2020.

Joshua H. Stein, Attorney General, by Kristin J. Uicker, Assistant Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by Nicholas C. Woomer-Deters, Assistant Appellate Defender, for defendant-appellee.

NEWBY, Justice.

Under North Carolina law, a prosecutor may freely amend a criminal warrant to correct allegations regarding property ownership as long as doing so either does not change the nature of the offense charged or is otherwise authorized by law. In this case we decide whether a prosecutor loses the right to amend a criminal warrant when the amendment is filed on a statement of charges form after the defendant's arraignment. Because we hold that, regardless of the label, such a change is still an amendment, and because no statutory provision limits the filing of a statement of charges in this way, the trial court did not err in proceeding under the amended pleading. We therefore reverse the decision of the Court of Appeals and reinstate the trial court's judgment.

In April 2016, Officer Donald Cline of the Cherokee Police Department and the Swain County Sheriff's Office observed defendant at a Love's truck stop in McDowell County. Defendant's vehicle was twenty-five to thirty feet away from Officer Cline, whose attention was drawn to the vehicle because of audible "cursing and foul language" coming from it. Defendant, the driver, then exited the vehicle to put air in its tire. During this time, he and the vehicle's passenger, defendant's wife, "cuss[ed] and holler[ed]" at each other. Soon after, as defendant continued to yell, he hit the passenger window next to his wife with the air hose. He then cut the hose off of the air pump and tried to hit his wife with it. The altercation escalated further as defendant "drug her out of the car" as she was "kicking and screaming," until she was lying on her back on the concrete.

A Love's employee, and then Officer Cline, intervened. The Love's employee asked defendant what was going on, and defendant responded by asking "[w]hat the f[---] are you looking [at]?" and calling Officer Cline and the Love's employee "sons of a [sic] b[----]es." When Officer Cline, who was off duty at the time, showed his badge to defendant, defendant

left his wife on the ground and quickly ran back to his vehicle, tossing in the severed hose. Defendant then rapidly drove around the truck stop three times, creating black marks on the pavement and smoke as he burned the vehicle's tires. As he maneuvered to leave the gas station "at a high rate of speed," he "screeched right in between" an eighteen-wheeler truck and another vehicle. When he exited, he ran a red light immediately in front of the truck stop and continued down the highway.

Defendant was charged by arrest warrant with misdemeanor injury to personal property and misdemeanor larceny, and was charged with reckless driving by a separate warrant. In August 2016, defendant pled guilty to all of the charges in district court. He was sentenced under one consolidated judgment to seventy-seven days in custody, the entirety of which he was credited because of pretrial confinement. He appealed to superior court.

Before jury selection in superior court, the prosecutor moved to amend the warrant charging injury to personal property and misdemeanor larceny. The prosecutor wanted to amend the charging language to correct the name of the property owner, which the original warrant alleged was "LOVES TRUCK STOP," to "Love's Travel Stops & Country Stores, Inc." Defendant did not object to the amendment, which was made on a statement of charges form, and the superior court allowed it. The oral exchange regarding this amendment was as follows:

> THE COURT: The State has a motion to amend.
>
> [PROSECUTOR]: Yes, sir. I have drafted it on a misdemeanor statement of charges. The history of this case briefly is that this was a misdemeanor which was pled guilty to in [district] court based on the charging language, and it was a time-served judgment, and so it was not scrutinized closely. The charging language alleges that the personal property and the property stolen in the larceny are the property—Love's Truck Stop. I am moving to amend the owner of that property to Love's Travel Stop & Country Stores, [Inc.] May I approach?
>
> THE COURT: Yes, sir. What says the defendant?
>
> [DEFENSE COUNSEL]: No objection, Your Honor.
>
> THE COURT: It's allowed . . . .

Ultimately, the jury returned guilty verdicts against defendant on all charges. Defendant was sentenced to 120 days in custody for

misdemeanor larceny, and, in a consolidated judgment, defendant received a consecutive sentence of forty-five days in custody for misdemeanor injury to personal property and reckless driving.

Defendant appealed to the Court of Appeals, arguing for the first time that the superior court lacked jurisdiction to try the misdemeanor injury to personal property and misdemeanor larceny charges under the statement of charges. A divided panel of the Court of Appeals agreed. *State v. Capps*, 828 S.E.2d 733, 734 (N.C. Ct. App. 2019). It held that, based on the language of N.C.G.S. § 15A-922, a statement of charges may be filed after arraignment only if the defendant objects to the sufficiency of the State's original pleading and the trial court finds the original pleading was indeed insufficient. *Id.* at 735–36; N.C.G.S. § 15A-922 (2019). In the court's view, because defendant was tried under a statement of charges that was filed after arraignment, and the sufficiency of the original arrest warrant had not been contested, the statement of charges was untimely and the superior court had no jurisdiction to try the case under that charging document. *Id.* at 737. The Court of Appeals vacated the two convictions arising from the statement of charges and remanded the case to the trial court to resentence defendant for the remaining reckless driving conviction only. *Id.* The dissent asserted that section 15A-922's limitation on when a prosecutor may file a statement of charges applies when the statement of charges is filed on the prosecutor's "own determination," but not when, as in this case, the defendant and the trial court consent to the filing. *Id.* at 738–39 (Berger, J., dissenting).

The State appealed to this Court, echoing the dissenting judge's position and also arguing that because the statement of charges was, in substance, an amendment to a pleading, it may be filed at any time before or during trial if it does not substantively change the nature of the charges. Defendant disagrees, again claiming that the relevant statute governing statements of charges allows those pleadings to be filed after arraignment only if the original pleading has been challenged as, and found to be, insufficient.

In this case the prosecutor specifically moved to "amend" the arrest warrant, but did so by filing a statement of charges document. The parties thus disagree as to whether statutory provisions about amendments to charging instruments or those specifically about statements of charges should apply. We hold that when a prosecutor's action is in substance an amendment to a criminal pleading, no matter what the document containing the amendment is labeled, the amendment can be made at any time as long as it does not alter the nature of the offense or is otherwise authorized by law. Thus, the superior court properly tried

defendant for injury to personal property and misdemeanor larceny, as those charges were amended by the statement of charges that corrected the name of the owner of the damaged property. Moreover, the result would be the same even if the prosecutor's correction was classified only as a statement of charges and not as an "amendment" to the original charging instrument.

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998)). "The best indicia of that intent are the language of the statute[,] . . . the spirit of the act[,] and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citation omitted). The question we address, then, is whether, based on the applicable statutory provisions, the General Assembly intended to allow prosecutors to make changes to criminal pleading documents like the change made in this case.

Subsection 15A-922(f) of the North Carolina General Statutes provides that a criminal pleading, including an arrest warrant, "may be amended at any time prior to or after final judgment when the amendment does not change the nature of the offense charged." N.C.G.S. § 15A-922(f) (2019). Section 15-24.1 supplements this principle in the specific context of an amendment that corrects an allegation of property ownership. It provides that a criminal warrant may be amended in superior court "before or during the trial, when there shall appear to be any variance between the allegations in the warrant and the evidence in setting forth the ownership of property if, in the opinion of the court, such amendment will not prejudice the defendant." N.C.G.S. § 15-24.1 (2019).[1] Together, these provisions make clear that a charging instrument may generally be amended at any time when doing so does not materially affect the nature of the charges or is otherwise authorized by law.

Section 15A-922 gives prosecutors various types of criminal pleadings to pursue misdemeanor charges, and additionally provides the procedures for amending those pleadings. Among the enumerated criminal pleadings is a statement of charges, which can modify existing charges

1. It appears that section 15-24.1 was enacted by the General Assembly in response to this Court's decision in *State v. Cooke*, 246 N.C. 518, 98 S.E.2d 885 (1957), as the language suggested by the concurrence in that case appears almost verbatim in the statutory provision.

or add additional or different charges up until arraignment. N.C.G.S. § 15A-922(a), (b), (d) (2019). When filed, "it supersedes all previous pleadings of the State and constitutes the pleading of the State." N.C.G.S. § 15A-922(a).

Subsections (d) and (e) of section 15A-922 provide procedural guidelines for filing statements of charges under certain circumstances. Subsection (d) explains that, before arraignment, a prosecutor may file a statement of charges on the prosecutor's own determination that charges the same, additional, or different offenses than the original criminal pleading. Subsection (e) provides that if the defendant objects to the sufficiency of the original criminal pleading at or after arraignment and the court rules that the pleading is insufficient, then the prosecutor may file a statement of charges that does not change the nature of the offense. These provisions thus explain that before arraignment, a prosecutor may file a statement of charges without constraint, even if that statement of charges changes the nature of the offense; but at and after arraignment, if the sufficiency of the original pleading is objected to and the pleading is found to be insufficient, the statement of charges may not change the nature of the offense.

The official commentary to Article 49, which includes each of the above provisions about statements of charges and amendments to criminal pleadings, shows that the General Assembly intended statements of charges to be generally treated like amendments. Concerning statements of charges, the commentary explains that

> [i]t was felt that there is some loss in trying to "amend" the warrant, and sometimes issue a new warrant, when what is desired is a correct statement of the charges — a proper pleading. Since the warrant exists primarily as authority to arrest, there is some inconsistency of basic purpose and there is frequently a problem in getting all appropriate changes written in. Thus the "statement of charges" is created, as a new pleading, to be used when there is some problem with the original process as a pleading. As such it takes the place of amending the warrant (or amending other process which may also be used as the pleading). When filed prior to arraignment, it also may charge additional crimes . . . . [T]hat is the underlying idea in [N.C.]G.S. [§] 15A-922.

N.C.G.S. ch. 15A, art. 49 official cmt. (2019). This commentary reveals at least two things about the nature of statements of charges: (1) they

function as amendments to prior criminal pleadings like criminal warrants but for convenience and clarity may completely supplant the prior pleading; and (2) they can charge additional crimes if filed before arraignment. Those elements, the commentary says, are the central point of the provisions governing statements of charges in section 15A-922.

In this case the prosecutor moved to amend the arrest warrant and submitted the amendment on a document used for filing a statement of charges. This procedural action was an amendment in substance. But whether this Court classifies the action as an amendment or a statement of charges, the superior court correctly allowed the change to be made.

Substantively, the prosecutor's action amended the arrest warrant, and thus may be evaluated under subsection 15A-922(f) or section 15-24.1. Together these provisions allow a prosecutor to amend a warrant as long as the amendment does not change the nature of the charges or is otherwise authorized by law. Here, the amendment simply corrected the legal name of the owner of the damaged property from "LOVES TRUCK STOP" to "Love's Travel Stops & Country Stores, Inc." Because the language of the original warrant, if not perfectly accurate, made substantially clear what entity owned the property, this limited change to the property owner's name was authorized by N.C.G.S. § 15A-922(f) and N.C.G.S. § 15-24.1.

The result is the same even if we treat the prosecutor's filing as a statement of charges and not as an amendment to the original charging instrument. Subsection 15A-922(d) provides that before arraignment a prosecutor may file a statement of charges upon his or her own determination even if the statement charges "additional or different offenses." Subsection (e) provides that if the defendant objects to the sufficiency of the pleading at or after arraignment and the trial court rules that the pleading is insufficient, then the prosecutor may file a statement of charges that does not "change the nature of the offense." N.C.G.S. § 15A-922(e).

Defendant asserts that because subsection (e) allows the filing of a statement of charges after arraignment when a defendant objects to the sufficiency of the original pleading and the court rules that the pleading is insufficient, that subsection by implication *disallows* the filing of a statement of charges if the defendant has *not* objected to the sufficiency of the original pleading. That position contravenes legislative intent.

By enacting subsections (d) and (e) the General Assembly did not intend to limit the circumstances in which a prosecutor may file a

statement of charges. It instead simply clarified a specific circumstance in which such a filing remains permissible. Read together, subsections (d) and (e) provide that before arraignment a prosecutor may file a statement of charges that changes the nature of the offense, but after arraignment the prosecutor may only file a statement of charges that does not change the nature of the offense. Where subsection (e) includes the clauses "[i]f the defendant by appropriate motion objects to the sufficiency of a criminal [pleading] . . . and the judge rules that the pleading is insufficient," it simply clarifies that a prosecutor may still file a statement of charges in that circumstance if doing so does not change the nature of the offense. It does not mean that a prosecutor may file a statement of charges *only* in that circumstance. It would be an odd result to allow a statement of charges to be filed when a defendant objects to the sufficiency of the warrant but not allow the same non-prejudicial statement of charges to be filed when a defendant does not object to the sufficiency of the warrant and consents to the new filing.

The General Assembly gave prosecutors the freedom to amend criminal pleadings at any stage of proceedings if doing so does not change the nature of the charges or is otherwise authorized by law. Similarly, for statements of charges in particular, the General Assembly only explained some specific circumstances in which a prosecutor may file a statement of charges; it did not act to limit the circumstances in which a prosecutor may file a statement of charges. In this case, when the prosecutor moved to amend the arrest warrant to correctly state the name of the property owner, and did so by filing a statement of charges form after arraignment, the superior court properly considered and allowed the change. It therefore rightly proceeded to try defendant for the charges of misdemeanor injury to personal property and misdemeanor larceny with the corrected name of the property owner. We therefore reverse the decision of the Court of Appeals that vacated defendant's convictions for those charges, thus reinstating defendant's convictions and sentences.

REVERSED.

STATE v. FIELDS

[374 N.C. 629 (2020)]

STATE OF NORTH CAROLINA
v.
MELVIN LAMAR FIELDS

No. 170A19

Filed 5 June 2020

1. Assault—habitual misdemeanor assault—felony assault—arising from same act

The trial court erred by entering judgment on convictions of habitual misdemeanor assault and felony assault where the convictions arose from the same assaultive act because the relevant statutes (sections 14-33, -33.2, and -32.4), when read together, prohibited punishment for misdemeanor assault based upon conduct that was subject to a higher punishment (here, for felony assault). Where the conduct could not be punished as misdemeanor assault, it could not form the basis for habitual misdemeanor assault.

2. Judgments—improper conviction—vacating versus arresting judgment—distinction

Where the trial court improperly entered judgment for both misdemeanor habitual assault and felony assault based on the same assaultive act, the correct remedy was to arrest judgment on the former conviction, rather than vacate it, since there was no fatal defect in the record affecting the verdict itself.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal of right pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 827 S.E.2d 120 (N.C. Ct. App. 2019), affirming a judgment entered on 12 January 2018 by Judge Paul Ridgeway in Superior Court, Durham County. Heard in the Supreme Court on 9 March 2020.

Joshua H. Stein, Attorney General, by Lisa Bradley, Special Deputy Attorney General, for the State-appellant.

Richard Croutharmel for defendant-appellee.

DAVIS, Justice.

In this case, we address the interplay between the offenses of habitual misdemeanor assault, felony assault inflicting serious bodily

injury, and misdemeanor assault inflicting serious injury. Based upon our application of principles of statutory construction, we agree with the Court of Appeals that defendant could not be separately convicted and punished for the offenses of both habitual misdemeanor assault and felony assault inflicting serious bodily injury stemming from the same act. However, because defendant's conviction for habitual misdemeanor assault should have been arrested rather than vacated, we modify and affirm the decision of the Court of Appeals and remand for further proceedings.

Factual and Procedural Background

The assault in this case occurred around midnight on 2 November 2015, when defendant Melvin Lamar Fields assaulted A.R.,[1] a transgender woman. A.R., defendant, and a third person had met at defendant's home that evening to engage in a mutual sexual encounter. While the three were showering, defendant seized A.R. by the hair and used his other hand to roughly grab her genitals. A.R. attempted to push defendant away and told him to let her go, stating, "Stop, you're hurting me." Defendant refused to release her and continued to squeeze her genitals. Defendant then said, "Let you go huh?" and slammed her to the floor, resulting in A.R. hitting her head on the side of the bathtub. Defendant then jumped on top of her and put his hands around her neck while screaming at her.

A.R. noticed that blood was running down her leg and told defendant that she was hurt and needed to leave. At first, defendant tried to prevent her from leaving, but eventually she was able to get dressed and drive herself to the hospital. As a result of the incident, A.R. needed 15 stitches to repair the wound to her scrotum.

On the day after the incident, defendant contacted A.R. multiple times asking that she not tell the police what had happened. However, A.R. chose to file a police report, and defendant was subsequently indicted on 15 August 2016 by the Durham County grand jury for felony assault inflicting serious bodily injury (felony assault) and malicious maiming of a privy member. On 6 February 2017, the grand jury issued a superseding indictment charging defendant with attempted malicious castration or maiming of a privy member, felony assault, and habitual misdemeanor assault.

A trial was held in Superior Court, Durham County, beginning on 8 January 2018. The trial court instructed the jury on two felony

1. We use the victim's initials in this opinion in order to protect her identity.

offenses—felony assault and attempted castration or maiming. Prior to trial, defendant stipulated to two prior misdemeanor assault convictions within the past 15 years. Based on this stipulation, instead of also submitting the offense of habitual misdemeanor assault to the jury, the trial court submitted the predicate misdemeanor offense of assault inflicting serious injury (misdemeanor assault).

On 11 January 2018, the jury found defendant guilty of misdemeanor assault and felony assault. The jury found as an aggravating factor that defendant had taken advantage of a position of trust or confidence to commit the offense. The trial court proceeded to impose sentences upon defendant for the offenses of felony assault and habitual misdemeanor assault. Defendant was sentenced to a minimum of 19 months imprisonment and a maximum of 32 months for the felony assault offense and to a minimum of 9 months and a maximum of 20 months for the habitual misdemeanor assault offense with the two sentences to run consecutively. Defendant appealed his convictions to the Court of Appeals.

Defendant raised two main arguments on appeal. First, he contended that there was insufficient evidence to submit the felony assault charge to the jury because A.R. did not suffer a serious bodily injury.Second, he argued that the trial court erred in entering judgment and sentencing him for the crime of habitual misdemeanor assault in light of his simultaneous conviction and sentencing for felony assault.

On the first issue, the Court of Appeals determined that sufficient evidence was introduced at trial to permit the jury to find that A.R. suffered a serious bodily injury.[2] *State v. Fields*, 827 S.E.2d 120, 122–23 (N.C. Ct. App. 2019). With regard to the second issue, the Court of Appeals held that the trial court had erred in entering judgment and sentencing defendant on both the felony assault and habitual misdemeanor assault convictions given that both offenses arose from the same act. *Id.* at 125. Based on this determination, the Court of Appeals vacated the trial court's judgment on the offense of habitual misdemeanor assault. *Id.*

In a separate opinion, Judge Berger concurred in part and dissented in part. *Id.* at 126 (Berger, J., dissenting). Judge Berger agreed with the Court of Appeals majority that there was sufficient evidence to submit the felony assault charge to the jury but disagreed that the habitual misdemeanor assault conviction should have been vacated. *Id.* at 126–27 (Berger, J., dissenting).

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2. This aspect of the Court of Appeals' decision is not before us in this appeal.

On 21 May 2019, the State filed a notice of appeal based upon Judge Berger's dissent as well as a petition for discretionary review seeking review of additional issues. We allowed the State's petition for discretionary review on 14 August 2019.

Analysis

[1] The primary issue in this appeal is whether defendant could lawfully be convicted and sentenced for both habitual misdemeanor assault and felony assault where both offenses arose from the same assaultive act. In order to analyze this issue, it is necessary to review the three separate statutes implicated by his convictions.

The statute establishing the offense of habitual misdemeanor assault provides, in pertinent part, as follows:

> A person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of G.S. 14-33 and causes physical injury . . . and has two or more prior convictions for either misdemeanor or felony assault, with the earlier of the two prior convictions occurring no more than 15 years prior to the date of the current violation. . . . A person convicted of violating this section is guilty of a Class H felony.

N.C.G.S. § 14-33.2 (2019).

Subsection 14-33, which is the statute governing the crime of misdemeanor assault, states, in relevant part, as follows:

> (c) *Unless the conduct is covered under some other provision of law providing greater punishment*, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:
>
> (1) Inflicts serious injury upon another person . . .

N.C.G.S. § 14-33(c)(1) (2019) (emphasis added). Finally, the statute addressing felony assault provides that "any person who assaults another person and inflicts serious bodily injury is guilty of a Class F felony." N.C.G.S. § 14-32.4(a) (2019).[3]

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3. For purposes of clarity and ease of reading, we refer to these three statutes for the remainder of this opinion as the habitual misdemeanor assault statute, the misdemeanor assault statute, and the felony assault statute, respectively.

The Court of Appeals' decision was based largely on the proposition that defendant could not be separately convicted and punished for both misdemeanor assault and felony assault based on the same conduct due to the above-quoted prefatory language contained in the misdemeanor assault statute. In applying the prefatory language, the Court of Appeals reasoned that defendant's conduct *was*, in fact, "covered under some other provision of law providing greater punishment"—namely, the felony assault statute—given that a violation of the misdemeanor assault statute is only a misdemeanor while a violation of the felony assault statute is a felony. *Fields*, 827 S.E.2d at 124–25. The Court of Appeals concluded that this same rationale precluded defendant from being punished for habitual misdemeanor assault given that the habitual misdemeanor assault conviction was "expressly predicated" on the underlying offense of misdemeanor assault. *Id.* at 124.

In its appeal, the State asks us to reject the Court of Appeals' analysis, arguing that the trial court did not err by entering judgment on defendant's convictions and sentencing him for both felony assault and habitual misdemeanor assault. Although the State does not dispute the fact that both convictions were based on the same assaultive act, the State asserts that the above-quoted prefatory language in the misdemeanor assault statute is inapplicable here given the fact that misdemeanor assault was merely used as an element of habitual misdemeanor assault. The State contends that because judgment was not actually entered on the misdemeanor assault offense and defendant was not sentenced based on his conviction for that offense, the prefatory language in the misdemeanor assault statute has no relevance here. The State further points to the fact that no analogous prefatory language is contained in the habitual misdemeanor assault statute.

The parties' arguments raise issues of statutory construction. It is well-established that "[t]he intent of the Legislature controls the interpretation of a statute." *State v. Joyner*, 329 N.C. 211, 217, 494 S.E.2d 653, 657 (1991) (citation omitted). If the language of a statute is unambiguous, this Court "will give effect to the plain meaning of the words without resorting to judicial construction." *State v. Byrd*, 363 N.C. 214, 219, 675 S.E.2d 323, 325 (2009) (citation omitted). "Moreover, where more than one statute is implicated, the Court must construe the statutes *in pari materia* and give effect, if possible, to all applicable provisions." *Meza v. Div. of Soc. Servs.*, 364 N.C. 61, 66, 692 S.E.2d 96, 100 (2010) (citation omitted).

Although this Court has not previously had occasion to address the specific issue raised in this case, we interpreted identical prefatory

language contained in a different criminal statute in *State v. Davis*, 364 N.C. 297, 698 S.E.2d 65 (2010). At issue in *Davis* was whether the trial court could lawfully sentence the defendant for the offenses of both felony serious injury by vehicle and assault with a deadly weapon inflicting serious injury arising from the same conduct. *Id.* at 298, 698 S.E.2d at 66. We noted that the statute governing the crime of felony serious injury by vehicle provided that "*unless the conduct is covered under some other provision of law providing greater punishment* . . . felony serious injury by vehicle is a Class F felony." *Id.* at 302, 698 S.E.2d at 68 (quoting N.C.G.S. § 20-141.4(b) (2009)). We stated that this prefatory language "limits a trial court's authority to impose punishment for the enumerated offenses when punishment is imposed for higher class offenses that apply to the same conduct." *Id.* We explained that:

> This [prefatory] language indicates the General Assembly was aware when it enacted the current version of [the vehicular injury statute] that other, higher class offenses might apply to the same conduct. In such situations, as in this case, the General Assembly intended an alternative: that punishment is *either* imposed for the more heavily punishable offense *or* for the [vehicular injury] offense, but not both.

Id. at 304, 698 S.E.2d at 69.

We noted that assault with a deadly weapon inflicting serious injury, a Class E felony, provided "greater punishment" than felony serious injury by vehicle—a Class F felony. *Id.* at 305, 698 S.E.2d at 70. Thus, we concluded that the trial court lacked the authority to impose punishment for felony serious injury by vehicle because assault with a deadly weapon inflicting serious injury was the offense "providing greater punishment" under the plain language of the statute. *See id.* at 305–06, 698 S.E.2d at 70. Accordingly, we held that the conviction for felony serious injury by vehicle could not stand. *Id.*

In the present case, this same prefatory language would serve to prevent defendant from being separately punished for both misdemeanor assault and felony assault. As noted above, felony assault is a Class F felony, thereby providing greater punishment than misdemeanor assault—a Class A1 misdemeanor. Consequently, defendant's conduct "is covered under some other provision of law providing greater punishment[.]" N.C.G.S. § 14-33(c).

The State concedes that the prefatory language in the misdemeanor assault statute would have the effect of precluding defendant from being

separately punished for both misdemeanor assault and felony assault if these were actually the offenses for which defendant was sentenced. However, because (1) defendant was actually sentenced for the crime of *habitual misdemeanor assault* rather than for misdemeanor assault; and (2) no similar prefatory language exists in the habitual misdemeanor assault statute, the State argues that the General Assembly did not intend for the prefatory language in the misdemeanor assault statute to apply on these facts.

We disagree. The fatal flaw in the State's argument is that in order for defendant to be guilty of habitual misdemeanor assault, his conduct had to have first violated the misdemeanor assault statute. As noted above, the habitual misdemeanor assault statute provides that "[a] person commits the offense of habitual misdemeanor assault if that person" (1) "*violates any of the provisions of [the misdemeanor assault statute]* and causes physical injury;" and (2) "has two or more prior convictions for either misdemeanor or felony assault" within the past 15 years. N.C.G.S. § 14-33.2 (2019) (emphasis added).

Based on the prefatory language contained in the misdemeanor assault statute, defendant's conduct would constitute a violation of that statute—a necessary prerequisite for defendant's guilt of habitual misdemeanor assault—*only if* his conduct was not covered under a separate provision of law providing greater punishment. Because the felony assault statute *did* provide greater punishment for the act committed by defendant upon A.R., that act did not constitute a violation of the misdemeanor assault statute and, accordingly, defendant could not be convicted of habitual misdemeanor assault.

In other words, defendant's guilt of habitual misdemeanor assault required that he first have violated the misdemeanor assault statute. But because the prefatory language of the misdemeanor assault statute was triggered, his conduct was not deemed to constitute a violation of that statute. Thus, absent a violation of the misdemeanor assault statute, he could not be guilty of habitual misdemeanor assault, and as a result, the trial court erred in sentencing him for that offense.

In short, the State's argument fails to account for the fact that defendant's habitual misdemeanor assault conviction was inextricably linked to his having violated the misdemeanor assault statute. The effect of the prefatory language in that statute did not simply disappear upon the misdemeanor assault conviction being upgraded to a conviction for habitual misdemeanor assault. Accordingly, the fact that the General Assembly did not repeat the prefatory language in the habitual

misdemeanor assault statute is of no consequence. Once defendant was found guilty of both misdemeanor assault and felony assault, this invoked the prefatory language of the misdemeanor assault statute, which served to invalidate the misdemeanor assault conviction. This, in turn, meant that defendant could not be punished for habitual misdemeanor assault. As a result, we are compelled to affirm the result reached by the Court of Appeals on this issue.

* * *

[2] Finally, the State argues in the alternative that even assuming the habitual misdemeanor assault conviction cannot stand, that conviction was improperly *vacated* by the Court of Appeals and should instead have been *arrested*. In his appellate brief, defendant does not disagree with the State's contention on this issue.

This Court has previously explained the distinction between vacating and arresting a judgment as follows:

> Defendants argue that the effect of arresting judgment is necessarily and uniformly to vacate the verdict and return a criminal defendant to the position he had been in prior to trial. While we agree that in certain cases an arrest of judgment does indeed have the effect of vacating the verdict, we find that in other situations an arrest of judgment serves only to withhold judgment on a valid verdict which remains intact. When judgment is arrested because of a fatal flaw which appears on the face of the record, such as a substantive error on the indictment, the verdict itself is vacated and the state must seek a new indictment if it elects to proceed again against the defendant. However, we hold that when judgment is arrested on predicate felonies in a felony murder case to avoid a double jeopardy problem, the guilty verdicts on the underlying felonies remain on the docket and judgment can be entered if the conviction for the murder is later reversed on appeal, and the convictions on the predicate felonies are not disturbed upon appeal.

State v. Pakulski, 326 N.C. 434, 439–40, 390 S.E.2d 129, 131–32 (1990) (citations omitted).

Although our resolution of this appeal is not directly based upon principles of double jeopardy, we nevertheless believe that the above-quoted rule—applicable in such cases—applies with equal force

here. Our holding that defendant could not be punished for habitual misdemeanor assault on the facts of this case is not the result of any fatal defect existing in the record. Rather, it is based on the effect of the prefatory language contained in the misdemeanor assault statute coupled with the fact that both of defendant's convictions arose from the same assaultive act. Accordingly, we agree that the Court of Appeals should have arrested the trial court's judgment for habitual misdemeanor assault rather than vacating the judgment.

Conclusion

For the reasons set out above, we modify and affirm the decision of the Court of Appeals. We remand this case to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

MODIFIED AND AFFIRMED; REMANDED.

STATE OF NORTH CAROLINA
v.
DAVID ALAN KELLER

No. 201A19

Filed 5 June 2020

1. Criminal Law—jury instructions—requested defense—entrapment

In a prosecution for solicitation by computer of a person fifteen years or younger for the purpose of committing a sexual act, defendant presented sufficient evidence from which the jury could reasonably infer that he did not have a willingness or predisposition to engage in sexual activity with a minor when communicating with an undercover officer in an online chat room, rendering erroneous the trial court's denial of defendant's request for a jury instruction on entrapment.

2. Criminal Law—jury instructions—requested defense—entrapment—inconsistent theories

In a prosecution for solicitation by computer of a person fifteen years or younger for the purpose of committing a sexual act, defendant's claim that he was entrapped by an undercover officer with whom he

communicated in an online chat room was not inconsistent with his denial of having the intent to commit the criminal act. Defendant did not deny the acts he committed—that he communicated with the officer online or that he drove to meet up with the person he thought he had been conversing with—and he should have been allowed to assert the defense of entrapment.

3. Criminal Law—jury instructions—requested defense—entrapment—prejudice

In a prosecution for solicitation by computer of a person fifteen years or younger for the purpose of committing a sexual act, defendant demonstrated he was prejudiced by the trial court's refusal to grant him a jury instruction on entrapment where the jury's questions during deliberations about defendant's intent indicated a possibility that had the jury been given the requested instruction, it might have concluded the criminal intent originated with law enforcement and not defendant.

Justice NEWBY dissenting.

Justice MORGAN joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 828 S.E.2d 578 (N.C. Ct. App. 2019), affirming a judgment entered on 26 September 2016 by Judge Eric L. Levinson in Superior Court, Lincoln County. Heard in the Supreme Court on 9 March 2020.

Joshua H. Stein, *Attorney General*, *by Sherri H. Lawrence*, *Assistant Attorney General*, *for the State-appellee.*

Glenn Gerding, *Appellate Defender*, *by Emily Holmes Davis*, *Assistant Appellate Defender*, *for defendant-appellant.*

BEASLEY, Chief Justice.

In this case we consider whether the trial court erred by refusing to instruct the jury on the defense of entrapment. Defendant contends that he presented sufficient evidence of entrapment to allow the jury to decide the factual issue of whether he was entrapped. We agree. For the reasons stated below, we hold that the trial court committed prejudicial error by failing to instruct the jury on the defense of entrapment, and we reverse the decision of the Court of Appeals.

On 11 May 2015, Detective Brent Heavner, who worked as an undercover officer in an operation targeting online sexual predators for the Lincolnton Police Department, began posting online as a fifteen-year-old boy named "Kelly." Detective Heavner posted a personal advertisement titled "Boy Needs a Man" on the "Personal Encounters" section of Craigslist, which read:

> OK never did this so here it goes. I am wanting to experience a man, never have tried it but want to. I have been with a girl and now wanna [sic] try a man. I am posting here because I want a complete stranger so no one will find out about this. I would like an older man that is not shy and knows what to do cause [sic] I will be probably a little nervous. I would prefer a pic and a number so we can not use email. I will be picky so be patient. BUT would like to do this soon, u [sic] would have to come to me. would like to try anything I am a white male open to anyone[.]

The next day, defendant responded to Detective Heavner's post as follows:

> Hey[.] I am a 44 white male looking for a young guy to take care of and spoil[.] I am 175 lbs. 32/32 pants[,] 6.5 cut[,] DD free. If you would like to be a daddys [sic] boy and have your every need provided for you let me know I am looking for a boy to treat very special.

Detective Heavner responded to defendant's message asking, "whats [sic] your number and what do you like [?]" Defendant responded by e-mailing his phone number. When Detective Heavner failed to respond, defendant sent the following three e-mails later that day:

> 2:43 p.m.: I sent you my number. I look like a 44-year-old guy. Not fat and not ugly.
>
> 9:38 p.m.: Are u [sic] still needing a man. I am still looking for a boy[.]
>
> 9:51 p.m.: This man is still looking for his boy toy[.]

Detective Heavner responded the following morning and defendant stated, "I could offer you a home. Car to drive[,] phone[,] clothes[, and] money to spend. . . . Pretty much whatever you need. . . . I have had 3 boys. They never had to work and got everything they ever asked for[.]" Defendant asked Detective Heavner for a picture and his "stats" and he sent defendant an image obtained from Google images. In response to the pictures, defendant began complimenting Detective Heavner

and offering to take good care of him. Defendant also told Detective Heavner about his three previous "boys." He told Detective Heavner that "Jeremy was 17. He was with me 3 years[,]" "[t]hen [K]aylen was 24 he was with me for 5 years. Then he got arrested for DWI three times[,]" and "I have had [D]ustin since 2008." They began to discuss when they could meet, but Detective Heavner expressed concern in the following text message exchange:

> [Detective Heavner]: I may be to young but I am needing a place to go, my aunt is about to put me back in foster care and I will run away if she does[.]
>
> [Defendant]: How old are u[?] If your [sic] 17 it's legal[.]
>
> [Detective Heavner]: I am a good kid, just my parents are shit bags and are in prison and I am the one suffering. I am not quiet [sic]16 and actually 16 is the legal age[.]
>
> [Defendant]: Send me a pic I can see your face please[.]
>
> [Detective Heavner]: I am scared to show my face right now[.]
>
> [Defendant]: Well. I could let you live here with me and take care of you[.]
>
> [Detective Heavner]: If ur [sic] willing it sounds good[.]
>
> [Defendant]: But we could not have sex till you was [sic] old enough[.]
>
> [Detective Heavner]: Ouch not good lol[.]

Defendant went on to state that he did not want to go to jail and told Detective Heavner that "[y]ou know my son got on line [sic] and thought he was talking to a girl it turned out to be a cop and when he went to meet her he got arrested and went to jail for 3 years and now has to register as a sex offender."

Prior to this conversation, Detective Heavner had not informed defendant of his age. Defendant continued the conversation and they made plans for defendant to pick him up the next day. When Detective Heavner told defendant that "I want to perform oral sex on u really bad for some reason can we do that[?]" defendant responded, "I don't want to talk about that stuff on here" and expressed his hope that Detective Heavner would understand. The conversation about problems at home continued, until Detective Heavner brought up sex again:

[Detective Heavner]: I am very curious[.]

[Defendant]: Curious about what[?]

[Detective Heavner]: I don't know how to say it[.]

[Defendant]: Just say it. I won't judge you[.]

[Detective Heavner]: How do I know if I am[.] And if I come there and we can't be sexual it might be a mistake[.]

. . . .

[Defendant]: I said we could[.]

. . . .

[Detective Heavner]: You said we could when I am old enough for u [.]

[Defendant]: Well like I said don't want to talk through text. But will talk to you in person about it[.]

[Detective Heavner]: You said I said we could so does that mean yes cuz if not I may have to find someone else first to see what its like[.]

. . . .

[Defendant]: Don't find anyone else. Please[.]

[Detective Heavner]: Only if we can have oral sex and anal tomorrow so I will know, just give me a yes or no and I will shut up about it[.]

[Defendant]: Yes[.]

After exchanging additional texts, defendant agreed to meet Detective Heavner and take him back to defendant's home the next day. When defendant arrived at the agreed upon location, officers placed defendant under arrest.

On 10 August 2015 defendant was indicted under N.C.G.S. § 14-202.3 for solicitation by computer or electronic device of a person believed to be fifteen years of age or younger for the purpose of committing an unlawful sexual act and appearing at the meeting location where he was to meet the person whom he believed was a child.

Detective Heavner testified at trial, explaining to the jury how he made the post in the Casual Encounters section of Craigslist and how

he had to confirm he was eighteen years old before making his post. Detective Heavner read the e-mails and text messages exchanged between himself and defendant for the jury.

Defendant's housemate, Curtis Miller, testified on behalf of the defense. Miller testified that he had known defendant for approximately twenty-five years and currently resided with him. Miller also testified that during the time Miller knew defendant he had brought home five or six men that were all over the age of eighteen. When the men lived with defendant, they had separate rooms and defendant helped them get jobs and get back on their feet.

Defendant also testified, stating that he began using Craigslist's personal advertisements in 2006. He used Craigslist because it was an adult website and he had previously received messages from minors when he used other online websites and chatrooms. He testified that in order to access the Casual Encounters section of Craigslist, he had agreed that he was over the age of eighteen, and he further explained that Craigslist required users' date of birth before allowing a post in the Casual Encounters section. He stated that over the course of ten years, he had met multiple men on the website and some of the men lived with him for extended periods. Defendant testified that he was not romantically or sexually involved with every man he met online, or even every man who moved in with him.

With regard to Detective Heavner's age, defendant testified that at the time he gave Heavner his phone number, they had not discussed the matter "because you've got to be 18 to be on Craigslist." He also testified that he believed Detective Heavner was seventeen years old and he would not "mess with anybody" unless they were eighteen. He explained that when he was in his twenties he met Jeremy, who was seventeen at the time, and made Jeremy wait until he was eighteen to move in.

Defendant further testified that he did not include any sexual content in his text messages with Detective Heavner and explained that the detective was the only person during the encounter to allude to the possibility of sexual activity during their conversations. Defendant testified that he responded to Detective Heavner's advertisement because he and his live-in companion were having problems and defendant wanted to make him jealous. He further testified that "sex was not on my mind at this time" and that he was concerned Detective Heavner was in danger because his aunt was not providing for him. He discussed Detective Heavner with his housemate Curtis Miller and planned on letting him stay in the spare bedroom.

However, on cross-examination, defendant admitted that initially, his response to the Craigslist ad was sexual in nature, but that he thought Detective Heavner was over eighteen years old. He further testified that he did not recall Detective Heavner telling him that he was only fifteen years old. He also explained that he did not want Detective Heavner finding anyone else because he was afraid whoever he met may hurt him. He testified that he agreed to have sex with Detective Heavner simply "to shut him up."

At the close of all of the evidence, defendant made a motion to dismiss, which the trial court denied. Defense counsel further argued for jury instructions on the defense of entrapment. The trial court ultimately denied defendant's request for jury instructions on entrapment, finding the defense inconsistent with defendant's argument that he did not travel to the meeting location for the purpose of having sex with Detective Heavner.

Shortly after deliberations began, the jury asked for the elements of the offense and some of the State's evidence. Approximately two hours later the jury returned with another question, asking the court, "Please define intent to have sex with a minor. Does it matter if the defendant's intent is to have sex when the boy is underage or if his intent is to wait until—is to wait to have sex until the boy is of age?" The trial court instructed the jury that "[i]t would constitute a violation of the law to have intent with a boy who is underage. It would not be a violation of the criminal code to have—to intend to have sex with someone who is not underage." Later that afternoon, the jury asked for the elements of the offense again. Shortly thereafter the jury indicated it had reached a verdict. However, when the trial court asked the foreperson if there was a unanimous decision, the foreperson indicated that it was not a unanimous verdict and that everyone had "made their own personal decision."

The jury returned for further deliberations the following day, and on 23 August 2016, it found defendant guilty of the offense charged. The trial court sentenced defendant to ten-to-twenty-one months' imprisonment and mandatory registration as a sex offender for thirty years. Defendant filed a petition for a writ of certiorari, which was granted by the Court of Appeals. Defendant argued on appeal that the trial court erred when it failed to instruct the jury on entrapment.

In a divided opinion issued 21 May 2019, the Court of Appeals held that the refusal to instruct on entrapment was not error because the evidence failed to support the instruction. *State v. Keller*, 828 S.E.2d 578,

583–84 (N.C. Ct. App. 2019). The majority concluded that defendant failed to show his entitlement to an entrapment instruction for two reasons: (1) the evidence showed that he was willing to engage in criminal activity; and (2) he failed to show that he did not have a predisposition to commit the act. *Id.* The Court of Appeals noted that defendant repeatedly used the word "boy" when communicating with Detective Heavner and continued to speak with him after he told defendant he was fifteen years old. *Id.* The court ultimately held that Detective Heavner simply gave defendant the opportunity to commit the crime, in which defendant willingly engaged. *Id.* at 584. Because the majority's conclusion that defendant was predisposed to commit the crime was dispositive, it did not address the other issues raised on appeal.

Arguing that the majority failed to consider the evidence in the light most favorable to defendant and to accept defendant's testimony as true as required by the applicable standard of review, the dissenting judge would have concluded that defendant demonstrated his entitlement to the entrapment instruction. *Id.* at 587–90 (Inman, J., dissenting). The dissenting judge further opined that the State's argument—that defendant was not entitled to the entrapment defense because he denied elements of the crime—was unavailing. *Id.* at 590. Finally, the dissenting judge asserted that defendant showed he was prejudiced by the trial court's denial of an entrapment instruction. *Id.* at 590–91. Based on the dissent, defendant filed notice of appeal on 25 June 2019.

Analysis

[1] The issue before this Court is whether the trial court committed prejudicial error by failing to instruct the jury regarding the defense of entrapment. Resolution of that issue requires this Court to determine whether defendant was entitled to entrapment jury instructions, whether those instructions were impermissibly inconsistent with defendant's other theories of defense, and whether defendant was prejudiced by the trial court's failure to give the instructions.

I. Entrapment Instructions

"The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it." *State v. Stanley*, 288 N.C. 19, 29, 215 S.E.2d 589, 595 (2010) (citation omitted). Thus, "[th]e defense of entrapment is available when there are acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime and when the criminal intent lies with the law enforcement agencies." *State v. Hageman*, 307 N.C. 1, 28, 296

S.E.2d 438, 449 (1982) (citing *State v. Walker*, 295 N.C. 510, 246 S.E.2d 748 (1978)). Entrapment is a complete defense to the crime charged. *See State v. Wallace*, 246 N.C. 445, 447, 98 S.E.2d 473, 474 (1957) ("The law of entrapment is that it not only may, but it does constitute a defense.") Defendants have the burden of proving the defense of entrapment "to the satisfaction of the jury" and the burden does not shift to the prosecution to prove predisposition beyond a reasonable doubt. *Hageman*, 307 N.C. at 28; 296 S.E.2d at 448.

The crucial inquiry by this Court is whether law enforcement or the defendant created the criminal intent. If a defendant has a "predisposition to commit the crime independent of governmental inducement and influence," the origin of the criminal intent lies with the defendant and the defense of entrapment is unavailable. *Id.* at 29, 296 S.E.2d at 449. Predisposition may be shown by "a defendant's ready compliance, acquiescence in, or willingness to cooperate in the criminal plan where the police merely afford the defendant an opportunity to commit the crime." *Id.* at 31, 296 S.E.2d at 450 (citations omitted).

Generally, the issue of whether a defendant is entrapped is a question of fact to be resolved by the jury. *State v. Hipp* 245 N.C. 205, 207; 95 S.E.2d 452 454 (1956) ("It is neither the function of the trial court nor this Court to say whether the defendant's story is true or false. That is the jury's function."). A defendant is entitled to jury instructions on the defense of entrapment if he presents "some credible evidence tending to support the defendant's contention that he was a victim of entrapment." *State v. Burnette*, 242 N.C. 164, 173, 87 S.E.2d 191, 197 (1955). In order to determine whether defendant presented "some credible evidence," we consider whether defendant has presented sufficient evidence to permit a jury to reasonably infer that he was entrapped. *See Walker*, 295 N.C. at 515, 246 S.E.2d at 751 (concluding that defendant's evidence was "simply insufficient to permit a jury to infer that any undue persuasion, trickery or fraud was practiced by government agents upon defendant to induce him").

Here, we do not determine defendant's guilt or weigh the credibility of his testimony; rather, we consider whether defendant met the threshold burden of producing "some credible evidence" of each element of entrapment.

When making this determination, we view the evidence in the light most favorable to the defendant, *see State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010); *State v. Mash*, 323 N.C. 339, 348 372 S.E.2d 532, 537 (1988), and we take the defendant's testimony as true, *see*

Moore, 363 N.C. at 796, 688 S.E.2d at 449 (citing *State v. Hipp*, 245 N.C. 205, 95 S.E.2d 452 (1956) ("[I]f defendant's evidence, taken as true, is sufficient to support an instruction . . . it must be given[.]"); *State v. Ott*, 236 N.C. App. 648, 652, 763 S.E.2d 530, 533 (quoting *State v. Foster*, 235 N.C. App. 365, 374, 761 S.E.2d 208, 215 (2014)) ("[F]or purposes of the entrapment issue, we must assume that [the] defendant's testimony is true[.]"). Discrepancies in defendant's evidence or contradictory evidence offered by the State do not bar the availability of this defense. *See State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) (noting in a self-defense case, "[w]here there is evidence that defendant acted in self-defense, the court must charge on this aspect, even though there is contradictory evidence by the State or discrepancies in defendant's evidence"). Therefore, it is not necessary that this Court find defendant's evidence persuasive on its merits—we need only find that, giving the defendant the benefit of every doubt and assuming the veracity of his testimony, a reasonable jury could do so.

The evidence here, viewed in the light most favorable to defendant and assuming the truth of his testimony, is sufficient to allow a reasonable juror to conclude that defendant was not predisposed to commit the crime and the criminal intent was placed in defendant's mind by Detective Heavner.[1] Defendant's conduct prior to responding to the Craigslist posting does not show predisposition to commit sexual activity with a minor. No evidence was introduced that defendant had ever engaged in sexual activity with an underage child. Rather, defendant's evidence showed that he had a history of interacting with adult men through Craigslist and he often invited those men to live with him. He further testified that not all of his interactions through Craigslist were sexual in nature, and that he did not have sexual relations with every man that lived with him. While defendant did acknowledge "mutual fondling" with a sixteen-year-old when defendant was nineteen years old, such an encounter is not illegal in North Carolina. *See* N.C.G.S. § 14-27.30 (2019) ("A defendant is guilty of a Class B1 felony if the defendant engages in a sexual act with another person who is 15 years of age or younger and the defendant is at least 12 years old and at least six years older than the person[.]") Defendant's evidence, which we must view in the light most favorable to him, indicates nothing more than consensual sexual activity with same-sex partners legally capable of consent. We cannot conclude

1. Here, it is uncontested whether Detective Heavner performed an act of persuasion, trickery, or fraud. Detective Heavner's conduct constituted an act of trickery because he testified that he had been working on an undercover operation on Craigslist for approximately 18 months and would "pretend to be either a 14-year-old girl, 14-year-old boy, or 15-year-old boy."

that such evidence demonstrates a predisposition to engaging in sexual activity with a child.

Defendant testified that he believed Detective Heavner to be eighteen years old when they began communicating because Craigslist required age verification prior to allowing posts in the Casual Encounters forum. Therefore, none of the communications made by defendant prior to Detective Heavner revealing his age can show predisposition to commit the crime charged. Once defendant became aware of Detective Heavner's age, he repeatedly stated that they would have to wait until Detective Heavner could give legal consent before the two could engage in sexual intercourse. After defendant refused to have sex with Detective Heavner due to his age, Heavner repeatedly shifted the conversation back towards the topic of sexual activity. Defendant's testimony indicates that he relented to Detective Heavner's requests only after he threatened to meet someone else with whom to engage in sexual activity if defendant was unwilling to participate. Defendant testified that he was concerned that Detective Heavner would meet with someone else who could hurt or kill him. Taking defendant's testimony as true, defendant presented evidence which a reasonable juror could find credible to demonstrate that he did not have a willingness or predisposition to engage in sexual activity with a minor, but had a desire to protect Detective Heavner from potential danger.

II. Inconsistent Theories

[2] Having determined that defendant presented sufficient evidence to warrant an entrapment instruction, we turn now to whether defendant's claim that he was entrapped is prohibitively inconsistent with defendant's other assertions. Generally, "[w]here a defendant claims he has not done an act, he also cannot claim that the government induced him to do that act." *State v. Neville*, 302 N.C. 623, 626, 276 S.E.2d 373, 374 (1981). Thus, a defendant cannot simultaneously deny committing the criminal *act* and also raise the defense of entrapment. The defense of entrapment is available, however, if "the State's own evidence raises an inference of entrapment" or if "the defendant denies the intent required for the commission of the offense." *Id.* at 626, 276 S.E.2d at 374.

This Court's holding in *Neville* is instructive here. In *Neville*, the defendant was charged with possession with intent to sell a controlled substance after he sold drugs to an undercover SBI agent. *Id.* at 625, 276 S.E.2d at 374–5. The defendant testified at trial, denying the act of possessing drugs or giving the undercover agent any drugs. *Id.* Defendant testified that he and another individual, an informant working with the

undercover agent, had conspired to trick the undercover agent into believing that defendant had purchased LSD with funds provided by the undercover agent when in fact the informant already possessed the LSD. *Id.* On appeal, the defendant argued that he was entitled to an entrapment instruction because, although he denied actually possessing the LSD, he did not deny participating in the scheme that gave the appearance of his having sold drugs to the informant. *Id.* at 625, 276 S.E.2d at 374. This Court held that the defendant's denial of having possessed or sold the controlled substance precluded the entrapment instruction. *Id.* at 626, 276 S.E.2d at 374. However, the Court went on to distinguish between a denial of the criminal act—the *actus reus*—and the denial of the criminal intent—the *mens rea*. We reasoned that the defense of entrapment remains available despite the defendant's denial of the culpable *mens rea* because "the defense of entrapment itself is an assertion that it was the will of the government, and not of the defendant, which spawned the commission of the offense." *Id.* at 626, 276 S.E.2d at 375.

Here, the delineation between the criminal act and the criminal intent is less clear. Defendant was charged and convicted of soliciting a minor by computer to commit an unlawful sex act, which provides:

> A person is guilty of solicitation of a child by a computer if the person is 16 years of age or older and the person knowingly, with the intent to commit an unlawful sex act, entices, advises, coerces, orders, or commands, by means of a computer or any other device capable of electronic data storage or transmission, a child who is less than 16 years of age and at least five years younger than the defendant, or a person the defendant believes to be a child who is less than 16 years of age and who the defendant believes to be at least five years younger than the defendant, to meet with the defendant or any other person for the purpose of committing an unlawful sex act.

N.C.G.S. § 14-202.3. This offense includes multiple elements relating to a defendant's state of mind. Defendant denied that he intended to commit an unlawful sexual act; that he had knowledge Detective Heavner was under sixteen years old; and that his purpose in meeting Detective Heavner was to commit an unlawful sex act. Each of these assertions relates to defendant's state of mind or criminal intent.

Unlike in *Neville*, in which the defendant denied the *actus reus* of the criminal activity, defendant here denies only his criminal intent—the *mens rea*. He did not deny that he communicated with Detective

Heavner online or that he drove to meet with Heavner but only that his intentions in doing so were criminal. Consistent with *Neville*, we hold that defendant's arguments at trial were consistent with the defense of entrapment and should not bar the availability of the defense.

III. Prejudice

[3] Under N.C.G.S. § 15A-1443(a) (2019), a criminal defendant is prejudiced by non-constitutional errors when "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]" As previously discussed, defendant presented substantial evidence that might allow a reasonable juror to find that it was Detective Heavner, rather than defendant, who repeatedly demanded that defendant agree to participate in sexual activity.

The jury's questions to the trial court further support a finding of prejudice. The jury returned with a question about defendant's intent, asking the trial court to define intent and whether it mattered if defendant intended to wait to have sex until the victim was of legal age. This question shows that at least part of the jury's deliberation focused on whether defendant had the requisite criminal intent, and the central inquiry for entrapment in this case is whether the criminal intent was originated by defendant or law enforcement. An entrapment instruction would have allowed the jury to determine whether that criminal intent originated in the mind of defendant or Detective Heavner. This question, combined with defendant's testimony, shows there is a reasonable *possibility* that a different result would have been reached had the jury been instructed on entrapment. We therefore conclude that the trial court's failure to instruct the jury on entrapment was prejudicial and defendant is entitled to a new trial.

REVERSED AND REMANDED.

Justice NEWBY dissenting.

The crucial event in this case is the moment defendant learned his prospective sexual partner was underage. Once he learned that fact, he did not end his pursuit. Instead, he continued his undertaking to the point of driving to pick up his young victim. His actions demonstrate his predisposition to pursue such an illegal sexual encounter. Defendant nonetheless claims that he was entrapped by law enforcement. The majority takes defendant at his word and blinds itself to the mountain of uncontested evidence that shows that defendant was predisposed

to commit the offense. The majority thus removes from our case law the requirement that a defendant must present sufficient credible evidence of entrapment. This case presents two issues: (1) whether defendant admitted that he committed all the elements of the offense, as he must admit if he wants to assert an entrapment defense; and (2) whether defendant presented sufficient credible evidence that he was not predisposed to solicit sex with someone under sixteen years of age. Defendant has done neither. He is therefore not entitled to a jury instruction on the defense of entrapment. I respectfully dissent.

Tragically, some adults use the internet to identify potential child victims and illegally entice them into engaging in sexual encounters. To address this societal problem, Detective Brent Heavner of the Lincolnton Police Department posed as a boy named "Kelly"[1] as part of an undercover operation and posted the following advertisement, titled "boy needing a man – m4m," in Craigslist's "Casual Encounters" section:

> OK never did this so here it goes. I am wanting to experience a man, never have tried it but want to. I have been with a girl and now wanna try a man. I am posting here because I want a complete stranger so no one will find out about this. I would like an older man that is not shy and knows what to do cause I will be probably a little nervous. I would prefer a pic and a number so we can not use email. I will be picky so be patient. BUT would like to do this soon, u would have to come to me. [W]ould like to try anything I am a white male open to anyone[.]

Defendant responded to the advertisement the next day describing himself, including his genitalia, and stating that he was "looking for a boy to treat very special."[2] He admits he was looking for a sexual encounter. Defendant soon gave Kelly his phone number, and the two began communicating by text message. Defendant reiterated to Kelly that he was looking for "a boy to take care of and spoil." He also asked Kelly for a picture and for Kelly's "stats." Defendant told Kelly he would buy him all sorts of things and that, in exchange, Kelly would "make [defendant] happy." As the conversation continued, defendant informed Kelly that he had hosted multiple live-in partners in the past and that he was tired

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1. Detective Heavner is most often referred to in this opinion as "Kelly," the name of the child alias.

2. Defendant identified himself as a forty-four-year-old male. It was later determined that he was fifty-one years of age.

of his current partner. After Kelly sent a photo, defendant complimented Kelly's appearance multiple times and spoke of his ability to have sex frequently.

Kelly soon informed defendant that he was under sixteen years of age. Defendant nevertheless continued the conversation. He first told Kelly that Kelly could live with him, but that they could not have sex until Kelly "was old enough." Defendant continued to ask for another picture of Kelly but also expressed his concern that he did not want to go to jail. Specifically, defendant explained that he did not want to end up like his son, who was imprisoned for three years after attempting a liaison with someone he thought was "a girl," but was actually a law enforcement officer posing as a girl online.

Kelly continued to steer the conversation to sexual themes, and defendant continued responding. Kelly explained that he had only had sex with "[two] girls" and that he wanted defendant to be the first man with whom he had sex. Defendant responded "[o]k. Well we can fix that. We will go slow." They then agreed that they would meet the following day. As Kelly continued to talk about having sex with defendant, defendant explained that he did not "want to talk about that stuff [by text message]."

Nevertheless, later in the conversation defendant became more explicit about his willingness to have sex with Kelly. When Kelly suggested that it might be a mistake for him to meet with defendant if they could not "be sexual," defendant responded "I said we could." After Kelly sought clarification, defendant told him "[w]ell like I said [I] don't want to talk through text. But will talk to you in person about it." Finally, Kelly issued an ultimatum, asking defendant for a direct answer as to whether they could have sex, and stating that he "may have to find someone else first" if they could not. To this, defendant simply responded "[y]es." Kelly then specifically asked if they could "have oral sex and anal" the next day. Again, defendant responded "[y]es."

Throughout the rest of their conversation, defendant resisted further discussions about sex over text message. But he moved forward with the plan to pick up Kelly the next day, all the while giving Kelly compliments like "[y]ou['re] the prettiest boy I ever saw" and "[y]ou['re] just what I have been looking for." The next day, defendant drove to pick up Kelly at a location Kelly selected and was arrested at the scene.

Defendant was tried for solicitation by computer of a person believed to be under the age of sixteen for the purpose of committing an unlawful sex act and appearing at a meeting location. *See* N.C.G.S.

14-202.3(a), (c)(2) (2019). The trial court denied defendant's request for a jury instruction on the defense of entrapment, and defendant was convicted and sentenced to ten to twenty-one months imprisonment. The Court of Appeals upheld the trial court's decision not to give a jury instruction on the defense of entrapment.

To assert the defense of entrapment, a defendant must first admit that he committed all the acts that are elements of the charged offense. As this Court said in *State v. Neville*, "it is inconsistent for [a] defendant to assert on the one hand that he did not do certain acts and then to insist that the government induced him to do the very acts which he disavows doing." 302 N.C. 623, 625, 276 S.E.2d 373, 375 (1981). The Court in *Neville* went on to clarify that a defendant may still assert the defense of entrapment if he "denies the *intent* required for the commission of the offense." *Id.* at 626, 276 S.E.2d at 375 (emphasis added). The Court explained that "the entrapment defense is not inconsistent with the defense of lack of mental state since the defense of entrapment itself is an assertion that it was the will of the government, and not of the defendant, which spawned the commission of the offense." *Id.* This limited exception of intent thus does not apply to all underlying facts about what was going on in a defendant's mind at the time the offense was committed. Instead, it only applies to the intent required to commit the acts of the charged offense.

Defendant in this case cannot assert the defense of entrapment because he has not admitted to all the elements of the charged offense. Defendant was charged with soliciting sex with a child by computer and appearing at a meeting location. To be found guilty of this offense, a defendant must, among other things, solicit sex with someone the defendant believes to be under sixteen years of age using a computer, with the intent to commit an unlawful sexual act, and appear at a meeting location.[3] The jury was therefore instructed that to find defendant guilty, it had to find beyond a reasonable doubt (1) that defendant "was [sixteen] years of age or older"; (2) that defendant "enticed and/or

3. Subsection 14-202.3(a) provides that "[a] person is guilty of solicitation of a child by a computer if the person is 16 years of age or older and the person knowingly, with the intent to commit an unlawful sex act, entices, advises, coerces, orders, or commands, by means of a computer or any other device capable of electronic data storage or transmission, a child who is less than 16 years of age and at least five years younger than the defendant, or *a person the defendant believes to be a child who is less than 16 years of age* and who the defendant believes to be at least five years younger than the defendant, to meet with the defendant or any other person for the purpose of committing an unlawful sex act." (Emphasis added). The accused is guilty of a Class G felony if, in addition to those things, he also appears at a meeting location. N.C.G.S. § 14-202.3(c)(2).

advised by means of [an electronic device] a person [defendant] believes to be . . . less than [sixteen] years old and at least five years younger than [defendant], to meet with the defendant for the purpose of committing an unlawful sex act"; (3) that defendant "acted knowingly with the intent to commit an unlawful sex act"; and (4) that defendant "actually appeared at the meeting location." The jury returned a guilty verdict.[4]

As the majority emphasizes, defendant still maintains that he did not know Kelly was under the age of sixteen. But belief that the intended victim is under the age of sixteen is an element of the offense charged against defendant. Thus, under North Carolina law, defendant cannot consistently claim both that he did not know that Kelly was under the age of sixteen and that the government induced him to solicit sex with someone defendant knew was underage.

The majority wrongly decides that defendant's knowledge of Kelly's age amounts to a denial of intent, which *Neville* allows to be asserted alongside the defense of entrapment. Knowledge of the victim's age is not, however, the sort of mental state to which *Neville* was referring. *Neville* explains that only *intent* to commit the necessary acts for the offense falls into this category. 302 N.C. at 626, 276 S.E.2d at 375 (referring to instances in which "the defendant denies the *intent* required for the commission of the offense" (emphasis added)). A defendant may only contest this type of mental state alongside an entrapment defense because, as the *Neville* Court explained, to claim entrapment is essentially to claim "that it was the *will* of the government, and not of the defendant, which spawned the commission of the offense." *Id.* (emphasis added).

In other words, in this case, defendant could only deny one of the four parts of the jury instruction and still maintain the defense of entrapment—the requirement that he "acted knowingly *with the intent* to commit an unlawful sex act." (Emphasis added.) He can deny he intended to have sex. But he cannot deny that he was at least sixteen years of age, *that he enticed someone to meet who he knew was under sixteen years of age*, or that he appeared at a meeting location. Because defendant denies knowledge of Kelly's age, he cannot assert the defense of entrapment.

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4. The majority focuses on certain pieces of evidence that, if viewed in isolation, might suggest that defendant had no intent to engage in sexual conduct with Kelly. However, defendant made that precise argument to the jury, and the jury rejected it. The jury found that defendant had the requisite intent. Thus, this Court may not now reconsider whether defendant had such intent; it may only consider whether that intent was purely implanted by law enforcement, or whether defendant was predisposed to possess it.

If, instead, a defendant admits to the elements of the charged offense, "[t]he defense of entrapment is available when there are acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime and when the origin of the criminal intent lies with the law enforcement agencies." *State v. Hageman*, 307 N.C. 1, 28, 296 S.E.2d 433, 449 (1982). A defendant is not entitled to a jury instruction on the defense of entrapment simply by showing that law enforcement engaged in deceptive behavior. *Id.* A defendant must also show "that the trickery, fraud or deception was '*practiced upon one who entertained no prior criminal intent*.' " *Id.* (quoting *State v. Stanley*, 288 N.C. 19, 28, 215 S.E.2d 589, 595 (1975)). Thus, as this Court has explained, if a defendant was "predisposed" to commit the criminal conduct, the defense of entrapment is not available to him. *State v. Luster*, 306 N.C. 566, 579, 295 S.E.2d 421, 428 (1982). "[M]erely providing the *opportunity* for one predisposed to criminal conduct does not constitute entrapment." *Id.* (emphasis added).

Moreover, our precedent shows that a defendant is not entitled to a jury instruction on the defense of entrapment even if the opportunity law enforcement presents to commit a crime is a particularly enticing option. In *Luster*, law enforcement set up an entire business front and offered people money for stolen goods. 306 N.C. at 568, 295 S.E.2d at 422. The defendant was charged after he sold multiple stolen vehicles to undercover law enforcement officers. *Id.* at 569, 295 S.E.2d at 423. The defendant later claimed he was entrapped, testifying that he had not been in any criminal trouble other than an unrelated misdemeanor six or seven years before and that he did not know the vehicles were stolen. *Id.* at 570, 579, 295 S.E.2d at 424, 428. Nevertheless, this Court went on to hold that he was not entitled to an entrapment instruction. *Id.* at 579, 295 S.E.2d at 428. The Court explained that the key inquiry is whether the defendant was predisposed to the criminal activity, not merely whether law enforcement created a seemingly convenient opportunity for the defendant to commit the criminal activity. *Id.* The Court thus did not consider the defendant's evidence of entrapment to be sufficient because other evidence plainly contradicted it—the defendant bragged to law enforcement about dealing in stolen vehicles, and he claimed he had inside contacts at a car dealership. *Id.* at 575, 295 S.E.2d at 426. This was so even though the defendant claimed he was paid $400 by law enforcement officers to bring them more stolen vehicles. *Id.* at 581, 295 S.E.2d at 429. In the Court's words, the "evidence overwhelmingly refute[d] [the] defendant's contention [that he was induced by law enforcement to commit the offense]." *Id.*

Luster therefore reveals that defendant here must show more than the fact that law enforcement's actions helped persuade him to commit the offense. He must provide sufficient evidence that he was not predisposed to intend to engage in sexual conduct with Kelly.

Luster thus also illuminates the proper standard of review. When a defendant raises the defense of entrapment, the trial court looks at all the evidence in the light most favorable to the defendant. *Id.* at 572, 295 S.E.2d at 425. But the court should not ignore concrete contradictory evidence. The defendant has the burden of showing that "credible" and "sufficient" evidence supports all the elements of entrapment. *Id.* at 571–72, 295 S.E.2d at 424–25.

The record here does not support defendant's claim of entrapment. The evidence in this case instead shows that law enforcement merely provided the apparent opportunity for defendant to commit criminal acts he was predisposed to commit. Defendant admitted that he had sexual intentions when he began communicating with Kelly. It is not a crime to seek sexual relations online. However, the telling point is what defendant did after he learned of Kelly's age. The evidence shows defendant maintained the intent to pursue a sexual encounter even after he learned that Kelly was underage. If defendant was not predisposed, he would have terminated the conversation.

Once Kelly responded to defendant and eventually revealed that he was fifteen years of age, initially defendant expressed that the two of them would have to wait until Kelly was older to have sex. Nevertheless, defendant did not end the conversation there. Instead, he continued to respond to Kelly even when Kelly repeatedly turned the conversation to sexual themes. Multiple times when Kelly brought up the possibility of the two of them having sex, defendant simply said that he did not want to talk about it over text message. The reasonable explanation of defendant's reluctance to discuss specifics over text message is that defendant wanted to avoid posting additional evidence of his criminal intent. Indeed, that explanation is further supported by defendant's statements expressing that he did not want to end up like his son, who was imprisoned for a similar offense.

In any event, defendant was unable to consistently conceal his intent; after Kelly said that it "might be a mistake" for him to meet with defendant if they could not have sex, defendant replied "I said we could." And when Kelly then responded that he thought defendant said they "could [only have sex] when [Kelly was] old enough," defendant reiterated that he did not want to "talk through text" *but would talk to Kelly in person about it.*

Defendant soon demonstrated his intent even more explicitly, after Kelly stated that he may have to "find someone else" if defendant would not promise to have sex with him. Kelly told defendant that he would meet him "[o]nly if [they could] have oral sex and anal [sex the next day]," and told defendant to "just give [him] a yes or no and [he would] shut up about it." Defendant simply replied "[y]es." The reasonable understanding of defendant's text conversation with Kelly is that defendant began with, and throughout the conversation maintained, the intent to engage in sexual conduct with Kelly.

Defendant's limited evidence to the contrary is too weak to show that he was not predisposed to seek sexual conduct with the underage Kelly. In other words, defendant has not met his burden of showing sufficient credible evidence that he had no criminal predisposition. Defendant claims that he only agreed to have sex with Kelly because he was afraid that, if he did not, Kelly would seek to meet with someone else and potentially be harmed. His alleged fear presumably was in part the result of Kelly's statements that his aunt did not want to care for him and that he would search elsewhere if defendant did not agree to have sex.

But this evidence does not show that defendant had no predisposition to seek sex with Kelly. More likely, the evidence reveals the *strength* of defendant's predisposition. First, as noted above, defendant engaged with Kelly's sex-themed dialogue after learning Kelly's age and before Kelly's final threat to look elsewhere (additionally, defendant's denial of knowledge of Kelly's age is conclusively undermined by the evidence; he would not have initially expressed that the two of them would have to wait to have sex, or that he was concerned about going to jail, unless he knew that Kelly was underage). Second, if the only encouragement required for defendant to explicitly agree to have sex the following day was Kelly's threat to look for someone else, defendant already had a predisposition, if not an outright intent, to have sex. Seeking sex with a minor to "protect" the minor from some other harm (such as sex with someone else) is not a defense. Even if the thought of Kelly going elsewhere solidified defendant's intent to have sex, it did not create that intent.

The other evidence the majority recites does not amount to sufficient credible evidence of entrapment either. The majority notes that defendant has not been known to engage in illegal sexual conduct with a minor in the past and that defendant expected to interact only with adults on Craigslist because of that website's age restrictions.

First, the fact that defendant has not been known to engage in the same illegal conduct as the offense charged is not significant evidence that defendant had no predisposition to commit the offense. An individual's history is weak evidence of how that person might act in any given new situation. That principle holds true in this case too—the fact that defendant had not been known to seek illegal sex with a minor before does not mean he was not predisposed to do so with someone like Kelly, who was, in defendant's words "the prettiest boy [he] ever saw" and "just what [he had] been looking for."

Second, it may be true that defendant originally expected to interact with only of-age individuals when he first accessed Craigslist, but that too is, at best, weak evidence that he had no criminal predisposition.[5] Defendant admitted he had sexual intentions when he responded to Kelly's Craigslist advertisement. And he continued pursuing a relationship with Kelly after Kelly revealed his young age and kept asking if the two of them could have sex.

Indeed, the majority's approach directly contradicts the approach this Court took in *Luster* when evaluating a defense of entrapment. In that case the Court held that the defendant's evidence of entrapment, which included his assertions that he had never committed a crime like the one charged and that law enforcement paid him $400 to encourage him to commit the crime again, was "overwhelmingly refute[d]" by other evidence. 306 N.C. at 581, 295 S.E.2d at 429. This case is like *Luster*. Though defendant has presented evidence that he has not had unlawful sex with an underage person, and though he claims he did not know Kelly's age, far greater evidence shows that he was well aware of Kelly's age and was predisposed to commit the offense.

At the core, then, the majority goes wrong because it misunderstands the standard of review. Certainly, we must reasonably view all the evidence in the light most favorable to defendant. *See*, *e.g.*, *id.* at 572, 295 S.E.2d at 425. Yet, that does not mean we disregard evidence that dramatically contradicts defendant's assertions. This Court should give defendant the benefit of the doubt when there *is* doubt. Ultimately, though, defendant has the burden of demonstrating that the facts, considered *in their entirety*, present "credible" and "sufficient" evidence that defendant was not predisposed to commit the offense. *Id.* at 571–72, 295 S.E.2d at 424–25. The majority improperly grasps onto only those facts which could possibly support defendant's claim, and it ignores all the others. If

5. Predisposition, after all, is not the same as intent. A predisposition may remain latent and subconscious until an opportunity to act on it arises.

the majority considered the factual record properly, it would see that, if anything, substantial evidence shows that defendant intended to engage in sexual conduct with Kelly from the beginning to the end of their text conversation and that he was predisposed to commit the offense. The trial court thus properly denied defendant's request for a jury instruction on the defense of entrapment. The decision of the Court of Appeals should be affirmed.

I respectfully dissent.

Justice MORGAN joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
ANDREW DARRIN RAMSEUR

No. 388A10

Filed 5 June 2020

1. Constitutional Law—ex post facto analysis—Racial Justice Act—repeal—retroactive application

The legislature violated the constitutional prohibition against *ex post facto* laws by mandating that the repeal of the Racial Justice Act (RJA) be applied retroactively so as to void any pending RJA motions filed by a capital defendant. The RJA provided a new, substantive basis for challenging a death sentence intended to alleviate harm from racial discrimination in capital cases, and its repeal increased the severity of the measure of punishment connected to first-degree murder.

2. Constitutional Law—ex post facto analysis—Racial Justice Act (RJA)—amendments—motion pending under original RJA

Where defendant had a pending motion under the original Racial Justice Act (RJA), substantive amendments to the RJA consisting of evidentiary changes could not be applied to him because they violated the constitutional prohibition against *ex post facto* laws. However, an amendment granting trial judges discretion to determine whether to hold a hearing was a procedural change that did not implicate constitutional concerns.

3. Criminal Law—post-conviction relief—Racial Justice Act—evidentiary hearing—sufficiency of evidentiary forecast

The trial court erred by determining that defendant's Racial Justice Act claims lacked merit and could be denied on the pleadings without an evidentiary hearing, because defendant presented sufficient statistical and non-statistical evidence that race was a significant factor in the prosecutor's decision to seek the death sentence, in the use of peremptory challenges, and in the actual imposition of death sentences in defendant's murder trial. Defendant was entitled to not only an evidentiary hearing but also discovery pursuant to N.C.G.S. § 15A-1415(f).

Justice NEWBY dissenting.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order dated 3 June 2014 entered by Judge Joseph N. Crosswhite, Senior Resident Superior Court Judge, in Superior Court, Iredell County, dismissing defendant's motions for appropriate relief. Heard in the Supreme Court on 26 August 2019.

Glenn Gerding, Appellate Defender, by Daniel K. Shatz and Andrew DeSimone, Assistant Appellate Defenders, for defendant-appellant.

Joshua H. Stein, Attorney General, by Jonathan P. Babb and Danielle Marquis Elder, Special Deputy Attorneys General, for the State-appellee.

Cassandra Stubbs for ACLU Capital Punishment Project, Burton Craige for North Carolina Advocates for Justice, and James Coleman and Irv Joyner for North Carolina Conference of the NAACP, amici curiae.

EARLS, Justice.

Defendant, Andrew Darrin Ramseur, was convicted of two counts of first-degree murder and sentenced to death in 2010. After his trial, defendant filed a motion seeking relief pursuant to the newly enacted North Carolina Racial Justice Act on the basis that race was a significant factor in the decision to seek or impose the death penalty in his case. Before the trial court ruled on defendant's motion, the General Assembly amended the Racial Justice Act in 2012 and then, in 2013, repealed the Racial Justice Act in its entirety. The trial court determined

that this repeal rendered defendant's pending motion void and therefore dismissed defendant's Racial Justice Act claims. Here we are asked to decide the constitutionality of the retroactive application of the repeal of the Racial Justice Act. For the reasons stated herein, we hold that applying the repeal retroactively violates the constitutional prohibition on *ex post facto* laws, and therefore we reverse the trial court.

Background

On 31 December 2007, defendant was indicted for two counts of first-degree murder and one count of robbery with a dangerous weapon in connection with the 16 December 2007 murders of Jennifer Lee Vincek and Jeffrey Robert Peck. On the same day, the State filed a notice of its intent to seek the death penalty in defendant's case. Before trial, on 7 December 2009, defendant filed a "Motion for Change of Venue" based upon allegations of prejudice stemming from pre-trial publicity and racial tensions in Iredell County that were exacerbated by the fact that he was a black defendant accused of killing two white victims. In his motion, defendant alleged that the likelihood of a death sentence in Iredell County and the surrounding area was greater because of, *inter alia*, substantial pre-trial publicity and public comments including: the distribution to media outlets of surveillance footage of the crime, inflammatory media coverage of the case, and the prevalence of overtly racist comments and discussion on community internet blogs and websites. On a similar basis, defendant simultaneously filed a "Motion to Continue Trial to Investigate Claim Pursuant to the Racial Justice Act" to examine whether the decision to seek the death penalty was free from racial discrimination.

The North Carolina Racial Justice Act (the RJA, or the Original RJA) was ratified by the General Assembly on 6 August 2009 and provided that "[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1214 [hereinafter Original RJA] (codified at N.C.G.S. § 15A-2010 (2009)) (repealed 2013). The RJA implemented a hearing procedure authorizing a defendant to raise an RJA claim either at the Rule 24 pretrial conference or in postconviction proceedings. *Id.*, § 1, 2009 N.C. Sess. Laws at 1214–15. Upon the filing of an RJA claim, the RJA mandated that "[t]he court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties." *Id.*, § 1, N.C. Sess. Laws at 1214. With respect to the evidence required to establish racial discrimination, the RJA placed the burden of proof on the defendant and provided, in pertinent part:

> (a) A finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.
>
> (b) Evidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed may include statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both, that, irrespective of statutory factors, one or more of the following applies:
>
> (1) Death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race.
>
> (2) Death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race.
>
> (3) Race was a significant factor in decisions to exercise peremptory challenges during jury selection.

Id., § 1, 2009 N.C. Sess. Laws at 1214. When a defendant meets his evidentiary burden, and it is not successfully rebutted by the State, the RJA prescribes a remedy distinct to RJA claims:

> If the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed, the court shall order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole.

Id., § 1, 2009 N.C. Sess. Laws at 1214. The General Assembly provided that the RJA "applies retroactively" and that for defendants sentenced to death prior to the RJA's effective date, "motions under this act shall be filed within one year of the effective date of this act." *Id.*, § 2, 2009 N.C. Sess. Laws at 1215.

Following hearings on 14 and 18 December 2009, the trial court denied defendant's motion for change of venue and defendant's motion to continue for RJA-related discovery. Defendant's trial began during the 10 May 2010 criminal session of Superior Court, Iredell County. On 11 May 2010, defendant made an oral motion to modify the courtroom arrangement objecting to the fact that when the parties arrived for trial, the first four rows directly behind the defense table were cordoned off by yellow crime scene tape. After the trial court denied his oral motion, defendant filed a written motion the following day alleging that this quarantining of the area behind the defense table effectively segregated the courtroom by race and forced defendant's family to sit in the back of the courtroom behind the crime scene tape while others, including white members of the victims' families, were able to sit in the front of the courtroom behind the prosecution table. The trial court ordered that the crime scene tape be removed but required that three rows behind the defense table remain vacant.

During jury selection, defendant twice objected to the prosecutor's use of peremptory challenges to exclude black jurors pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). The trial court denied both of defendant's *Batson* challenges. Defendant also renewed his motions to change venue and to continue for RJA-related discovery, noting that all twelve jurors selected to hear the case were white, and that all black potential jurors had been excused. The trial court denied these motions. On 28 May 2010, the jury returned verdicts finding defendant guilty of all charges. On 7 June 2010, following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended defendant be sentenced to death for each murder conviction. On 8 June 2010, the trial court sentenced defendant to death for each murder charge and to 61 to 83 months imprisonment for robbery with a dangerous weapon. Defendant gave notice of appeal to this Court.

Following his trial, on 10 August 2010, defendant filed a post-conviction motion for appropriate relief (MAR) under the RJA in both the trial court and in this Court. On 7 September 2010, this Court entered an order dismissing without prejudice defendant's MAR filed in this Court and staying further proceedings in defendant's direct appeal "until after the trial court's hearing and determination of defendant's

Motion for Appropriate Relief Pursuant to the Racial Justice Act filed in Superior Court, Iredell County." *State v. Ramseur*, 364 N.C. 433, 702 S.E.2d 62 (2010).

On 21 June 2012, following a ruling in an RJA case in Cumberland County, *State v. Robinson*, No. 91 CRS 23143, Order Granting Motion for Appropriate Relief (Superior Court, Cumberland County, Apr. 20, 2012), *vacated by* 368 N.C. 596, 780 S.E.2d 151 (2015), and before the trial court ruled on defendant's pending RJA motion, the General Assembly passed a new law substantially amending the RJA (the Amended RJA). An Act to Amend Death Penalty Procedures, S.L. 2012-136, §§ 1–10, 2012 N.C. Sess. Laws 471 [hereinafter Amended RJA] (repealed 2013). Under the Amended RJA, the trial court was not automatically required to hold an evidentiary hearing upon the filing of an RJA claim. *Compare* Original RJA, § 1, 2009 N.C. Sess. Laws at 1214 ("The court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties."), *with* Amended RJA, § 3, 2012 N.C. Sess. Laws at 472 (enacting N.C.G.S. § 15A-2011(f)(2) (Supp. 2012)) ("If the court finds that the defendant's motion fails to state a sufficient claim under this Article, then the court shall dismiss the claim without an evidentiary hearing."), *and* Amended RJA, § 3, 2012 N.C. Sess. Laws at 472 (enacting N.C.G.S. § 15A-2011(f)(3) (Supp. 2012)) ("If the court finds that the defendant's motion states a sufficient claim under this Article, the court shall schedule a hearing on the claim and may prescribe a time prior to the hearing for each party to present a forecast of its proposed evidence."). Additionally, the Amended RJA added a waiver provision as a prerequisite to filing an RJA claim, providing that:

> It shall be a condition for the filing and consideration of a motion under this Article that the defendant knowingly and voluntarily waives any objection to the imposition of a sentence to life imprisonment without parole based upon any common law, statutory law, or the federal or State constitutions that would otherwise require that the defendant be eligible for parole.

Amended RJA, § 3, 2012 N.C. Sess. Laws at 471.

Moreover, the Amended RJA altered what is necessary to establish racial discrimination by, *inter alia*: limiting the geographic regions solely to the "county or prosecutorial district" (eliminating "judicial division" and "State"); defining the relevant time period as "the period from 10 years prior to the commission of the offense to the date that is two years after the imposition of the death sentence"; and mandating

that "[s]tatistical evidence alone is insufficient to establish that race was a significant factor under this Article." *Id.*, § 3, 2012 N.C. Sess. Laws at 472–73; *see also id.*, § 4, 2012 N.C. Sess. Laws at 473 (repealing N.C.G.S. § 15A-2012 (2009)). The Amended RJA also repealed N.C.G.S. § 15A-2011(b) (2009) (as set forth above) and provided instead, in relevant part:

> Evidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the county or prosecutorial district at the time the death sentence was sought or imposed may include statistical evidence derived from the county or prosecutorial district where the defendant was sentenced to death, or other evidence, that either (i) the race of the defendant was a significant factor or (ii) race was a significant factor in decisions to exercise peremptory challenges during jury selection.

Id., § 3, 2012 N.C. Sess. Laws at 472. The General Assembly provided that the Amended RJA applies retroactively to any motions filed or hearings commenced under the Original RJA and that a defendant who filed an MAR under the RJA "shall have 60 days from the effective date of this act to amend or otherwise modify the motion." *Id.*, § 6, 2012 N.C. Sess. Laws at 473.

On 31 August 2012, defendant filed an amendment to his MAR filed under the Original RJA, asserting that he was entitled to pursue claims under both the Original RJA and the Amended RJA. On 29 November 2012, the State filed a response to defendant's RJA motions and requested judgment on the pleadings.

On 13 June 2013, still prior to any ruling by the trial court on defendant's pending RJA and Amended RJA motions, the General Assembly repealed the RJA in its entirety (the RJA Repeal). Act of June 13, 2013, S.L. 2013-154, § 5.(a), 2013 N.C. Sess. Laws 368, 372 [hereinafter RJA Repeal]. The General Assembly provided that the RJA Repeal "is retroactive and applies to any" MAR filed pursuant to the RJA "prior to the effective date of this act," and that all such motions "are void." *Id.*, 5.(d), 2013 N.C. Sess. Laws at 372. In light of the RJA Repeal, the State filed a second response on 23 August 2013 requesting that defendant's RJA claims be dismissed on the basis of the repeal. Defendant filed a response asserting that retroactive application of the RJA Repeal would be unconstitutional and that ruling on the State's motion would be premature.

In an order entered on 3 June 2014, the trial court dismissed defendant's RJA and Amended RJA claims. Citing only the statute and with no further explanation, the trial court stated that the only exception to the retroactive application of the RJA Repeal is in cases in which a final order has been entered. Because the trial court had not entered any final order in defendant's case, the trial court ruled that the RJA Repeal rendered all of his RJA and Amended RJA claims void. In addition, the trial court made an alternative ruling summarily stating, without further elaboration or examination of the evidence or the parties' legal arguments, that "[i]n the alternative, this Court can determine that defendant's RJA and Amended RJA claims are without merit. An evidentiary hearing is not necessary to decide the issues raised in these claims, and these claims are all denied on the pleadings." The trial court also denied defendant's request for additional discovery.

On 9 April 2015, defendant filed a petition for writ of certiorari seeking review of the trial court's order and a "Motion to Maintain Stay of Direct Appeal." This Court allowed defendant's petition for writ of certiorari and his motion to maintain the stay of his direct appeal.

Standard of Review

At issue here is the constitutionality of the retroactive application of the RJA Repeal. "We review constitutional issues de novo." *State v. Whittington*, 367 N.C. 186, 190, 753 S.E.2d 320, 323 (2014) (citing *State v. Ortiz-Zape*, 367 N.C. 1, 10, 743 S.E.2d 156, 162 (2013), *cert. denied*, 572 U.S. 1134 (2014)).

Ex Post Facto Analysis of the RJA Repeal

[1] Defendant argues that the retroactive application of the RJA Repeal violates the prohibition against *ex post facto* laws under the United States and North Carolina Constitutions.[1] Following relevant precedents of this Court indistinguishable from the facts of this case, we hold that the RJA Repeal is an unconstitutional *ex post facto* law when applied retroactively.

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1. Defendant also challenges the constitutionality of the retroactive application of the RJA Repeal on other grounds, arguing that it: violates his rights under the Due Process and Law of the Land Clauses of the Federal and State Constitutions; violates the Constitutional prohibition against Bills of Attainder under the Federal Constitution; violates his right to equal protection of the law under the Federal and State Constitutions; violates the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Federal Constitution and Article I, Section 26 of the North Carolina Constitution; violates the guarantee of separation of powers under Article I, Section 6 and Article IV, Section 1 of the State Constitution; and deprives him of a vested right under the State Constitution. In addition to challenging the retroactive application of

As an initial matter, it is well established that "a statute is presumed to have prospective effect only and should not be construed to have a retroactive application unless such an intent is clearly expressed or arises by necessary implication from the terms of the legislation." *State v. Green*, 350 N.C. 400, 404, 514 S.E.2d 724, 727 (1999) (citing *In re Mitchell*, 285 N.C. 77, 203 S.E.2d 48 (1974)); *see also Gardner v. Gardner*, 300 N.C. 715, 718, 268 S.E.2d 468, 471 (1980) (explaining that "a statute is deemed 'retroactive' or 'retrospective' when its operative effect is to alter the legal consequences of conduct or transactions completed prior to its enactment"). Here, in light of the plain language of the RJA Repeal, *see* RJA Repeal, § 5.(d), 2013 N.C. Sess. Laws at 372 ("[T]his section is retroactive and applies to any motion for appropriate relief filed . . . prior to the effective date of this act. All motions filed . . . prior to the effective date of this act are void."), it is clear that the General Assembly intended for the RJA Repeal to have a retroactive application. Thus, the sole question is whether the retroactive application of the RJA Repeal violates the prohibition against *ex post facto* laws.

Both our state and federal constitutions prohibit the enactment of *ex post facto* laws. U.S. Const. art. I, § 10 ("No State shall . . . pass any Bill of Attainder, *ex post facto* Law, or Law impairing the obligation of contracts . . . ."); N.C. Const. art. I, § 16 ("Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no *ex post facto* law shall be enacted."); *see also State v. Wiley*, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002) (stating that "both the federal and state constitutional *ex post facto* provisions are evaluated under the same definition"). The purpose of this prohibition against *ex post facto* laws is to "restrict[ ] governmental power by restraining arbitrary and potentially vindictive legislation" and to "assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28–29 (1981) (citations omitted). Moreover, "[t]here is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell v. Texas*, 529 U.S. 513, 533 (2000).

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the RJA Repeal, defendants in the RJA cases before this Court also contend that the RJA Repeal was enacted with discriminatory intent and therefore is invalid under the Equal Protection Clauses of the Federal and State Constitutions. In light of our holding, we do not reach these other arguments. This opinion does not address in any way the prospective application of either the Amended RJA or the RJA Repeal.

The United States Supreme Court has explained that there are four categories, first enumerated in 1798 by Justice Chase in *Calder v. Bull*, to which the prohibition against *ex post facto* laws applies:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Collins v. Youngblood, 497 U.S. 37, 42 (1990) (emphasis omitted) (quoting *Calder v. Bull*, 3 U.S. 386, 390–91 (1798) (opinion of Chase, J.)). The Court has also defined an *ex post facto* law as one "which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed." *Beazell v. Ohio*, 269 U.S. 167, 169 (1925); *see also Collins*, 497 U.S. at 50 (stating that the term "defense," as used in *Beazell*, "was linked to the prohibition on alterations in 'the legal definition of the offense' or 'the nature or amount of the punishment imposed for its commission' " (quoting *Beazell*, 269 U.S. at 169–70)).

At issue here is the third category of *ex post facto* laws, which includes not only those laws that increase the maximum sentence attached to a crime, but also any law that makes the range or measure of punishments more severe.[2] *See*, *e.g.*, *Peugh v. United States*, 569 U.S. 530, 539 (2013) (stating that the Court has "never accepted the proposition that a law must increase the maximum sentence for which a defendant is eligible in order to violate the *Ex Post Facto* Clause" (citing *Lindsey v. Washington*, 301 U.S. 397 (1937))); *California Dep't of Corr. v. Morales*, 514 U.S. 499, 505 (1995) ("[T]he Ex Post Facto Clause

2. Defendant also argues that the RJA Repeal implicates the fourth category of *ex post facto* laws identified in *Calder* because it changed the quantum and type of evidence sufficient to sustain his death sentences. It is not necessary to reach that additional question with regard to the RJA Repeal given our analysis below but the fourth category of *ex post facto* laws is relevant to the issue whether the Amended RJA can be applied retroactively.

forbids the States to enhance the *measure of punishment* by altering the substantive 'formula' used to calculate the applicable sentencing range." (emphasis added)). The Supreme Court has explained that "the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed" and that "an increase in the possible penalty is ex post facto, regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by the later statute is more severe than that of the earlier." *Lindsey*, 301 U.S. 397, 401 (citations omitted). Accordingly, in order to establish that a challenged law impermissibly falls into this third category, a defendant "need not carry the burden of showing that he would have been sentenced to a lesser term under the measure or range of punishments in place under the previous statutory scheme," but he must "establish[ ] that the measure of punishment itself has changed." *Morales*, 514 U.S. at 510 n.6 (1995) (citing *Lindsey*, 301 U.S. at 401).

Here the State first contends that defendant cannot establish any change in the measure of punishment attached to his criminal offenses because the Original RJA was enacted *after* defendant's crimes, and therefore the RJA Repeal had no effect on the punishment "applicable at the time of the crimes committed." The General Assembly, however, by giving the RJA retroactive effect, has declared that the RJA was the applicable law at the time the crimes were committed. The State does not challenge the constitutionality of the retroactive application of the RJA here, and we note that the *Ex Post Facto* Clause does not prohibit the retroactive application of laws that—like the RJA—are ameliorative in nature. *See Dobbert v. Florida*, 432 U.S. 282, 294 (1977) ("It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law."). This unusual situation is illustrated by this Court's decision in *State v. Keith*, 63 N.C. 140 (1869).

There the defendant, who had been indicted for murder stemming from events that occurred when he was serving as a Confederate officer in the Civil War, sought to avail himself of an "Amnesty Act" passed by the General Assembly following the conclusion of the war. *Id.* at 141–42. This Act provided a "full and complete amnesty, pardon and discharge" for all "homicides, felonies or misdemeanors" committed by officers and soldiers of both the United States and the Confederacy, provided that such acts were "done in the discharge of any duties imposed on him, purporting to be by a law . . . . or by virtue of any order emanating from any officer, commissioned or non-commissioned." Act of Dec. 22, 1866, ch. 3, § 1, 1866-67 N.C. Sess. Laws 6, 6–7. By the time the defendant was brought to trial, however, the Constitutional Convention of 1868

had enacted "An Ordinance in Relation to the Pardon of Officers and Soldiers of the Late Confederate Service" repealing the Amnesty Act. Act of March 13, 1868, ch. 29, § 1, 1868 N.C. Ordinances and Resolutions of the Constitutional Convention 69, 69; *see also Keith*, 63 N.C. at 144 (stating that the "Convention of 1868 . . . was assembled under the Reconstruction Acts of Congress to form a new Constitution for the State, and as representing the people of North Carolina, it had general legislative powers"). The trial court "refus[ed] to discharge the prisoner entirely upon the effect of the ordinance of 1868," and the defendant appealed. *Keith*, 63 N.C. at 143.

On appeal, the Court considered whether the ordinance of 1868 violated the prohibition against *ex post facto* laws. *Id.* at 143–45. The Court noted that the "effects of a pardon are well settled in law: as far as the State is concerned, they destroy and entirely efface the previous offence; it is as if it had never been committed." *Id.* at 143; *see also id.* at 144 ("Bishop says it is 'a remission of guilt,' not only of the punishment of guilt." (citing 1 Bishop Cr. L. § 749)). Accordingly, the Court concluded that the ordinance of 1868, which had the intended effect of "reviv[ing] the previous offences of the prisoner," "was substantially an *ex post facto* law" because "it made criminal what, before the ratification of the ordinance was not so."[3] *Id.* at 144–45.

Here, as in *Keith*, the legislature passed a law aiming to repeal a prior, ameliorative law that had retroactively changed the law applicable to crimes already committed. While the repeal in *Keith* involved the first *Calder* category, *see Calder*, 3 U.S. at 390 ("1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action."), the RJA Repeal falls under the third category inasmuch as it alters only the punishment and not the underlying crime. However, the *Ex Post Facto* Clause's prohibition against retroactive legislation applies with equal force to each category. *See*, *e.g.*, *Collins*, 497 U.S. at 46 (stating that "the constitutional prohibition is addressed to laws, 'whatever their form,' which make innocent acts

3. The Court also concluded that the ordinance of 1868 unconstitutionally deprived the defendant of a vested right under the Law of the Land Clause of the North Carolina Constitution. *Keith*, 63 N.C. at 144–45. As noted above, defendant has also raised this issue in support of his position, but we decline to reach this argument and limit our analysis solely to the *Ex Post Facto* Clause. *See*, *e.g.*, *Weaver*, 450 U.S. at 30 n.13 ("When a court engages in *ex post facto* analysis, which is concerned solely with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred, it is irrelevant whether the statutory change touches any vested rights.").

criminal, alter the nature of the offense, or increase the punishment" and that "the prohibition which may not be evaded is the one defined by the *Calder* categories" (quoting *Beazell*, 269 U.S. at 170)). The General Assembly, having decided with the enactment of the RJA to "alter the legal consequences of conduct . . . completed prior to its enactment," *Gardner*, 300 N.C. at 718, and to extend a new form of relief from the maximum punishment for first degree murder, cannot now "revive" the former measure of punishment attached to crimes already committed and make more burdensome "what, before the ratification of" the RJA Repeal, was less severe.[4] *Keith*, 63 N.C. at 144–45.

Nonetheless, the State contends that *Keith* is inapposite due to the unique nature and greater breadth of the Amnesty Act in comparison to the RJA. Specifically, the State asserts that the conditional, "potential" nature of the relief provided by the RJA renders it distinguishable from the "firmly established" immunity afforded by the Amnesty Act, which the State describes as a "blanket pardon" or "blanket amnesty." The State notes that the Court in *Keith* compared the Amnesty Act to "a general pardon by parliament," which need not be formally pleaded and cannot be waived. *Id.* at 142. According to the State, "the Amnesty Act did not grant conditional relief, it gave a full immunity to all Confederate and Union soldiers for acts done during the Civil War," whereas the RJA is merely a procedure that does "not provide 'amnesty' from the death penalty."

Yet, this characterization of the Amnesty Act is inaccurate as the Amnesty Act limited its potential relief to acts committed in the "discharge of duties imposed" and required an indicted defendant to "show that he was an officer or private in either" the United States or the Confederacy, at which point "it shall be presumed that he acted under orders, until the contrary shall be made to appear." Act of Dec. 22, 1866, ch. 3, §§ 1-2, 1866-67 N.C. Sess. Laws 6, 6-7; *see also Keith*, 63 N.C. at 143 ("All that could have been necessary for the prisoner to do in this case, was to show that he was an officer or soldier, and that the felony was committed in the discharge of his duties as such, and we are clearly of opinion that this was sufficiently alleged; indeed no objection of that kind

4. While generally "both the federal and state constitutional *ex post facto* provisions are evaluated under the same definition," *Wiley*, 355 N.C. at 625, 565 S.E.2d at 45, the United States Supreme Court, unlike this Court, has not addressed a situation in which the legislature passes a law aiming to repeal a prior, ameliorative law that had retroactively changed the law applicable to crimes already committed. To the extent that the Supreme Court would reach a different conclusion when analyzing the United States Constitution, we are bound under our State Constitution's *Ex Post Facto* Clause by *Keith*.

was taken below, and it may, therefore, admit of some doubt, whether it could properly be taken here."). The State concedes that, following a defendant's successful showing that he was an officer or private in the United States or the Confederacy, the resulting presumption was not irrebuttable. For instance, in *State v. Cook*, in addressing whether the defendant, a Confederate soldier, was entitled to relief under the Amnesty Act, the Court stated:

> The defendant craves the benefit of that act. But it cannot be allowed him; because it does not appear that his offence had any connection with his war duties. . . . It was not the intention of the act to exempt persons from punishment merely because they were soldiers; but only for acts which they committed *as* soldiers.

State v. Cook, 61 N.C. 535, 536–37 (1868). Thus, even with the Amnesty Act's more broadly aimed remedy, its conditional relief contemplated that certain procedural and evidentiary steps may be required before a defendant did or did not receive the benefit of the Act.

More importantly, however, in stressing the nature of the Amnesty Act as a "blanket pardon" or "general pardon by parliament," the State does not identify anything about this characterization, apart from placing the Amnesty Act's repeal in a different *Calder* category, that changes the retroactivity analysis for the purposes of the *Ex Post Facto* Clause. Indeed, in explaining why a parliamentary pardon need not be formally pleaded, as opposed to a traditional executive pardon, the Court in *Keith* stated that "[t]he reason why a Court must, *ex officio*, take notice of a pardon by act of parliament, is that it is considered as a public law; having the same effect on the case as if the general law punishing the offence had been repealed or amended." *Keith*, 63 N.C. at 143 (quoting *United States v. Wilson*, 32 U.S. 150, 163 (1833)). While there are procedural differences in line with the different aims of the respective laws, both the Amnesty Act and the RJA are public laws "repeal[ing] or amend[ing]" the substantive laws of crime and punishment with respect to crimes already committed.

Finally, in that latter respect, the State asserts that the Original RJA did not substantively change the rules of law governing the death penalty, and therefore the RJA Repeal did not impermissibly increase the measure of punishment. The State points out that a retroactive law is not rendered impermissibly *ex post facto* if it results in a mere disadvantage to a defendant, and that "changes in the procedures by which a criminal case is adjudicated, as opposed to the changes in the

substantive law of crimes," do not constitute *ex post facto* laws. *Collins*, 497 U.S. at 45; *see also Miller v. Florida*, 482 U.S. 423, 433 (1987) ("[E]ven if a law operates to the defendant's detriment, the *ex post facto* prohibition does not restrict 'legislative control of remedies and modes of procedure which do not affect matters of substance.' Hence, no *ex post facto* violation occurs if the change in the law is merely procedural and does 'not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt.' " (citations omitted)); *Morales*, 514 U.S. at 506 n.3 (stating that "the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable"). According to the State, the RJA, which did not change the statutory aggravating circumstances that made defendant eligible for the death penalty, is merely "a procedural opportunity to raise a statutory claim for relief based on alleged racial discrimination," the repeal of which left in place existing mechanisms "to allege racial discrimination in his case by other means." This contention by the State misapprehends the nature and scope of the RJA.

With the enactment of the RJA, the General Assembly declared that "[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." Original RJA, § 1, 2009 N.C. Sess. Laws at 1214. In order to effectuate this mandate the General Assembly expansively defined what is necessary to establish "that race was the basis of the decision to seek or impose a death sentence." *Id.*, § 1, 2009 N.C. Sess. Laws at 1214. Specifically, such "[a] finding . . . may be established if the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed."[5] *Id.*, § 1, 2009 N.C. Sess. Laws at 1214. Moreover, in setting forth the type of evidence sufficient to support such a finding, the General Assembly provided that a defendant could rely on, *inter alia*, "statistical evidence" tending to show that either "[d]eath sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race," "[d]eath sentences were sought or imposed significantly more frequently as punishment

5. Notably, while the RJA does not define the temporal parameters of the phrase "at the time the death sentence was sought or imposed," even in the substantially curtailed Amended RJA this timeframe was limited to the "period from 10 years prior to the commission of the offense to the date that is two years after the imposition of the death sentence." Amended RJA, § 3, 2012 N.C. Sess. Laws at 471.

for capital offenses against persons of one race than as punishment of capital offenses against persons of another race," or "[r]ace was a significant factor in decisions to exercise peremptory challenges during jury selection." *Id.*, § 1, 2009 N.C. Sess. Laws at 1214.[6] This allowance of the use of statistical evidence must be seen as deliberate, as it comes after the Supreme Court's decision in *McCleskey v. Kemp*.

There the Court rejected the petitioner's reliance solely on statistical evidence of racial disparities in capital sentencing in the context of claims brought under the Fourteenth and Eighth Amendments and indicated that the role of such evidence in litigating racial discrimination should be prescribed by state legislatures. *McCleskey v. Kemp*, 481 U.S. 279, 314–319 (1987) ("McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes."). Following that suggestion, the General Assembly designed the RJA as a new substantive claim permitting the use of statistical evidence of racial disparities across different geographic areas and periods of time to establish racial discrimination in capital sentencing. Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. Rev. 2031, 2111–12 (2010) ("In enacting the [RJA], North Carolina determined that its inquiry would not be limited by *McCleskey v. Kemp* and its rejection of statistical evidence when examining constitutional claims[.] . . . The legislature understood that it was creating a different system of proof than that prescribed by *McCleskey*, explicitly accepting the Court's invitation to legislatures to act because they, rather than the United States Supreme Court, are best able to judge how statistical studies should be used in regulating the death penalty." (footnotes omitted)).[7] The General

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6. The RJA also eliminated any procedural bars that would apply to traditional motions for appropriate relief. Original RJA, § 1, 2009 N.C. Sess. Laws at 1215 ("Notwithstanding any other provision or time limitation contained in Article 89 of Chapter 15A of the General Statutes, a defendant may seek relief from the defendant's death sentence upon the ground that racial considerations played a significant part in the decision to seek or impose a death sentence by filing a motion seeking relief."); *see also* Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. Rev. 2031, 2114 n.370 (2010) ("[T]his provision allows defendants to litigate racial discrimination regarding peremptory strikes even if objections were not made at trial or might be subject to other procedural bars in Article 89.").

7. As one state senator stated during the floor debate on the day the Senate first approved the RJA bill:

> Without this legislation, previous efforts to raise this issue would have been to no avail because of the *McCleskey* decision. . . . The *McCleskey*

Assembly's decision to afford capital defendants this new, substantive basis for challenging the validity of a death sentence reflects ongoing concerns with the difficulty of proving covert racial discrimination,[8] particularly in capital sentencing decisions, *see Turner v. Murray*, 476 U.S. 28, 35 (1986) ("Because of the range of discretion entrusted to a

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> decision . . . said that while statistics may show race discrimination, it doesn't rise to the level of being a constitutional violation of the equal protection clause and specifically directed that if states wanted to provide this additional protection and making it a means by which somebody could prove race discrimination, then they could do it. And that's what we're doing here today.

Sen. Doug Berger, Senate Floor Debate on Racial Justice Act (May 14, 2009), https://archive.org/details/NorthCarolinaSenateAudioRecordings20090514/North_Carolina_Senate_Audio_Recordings_20090514.mp3; *see also* Rep. Deborah Ross, House Floor Debate on Racial Justice Act (July 14, 2009), https://www.ncleg.gov/DocumentSites/HouseDocuments/2009-2010%20Session/Audio%20Archives/2009/07-14-2009.mp3 ("In a 5-4 decision, the U.S. Supreme Court said that you don't have the constitutional right to present statistical evidence, though at the end of his opinion for the five judge majority, Justice Lewis Powell said 'these arguments are best presented to legislative bodies.' "); Barbara O' Brien & Catherine M. Grosso, *Confronting Race: How A Confluence of Social Movements Convinced North Carolina to Go Where the McCleskey Court Wouldn't*, 2011 Mich. St. L. Rev. 463 (2011).

8. *See* Sen. Doug Berger, Senate Floor Debate on Racial Justice Act (May 14, 2009), https://archive.org/details/NorthCarolinaSenateAudioRecordings20090514/North_Carolina_Senate_Audio_Recordings_20090514.mp3 ("I want to step back and explain, very quickly, where this idea of using statistics to prove race discrimination comes from and why it's needed. Race discrimination is very hard to prove. Rarely, particularly in today's time, do people just outright say, 'I am doing this because of the color of your skin.' Imagine if our Civil Rights Act that was passed in '64 said that the only way that you could prove race discrimination was by that sort of evidence—an admission by the person engaging in racial discrimination. We would have had very little change in our society and culture in terms of the hiring practices."); Rep. Rick Glazier, House Floor Debate on Racial Justice Act (July 14, 2009), https://www.ncleg.gov/DocumentSites/HouseDocuments/2009-2010%20Session/Audio%20Archives/2009/07-14-2009.mp3 ("Well, I'm here to tell you, at least from my perspective, that unstated motivation is extraordinarily difficult to ferret out. That is why we use statistical evidence in employment discrimination cases, and if we are using statistical evidence in employment cases to protect property rights, I fail to see why credible statistical evidence ought not be a legislative reason or a legislative priority to allow people to use to fight for their life."); *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977) ("Since the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation. . . . In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved." (alteration in original) (quoting *United States v. Ironworkers Local* 86, 443 F.2d 544, 551 (9th Cir. 1971))); *see generally Miller-El v. Dretke*, 545 U.S. 231, 238 (2005) (stating that while the "Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection violates the Equal Protection Clause," "[t]he rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences" (citations omitted)).

jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected."), as well as the fact that the harm from racial discrimination in criminal cases is not limited to an individual defendant, but rather it undermines the integrity of our judicial system and extends to society as a whole, *Batson*, 476 U.S. at 87 ("Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. . . . The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.").

As this Court, in addressing Article I, Section 26 of our State Constitution ("No person shall be excluded from jury service on account of sex, race, color, religion, or national origin."), stated:

> Article I, section 26 does more than protect individuals from unequal treatment. The people of North Carolina have declared in this provision that they will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice. They have recognized that the judicial system of a democratic society must operate evenhandedly if it is to command the respect and support of those subject to its jurisdiction. It must also be *perceived* to operate evenhandedly. Racial discrimination in the selection of grand and petit jurors deprives both an aggrieved defendant and other members of his race of the perception that he has received equal treatment at the bar of justice. Such discrimination thereby undermines the judicial process.
>
> Exclusion of a racial group from jury service, moreover, entangles the courts in a web of prejudice and stigmatization. To single out blacks and deny them the opportunity to participate as jurors in the administration of justice—even though they are fully qualified—is to put the courts' imprimatur on attitudes that historically have prevented blacks from enjoying equal protection of the law.

State v. Cofield, 320 N.C. 297, 302–03, 357 S.E.2d 622, 625–26 (1987) (footnote omitted) (citation omitted); *see also Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019) ("By taking steps to eradicate racial discrimination from the jury selection process, *Batson* sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system."); *Davis v. Ayala*, 135

S. Ct. 2187, 2208 (2015) ("Discrimination in the jury selection process undermines our criminal justice system and poisons public confidence in the evenhanded administration of justice."); *Miller-El v. Dretke*, 545 U.S. 231, 237–38 (2005) ("Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish state-sponsored group stereotypes rooted in, and reflective of, historical prejudice[.] Nor is the harm confined to minorities. When the government's choice of jurors is tainted with racial bias, that 'overt wrong casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial. That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality, and undermines public confidence in adjudication[.]" (cleaned up)); *Ballard v. United States*, 329 U.S. 187, 195 (1946) ("The systematic and intentional exclusion of women, like the exclusion of a racial group, or an economic or social class, deprives the jury system of the broad base it was designed by Congress to have in our democratic society. . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." (citations omitted)).

As part of its decision to make this new type of claim available to capital defendants, the General Assembly specified that the RJA would provide a unique and limited remedy:

> If the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed, the court shall order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole.

Original RJA, § 1, 2009 N.C. Sess. Laws at 1214. Thus, in its efforts to combat racial discrimination in our state's application of the death penalty—the most serious and irrevocable of our state's criminal punishments—the General Assembly designed a new substantive claim that fundamentally changes what is necessary to prove racial discrimination and, in return, provides a limited grant of relief that is

otherwise unavailable.[9] *See generally Turner*, 476 U.S. at 35 ("The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence."); *California v. Ramos*, 463 U.S. 992, 998–99 (1983) ("The Court . . . has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.").

Accordingly, the RJA Repeal is not a mere procedural alteration that may "produce[ ] some ambiguous sort of 'disadvantage.' " *Morales*, 514 U.S. at 506 n.3. Rather, by retroactively eliminating the RJA's substantive claim and its accompanying relief, the RJA Repeal increases the severity of the standard of punishment attached to the crime of first-degree murder and deprives defendant of a defense to the "nature or amount of the punishment imposed for its commission." *Collins*, 497 U.S. at 50 (quoting *Beazell*, 269 U.S. at 169–70). As such, the retroactive application of the RJA Repeal to defendant violates the prohibition against *ex post facto* laws.

It is within the purview of the General Assembly to pass such ameliorative laws granting potential relief from crimes and punishment to defendants for crimes already committed, and, having done so, it cannot then withdraw that relief consistent with the *Ex Post Facto* Clause, which "restricts governmental power by restraining arbitrary and potentially vindictive legislation," *Weaver*, 450 U.S. at 28–29, and serves "a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life," *Carmell*, 529 U.S. at 533. This interest in restricting "arbitrary and potentially vindictive legislation" is particularly relevant here,[10] given that the Amended RJA and the RJA Repeal followed

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9. As part of its contention that the RJA and its repeal amount merely to procedural changes in the law, the State catalogues at length the existing legal doctrines and mechanisms for addressing racial discrimination in the criminal justice system. None of these protections, however, are as robust as the substantive guarantees provided by the RJA to these defendants. Indeed, the unique and otherwise unavailable protection afforded by the RJA was the reason for its enactment and, presumably, for its subsequent repeal.

10. Here the *Ex Post Facto* Clause's interest in providing notice and fair warning is lessened, as the measure of punishment to which the RJA repeal subjected defendant was the same pre-RJA measure of punishment of which he had notice at the time he committed his crimes. But this was equally true in *Keith*, where the ordinance of 1868 returned the law to that which existed at the time the defendant allegedly committed his crimes, at which time he would have been deemed to have had notice not only of the potential legal

closely on the heels of the four Cumberland County cases, in which the trial court concluded that the RJA evidentiary hearings uncovered significant evidence of widespread racial discrimination and disparities in our state's capital sentencing scheme and in which four convicted murderers had their sentences commuted to life imprisonment without parole by that court.

The dissent gives no weight to this fundamental fairness interest, which is apart from the concept of notice that is embodied in the constitutional prohibition on *ex post facto* laws. Instead, the dissent is premised on the narrow proposition that the only interest served by the *Ex Post Facto* Clause is to deter crime by providing "actual or constructive notice to the criminal before commission of the offense of the penalty for the transgression." (quoting *Garner v. Jones*, 529 U.S. 244, 253 (2000)). However, the U.S. Supreme Court has acknowledged repeatedly, and did again in *Garner*, that preventing arbitrary and potentially vindictive legislation is also a purpose of the *Ex Post Facto* Clause. *Weaver*, 450 U.S. at 28–29. In *Garner*, the Court observed that "[t]he danger that legislatures might disfavor certain persons after the fact is present even in the parole context, and the Court has stated that the *Ex Post Facto* Clause guards against such abuse." *Id.* at 253 (citing *Miller*, 482 U.S. at 429). The dissent reads the *ex post facto* prohibition too narrowly when concluding that it does not apply to the repeal of the RJA.

Our decision is further premised on the North Carolina Constitution, which this Court previously found to prohibit laws that seek to retroactively impose a greater penalty. Referring to the North Carolina Constitution, we explained:

> These great principles are inseparable from American government and follow the American flag. No political assemblage under American law, however it may be summoned, or by whatever name it may be called, can rightfully violate them, nor can any Court sitting on American soil sanction their violation. . . . The ordinance in question was substantially an *ex post facto* law; it made criminal what, before the ratification of the ordinance was

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consequences of participating in armed secession, but also of the consequences of homicides that transcended the acceptable norms of war. Indeed, following the defendant's alleged role in the "Shelton Laurel Massacre," including the summary execution of thirteen captives, three of them aged 13, 14, and 17, the Confederate Governor of North Carolina, Zebulon B. Vance, had vowed to "follow him [Keith] to the gates of hell, or hang him." Phillip Shaw Paludan, *Victims: A True Story of the Civil War* 107 (1981).

> not so; and it took away from the prisoner his vested right to immunity.

State v. Keith, 63 N.C. at 144–45. Here the right is to challenge a sentence of death on the grounds that it was obtained in a proceeding tainted by racial discrimination, and, if successful, to receive a sentence of life without parole. Repealing the RJA took away that right, and the repeal cannot be applied retroactively consistent with this state's constitutional prohibition on *ex post facto* laws.

We note that our analysis under the *Ex Post Facto* Clauses of the U.S. and North Carolina Constitutions addresses a question purely of law and applies equally to anyone in the same circumstances as defendant—specifically, any capital defendant who filed a motion for appropriate relief under the Original RJA. With respect to this class of individuals, the RJA Repeal cannot, consistent with constitutional guarantees, retroactively apply to void their pending RJA claims. We express no opinion on the ultimate merits of defendant's RJA claims, nor those of any other capital defendant, and leave those issues to the trial courts to adjudicate in the first instance.

Ex Post Facto Analysis of the Amended RJA

[2] Our holding that the RJA Repeal cannot constitutionally apply retroactively to pending RJA motions necessitates examining whether the trial court erred in its alternative ruling that defendant's RJA and Amended RJA claims were without merit and its denial of his claims without a hearing. In order to address that issue, however, we must first determine whether the retroactive application of the Amended RJA violates the prohibition against *ex post facto* laws under the United States and North Carolina Constitutions. Specifically, defendant argues that "[t]o the extent that the amended RJA took away categories of claims that were available under the original RJA or impaired Mr. Ramseur's ability to assert any of his RJA claims, the retroactive application of the amended RJA was unconstitutional for all the same reasons the retroactive application of the repeal bill was unconstitutional."

Like the RJA Repeal, the Amended RJA contains a provision explicitly stating that it should apply retroactively:

> Unless otherwise excepted, this act, including the hearing procedure, evidentiary burden, and the description of evidence that is relevant to a finding that race was a significant factor in seeking or imposing a death sentence, also applies to any postconviction motions for appropriate

> relief that were filed pursuant to S.L. 2009-464. This act also applies to any hearing that commenced prior to the effective date of this act.

Amended RJA, § 6, 2012 N.C. Sess. Laws at 473. The Amended RJA further specifies that a person who filed an RJA MAR would have sixty days from the effective date of the act, 2 July 2012, to file an amended motion. *Id.*, § 6, 2012 N.C. Sess. Laws at 473. On its face, the law was intended to apply retroactively and, because it allowed defendants to amend their RJA MARs, there was an acknowledgement that the new evidentiary standards created a substantive change in the law.

The changes implemented by the Amended RJA, as summarized above, are both procedural and substantive. Moreover, the law also contained a severability clause which states: "If any provision of this act or its application is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or application, and to this end the provisions of this act are severable." *Id.*, § 9, 2012 N.C. Sess. Laws at 473. Therefore, it is necessary to evaluate each of the changes worked by the Amended RJA to determine whether they fall into any of the categories of an *ex post facto* law when applied retroactively.

The Amended RJA made several significant changes to the Racial Justice Act. First, the Amended RJA altered the hearing procedure by providing that the trial court was no longer automatically required to hold an evidentiary hearing upon the filing of an RJA claim. Rather, under the Amended RJA, the trial court need only schedule a hearing if it "finds that the defendant's motion states a sufficient claim." *Id.*, § 3, 2012 N.C. Sess. Laws at 473.

Second, the Amended RJA substantially altered the evidentiary requirements for an RJA claim. Specifically, as previously discussed, the Amended RJA altered what is necessary to establish racial discrimination by, *inter alia*: limiting the geographic regions solely to the "county or prosecutorial district" (eliminating "judicial division" and "State"); defining the relevant time period as "the period from 10 years prior to the commission of the offense to the date that is two years after the imposition of the death sentence"; and mandating that "[s]tatistical evidence alone is insufficient to establish that race was a significant factor under this Article." *Id.*, § 3, 2012 N.C. Sess. Laws at 472–73 (amending N.C.G.S. § 15A-2011(c) (2009) and enacting N.C.G.S. § 15A-2011(d)–(g) (Supp. 2012)); *see also id.*, § 4, 2012 N.C. Sess. Laws at 473 (repealing

N.C.G.S. § 15A-2012 (2009)). The Amended RJA also repealed N.C.G.S. § 15A-2011(b) (2009)[11] and provided instead, in relevant part:

> Evidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the county or prosecutorial district at the time the death sentence was sought or imposed may include statistical evidence derived from the county or prosecutorial district where the defendant was sentenced to death, or other evidence, that either (i) the race of the defendant was a significant factor or (ii) race was a significant factor in decisions to exercise peremptory challenges during jury selection.

Id., § 3, 2012 N.C. Sess. Laws at 472.

Third, the Amended RJA added a waiver provision providing that in order to assert an RJA claim, a defendant must knowingly and voluntarily waive any objection to the imposition of a sentence to life imprisonment without parole. *Id.*, § 3, 2012 N.C. Sess. Laws at 471.

We conclude that the first alteration, amending the hearing procedure, is merely a procedural change which, while possibly working some disadvantage to a defendant, does not implicate the prohibition against *ex post facto* laws. *See Morales*, 514 U.S. at 506 n.3. The second alterations

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11. N.C.G.S. § 15A-2011(b) (2009) of the Original RJA provided:

> Evidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed may include statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both, that, irrespective of statutory factors, one or more of the following applies:
>
> (1) Death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race.
>
> (2) Death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race.
>
> (3) Race was a significant factor in decisions to exercise peremptory challenges during jury selection.

Original RJA, § 1, 2009 N.C. Sess. Laws at 1214.

amending the evidentiary requirements, however, do constitute changes in the criminal law that cannot be applied retroactively. These revisions fall within the fourth *Calder* category by altering the "legal rules of evidence" and require a different, more stringent, standard of proof in showing the racially discriminatory imposition of the death penalty. *See Collins*, 497 U.S. at 41 (quoting *Calder*, 3 U.S. at 390 (opinion of Chase, J.)).

The third alteration, adding the waiver provision, may only be an *ex post facto* law as applied to certain defendants. It creates a condition precedent to asserting an RJA defense which, like the RJA Repeal, changes the punishment for any defendant who, prior to the amendment, could assert an RJA defense *and* further object to a sentence of life imprisonment without parole. It is difficult to determine whether any defendant actually could fall into such a category. In any event, any potential issue with the retroactive application of this waiver provision is unrelated to the trial court's alternative ruling in this case that defendant's RJA claims were without merit. Accordingly, because we need not decide this issue in order to determine whether the trial court erred in its alternative ruling, we decline to address here whether the retroactive application of the Amended RJA's waiver provision violates the prohibition against *ex post facto* laws.

In summary, the evidentiary changes effected by the Amended RJA are an *ex post facto* law that cannot constitutionally be applied to defendants who had RJA MARs pending at the time of the Amended RJA. For those defendants, the original RJA evidentiary rules apply. However, the portion of the Amended RJA which grants a trial judge discretion over whether to hold a hearing is a procedural change which can be applied retroactively to pending RJA MARs.

Defendant's RJA Claims

[3] Next, defendant argues that the trial court erred in its alternative rulings that defendant's RJA and Amended RJA MARs were without merit and could be denied without conducting an evidentiary hearing and that defendant was not entitled to discovery with respect to his RJA claims. The evidentiary forecast produced by defendant with his motions requires reversal of the trial courts' alternative rulings.

Defendant's extensive RJA and Amended RJA MARs "state with particularity how the evidence supports a claim that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed." Original RJA, § 1, 2009 N.C. Sess. Laws at 1214. Specifically, in accordance with

the requirements of the RJA, defendant forecast, *inter alia*, statistical and non-statistical evidence that, taken in the light most favorable to defendant, tends to show that race was a significant factor in the prosecution's use of peremptory challenges, in the prosecution's decision to proceed capitally, and in the actual imposition of death sentences, at the time defendant's sentence was imposed with respect to all four of the relevant geographic areas.

Defendant also alleged how in his case: he was brought to trial against a backdrop of prejudicial pre-trial publicity and racial tensions in the community; the four rows in the courtroom directly behind the defense table were cordoned off with yellow crime scene tape at the start of the trial, suggesting that defendant was a dangerous criminal and forcing his black family members to sit in the back of the courtroom; six individuals who were later selected to serve as jurors were in the courtroom and observed the police tape before it was taken down two days later; all twelve jurors selected to hear the case were white and the trial court allowed the prosecution to exercise peremptory challenges to excuse all potential black jurors not removed for cause; the trial court denied defendant's request for a change of venue; and the trial court did not allow defense counsel to question potential jurors about issues of racial bias nor question the jury about whether they heard media accounts of the case or racially biased comments in the community. Both defendant's RJA MAR and Amended RJA MAR plainly "state[ ] a sufficient claim" under the RJA, as required by the Amended RJA in order to trigger an evidentiary hearing. Thus, the trial court at a minimum erred as a threshold matter in not conducting an evidentiary hearing on defendant's claims. Additionally, defendant's MARs established that he was entitled to discovery under N.C.G.S. § 15A-1415(f) (2019), which provides for complete discovery of state files in capital post-conviction cases. Accordingly, the trial court erred in denying defendant's MARs on the pleadings.

Conclusion

In sum, we conclude that the RJA Repeal and the provisions of the Amended RJA altering the evidentiary requirements for an RJA claim constitute impermissible *ex post facto* laws and cannot be constitutionally applied retroactively to defendant's pending RJA claims. Further, we conclude that the trial court erred in ruling that defendant's claims lacked merit and denying his RJA claims without a hearing. We remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice NEWBY dissenting.

The narrow issue presented by this case is whether, as applied to defendant, legislation repealing the Racial Justice Act of 2009 (the RJA) constitutes an ex post facto law. The majority incorrectly answers this question in the affirmative. The repeal plainly does not qualify as an ex post facto law because it left defendant in precisely the same legal situation as the one he occupied on 16 December 2007, when, according to a jury, he murdered Jennifer Lee Vincek and Jeffrey Robert Peck. The repeal did not subject defendant to more serious or additional charges for past conduct, nor did it increase the punishment in effect on 16 December 2007. When properly viewed, the General Assembly intended the RJA to provide a procedural mechanism by which a defendant could collaterally attack a capital sentence. The General Assembly did not intend to make a substantive change to the death penalty sentencing law. As such, the General Assembly had the constitutional authority subsequently to amend it and repeal it.

Viewed more broadly, though, this case is about who should determine the future of the death penalty in North Carolina. Under our system of government, the obvious answer to this question is that ultimate authority over death penalty policy resides with the people of this State. It is for them to determine whether North Carolina will have a death penalty and to establish, within constitutional bounds, the circumstances in which that penalty may be imposed. Ordinarily, the people exercise this power indirectly through their elected representatives in the General Assembly.

The majority's interpretation of the RJA cedes significant portions of the people's authority over death penalty policy to the courts. In the majority's view, the law empowers a judge to vacate a defendant's death sentence based on statistical evidence that race had been a significant factor in *other* death penalty proceedings in the county, prosecutorial district, judicial division, *or the State as a whole*, regardless of the role of race in defendant's own capital proceeding. This interpretation could be viewed as granting policymaking power to the judiciary to effectively eliminate the death penalty in North Carolina. By invalidating the RJA repeal, the majority does more than merely misapply the constitutional prohibition on ex post facto laws. It also intrudes upon the right of the people, in the form of their elected representatives, to decide death penalty policy for this State. I respectfully dissent.

Defendant was indicted on 31 December 2007 for the 16 December 2007 murders of Jennifer Lee Vincek and Jeffrey Robert Peck during the

commission of an armed robbery of the Broad Street Shell Station in Iredell County for approximately $90 to $100. At the time of the armed robbery, Ms. Vincek worked at the station as a cashier on third shift, and Mr. Peck was a customer. At trial the jury watched a security video from the store capturing the robbery and murders as they occurred. The video showed the first shot striking Ms. Vincek while she lay on the ground behind the counter in a fetal position. When Ms. Vincek attempted to crawl away on her hands and knees, she was shot again. The video showed that her hair "popped off her back." The medical examiner testified that Ms. Vincek suffered from three gunshot wounds with the first two being fairly superficial, but the third and fatal gunshot striking her in the back. Mr. Peck died from a single gunshot wound to the chest.

A jury convicted defendant of two counts of first-degree murder and one count of armed robbery. In recommending the death penalty, the jury unanimously found the following statutory aggravating factors under N.C.G.S. § 15A-2000: "(1) the capital felony was committed while the defendant was in engaged in the commission of robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5); (2) the capital felony was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); (3) the capital felony was part of a course of conduct in which the defendant engaged and which included the commission of the defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11)." Consistent with the jury's recommendation, the trial court entered a death sentence for each murder and a sentence of 61 to 83 months to run consecutively for the armed robbery.

Defendant committed his crimes in 2007, before the original RJA was enacted in 2009. After the original RJA was enacted, defendant delayed his direct appeal, *State v. Ramseur*, 364 N.C. 433, 702 S.E.2d 62 (2010), and instead filed a post-conviction motion for appropriate relief (MAR) under the RJA. Defendant filed his first MAR seeking relief under the original RJA and later filed a MAR under the amended RJA. Before the trial court rendered judgment, the legislature repealed the statutory provisions upon which defendant's motions relied. Act of June 13, 2013, S.L. 2013-154, § 5.(a), 2013 N.C. Sess. Laws 368, 372 [hereinafter the RJA Repeal]. In an order dated 3 June 2014, the trial court recognized that Session Law 2013-154 repealed the RJA and that the statutory language of the repeal retroactively applied to void defendant's RJA motions.

The trial court concluded that, because no final order had been entered on defendant's RJA claims or his claims under the amended RJA, those claims were controlled by the repeal of the RJA, and his RJA

claims were voided as a matter of law. The trial court concluded that the unconditional repeal of the RJA warranted the dismissal of defendant's RJA claims, citing *Spooners Creek Land Corp. v. Styron*, 276 N.C. 494, 496, 172 S.E.2d 54, 55 (1970), and *In re Incorporation of Indian Hills*, 280 N.C. 659, 663, 186 S.E.2d 909, 911 (1972).

I.

Our system of government is founded on a principle that all people are created equal, possessing equal rights. *The Declaration of Independence* para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."); *see also* N.C. Const. art. I, § 1 ("We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."). It is imperative that all are treated equally under the law in every case that comes before the courts, particularly in criminal trials when life and liberty are at stake. Our state and federal constitutions recognize this sacred responsibility and safeguard against invidious discrimination. *See*, *e.g.*, N.C. Const. art. I, § 19 (protecting life, liberty, and due process rights with the Law of the Land Clause); *id.* art. I, § 26 (prohibiting exclusion "from jury service on account of sex, race, color, religion, or national origin"); *see also Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986) (holding that the Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on account of their race and setting the factual threshold for a defendant to establish a prima facie case of purposeful discrimination in jury selection); *Oyler v. Boles*, 368 U.S. 448, 82 S. Ct. 501 (1962) (A defendant cannot be selected for prosecution based on race, religion, or other arbitrary classification.); *State v. Bowman*, 349 N.C. 459, 509 S.E.2d 428 (1998) (discussing the constitutional right to a jury of one's peers and the protections to prevent arbitrary exclusion from the jury pool); *State v. Mitchell*, 321 N.C. 650, 653, 365 S.E.2d 554, 556 (1988) (A jury foreman cannot be excluded based on race.).

"[O]ne of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder." *Gregg v. Georgia*, 428 U.S. 153, 226, 96 S. Ct. 2909, 2949 (1976) (White, J., concurring). The imposition of the death penalty "has a long history of acceptance both in the United States and in England." *Id.* at 176, 96 S. Ct. at 2927 (Stewart, J., opinion

expressing the judgment of the Court). In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726 (1972), the Supreme Court of the United States held that imposing and carrying out the death penalty under statutes that provide no basis for determining whether the penalty was proportionate to the crime would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. "The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person." *Gregg*, 428 U.S. at 179–80, 96 S. Ct. at 2928 (footnote omitted); *see McCleskey v. Kemp*, 481 U.S. 279, 302, 107 S. Ct. 1756, 1772–73 (1987) (reviewing and approving of new statutory measures to, *inter alia*, ensure individualized assessments for each defendant's punishment based on definite statutory criteria such as the finding and weighing of aggravating factors by a jury). The weightiest of criminal punishment certainly requires the necessary legal justification. *Gregg*, 428 U.S. at 189, 96 S. Ct. at 2932. The Court in *Gregg* reviewed the legislative backlash from *Furman* and concluded:

> Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

Id. at 186–87, 96 S. Ct. at 2931 (recognizing that ascertaining contemporary standards for purposes of the death penalty's viability under the Eighth Amendment is best left to legislative judgment).

While there is " 'no perfect procedure,' " "our consistent rule has been that constitutional guarantees are met when 'the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible.' " *McCleskey*, 481 U.S. at 313, 107 S. Ct. at 1778 (alteration in original) (first quoting *Zant v. Stephens*, 462 U.S. 862, 884, 103 S. Ct. 2733, 2746 (1983); then quoting *Singer v. United States*, 380 U.S. 24, 35, 85 S. Ct. 783, 790 (1965)). These safeguards are "designed to minimize racial bias in the process" and protect "the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants," on a case-by-case basis. *Id.* at 313, 107 S. Ct. at 1778. Case-by-case assessments by the courts have

narrowed the scope of when the death penalty can be imposed based on the specific facts and the particular defendant.[1]

II.

In North Carolina, a prosecutor has discretion to pursue the death penalty given the facts of a case, *see* N.C.G.S. § 15A-2004 (2019), but that prosecutorial discretion is limited by the constitutional principles of equal protection and due process, *see Oyler*, 368 U.S. at 456, 82 S. Ct. at 506. Recognizing the gravity of capital punishment, the General Assembly has created by statute other significant safeguards for capitally tried defendants. A defendant in a capital trial is given two attorneys. N.C.G.S. § 7A-450(b1) (2019). A capitally tried defendant may move to transfer venue to avoid local prejudice against him and secure a fair and impartial trial. *Id.* § 15A-958. Following a guilty verdict of first-degree murder, in a separate trial phase the jury considers aggravating factors from a comprehensive list, *id.* § 15A-2000(e), presented pursuant to the Rules of Evidence, *see id.* § 8C-1 (2019), and weighs any mitigating factors in defendant's favor, *id.* § 15A-2000(f). The jury must find the existence of an aggravating factor beyond a reasonable doubt and that that factor outweighs any mitigating factors before recommending the death penalty. *Id.* § 15A-2000(c)(1)–(3). This Court automatically reviews cases where a death sentence is imposed, *id.* § 7A-27(a)(1), to ensure the defendant received a fair trial, free from prejudicial error, and that the death sentence was proportional to the facts of the defendant's individual case.

In addition to a direct appeal, the General Assembly by statute provides an avenue for post-conviction review and lists grounds for post-conviction relief. *See* N.C.G.S. § 15A-1411 through N.C.G.S. § 15A-1422. A defendant may collaterally attack his conviction and sentence through a MAR filed with the trial court, *id.* § 15A-1420(b1)(1), or directly with this Court, N.C. R. App. P. 21(f) (2019). A capitally tried defendant may

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1. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005) (precluding the death penalty due to offender's age); *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002) (precluding the death penalty due to offender's mental retardation); *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595 (1986) (precluding the death penalty due to offender's mental insanity); *Batson*, 476 U.S. at 84, 106 S. Ct. at 1716 (curtailing improper consideration of the race of potential jurors); *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368 (1982) (requiring offender's intent to kill); *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954 (1978) (allowing offender's individualized mitigating circumstances); *Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861 (1977) (reviewing the proportionality of the crime to the penalty); *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978 (1976) (requiring an individualized assessment of the offender and circumstances with objective standards to guide the process for imposing a sentence of death).

file a MAR on the grounds listed in N.C.G.S. § 15A-1415(b). *See*, *e.g.*, N.C.G.S. § 15A-1415(b)(7) ("There has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required."); *id.* § 15A-1415(b)(8) (The sentence imposed was "unauthorized at the time imposed . . . or is otherwise invalid as a matter of law.").

Any trial court decision on a MAR is subject to appellate review. *See State v. Stubbs*, 368 N.C. 40, 42–43, 770 S.E.2d 74, 76 (2015); *see also District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69, 129 S. Ct. 2308, 2320 (2009) ("Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided."). The capitally tried defendant may raise issues of racial discrimination on direct appeal and through post-conviction MARs. *See* N.C.G.S. § 15A-2000(d)(2) (On appeal a death sentence may be overturned, *inter alia*, "upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.").

The RJA was signed into law on 11 August 2009. North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1214 [hereinafter original RJA] (codified at N.C.G.S. § 15A-2010 (2009)) (repealed 2013). This legislation, echoing our existing constitutional safeguards, provided that "[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." *Id.*, § 1, 2009 N.C. Sess. Laws at 1214.

Under the RJA, a defendant who had been sentenced to death had the opportunity to file a post-conviction MAR using statistical or other evidence. It provides in part:

> (a) A finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.

Id. It allowed relief if a defendant proved that death sentences in the specified geographic areas were sought more frequently upon persons of one race or upon persons when victims were of another race, or when race was a "significant factor" in peremptory challenges during jury selection. *Id.* If the court found that the defendant had met his burden

of proof then his death sentence was converted to a sentence of life without the possibility of parole. *Id.*

While the RJA became effective immediately and applied retroactively, *id.*, § 2, 2009 N.C. Sess. Laws at 1215, its retroactive application provided different relief and different filing requirements, depending on the status of a particular defendant's case. For those defendants who had previously been sentenced to death, the RJA required them to file a MAR within one year of the RJA's enactment. *Id.* The one-year requirement did not apply to those with pending cases. *See id.*, § 1, 2009 N.C. Sess. Laws at 1214. Though generally adhering to the requirements for filing MARs, the RJA also gave a specific mechanism in pending cases to those who claimed race was a significant factor in seeking the death penalty. *Id.* In those cases, defendants were allowed to raise their claims at the pretrial conferences. *Id.* If a defendant were successful in presenting the pretrial claim, then the State was prevented from seeking the death penalty in that case. *Id.*

In its original form, the RJA did not expressly address whether, in addition to producing statistical evidence that race had been a significant factor in other death penalty cases, a defendant had to show that race played a substantial role in the outcome of his own case. The majority interprets the RJA not to require such a showing. As explained in section V below, this erroneous interpretation of the RJA overlooks the RJA's stated purpose and raises serious separation-of-powers issues.

The General Assembly amended the RJA on 2 July 2012. An Act to Amend Death Penalty Procedures, S.L. 2012-136, §§ 1–10, 2012 N.C. Sess. Laws 471, 471 [hereinafter amended RJA]. The amending legislation made it clear that a defendant had to show particularized racial bias in his case to prevail:

> A finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the death penalty *in the defendant's case* "at the time the death sentence was sought or imposed."

Id., § 3, 2012 N.C. Sess. Laws at 471 (emphasis added). The amendment limited the relevant time frame for any statistical evidence presented by defining "at the time the death sentence was sought or imposed" "as the period from 10 years prior to the commission of the offense to the date that is two years after the imposition of the death sentence." *Id.* The amendment also limited the geographic area of relevant statistical evidence to the county or prosecutorial district and made other

procedural changes. *Id.* The trial court was authorized to dismiss claims it determined to be insufficient without a hearing. *Id.*, § 3, 2012 N.C. Sess. Laws at 471–72. The amendment applied retrospectively to any case that had not received a final order affirmed on appeal under the original RJA. *Id.*, § 8, 2012 N.C. Sess. Laws at 472. Though the amended statute provided no additional post-conviction statutory procedural remedies to defendants alleging discrimination, a defendant retained the same right to bring claims based on constitutional violations as he possessed before and during the tenure of the RJA.

On 19 June 2013, the RJA was repealed in its entirety. RJA Repeal, §§ 5.(a), 6, 2013 N.C. Sess. Laws at 372. The repeal legislation applies retroactively, though it exempts any judgments granting relief under the RJA that were affirmed on appeal and became final orders before the repeal legislation's effective date. *Id.*, § 5.(d), 2013 N.C. Sess. Laws at 372. Furthermore, the repeal legislation expressly acknowledges the continued existence of other procedural mechanisms by which capitally sentenced defendants may seek relief from death sentences on the ground that racial discrimination played a significant role in their convictions or sentences:

> Upon repeal of Article 101 of Chapter 15A of the General Statutes, a capital defendant retains all of the rights which the State and federal constitutions provide to ensure that the prosecutors who selected a jury and who sought a capital conviction did not do so on the basis of race, that the jury that hears his or her case is impartial, and that the trial was free from prejudicial error of any kind. These rights are protected through multiple avenues of appeal, including direct appeal to the North Carolina Supreme Court, and discretionary review to the United States Supreme Court; a postconviction right to file a motion for appropriate relief at the trial court level where claims of racial discrimination may be heard; and again at the federal level through a petition of habeas corpus.

Id., § 5.(b), 2013 N.C. Sess. Laws at 372. In short, in repealing the RJA, the General Assembly merely eliminated one procedural mechanism by which defendants sentenced to death could seek relief for alleged racial discrimination; it left intact other procedural mechanisms by which defendants could seek relief on the same basis.

On 18 December 2015, following the wholesale repeal of the RJA, this Court reviewed and ultimately vacated trial court orders dated

20 April 2012 and 13 December 2012 that had granted certain defendants relief under the RJA. *State v. Robinson*, 368 N.C. 596, 597, 780 S.E.2d 151, 152 (2015); *see also State v. Augustine*, *Golphin and Walters*, 368 N.C. 594, 780 S.E.2d 552 (2015). The cases were remanded to the trial court. *Robinson*, 368 N.C. at 597, 780 S.E.2d at 152; *Augustine*, 368 N.C. at 594, 780 S.E.2d at 552.[2]

In our orders, vacating the trial court's orders, we determined that the trial court should have allowed the State's motion to continue, citing section 15A-952(g)(2) that "requires a trial court ruling on a motion to continue in a criminal proceeding to consider whether a case is 'so unusual and so complex' that the movant needs more time to adequately prepare." *Robinson*, 368 N.C. at 596, 780 S.E.2d at 151 (quoting N.C.G.S. § 15A-952(g)(2) (2013)); *see id.* ("The breadth of respondent's study placed petitioner in the position of defending the peremptory challenges that the State of North Carolina had exercised in capital prosecutions over a twenty-year period. Petitioner had very limited time, however, between the delivery of respondent's study and the hearing date."). This Court "express[ed] no opinion on the merits of respondent's motion for appropriate relief," but vacated the trial court's order and remanded to the trial court to "address petitioner's constitutional and statutory challenges pertaining to the Act." *Id.* Thus, no defendant had received statutory relief under the original or amended RJA before its repeal because no trial court judgment granting relief had been affirmed upon appellate review; therefore, no one has an established or "vested" right in the RJA procedure.

There is no dispute that the General Assembly intended to repeal retroactively the RJA. The question presented is whether the repeal violated the constitutional prohibition against ex post facto laws. Generally, a law is considered ex post facto if it criminalizes conduct after it occurred or increases the penalty of a crime already committed. The majority claims the RJA is "[a] public law[ ] 'repeal[ing] or amend[ing]' the substantive laws of crime and punishment with respect to crimes already committed." (Third and fourth alterations in original.) However, neither the crime of first-degree murder nor its potential punishment has been altered by the RJA or its repeal. The General Assembly intended the RJA to provide a new procedure through which a capitally sentenced

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2. The majority's analysis relies, in part, on some of the substance of these vacated trial court orders. A vacated order is treated as if the order were never entered. *See Alford v. Shaw*, 327 N.C. 526, 544 n.6, 398 S.E.2d 445, 455 n.6 (1990) (defining "vacate" as " '[t]o annul; to set aside; to cancel or rescind. To render an act void; as, to vacate an entry of record, or a judgment' " (citing *Black's Law Dictionary* 1388 (rev. 5th ed. 1979))).

defendant could collaterally challenge a death sentence. Consequently, the General Assembly acted within the scope of its authority when it amended and later repealed the RJA. The General Assembly has the authority to pass legislation directed at pending litigation and has the authority to direct statutory post-conviction criminal procedures and remedies, including procedural measures that do not alter the substance of the underlying crime and its punishment.

III.

"The legislative power of the State shall be vested in the General Assembly." N.C. Const. art. II, § 1. As the agent of the people's sovereign power, *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895), the General Assembly has the presumptive power to act, *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989). "All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." *Preston*, 325 N.C. at 448–49, 385 S.E.2d at 478 (citations omitted). "We review constitutional questions de novo. In exercising de novo review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond reasonable doubt." *State ex. rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016) (citation omitted).[3]

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998)). "The best indicia of that intent are the language of the statute[,] . . . the spirit of the act[,] and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citation omitted).

As the policymaking branch, one legislature generally cannot bind a future legislature. *See Kornegay v. City of Goldsboro*, 180 N.C. 441, 451, 105 S.E. 187, 192 (1920). Thus, the General Assembly has the authority to enact new statutes, to amend or repeal current statutes, and to enact statutes directed at pending claims. "The Legislature may alter a provision of law at any time before the rights of parties are settled."

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3. The majority ignores this historic presumption of constitutionality of laws enacted by the legislature.

Blue Ridge Interurban R. Co. v. Oates, 164 N.C. 167, 171, 80 S.E. 398, 399 (1913). A mere expectation that a law or a favorable statutory provision will continue does not amount to a vested property right or prevent the General Assembly from revisiting its policy decisions. *Armstrong v. Armstrong*, 322 N.C. 396, 402, 368 S.E.2d 595, 598 (1988); *Pinkham v. Unborn Children of Jather Pinkham*, 227 N.C. 72, 79, 40 S.E.2d 690, 696 (1946). When statutes providing a particular remedy are unconditionally repealed, the remedy is gone, and "there can be no further proceedings under the remedy." *Spooners Creek Land Corp.*, 276 N.C. at 495–96, 172 S.E.2d at 55; *see also In re Incorporation of Indian Hills*, 280 N.C. at 663, 186 S.E.2d at 912.

Specifically, regarding criminal cases, "[r]emedies must always be under the control of the legislature," "and it may prescribe altogether different modes of procedure in its discretion" that do not "dispense with any of those substantial protections" that the law at the time provided the accused. *Thompson v. State of Missouri*, 171 U.S. 380, 386, 18 S. Ct. 922, 924 (1898); *see also In re Kivett*, 309 N.C. 635, 672, 309 S.E.2d 442, 464 (1983) ("Procedural changes of the law in criminal cases are not violations of the ex post facto doctrine." (citing *Dobbert v. State of Florida*, 432 U.S. 282, 97 S. Ct. 2290 (1977)). "There is no vested right in procedure and statutes affecting procedural matters may be given retroactive effect or applied to pending litigation." *State v. Morehead*, 46 N.C. App. 39, 43, 264 S.E.2d 400, 402 (1980) (citing *Spencer v. Motor Co.*, 236 N.C. 239, 72 S.E.2d 598 (1952)). Even if a certain criminal procedure implicates a constitutional right, it does not transform it into a substantive provision. *See id.* at 42–43, 264 S.E.2d at 402 (allowing an amendment to the North Carolina Speedy Trial Act to apply to the defendant's pending case because, "[a]t that time, defendant had no vested or substantial rights under the statute" even though the Sixth Amendment protects the right to a speedy trial). Modes of procedure do not operate substantive changes, "leav[ing] untouched the nature of the crime and the amount or degree of proof essential to conviction," *Hopt v. People of the Territory of Utah*, 110 U.S. 574, 590, 4 S. Ct. 202, 210 (1884); their alteration cannot constitute an ex post facto violation.

IV.

Since our earliest history, ex post facto laws have been prohibited. Ex post facto laws criminalize past actions or increase a punishment from what a defendant could have received at the time of the crime's commission. Recognizing that one of the purposes of criminalizing conduct is deterrence,

> [a] law made after the fact (ex post facto) could not logically have deterred the crime; to punish a person for an act not contrary to the law when committed was therefore unjust. More than individual injustice was involved; the whole social basis of republican government was jeopardized if the people did not know exactly what was prohibited.

John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 63 (2d ed. 2013). The first constitution of North Carolina adopted in 1776 provided "[t]hat retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no ex post facto law ought to be made." N.C. Const. of 1776, Declaration of Rights, § 24. Early in our nation's history, the Supreme Court of the United States discussed the idea of ex post facto laws in *Calder v. Bull*, 3 U.S. 386 (1798). Relying in part on the North Carolina Constitution's explicit prohibition on criminal ex post facto laws, the Supreme Court in *Calder* confined the definition of ex post facto laws to retrospective criminal laws that punish acts committed before they became crimes and laws that exact a more severe punishment than they would have incurred at the time they were committed. *The North Carolina State Constitution* 63–64.

As recently as 2010, "[t]his Court has articulated that 'both the federal and state constitutional ex post facto provisions are evaluated under the same definition.' " *State v. Whitaker*, 364 N.C. 404, 406, 700 S.E.2d 215, 217 (2010) (quoting *State v. Wiley*, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002), *cert. denied*, 537 U.S. 1117, 123 S. Ct. 882 (2003)). The term ex post facto generally should be limited to only those retroactive laws "that create, or aggravate, the crime; or [i]ncrease the punishment, or change the rules of evidence, for the purpose of conviction." *Calder*, 3 U.S. at 391 (opinion of Chase, J.). "[A]ny statute . . . which makes more burdensome the punishment for a crime, after its commission, . . . is prohibited as ex post facto," *Beazell v. Ohio*, 269 U.S. 167, 169–70, 46 S. Ct. 68, 68 (1925), because "legislatures may not retroactively . . . increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43, 110 S. Ct. 2715, 2719 (1990).

To be an ex post facto law, the legislative change must "alter[ ] the definition of criminal conduct or increase[ ] the penalty by which a crime is punishable." *California Dep't of Correction v. Morales*, 514 U.S. 499, 506 n.3, 115 S. Ct. 1597, 1602 n.3 (1995). "[M]ore burdensome" does not equate to "some ambiguous sort of 'disadvantage' " for defendant, *id.*;

it relates to the quantum of punishment assigned to the offense at the time of its commission, *see*, *e.g.*, *State v. Bowditch*, 364 N.C. 335, 341, 700 S.E.2d 1, 5 (2010) ("An ex post facto law may be defined . . . as a law that 'allows imposition of a different or greater punishment than was permitted when the crime was committed.' " (quoting *State v. Barnes*, 345 N.C. 184, 233–34, 481 S.E.2d 44, 71 (1997))); *State v. Vance*, 328 N.C. 613, 620, 403 S.E.2d 495, 500 (1991), *cert. denied*, 522 U.S. 876, 118 S. Ct. 196 (1997); *State v. Wright*, 302 N.C. 122, 128, 273 S.E.2d 699, 704 (1981); *State v. Detter*, 298 N.C. 604, 637, 260 S.E.2d 567, 589–90 (1979).

Even if a legislative amendment creates a disadvantage, that circumstance "is an insufficient basis to establish an ex post facto violation unless the change in the law actually increased the quantum of punishment for the offense," *Hameen v. State of Delaware*, 212 F.3d 226, 245–46 (3rd Cir. 2000), in other words, the range of punishment assigned to the offense at the time of its commission.

The central concern of the Ex Post Facto Clause is "the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Lynce v. Mathis*, 519 U.S. 433, 441, 117 S. Ct. 891, 895–96 (1997) (quoting *Weaver v. Graham*, 450 U.S. 24, 30, 101 S. Ct. 960, 965 (1981)); *see also Dobbert*, 432 U.S. at 297, 97 S. Ct. at 2300 ("The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder."); *Garner v. Jones*, 529 U.S. 244, 253, 120 S. Ct. 1362, 1369 (2000) (The ex post facto doctrine carries "some idea of actual or constructive notice to the criminal before commission of the offense of the penalty for the transgression . . . .").

The majority focuses its analysis of the original RJA on the third *Calder* category, which prohibits "[e]very law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed" as an ex post facto law. *Calder*, 3 U.S. at 390 (opinion of Chase, J.). The majority concludes the RJA repeal fits into the third *Calder* category because it " 'revive[s]' the former measure of punishment attached to crimes already committed and make[s] more burdensome" the punishment that the original RJA made "less severe." According to the majority's rationale, the original RJA's retroactivity changed the quantum of punishment annexed to every capital conviction by offering the possible sentence of life without the possibility of parole. In its view, the RJA repeal then "revive[d]" the "more severe" punishment of death when it in actuality only altered a post-conviction procedure.

The majority wrongly concludes that the original RJA retroactively and substantively changed the quantum of punishment the law annexed to the crime of first-degree murder and that the RJA repeal increases its punishment. The punishment for first-degree murder before, during, and after the RJA has been the same and remains the same. The General Assembly intended the RJA to be a procedure to collaterally attack a capital sentence. By its nature, a collateral attack does not address the substance of the crime itself or its penalty.

The foundation of the majority's approach is that, "[t]he General Assembly, . . . by giving the RJA retroactive effect, has declared that the RJA was the applicable law at the time the crimes were committed." It makes this claim without analysis. However, it begs the question of whether the General Assembly, by using the term "retroactive," intended simply to give all those subject to the death penalty an additional procedural tool to attack their sentences or, more expansively, to substantively change the punishment for first-degree murder. Courts should interpret statutes as the legislature intended. If the General Assembly had wanted to change the statutory punishment for first-degree murder to incorporate the provisions of the RJA, it could have done so; but, it chose not to change the statutory punishment. Likewise, the General Assembly could have specified that the provisions of the RJA are retroactive to the dates of each offense. Again, it did not do so. The General Assembly simply provided that the RJA's provisions were "retroactive." Certainly, whether the provisions of the RJA apply to a particular defendant is unknown at the time of the offense. They only apply if a defendant receives a death sentence.

The best reading of this provision in context of the entire RJA is that the General Assembly intended the RJA procedure to be available to all those who had been sentenced to death already or those facing capital trials who are ultimately sentenced to death. The text of the statute supports this interpretation. As previously discussed, the RJA provides for different remedies and filing requirements, depending on each defendant's status. The RJA is not a substantive change in the penalty for first-degree murder. This interpretation of the RJA is consistent with the position taken in a publication by the University of North Carolina School of Government, the institute tasked with educating legal practitioners and judges. *See* The Racial Justice Act, *N.C. Capital Case Law Handbook* ch. 7, at 273 (School of Gov't, Chapel Hill, N.C., 3d ed. 2013) ("In analyzing the possible ex post facto constraints on the application of the amended RJA, it is helpful to divide capital defendants into three classes based on the date of the charged offense: Offense

dates prior to August 11, 2009. These defendants allegedly committed murder prior to the enactment of the original RJA. The protections offered by the amended RJA, although less substantial than the protections offered by the original RJA, are no less than what was available to these defendants at the time of their alleged crimes. Therefore, there is no ex post facto problem for these defendants." (emphasis omitted)). No doubt, as considered by the author of this publication, ex post facto case law does not support the majority's analysis.

In *Dobbert v. State of Florida*, 432 U.S. 282, 97 S. Ct. 2290 (1977), a new statute in effect at the time of the petitioner's trial made the jury's recommendation of a life or death sentence advisory and not binding on a judge. *Id.* at 289–91, 97 S. Ct. at 2296–97. It altered the method used to determine whether a criminal defendant would receive the death penalty because the judge could still impose the death penalty against the jury's recommendation. *Id.* at 294–95, 97 S. Ct. at 2299. In the petitioner's case, "the trial judge, pursuant to his authority under the amended Florida statute, overruled the jury's recommendation and sentenced petitioner to death." *Id.* at 287, 97 S. Ct. at 2295. The petitioner argued, *inter alia*, that "the change in the role of the judge and jury in the imposition of the death sentence in Florida between the time of the first-degree murder and the time of the trial constitutes an ex post facto violation." *Id.* at 292, 97 S. Ct. at 2297. The Supreme Court, however, described the change as "clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." *Id.* at 293–94, 97 S. Ct. at 2298.[4]

The Supreme Court considered the statutory change to be procedural, and not a matter of substance, even when the change occurred during the initial trial itself, when the sentence was first imposed. "[A] procedural change is not ex post facto," even if it works "to the disadvantage of a defendant." *Id.* at 293, 97 S. Ct. at 2298. Moreover, the petitioner could

4. Retroactive, substantive rule changes interfere with the jury's fact-finding process by altering the burden of proof for the underlying offense or the quantum of punishment. *Compare State v. Correll*, 715 P.2d 721 (1986) (retroactively applying an aggravating circumstance that did not exist at the time the offense was committed, makes defendant guilty of a greater crime), *with Hameen*, 212 F.3d at 244 (allowing a judge to impose the death penalty under a modified sentencing scheme when the jury had already unanimously found the aggravating factors outweighed the mitigating circumstances and classifying the modification as procedural); *accord Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002) (requiring a jury to adjudicate a defendant's guilt and the presence or absence of the aggravating factors to the death penalty for first-degree murder, in keeping with Sixth Amendment right to a jury trial in capital prosecutions).

not show he was entitled to a lesser sentence; his argument amounted to mere speculation because "it certainly cannot be said with assurance that, had his trial been conducted under the old statute, the jury would have returned a verdict of life." *Id.* at 294, 97 S. Ct. at 2299.

In *California Department of Correction v. Morales*, 514 U.S. 499, 115 S. Ct. 1597 (1995), a California statute amended post-conviction parole procedures to allow the Board of Prison Terms to decrease the frequency of parole suitability hearings under certain circumstances. Respondent Morales broadly argued that "the Ex Post Facto Clause forbids any legislative change that has any conceivable risk of affecting a prisoner's punishment." *Id.* at 508, 115 S. Ct. at 1602. The Court first determined that the legislation did not alter the definition of the crime, *id.* at 505, 115 S. Ct. at 1601, and further rejected respondent's expansive argument, holding instead that the amendment did not increase the "punishment" attached to respondent's crime of second-degree murder. *Id.* at 507–08, 115 S. Ct. at 1602. Even if it altered the method for fixing a parole release date, it did not change respondent's indeterminate sentence of fifteen years to life for the murder of his wife. *Id.* at 508–09, 115 S. Ct. at 1603. *Compare id.* (recognizing a "speculative and attenuated possibility" of parole for respondent who, while parole-eligible, had committed more than one murder, one while paroled for another offense), *and Jones v. Keller*, 364 N.C. 249, 259, 698 S.E.2d 49, 57 (2010) (affirming the trial court in finding no ex post facto violation when the defendant "d[id] not allege that any legislation or regulation has altered the award of sentence reduction credits" or that there had been an administrative change in the interpretation of applicable regulations), *cert. denied*, 563 U.S. 960, 131 S. Ct. 2150 (2011), *with Lynce*, 519 U.S. at 439–47, 117 S. Ct. at 895–99 (retroactively cancelling provisional early release credits awarded to a state prisoner to alleviate prison overcrowding, thereby resulting in rearrest and reincarceration of that prisoner, violated Ex Post Facto Clause).

In *Hopt v. People of the Territory of Utah*, 110 U.S. 574, 4 S. Ct. 202 (1884), a change in the rules of evidence, occurring after the commission of the crime but before the defendant's retrial, enlarged the class of competent witnesses to testify in criminal trials to include convicted felons. *Id.* at 587–88, 4 S. Ct. at 209. The State presented a convicted felon as a new witness who testified against the defendant. *Id.* Despite the new law's effect of expanding the range of admissible evidence in the guilt or innocence phase, the Supreme Court of the United States held the change was not ex post facto because it "relate[d] to modes of procedure only in which no one can be said to have a vested right, and

which the state, upon grounds of public policy, may regulate at pleasure." *Id.* at 590, 4 S. Ct. at 210. It did not meet the definition of an ex post facto law because the change did not alter the underlying crime, the burden of proof for proving its elements, or the punishment prescribed for it:

> [T]hey do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission, nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed. *The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.*

Id. at 589–90, 4 S. Ct. at 210 (emphasis added); *see also Thompson*, 171 U.S. at 386–87, 18 S. Ct. at 924–25 (finding no ex post facto violation in the seemingly pointed change in the law to allow admissibility of handwriting comparisons upon retrial because it "did not enlarge the punishment to which the accused was liable when his crime was committed" or change the quality of degree of proof required to prove the offense at the time of its commission).

Applying ex post facto jurisprudence, it is clear that both the original RJA and its amendment were procedural in nature. The original and amended RJA statutes provided a procedural tool for seeking post-conviction relief for claims of racial discrimination. Neither altered the elements of first-degree murder, the necessary proof for conviction, or its potential penalties. There has always been and remains the possibility of amelioration of a defendant's capital sentence on direct appeal, *see* N.C.G.S. § 15A-2000(d)(2), and through post-conviction relief, N.C.G.S. § 15A-1417. The repeal of the RJA left defendants in capital cases other means of raising claims of discrimination. As a procedural statute, it is not an ex post facto violation to amend the RJA or repeal it.[5]

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5. The interpretation of the Ex Post Facto Clause has included the concept of "vested rights" with the implication that an ex post facto law impairs a vested right. "The true construction and meaning of the prohibition is, that the states pass no law to deprive a citizen of *any right vested in him* by existing laws." *Calder*, 3 U.S. at 394 (opinion of Chase, J.) (emphasis added) (discussing a just application of retroactive rules, including pardons and a taking justly compensated). "Alterations which leav[e] untouched the nature of the crime and the amount or degree of proof essential to conviction . . . relate to modes of procedure only, in which no one can be said to have a *vested right*, and which

The majority heavily relies on *State v. Keith*, 63 N.C. 140 (1869), to support its classification of the RJA repeal as an ex post facto law; however, that case is inapposite.

In the aftermath of the Civil War, the General Assembly passed the Amnesty Act of 1866, which "contain[ed] a full and unequivocal pardon for all 'homicides and felonies' committed by officers or soldiers of the late Confederate States, or by officers or soldiers of the United States, 'done in the discharge of any duties imposed on him, purporting to be by a law of the State or late Confederate States Governor, or by virtue of any order emanating from any officer.' " *Id.* at 142 (quoting Act of Dec. 22, 1866, ch. 3 § 1, 1866-67 N.C. Sess. Laws 6, 6–7). The Act was later repealed by legislative action at the Constitutional Convention of 1868. *Id.* at 144. The central issue in *Keith* was whether the repeal of the Act was valid. *Id.*

The language of the Act expressly provided that, "if the defendant can show that he was an officer or a private in either of the above named organizations at the time, it shall be presumed that he acted under orders, until the contrary shall be made to appear." *Id.* at 142 (quoting Act of Dec. 22, 1866, ch. 3 § 2, 1866-67 N.C. Sess. Laws 6, 6–7). If he could show he was a soldier at the time, then it was presumed he was acting under orders for otherwise criminal acts and would be entitled to full amnesty for those acts. *Id.* In *Keith* the defendant alleged, and the solicitor agreed, "that his case came within the provisions of that act." *Id.* Thus, Keith properly claimed the Act's benefit and, if the repeal of the Act did not affect the defendant's claim, he was undisputedly entitled to it.

To determine whether the legislature could repeal its grant of legislative amnesty, the Court defined this legislative act as "destroy[ing] and entirely effac[ing] the previous offen[s]e; it is as if it had never been committed." *Id.* at 143. Referencing English common law, the Court determined that, if the legislature issued a general legislative pardon, the Court was bound to take notice of it and "cannot proceed against any person whatsoever" who is entitled to the pardon "as to any of the offen[s]es pardoned" even if he neglects to raise it or waives it. *Id.* at 142. Simply put, the pardon remitted guilt entirely by treating the offense as if it had never occurred. *Id.* at 144.

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the state, upon grounds of public policy, may regulate at pleasure." *Hopt*, 110 U.S. at 590, 4 S. Ct. at 210 (emphasis added)); *see also Thompson*, 171 U.S. at 388, 18 S. Ct. at 925 ("We cannot adjudge that the accused had any *vested right* in the rule of evidence . . . ." (emphasis added)).

Even if the soldier did nothing but belong to the historically unique class of Civil War soldiers on duty, he was entitled to relief under it. As a legislative pardon, the Act in effect removed a historically unique class of individuals from the reach of criminal laws, making it as if "the offen[s]e had been repealed or amended" to exclude that class of individuals. *Id.* (A legislative pardon "is considered as a public law; having the same effect on the case as if *the general law punishing the offen[s]e* had been repealed . . . ." (emphasis added) (quoting *United States v. Wilson*, 32 U.S. 150, 163 (1833))).[6] In making its determination, the Court in *Keith* analogized that the revocation of amnesty "was substantially an ex post facto law; it made criminal what, before the ratification of the ordinance was not so; and it took away from the prisoner his vested right to immunity." *Id.* at 145.

The majority relies on the reasoning in *Keith* to argue that the RJA repeal is an unconstitutional ex post facto law that affected defendant's substantive rights. The RJA repeal, however, does not fit the definition of ex post facto as discussed in *Keith*.

In *Keith* the General Assembly granted a blanket legislative pardon to all Civil War soldiers for their crimes, making what had been criminal no longer criminal; it were as if the criminal acts never happened. The Amnesty Act applied to all soldiers, presuming they were acting under orders. The enactment created a vested right to the pardon. The Amnesty Act became part of the substantive criminal trial. Courts were required to apply the legislative pardon even if not raised by the defendant. In short, soldiers did not have to follow any procedure to be entitled to its benefits. There was no deadline or expiration.

The RJA is clearly not analogous to legislative amnesty. The RJA did not grant amnesty or remit guilt; it is not a pardon. It is not a blanket change in the penalty for first-degree murder. This distinction between the RJA and legislative amnesty is underscored by the fact that the RJA

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6. Illustratively, in *State v. Blalock*, 61 N.C. 242, 244 (1867), defendants similarly situated to *Keith* had already been convicted of murder. On appeal the Court in *Blalock* took judicial notice of the Act, "and seeing from the record that the case of the prisoners came within it, ordered their discharge." *Keith*, 63 N.C. at 143 (citing *Blalock*, 61 N.C. at 247–48). The Court did not remand to the trial court to hold a hearing. On the contrary, the prisoners were automatically entitled to relief once the Court concluded that they fit squarely within the Act's purview. On the other hand, defendant Cook in *State v. Cook*, 61 N.C. 535 (1868), was not entitled to amnesty in the first place because his murder did not occur while he was "on duty." The purview of the Act only included acts done while performing wartime duties. The Act did not speak to the consequences for "off-duty" conduct.

provides a different procedure for defendants already convicted than for those with capital trials pending. Original RJA, § 2, 2009 N.C. Sess. Laws at 1215. It does not provide relief to all those with capital sentences, but rather any potential relief is conditioned on multiple factors. In order to pursue relief, each defendant must meet a filing deadline. RJA claims are not part of a defendant's trial, but must be pursued through a collateral motion for relief. Each defendant has the burden of proof and must provide sufficient evidence in support of the claim. Under the RJA, a defendant's relief becomes vested only upon a final order affirmed on appeal. Even if a defendant theoretically received RJA relief, that relief would not speak to his actual innocence or afford him the opportunity to retry his guilt or innocence through a new trial. Thus, the provisions of the RJA cannot be analogized to a legislative grant of immunity or "a full and unequivocal pardon." *Keith*, 63 N.C. at 142. The RJA simply provided a statutory avenue by which to pursue possible post-conviction relief.

Far from resembling the defendant's situation in *Keith*, defendant's position in this case is more akin to that of the petitioner in *United States ex rel. Forino v. Garfinkel*, 166 F.2d 887 (3rd Cir. 1948), an Italian national who was serving a sentence for second-degree murder. At the time of the petitioner's offense and trial, state law "pardoned" certain offenders once they had served their sentences. *Id.* at 888–89. The legislature repealed the pardon law before the petitioner completed his sentence. *Id.* at 889. Without a pardon, the petitioner faced deportation. *Id.* at 888. In an effort to avoid that outcome, the petitioner argued that

> in effect that he ha[d] achieved the benefit of a legislative pardon, or at least should be deemed to have acquired the status of a person who has been pardoned by the Pennsylvania Legislature, since otherwise the repealing statute would be given retroactive effect and he would lose his civil right to a legislative pardon, a right which he says was acquired by him prior to the passage of the repealing statute.

Id. at 889. The petitioner further maintained that, to "treat the repealing statute as effective when he had served part of his sentence at the time it was enacted [would have been] to impose upon him the burden of [a constitutionally prohibited] ex post facto law." *Id.*

The United States Court of Appeals for the Third Circuit disagreed. "The flaw in Forino's reasoning lies in the fact that the access to legislative grace was withdrawn by an act of the Pennsylvania Legislature before he had endured his punishment." *Id.* at 889–90. The court noted

that "[n]o one has or can acquire a vested right to a pardon," *id.* at 889, and that,

> [t]o sustain Forino's point one would have to take the position that any sentence of imprisonment imposed prior to the effective date of the repealing act carried with it a right to a legislative pardon. This would constitute judicial legislation and would change the terms of the Legislative Pardons Act making the issuance of the pardon dependent on the imposition of the sentence on the criminal and not on the criminal having endured his punishment.

Id. at 890. The court concluded that Forino, in making an ex post facto argument, "confuse[d] the nature of punishment and the nature of a pardon. He [took] the broad position that any law which alters his position to his disadvantage is necessarily ex post facto. . . . But the repeal of the Legislative Pardons Act did not change the punishment or inflict a greater punishment on Forino." *Id.* (citing *Calder*, 3 U.S. at 390–91). By the time Forino had served his sentence, "the grace previously afforded by the Legislative Pardons Act had been withdrawn." *Id.*

In other words, the Pennsylvania legislature's repeal of the pardon statute in *Forino* did not amount to an ex post facto law in the petitioner's case because the petitioner never obtained a pardon under the statute. Similarly, the RJA repeal is not an ex post facto law as applied to defendant because defendant was not granted relief under the RJA prior to the repeal. In contrast, the 1868 repealing ordinance at issue in *Keith* deprived the defendant of a benefit he had already obtained.

To reach its desired outcome, the majority here expands the interpretation of ex post facto laws far beyond that described in *Keith* and beyond the interpretation of the Ex Post Facto Clause in federal cases. The majority embeds that expansive interpretation in our state constitution. Notably, as the majority itself concedes, this Court has repeatedly held that the protection provided by our state constitution against ex post facto laws mirrors the interpretation of its federal counterpart. The majority now seems to overrule our case law and reject this notion.

The offense of first-degree murder and its punishment have not changed. *See Dobbert*, 432 U.S. at 300, 97 S. Ct. at 2302 (suggesting ex post facto comes into play only when, "under the new law a defendant must receive a sentence which was under the old law only the maximum in a discretionary spectrum of length," but "has had no effect on the defendant" when he already received the maximum punishment).

Defendant here received fair warning of the range of punishment imposed for first-degree murder, particularly considering the RJA postdates defendant's offenses. Thus, the legislature acted within its constitutional prerogative in repealing the RJA. Its repeal does not constitute an ex post facto law.

The majority continues its misapplication of the correct legal standard for ex post facto laws in its analysis of the amended RJA. In the amended RJA, the General Assembly clarified the original RJA by explicitly stating that a defendant must show the allegations of improper racial influence affected his own proceeding.

The majority characterizes the amendment's changes as both procedural and substantive and therefore subverting "fundamental fairness." It holds the "alterations amending the evidentiary requirements . . . constitute changes in the criminal law that cannot be applied retroactively." It maintains "[t]hese revisions fall within the fourth *Calder* category by altering the 'legal rules of evidence' and require a different, more stringent, standard of proof in showing the racially discriminatory imposition of the death penalty." The case relied upon by the majority for this proposition, *Carmell v. Texas*, 529 U.S. 513, 120 S. Ct. 1620 (2000), clearly frames the fourth *Calder* category in terms of prohibiting laws that retroactively lower the burden of proof required for proving the *commission* of the offense or increasing its punishment "*to facilitate an easier conviction*," thereby "making it easier to meet the threshold for overcoming the presumption" of innocence, *id.* at 532, 120 S. Ct. at 1633. When viewed in its proper context, it is protecting against *those* types of retroactive laws that preserves "fundamental fairness."

> *Calder*'s fourth category addresses this concern precisely. A law reducing the quantum of evidence *required to convict* an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof. In each of these instances, the government *subverts the presumption of innocence* by reducing the number of elements it must prove *to overcome that presumption;* by threatening such severe punishment so as to induce a plea to a lesser offense or a lower sentence; or *by making it easier to meet the threshold for overcoming the presumption.* Reducing the quantum of evidence necessary *to meet the burden of proof* is simply another way of achieving the same end. All of these legislative changes, in a sense, are mirror images

> of one another. In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, *to facilitate an easier conviction*. There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.

Id. at 532–33, 120 S. Ct. at 1632–33 (emphases added) (internal citation and footnotes omitted).

The quantum of proof required to convict for the offense of first-degree murder or to recommend the death penalty has not been changed. For the same reasons previously discussed, the RJA in its original form or as amended did not change the nature of the crime of first-degree murder, the elements to prove that crime, or the range of its punishment. Neither its amendment, nor its later repeal, violated the prohibition against ex post facto laws. However, the majority's broad reading of the original RJA creates significant constitutional separation-of-powers issues, granting the judiciary the power to make capital punishment policy.

V.

If broadly interpreted and applied, as the majority does, the original RJA is unconstitutional because, through it, the General Assembly delegated its legislative policymaking authority to the judiciary. Since 1776 our state constitution has provided that each branch of government has a distinct function. N.C. Const. of 1776, Declaration of Rights, § IV; *see* N.C. Const. art. I, § 6; N.C. Const. of 1868, art. I, § 8. Among those functions, the General Assembly is the policymaking body; the judiciary adjudicates cases. Article I, Section 18 of the state constitution provides that the courts are open to address wrongs done to a person. N.C. Const. art. I, § 18. Thus, courts determine specific controversies based on the evidence relevant to the particular case. *See McCleskey*, 481 U.S. at 302, 107 S. Ct. at 1772–73 (reviewing and approving of new statutory measures to, *inter alia*, ensure individualized assessments for each defendant's punishment).

Accountable to and representative of the people, N.C. Const. art. II, §§ 2–5, "[t]he legislative branch of government is without question 'the policy-making agency of our government' " and is "a far more appropriate forum than the courts for implementing policy-based changes to our laws," *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004)

(quoting *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956)). The legislative branch conducts its business through the passing of statutes reflecting the policymaking decisions of the currently sitting General Assembly. "[I]dentified as [the legislature's] members are, with the other citizens of the community, and faithfully representing their feelings and interests, we can never allow ourselves to think that the acts proceeding from them can be designed for any other purpose than the promotion of the general welfare; or can result from other than the purest and most patriotic motives." *Jones v. Crittendon*, 4 N.C. 55, 55 (1814). It is "[t]he diversity within the [legislative] branch [that] ensures healthy review and significant debate of each proposed statute, the enactment of which frequently reaches final form through compromise." *Berger*, 368 N.C. at 653, 781 S.E.2d at 261 (Newby, J., concurring in part and dissenting in part). Under our sentencing structure, the extent of punishment is a legislative policy decision. The legislature provides procedure for capital cases and guidance to juries through aggravating factors by statute.[7] *See* N.C.G.S. § 15A-2000. It also provides for appeals, *see* N.C.G.S. §§ 7A-25 through -32, and post-conviction relief and remedies by statute, *see* N.C.G.S. §§ 15A-1411 through -1422.

Applying the majority's sweeping interpretation of the RJA, if a court finds evidence that race was a significant factor in the imposition of a capital sentence "in the county, the prosecutorial district, the judicial division, or the State," Original RJA, § 1, 2009 N.C. Sess. Laws at 1214, a defendant's capital sentence is changed to life without the possibility of parole, even if the misuse of race was completely unrelated to the defendant or his case. If affirmed on appeal, then that ruling could control all other challenges under the RJA. In other words, all death sentences imposed before the RJA repeal could be changed to life without the possibility of parole. It would not matter that the particular defendant's proceeding was completely untainted by racial considerations. Whether courts should use statewide statistical studies to determine capital punishment policy is precisely the question answered by the Supreme

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7. *See McCleskey*, 481 U.S. at 305–06, 107 S. Ct. at 1774 (summarizing the case law consensus for the "constitutionally permissible range of discretion in imposing the death penalty" that state legislatures may allow decisionmakers at trial, including the use of aggravating factors); *Zant*, 462 U.S. at 878–79, 103 S. Ct. at 2743–44 (The legislature defines the aggravating factors and the factors circumscribe the class of persons eligible for the death penalty; the jury "makes an individualized determination on the basis of the character of the individual and the circumstances of the crime."); *see also Osborne*, 557 U.S. at 72–73, 129 S. Ct. at 2322 (The state legislature primarily bears the task of harnessing DNA's power to prove actual innocence by creating workable post-conviction measures within the established criminal justice system.).

Court of the United States in *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756 (1987).

There the Supreme Court considered whether a court is the proper venue to utilize a statistical study, which purported to show a disparity in those defendants receiving a death sentence based on the race of the victim and, to a lesser extent, the race of the defendant. McCleskey claimed that the study proved Georgia's capital sentencing process was administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments of the United States Constitution. McCleskey argued that the statistical study "compel[led] an inference that his sentence rests on purposeful discrimination" without regard to the facts of his particular case. *Id.* at 293, 107 S. Ct. at 1767. Like defendant's claim here, McCleskey's argument could extend to all capital cases in his state and, "[i]n its broadest form, . . . extends to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application." *Id.* at 292, 107 S. Ct. at 1767. Such broad accusations cannot be effectively rebutted, not because they are necessarily true, but because it is practically impossible to show they are *not* true. *See id.* at 296, 107 S. Ct. at 1769.

The Supreme Court declined "to accept the likelihood allegedly shown by the [statistical] study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions." *Id.* at 309, 107 S. Ct. at 1776. It then classified the role of making such an assessment based on a statistical study as a legislative function:

> McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are "constituted to respond to the will and consequently the moral values of the people." Legislatures also are better qualified to weigh and "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts."

Id. at 319, 107 S. Ct. at 1781–82 (first quoting *Furman*, 408 U.S. at 383, 92 S. Ct. at 2800 (Burger, C.J., dissenting); then quoting *Gregg*, 428 U.S. at

186, 96 S. Ct. at 2931). "It is the ultimate duty of courts to determine on a case-by-case basis whether these laws are applied consistently with the Constitution." *Id.* at 319, 107 S. Ct. at 1782. Through its lawmaking and policymaking power, the legislature has the prerogative to criminalize conduct and outline the extent of its punishment; that statutory guidance then directs the judiciary, and the judiciary follows these rules. "[L]egislatures necessarily have wide discretion in the choice of criminal laws and penalties." *Id.* at 298, 107 S. Ct. at 1770. Thus, the reasoning of *McCleskey* did not invite legislatures to authorize courts to utilize statistical studies and make statewide capital punishment policy. To the contrary, the Supreme Court emphasized that the judiciary should confine itself to making individual assessments on a case-by-case basis. The potential scope and the breadth given the RJA by the majority is derived from a fundamental misunderstanding of the holding in *McCleskey*.

The majority's interpretation of the RJA ignores the plain language of *McCleskey* that legislatures, not courts, are equipped to evaluate statistical information and enact policies based on that information. Courts are designed to determine specific controversies, not formulate policies. The majority's broad reading of the RJA seems to ask the question: Should North Carolina have capital punishment if there exists evidence that race may have been a significant factor in the process anywhere in the State? Answering this question is a quintessential legislative act. A judicial function is to ask whether race was a significant factor in *a particular defendant's case*. Courts are not the vehicle for policy decisions. Whether there should be a death penalty in North Carolina is a decision for the people, through their elected representatives, or directly by them through a constitutional amendment. Thus, it is improper for the majority to interpret the RJA as delegating legislative responsibility to the judiciary.

Courts are required to interpret statutes in a constitutional manner whenever possible. *See, e.g.*, *State v. Barber*, 180 N.C. 711, 712, 104 S.E. 760, 761 (1920) ("It is among the accepted rules of statutory construction that the courts are inclined against an interpretation that will render a law of doubtful validity."); *State v. Pool*, 74 N.C. 402, 405 (1876) ("Whenever an act of the Legislature can be so construed and applied, as to avoid conflict with the constitution, and give it the force of law, such construction will be adopted by the courts."). Thus, to comply with separation of powers and avoid placing the judiciary in a legislative role, the RJA should be interpreted in such a manner that any relief arising from a finding that race played an improper role must be related to the

particular defendant who raises the claim. The stated purpose of the RJA is that "[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." Original RJA, § 1, 2009 N.C. Sess. Laws at 1214. This provision illustrates the General Assembly's intent that a showing that any misuse of race must have been relevant to the particular defendant's case. This is precisely what the amended RJA attempted to clarify.

The Racial Justice Act did not change the punishment for first-degree murder. It is a procedural, not a substantive, law. Its repeal did not violate the prohibition against ex post facto laws. The repeal should be upheld. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
QUINTIN SHAROD TAYLOR

No. 32A19

Filed 5 June 2020

1. Criminal Law—withdrawal of a guilty plea—fair and just reason—consideration of factors

Defendant failed to demonstrate a fair and just reason for withdrawing his guilty plea to second-degree murder and two related robbery charges where the factors stated in *State v. Handy*, 326 N.C. 532 (1990), weighed against permitting the plea withdrawal. Defendant had not sufficiently asserted his legal innocence before attempting to withdraw his plea; the State's proffered evidence of defendant's guilt, though not overwhelming, was uncontested and sufficient; defendant waited eighteen months to file his motion to withdraw the plea; and defendant did not enter into his plea agreement under any misunderstanding, haste, confusion, or coercion. It was unnecessary to determine whether the *Handy* factor regarding defense counsel's competency benefitted defendant.

2. Criminal Law—withdrawal of a guilty plea—analysis of prejudice to the State—unnecessary

Once it determined that the factors stated in *State v. Handy*, 326 N.C. 532 (1990), weighed against allowing defendant to withdraw his guilty plea in a capital case, the Court of Appeals was not required to

analyze any potential prejudice to the State in the event that the plea withdrawal had been allowed.

3. Criminal Law—withdrawal of a guilty plea—effective assistance of counsel—dismissal without prejudice

In a capital case, where it was unnecessary to determine whether defense counsel's competency weighed in favor of defendant's motion to withdraw his guilty plea, defendant's ineffective assistance of counsel claim was dismissed without prejudice so he could raise it in a motion for appropriate relief.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, No. COA18-55, 2018 WL 6614053 (N.C. Ct. App. Dec. 18, 2018) (unpublished), affirming judgments entered on 6 April 2017 by Judge Robert F. Floyd Jr. in Superior Court, Robeson County. Heard in the Supreme Court on 1 October 2019 in session in the Randolph County Historic Courthouse in the City of Asheboro.

Joshua H. Stein, *Attorney General*, *by Kimberly N. Callahan*, *Assistant Attorney General*, *for the State-appellee.*

Kimberly P. Hoppin for defendant-appellant.

MORGAN, Justice.

This appeal presents the issue of whether defendant in this case established a fair and just reason for the withdrawal of his guilty plea. After careful consideration of the factors relevant to this question as set forth in this Court's decision in *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990), we agree with the determination made by the trial court and affirmed by the North Carolina Court of Appeals that defendant failed to demonstrate a fair and just reason for the withdrawal of his guilty plea. As a result, we modify and affirm the lower appellate court's decision that it rendered in this case.

I. Factual Background and Procedural History

On 11 July 2011, the Robeson County grand jury returned an indictment charging defendant Quintin Sharod Taylor with first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. These charges arose from defendant's alleged participation in the 13 March 2011 murder of Brandon Lee Hunt in Fairmont, North Carolina. Hunt was shot and killed by Taurus

Locklear in the course of a robbery that the State believed was planned and committed by Locklear, defendant, and another accomplice, Shawn Jones. After the State announced its intention to proceed capitally in October 2011, defendant and the State negotiated a plea agreement that would allow defendant to avoid the possibility of receiving the death penalty in exchange for his continued cooperation with the State in the pending prosecutions of Locklear and Jones. At a 24 June 2014 plea hearing in the Superior Court, Robeson County, defendant pled guilty to second-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery. By virtue of this guilty plea, defendant acknowledged that he was in fact guilty of the charged offenses. Defendant consented to the State's summarization of the facts supporting his guilty plea, which included the following pertinent details:

> During the course of the investigation as well, Mr. Jones[ ] was interviewed by law enforcement. He stated that at the time of the shooting that there had been a discussion between [defendant] and Mr. Locklear that Mr. Locklear was going to rob the victim, Brandon Hunt. He stated that he was going to stick him—going to basically hold him up, going to rob him of some money. They knew he had some money. They knew he kind of sold drugs at a very low level, but they knew he—Mr. Locklear knew he had money. And so there was an agreement.
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> They sta[r]ted walking over. Mr. Jones . . . . stated that [defendant] walked up first, that he knew the victim. They started talking, just standing there kind of hanging out talking. That Mr. Locklear approached. Mr. Jones stated that he turned to start walking back towards the Subway which is located there about a block or so away, and as he's turning around and started to walk away, he heard a shot. He started running. He said that Mr. Locklear then caught up with him. Mr. Locklear was out of breath. He was in a frenzy. That they ultimately were able to call someone to come pick them up. . . .
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> . . . . Mr. Jones reported that Mr. Locklear was agitated. He was upset. He was nervous. That he at some point made the statement that he had just shot a guy, indicating that he shot Mr. Hunt. . . .
>
> Based upon that, officers then went back to [defendant] and spoke with him. And after being interviewed, he

> admitted that he knew that there was going to [be] a robbery. He knew that they—there was a conversation [that] had taken place. He had said that Mr. Jones and Mr. Locklear were the ones that were planning to rob Mr. Hunt. [Defendant] stated that he knew Mr. Hunt. He knew that he wasn't any—he wasn't going to do anything if he were robbed. He was kind of—he was a very easy going guy. He was not the kind of guy that anybody wanted to rob. And so his plan was to go along with this up to the point to try to get Brandon Hunt away from the situation.
>
> He stated that—in this interview as well as subsequent interviews, he stated that when they went over there he was trying to get Mr. Hunt alone. There were other individuals that were around. And ultimately, [by] the point he got him alone to try to tell him they needed to leave, it was too late. Mr. Locklear was there. Within a matter of a minute or so, Mr. Locklear pulled out a gun, shot Mr. Hunt, and then everybody scattered at that point.
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> . . . . [Defendant] did confess to what he knew and it's his involvement which constitute[s] the charges that he is pleading guilty to.

The trial court accepted defendant's guilty plea but deferred imposing sentence pending resolution of the State's case against Locklear, in which defendant was obligated to assist under the terms of the plea agreement.

No trial of Locklear ever occurred in this matter, however. On 25 August 2015, all charges against Locklear in connection with Hunt's murder were voluntarily dismissed by the State, due in large part to the unwillingness of key witnesses to testify honestly against Locklear at trial. The loss and mislabeling of certain items of evidence in the case were also factors which contributed to the State's election to discontinue its prosecution of Locklear.

Upon learning of the dismissal of Locklear's charges, defendant began attempting to retract the guilty plea that he entered in June 2014. Defendant first filed a motion to dismiss the charges against him on 10 November 2015, and then on 28 December 2015 he filed a motion to withdraw his guilty plea. On 7 April 2016, at an evidentiary hearing held in the trial court on defendant's motion to dismiss the charges against him, Detective Roy Grant of the Fairmont Police Department and Special Agent Paul Songalewski of the State Bureau of Investigation testified about their involvement in the investigation of Hunt's murder.

Detective Grant read into evidence a report that he claimed was generated to document the contents of an interview that he and Special Agent Songalewski had conducted with defendant. Although the interview had taken place in the spring of 2011,[1] Detective Grant did not prepare the report until August 2012. In pertinent part, the report stated the following:

> [Special] Agent Songalewski then started talking to [defendant] who told us that he had set the victim up, Mr. Brandon Hunt, to be robbed. [Defendant] stated that Bobby Deshawn Jones and himself had called or spoke with Mr. Hunt and told him to meet them. [Defendant] said he took Taurus Locklear with them. There was an exchange of words between [Mr. Hunt] and Ta[u]rus, and Ta[u]rus pulled out a gun and shot.

In his testimony, Special Agent Songalewski agreed that he had participated in an interview of defendant on 25 March 2011, but he rejected the account of defendant's statements set out in Detective Grant's report, specifically the detective's claims that defendant "told us that he had set the victim up, Mr. Brandon Hunt, to be robbed"; "stated that Bobby Deshawn Jones and himself had called or spoke with Mr. Hunt and told him to meet them"; and "said he took Taurus Locklear with them." At the conclusion of the evidentiary hearing, the trial court orally denied defendant's motion to dismiss.

On 7 June 2016, the trial court held a hearing on defendant's motion to withdraw his guilty plea. Defendant's counsel explained that in his capacity as defendant's attorney, he had advised defendant to accept the terms of the plea agreement offered by the State because, in counsel's view, the account of the interview contained in Detective Grant's report indicated that defendant had admitted to felony murder, even though defendant had "always denied" making the inculpatory statements contained in the report. Defendant's counsel told the trial court during the hearing that he did not realize the discrepancy between Detective Grant's and Special Agent Songalewski's respective accounts of the 25 March 2011 interview until counsel undertook a reexamination of the discovery materials that he had received from the State, spurred by the dismissal of the charges against Locklear. Defendant's counsel argued that defendant had a right to withdraw his guilty plea based upon

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1. The report indicated that the interview took place on 7 April 2011, but Detective Grant testified that this date was erroneous and that the interview had actually occurred on 25 March 2011.

counsel's failure to provide defendant with effective assistance in the plea agreement process.

Special Agent Songalewski offered testimony at the hearing on defendant's motion to withdraw his guilty plea. Special Agent Songalewski explained that during the 25 March 2011 interview of defendant, he had confronted defendant concerning defendant's prior inconsistent statements to law enforcement officers about his involvement with Locklear and Jones, as well as the attempted robbery and the shooting of Hunt. Special Agent Songalewski testified that defendant then recounted during the interview that he had overheard Locklear and Jones planning to rob Hunt, with the understanding that Locklear would shoot Hunt if the robbery "did not go down right." According to Special Agent Songalewski, defendant said that he had been involved in the confrontation with Hunt only in an effort to prevent the robbery from going amiss and Hunt consequently being shot. Detective Grant also testified at the hearing, maintaining that defendant had told him and Special Agent Songalewski during the interview that defendant had set up Hunt to be robbed. Defendant did not testify at the hearing.

On 5 April 2017, the trial court entered an order denying defendant's motion to withdraw his guilty plea. Pursuant to the plea agreement, the trial court then sentenced defendant to serve consecutive terms of imprisonment of 157–198 months for the second-degree murder conviction, 64–86 months for the robbery with a dangerous weapon conviction, and 25–39 months for the conspiracy to commit robbery with a dangerous weapon conviction. Defendant gave oral notice of appeal in open court.

In his argument to the Court of Appeals, defendant contended that the trial court erred by denying his motion to withdraw his guilty plea because he had established a fair and just reason for withdrawal. *State v. Taylor*, No. COA18-55, 2018 WL 6614053 (N.C. Ct. App. Dec. 18, 2018) (unpublished). In the alternative, defendant asserted that he received ineffective assistance of counsel during the plea agreement process. In assessing defendant's argument regarding the denial of his motion to withdraw his guilty plea, the Court of Appeals was expressly guided by the overarching principle identified in *Handy* as the measure to utilize in circumstances in which a criminal defendant seeks to withdraw a guilty plea prior to sentencing; namely, that "the defendant . . . is generally accorded that right if he can show any fair and just reason." *Handy*, 326 N.C. at 536, 391 S.E.2d at 161 (citations and internal quotation marks omitted). The lower appellate court then cited the following factors, which this Court articulated in *Handy* are to be applied in implementing that principle:

> Some of the factors which favor withdrawal include whether the defendant has asserted legal innocence, the strength of the State's proffer of evidence, the length of time between entry of the guilty plea and the desire to change it, and whether the accused has had competent counsel at all relevant times. Misunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion are also factors for consideration.

Id. at 539, 391 S.E.2d at 163 (citations omitted). The Court of Appeals continued its interpretation of the *Handy* decision by quoting our outlined procedure which states that "[t]he State may refute the movant's showing by evidence of concrete prejudice to its case by reason of the withdrawal of the plea." *Id.* In evaluating these so-called "*Handy* factors," the Court of Appeals determined that (1) although defendant had made some inconsistent statements regarding his culpability during the murder investigation, he had not sufficiently asserted his legal innocence prior to his attempt to withdraw his plea; (2) the State's proffer of evidence of defendant's guilt at the plea hearing, although not overwhelming, was uncontested and sufficient; (3) the length of time between the entry of defendant's guilty plea and the filing of his motion to withdraw it—a full eighteen months—weighed against granting defendant's motion; and (4) defendant did not enter into the plea agreement based upon misunderstanding, haste, confusion, or coercion. *Taylor*, slip op. at 13–19, 2018 WL 6614053, at *6–8.

With regard to competency of counsel as a *Handy* factor, the majority at the Court of Appeals expressed an inability, based on the record before the lower appellate court, to determine "whether Defendant received effective assistance of counsel in deciding to plead guilty." *Taylor*, slip op. at 17–18, 2018 WL 6614053, at *8. The Court of Appeals majority (1) recognized defendant's assertion that he lacked competent counsel because his defense counsel advised defendant to plead guilty after misunderstanding the information provided by Detective Grant and Special Agent Songalewski regarding their different respective accounts of the same interview, (2) recognized the State's assertion that defense counsel showed competence in successfully eliminating defendant's exposure to the death penalty through a plea agreement that culminated with defendant's expression of satisfaction with his counsel upon the entry of his guilty plea, and (3) subsequently opted to express no opinion on the *Handy* factor pertaining to the competency of counsel. *Id.* Consistent with this competency of counsel determination in its application of the *Handy* factors and in light of

defendant's alternative ineffective assistance of counsel claim stemming from the same argument, the Court of Appeals declined to rule upon the merits of his ineffective assistance of counsel claim "based upon the cold record" before the court and dismissed defendant's ineffective assistance of counsel claim "without prejudice to his right to file a motion for appropriate relief based upon his allegations of IAC."[2] *Id.* at 22, 2018 WL 6614053, at *10.

As to the ultimate issue of whether the trial court erred in denying defendant's motion to withdraw his guilty plea in light of the trial court's consideration and application of the *Handy* factors, the Court of Appeals majority affirmed the trial court's denial of defendant's motion and dismissed defendant's ineffective assistance of counsel claim without prejudice to his right to raise it in a future motion for appropriate relief. *Id.* The lower appellate court concluded that defendant "failed to demonstrate a fair and just reason for the withdrawal of his plea." *Id.* at 19, 2018 WL 6614053, at *8. The Court of Appeals went further, offering that even if defendant could show that he had established a fair and just reason to support the withdrawal of his guilty plea, nonetheless "his motion was still properly denied because the State presented concrete evidence at the withdrawal hearing of prejudice to its case against him should the motion be granted." *Id.*

While concurring with the judgment of the Court of Appeals majority "to dismiss defendant's independent ineffective assistance of counsel ("IAC") claim without prejudice to his right to reassert it in a motion for appropriate relief ("MAR") in the superior court," Judge Elmore, dissenting in part, "disagree[d] with the majority's application and balance of the *Handy* factors, and believe[d] defendant has satisfied his burden of establishing 'any fair and just reason' to allow the withdrawal of his guilty plea that the State's showing of concrete prejudice failed to refute." *Taylor*, slip op. at 1, 2018 WL 6614053, at *10 (Elmore, J., concurring in part and dissenting in part). The dissenting judge agreed with defendant's position on each of the four most prominent and individualized *Handy* factors and concluded that "the State failed to demonstrate it would suffer concrete prejudice by its reliance on defendant's plea, and thus failed to tilt the scales against defendant's considerably weighty showing." *Id.* at 22, 2018 WL 6614053, at *19.

Defendant filed his notice of appeal on 22 January 2019, based upon the partial dissenting opinion at the Court of Appeals. In the

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2. "IAC" is a common abbreviation in legal references for "ineffective assistance of counsel."

parties' respective arguments to this Court, there is no dispute between defendant and the State as to the appropriateness of the application of the *Handy* factors to resolve the identified issue in this case. As elucidated in the majority and dissenting opinions of the lower appellate court, the parties' disagreement here focuses upon the appropriate consideration, application, and balance of the specified factors. After carefully reviewing the pertinent facts, the procedural circumstances, and the substantive legal arguments presented by the parties in this case, we believe that the evaluation of the *Handy* factors and their accorded weight as determined by the Court of Appeals majority was proper and correct. As a result, we affirm this portion of the decision of the Court of Appeals majority.

II. Examination and Application of the *Handy* Factors

[1] *Handy* involved a circumstance in which the defendant originally pled not guilty at his arraignment for the charge of murder. *Handy*, 326 N.C. at 534, 391 S.E.2d at 160. Two months later, during a hearing which was conducted for the resolution of final pretrial motions, the defendant moved to withdraw his plea of not guilty in order to enter a plea of guilty to felony murder. *Id.* The trial court accepted and recorded the defendant's guilty plea. *Id.* On the following morning, before the proceedings reconvened, defense counsel moved to withdraw the defendant's guilty plea. *Id.* at 535, 391 S.E.2d at 160. The trial court treated the motion to withdraw the plea as a motion for appropriate relief and denied the defendant's motion. *Id.* In ruling that the trial court "erred in treating defendant's motion made prior to verdict as a motion for appropriate relief," this Court reiterated the principle that "[a] motion for appropriate relief is a *post-verdict* motion," and therefore, "[a] motion for appropriate relief is not proper where made prior to sentencing when there is no jury verdict." *Id.* at 535–36, 391 S.E.2d at 160–61. We utilized this opportunity to clarify and explain the applicable legal standards in such matters by (1) establishing that a defendant who seeks to withdraw a guilty plea before sentencing occurs is generally accorded that right if the defendant can show any fair and just reason, (2) confirming that there is no absolute right to withdraw a guilty plea, (3) emphasizing that motions to withdraw a plea made prior to sentencing should be granted with liberality, and (4) recognizing ancillary holdings from federal and other state courts which are not directly relevant to the instant case. *Id.* at 536–38, 391 S.E.2d at 161–62. This Court then assembled from a variety of court jurisdictions and legal publications a group of factors to guide the trial courts in their respective determinations of motions that are made

by criminal defendants who seek to withdraw their guilty pleas prior to sentencing. Just as we applied the governing factors to resolve the identified issue in *Handy*, we now turn to replicate this analytical approach in the present case.

Factor 1: Defendant's Assertion of Legal Innocence

Defendant represents that he asserted his legal innocence of the charges against him through proffer of counsel and through defendant's pre-arrest statements. Defendant acknowledges, however, that he made inconsistent statements to law enforcement officers during their investigation of the offense. Depictions of these statements by defendant included his admission that he had advance knowledge of the plan that Locklear and Jones created in order to unlawfully take money from Hunt, that defendant had "set up" Hunt to be robbed by Locklear and Jones, that defendant was aware of Locklear's plan to shoot Hunt if the robbery of Hunt did not proceed as anticipated, that defendant had agreed to participate in the robbery, and that defendant was present during the attempted robbery and the actual killing of Hunt. Additionally, at the plea hearing, defendant admitted his guilt to the charges against him, did not couch his guilt by virtue of a "no contest" plea or an Alford plea,[3] agreed that there were facts to support his guilty plea, and stipulated to the sufficiency of the factual basis as rendered in open court by the State.

We agree with the Court of Appeals' assessment of this factor and we are likewise "unpersuaded by Defendant's argument that his inconsistent statements to law enforcement prior to his arrest are sufficient to negate his later guilty plea for purposes of the *Handy* test" and that "this factor does not weigh in favor of Defendant." *Taylor*, slip op. at 14, 2018 WL 6614053, at *6.

Factor 2: The Strength of the State's Proffer of Evidence

Defendant describes the State's proffer of evidence at the plea hearing as "not overwhelming" and the dissenting judge of the Court of Appeals characterized the State's proffer of evidence as to defendant's guilt as "weak." *Id.* at 4, 2018 WL 6614053, at *11 (Elmore, J., concurring in part and dissenting in part). Defendant extrapolates from the State's dismissal of the charges against Locklear that "the State would have difficulty presenting sufficient evidence of [defendant's] guilt" since defendant

3. An *Alford* plea is a type of guilty plea recognized by North Carolina's General Court of Justice in which a criminal defendant accepts that the State has sufficient evidence to convict him, but the defendant does not actually admit his guilt.

was deemed to be "Locklear's accomplice and co-conspirator." Issues that the State had with regard to some of its tangible and testimonial evidence were also cited by defendant as matters which effectively diluted the force of the State's evidence against him. Apart from these representations by defendant, the dissenting judge at the Court of Appeals viewed the inadequacy of the State's proffer of evidence from a different perspective through the dissenting judge's disagreement with the trial court's standard by which to gauge defendant's challenge to the strength of the State's proffer of evidence.

These approaches of defendant and the dissenting judge at the Court of Appeals, which attempt to blunt the strength of the State's proffer of evidence, fade in the face of the observation of the Court of Appeals majority that "the State's proffer of evidence at the plea hearing was uncontested" and "included statements from multiple witnesses indicating that they saw Defendant conversing with Locklear and Jones during the time period immediately prior to Hunt's killing." *Id.* at 15, 2018 WL 6614053, at *7.

While all three commentators on the strength of the State's proffer of evidence—defendant, the dissenting judge at the Court of Appeals, and even the Court of Appeals majority—employed the phrase "not overwhelming" in describing that proffer of evidence, only the lower appellate court's majority subscribed to the assessment term that is dispositive of this *Handy* factor: "sufficient." *See id.* Since the strength of the State's proffer of evidence against defendant that was presented as the factual basis at the plea hearing was essentially uncontested and therefore sufficient, we agree with the Court of Appeals that "this factor likewise fails to support withdrawal of his guilty plea." *Id.*

Factor 3: The Length of Time Between Entry of the Guilty Plea and the Desire to Change It

Defendant entered his guilty plea on 24 June 2014. On 28 December 2015—a full eighteen months later—defendant expressed his desire to change his guilty plea prior to resentencing through his motion filed in the trial court to withdraw his guilty plea. He contends that the significant lapse in time between the two events regarding his guilty plea was occasioned by the dismissal of all charges against Locklear fourteen months after defendant's entry of his guilty plea, which in turn led to belated discoveries about the inconsistencies between the versions of defendant's statements as reported by Detective Grant and Special Agent Songalewski that defense counsel made in reviewing the facts and circumstances of the case. Defendant argues that this delayed

enlightenment, coupled with other intervening events during the time period under scrutiny, constitute "changed circumstances" that justify the withdrawal of his guilty plea despite the lengthy interim period between the entry of his plea and his filing of the motion to withdraw it. Defendant buttresses his stance on this *Handy* factor with the dissenting judge at the Court of Appeals that not only agrees with his "changed circumstances" assertion but also advances the premise that the "delay clock"—as the dissenting judge coins it—"should start when defendant first learned the true import of the vital piece of evidence supporting his decision to accept the State's plea to avoid the death penalty," thus reducing the length of time between the entry of his guilty plea and defendant's desire to change it through filing his motion to withdraw the plea to a "most conservative calculation" of forty-eight days. *Taylor*, slip op. at 6, 2018 WL 6614053, at *12 (Elmore, J., concurring in part and dissenting in part).

In the seminal *Handy* case, this Court made the following observation: "A fundamental distinction exists between situations in which a defendant pleads guilty but changes his mind and seeks to withdraw the plea before sentencing and in which a defendant only attempts to withdraw the guilty plea after he hears and is dissatisfied with the sentence." *Handy*, 326 N.C. at 536, 391 S.E.2d at 161. In the present case, while defendant attempted to withdraw his guilty plea before he heard the sentence which he would receive, nonetheless defendant had already expressed dissatisfaction with any sentence which would be imposed in light of the State's dismissal of all charges against Locklear. While defendant and the dissenting judge at the Court of Appeals couch the extended length of time between the entry of defendant's guilty plea and the filing of defendant's motion to withdraw his guilty plea in terms of "changed circumstances" due to defendant's lack of "the full benefit of competent counsel at all relevant times," we are mindful that defendant has acknowledged that his quest to withdraw his guilty plea was prompted by his interest "regarding the State's dismissal with prejudice of the case against co-defendant Taurus Locklear." *Taylor*, slip op. at 6, 2018 WL 6614053, at *12 (Elmore, J., concurring in part and dissenting in part). When defendant was faced with the prospect of the State's potential pursuit of the death penalty for his first-degree murder charge, defense counsel and the State negotiated a plea agreement in which defendant was spared a capital murder prosecution in exchange for defendant pleading guilty to second-degree murder and other criminal offenses, agreeing that he was satisfied with his counsel's legal services, and accepting the existence of a factual basis as grounds for his guilty plea—all before sentencing. After defendant learned that the

charges against Locklear had been dismissed prior to the imposition of judgment, defendant now claims that he was bereft of competent counsel at a critical juncture in the proceedings and that "he was misadvised on the vital evidence supporting his decision to plead guilty"—all upon the inevitability of sentencing.

It is apparent that defendant's attempt to withdraw his guilty plea after a major passage of time is spawned by his dissatisfaction with the certainty of his sentence in light of the State's dismissal of the charges against Locklear. This circumstance fits the logic that this Court employed in *Handy* in differentiating between a defendant's effort to withdraw a guilty plea before sentencing and a defendant's effort to withdraw a guilty plea after sentencing when defendant is dissatisfied with the sentence. Defendant here was dissatisfied with the sentence which he was destined to receive, which compelled him to seek to withdraw his guilty plea. The significant length of time between the entry of defendant's guilty plea and his desire to change it through filing his motion to withdraw the guilty plea serves to exacerbate this Court's proven concern in *Handy* in cases like the current one in which a defendant attempts to withdraw a guilty plea. Hence, this *Handy* factor does not favor the withdrawal of defendant's plea.

Factor 4: Competency of Counsel

As we observed earlier in our review of the decision that was issued in this case by the Court of Appeals, the lower appellate court assessed the *Handy* factor regarding the competency of counsel and decided to "express no opinion as to whether this factor weighs in favor of Defendant or the State for purposes of the *Handy* factors." *Taylor*, slip op. at 18, 2018 WL 6614053, at *8. In weighing both defendant's contention that "he lacked competent counsel because his trial attorney failed to realize that the reports written by Detective Grant and Special Agent Songalewski recounted the same interview and advised Defendant to plead guilty based upon a misunderstanding of the evidence" and the State's contention that defendant had competent counsel available at all relevant times as "his attorneys successfully negotiated a plea agreement reducing his charge to second-degree murder—thereby eliminating any chance that he would face the death penalty—and that Defendant expressed satisfaction with his trial counsel at the 24 June 2014 plea hearing," the Court of Appeals concluded that it was "unable to determine based upon the record before [the Court of Appeals] whether Defendant received effective assistance of counsel in deciding to plead guilty." *Id.* at 17–18, 2018 WL 6614053, at *8.

In our view, the Court of Appeals majority has accurately captured the salient points of the parties' respective positions on the *Handy* factor concerning the competency of counsel. The dissenting judge at the Court of Appeals opined that "defendant has established he lacked the full benefit of competent counsel at all relevant times" and therefore "this *Handy* factor weighs heavily in favor of withdrawal." *Id.* at 11, 2018 WL 6614053, at *14 (Elmore, J., concurring in part and dissenting in part).

In considering each *Handy* factor individually, a court is not required to expressly find that a particular factor benefits either the defendant or the State in assessing whether a defendant has shown any fair and just reason for the withdrawal of a guilty plea. In *Handy*, this Court listed "[s]ome of the factors which favor withdrawal." *Handy*, 326 N.C. at 539, 391 S.E.2d at 163. This depiction of the identification of the *Handy* factors inherently illustrates that the slate of them is not intended to be exhaustive nor definitive; rather, they are designed to be an instructive collection of considerations to aid the court in its overall determination of whether sufficient circumstances exist to constitute any fair and just reason for a defendant's withdrawal of a guilty plea.

To this end, although the dissenting judge at the Court of Appeals takes issue with the majority's decision to express no opinion on the *Handy* factor concerning the competency of counsel, this Court does not regard the declination of the lower appellate court to adopt a position on the factor to be an abdication of the legal forum's duty. We are satisfied that the Court of Appeals has amply shown that it has fully appraised the *Handy* factor concerning the competency of counsel as it evaluates the entire array of factors, and we are unable to find any error in the manner in which the lower appellate court has addressed this issue.

Additional Factors: Misunderstanding of the Consequences of a Guilty Plea, Hasty Entry, Confusion, and Coercion

Among the additional factors that this Court mentioned in *Handy* is the existence of coercion in a defendant's guilty plea as a trial court determines whether any fair and just reason has been shown for the withdrawal of the guilty plea. Here, defendant submits that there is "some element of coercion" involved when a defendant either accepts an offer from the State to plead guilty or otherwise be subject to "a death sentence should he lose at trial." A defendant's exposure to the death penalty does not amount to coercion; as the term is utilized in *Handy*, regarding whether an accused was threatened, pressured, forced, or similarly compelled to enter a guilty plea. Defendant also argues that his

eighth-grade reading level is also "worthy of consideration" for purposes of the additional *Handy* factors.

Defendant's answers to the questions posed to him by the trial court from the transcript of plea at the plea hearing contradict his representation that his guilty plea was coerced or otherwise in contravention of the additional *Handy* factors. Such questions intentionally probed the voluntariness of defendant's guilty plea and his understanding of the consequences of his guilty plea. In responding to these queries from the trial court, defendant unequivocally indicated that no one had "promised [him][4] anything or threatened [him] in any way to cause [him] to enter th[e] plea against [his] wishes"; that he "enter[ed] th[e] plea of [his] own free will, fully understanding what [he was] doing"; and that he understood the various aspects and ramifications of his plea. In light of this, neither the additional *Handy* factor of coercion nor any other additional factor operate to advance the cause of defendant to withdraw his guilty plea based upon any fair and just reason.

Having examined each of the factors that this Court identified in *Handy* in order to ascertain whether there was any fair and just reason to allow defendant's motion to withdraw his guilty plea, we agree with the conclusion of the Court of Appeals that defendant has failed to demonstrate that there is a fair and just reason for the withdrawal of his plea.

Prejudice to the State

[2] Upon its conclusion "that Defendant has failed to demonstrate a fair and just reason for the withdrawal of his plea," the Court of Appeals went on to state the following:

> Even assuming *arguendo* that Defendant could show that he has established a fair and just reason supporting the withdrawal of his guilty plea, his motion was still properly denied because the State presented concrete evidence at the withdrawal hearing of prejudice to its case against him should the motion be granted.

Taylor, slip op. at 19, 2018 WL 6614053, at *8.

After the delineation of the factors in *Handy*, we offered further guidance concerning the analytical process that a trial court should

4. Pronouns in the third person are substituted for pronouns in the second person because the trial court's questions from the transcript of plea were directed to defendant.

undertake in its determination of a defendant's motion to withdraw his guilty plea. "The State may refute the movant's showing by evidence of concrete prejudice to its case by reason of the withdrawal of the plea. *Prejudice to the State is a germane factor against granting a motion to withdraw*." *Handy*, 326 N.C. at 539, 391 S.E.2d at 163 (emphasis added).

Once the Court of Appeals determined that its consideration of the *Handy* factors did not convince that court to conclude that defendant had shown any fair and just reason to allow the withdrawal of his guilty plea, the lower appellate court was not required to engage in an analysis of any potential prejudice to the State in the event that the withdrawal of the guilty plea had been allowed. Since the Court of Appeals arrived at the outcome that no fair and just reason existed for such withdrawal because the *Handy* factors had not been met by defendant, prejudice to the State did not arise as a germane factor for consideration against granting defendant's motion to withdraw his guilty plea. The exploration of this unreached factor by the Court of Appeals therefore constitutes unnecessary surplusage which clutters its learned analysis, so we disavow that portion of the Court of Appeals' decision.

III. Ineffective Assistance of Counsel

[3] For the same reasons that we articulated in our assessment of the *Handy* factor concerning the competency of counsel, in which we deferred to the ability of the Court of Appeals to sufficiently consider the factor without a requirement to rule that said factor supports the position of defendant or the State, this Court adopts the decision of the Court of Appeals majority—with which the dissenting judge at the Court of Appeals concurs—to dismiss defendant's ineffective assistance of counsel claim without prejudice to his right to file a motion for appropriate relief to reassert that claim.

IV. Conclusion

For the reasons stated, we affirm the decision of the Court of Appeals in its consideration and application of the factors identified by this Court in *Handy* and the lower appellate court's resulting determination that the trial court did not err in denying defendant's motion to withdraw his guilty plea based upon the trial court's ruling that defendant failed to show any fair and just reason for the withdrawal of his guilty plea. In light of our holding, we disavow the dicta contained in the decision of the Court of Appeals regarding the subject of prejudice to the State after the lower appellate court's stated conclusion that

defendant had not satisfied the *Handy* factors. Defendant's ineffective assistance of counsel claim is dismissed without prejudice to his right to file a motion for appropriate relief in the trial court to reassert that claim. The decision of the Court of Appeals is therefore modified and affirmed.

MODIFIED AND AFFIRMED.

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

DALE THOMAS WINKLER AND DJ'S HEATING SERVICE
v.
NORTH CAROLINA STATE BOARD OF PLUMBING, HEATING & FIRE SPRINKLER CONTRACTORS

No. 319PA18

Filed 5 June 2020

1. Licensing Boards—disciplinary action—attorney fees—N.C.G.S. § 6-19.1—statutory interpretation

The Supreme Court construed ambiguous phrasing in N.C.G.S. § 6-19.1(a) (regarding attorney fees for a party appealing or defending against an agency decision) as allowing trial courts to award attorney fees in a disciplinary action by a licensing board.

2. Licensing Boards—disciplinary action—substantial justification by agency—attorney fees—N.C.G.S. § 6-19.1

The trial court abused its discretion by awarding a contractor attorney fees for defending a disciplinary action brought by the Board of Plumbing, Heating & Fire Sprinkler Contractors because the Board had substantial justification for pursuing its claim, even though it did not prevail. The sequence of events after the contractor erroneously determined that there was no gas leak after he inspected a hotel's pool heating system—work for which he did not possess the requisite license—included the death of three people from carbon monoxide poisoning and the serious injury of another person.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 261 N.C. App, 106, 819 S.E.2d 105 (2018), reversing an order entered on 15 May 2017 by Judge Edwin G. Wilson in Superior Court, Watauga County. On 14 August 2019, the Supreme Court allowed defendant's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 6 January 2020.

Bailey & Dixon, LLP, by Jeffrey P. Gray, for petitioner-appellants.

Young Moore and Henderson P.A., by Angela Farag Craddock, John N. Fountain, and Reed N. Fountain, for respondent-appellee.

Nichols, Choi & Lee, PLLC, by M. Jackson Nichols, Anna Baird Choi, and Christina D. Cress; and North Carolina Real Estate Commission, by Janet B. Thoren, for the North Carolina Board of Architecture, North Carolina Board of Barber Examiners, North Carolina Real Estate Commission, North Carolina State Board of Chiropractic Examiners, and State Licensing Board for General Contractors, amici curiae.

BEASLEY, Chief Justice.

In this case, the Court is asked to consider whether a trial court may award attorney's fees to a prevailing party in a disciplinary action by a licensing board. Because we conclude that N.C.G.S. § 6-19.1 does not preclude a trial court from awarding attorney's fees in disciplinary actions by a licensing board, we modify and affirm the holding below.

I. Factual and Procedural Background

In April 2013, maintenance staff from the Best Western Hotel in Boone, North Carolina, contacted Dale Thomas Winkler f/k/a DJ's Heating Service (Winkler) to examine the hotel's pool heater. Winkler held a Heating Group 3 Class II (H-3-II) residential license that qualified him to work on detached residential HVAC units and, as such, he was not licensed to perform the work requested. Upon examining the heater, despite the fact that he was not equipped with the appropriate licensure, Winkler determined that the gas supply had been turned off. He located the fuel supply in the pool equipment room and turned on the gas.

On 16 April 2013, several days after Winkler examined the pool heater, two guests died in Room 225 of the hotel, located above the pool equipment

room. The hotel closed the room until it could be checked for gas leaks. At the time, the cause of death for both guests was undetermined.

The hotel contacted Winkler, asking him to examine the ventilation system for the pool heater and the fireplace in Room 225. During his visit, Winkler performed a soap test to check for gas leaks and determined there were no leaks. Without checking for carbon monoxide, Winkler informed the hotel that the ventilation system appeared to be working.

Following Winkler's inspection, the hotel reopened Room 225 in late May 2013. On 8 June 2013, one guest died and another guest was injured while staying in Room 225. Shortly after the third death, toxicology reports from the first two guests were performed and indicated that both individuals had a lethal concentration of carbon monoxide in their blood. Toxicology reports later performed on the third and fourth guests also indicated excessive levels of carbon monoxide in their blood.

Following the issuance of the toxicology reports, the North Carolina State Board of Plumbing, Heating, & Fire Sprinkler Contractors (the Board) performed its own investigation and determined that carbon monoxide from the ventilation system for the pool heater had entered Room 225 through openings near the room's fireplace and HVAC unit. After he admitted to the Board that he had performed work beyond his license qualification, the Board suspended Winkler's license for one year and ordered him to complete multiple courses.

Winkler appealed the Board's decision to the Superior Court, Watauga County. The trial court entered an order on 22 June 2015 affirming the Board's decision. On appeal to the North Carolina Court of Appeals, Winkler challenged the Board's jurisdiction to discipline him for working on the pool heater without proper licensure. On 20 September 2016, the Court of Appeals held that N.C.G.S. § 87-21 did not grant the Board jurisdiction to discipline Winkler for conducting the pool heater inspection. *Winkler v. State Bd. of Exam'rs of Plumbing, Heating & Fire Sprinklers Contractors* (*Winkler I*), 249 N.C. App. 578, 599, 790 S.E.2d 727, 739 (2016). The Court of Appeals vacated the portion of the Board's order relating to Winkler's inspection of the pool heater and remanded the case to the Board for entry of a new order based on other misconduct.

On 24 October 2016, Winkler filed a motion for attorney's fees and costs in Superior Court, Watauga County, pursuant to N.C.G.S. §§ 6-19.1 and 6-20, arguing that the Board knew or should have known that it lacked authority to discipline him for the pool heater inspection. The

trial court entered an order awarding Winkler $29,347.47 in attorney's fees and costs. The Board appealed the order and moved to stay the order awarding attorney's fees and costs pending appeal.

The Court of Appeals ultimately held that the trial court erred in awarding Winkler attorney's fees pursuant to N.C.G.S. § 6-19.1 because, when read as a whole, the statute excludes cases arising out of the defense of a disciplinary action by a licensing board. *Winkler v. N.C. State Bd. of Plumbing, Heating & Fire Sprinkler Contractors* (*Winkler II)*, 261 N.C. App. 106, 114, 819 S.E.2d 105, 110–11 (2018). We disagree.

II. Discussion

In North Carolina, a trial court may award attorney's fees only as authorized by statute. *City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972). Section 6-19.1 of the North Carolina General Statutes governs a trial court's ability to award attorney's fees. The relevant portion of the statute provides the following:

> In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action pursuant to G.S. 150B-43 or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if:
>
> > (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
> >
> > (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

N.C.G.S. § 6-19.1(a) (2019).

The Board contends that the phrase "or a disciplinary action by a licensing board" was intended to be an exclusion to the statute; Winkler, on the other hand, argues that rate-fixing cases are the only exclusion to

the statute. Thus, this case presents an issue of statutory interpretation, which we review de novo. *Applewood Props., LLC v. New S. Props., LLC*, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013).

1. Statutory Construction of N.C.G.S. § 6-19.1

[1] This Court has long recognized that, "[w]hen the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) (quoting *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006)). When the statutory language is ambiguous, however, the Court will ascertain legislative intent. *Id.*

Furthermore, courts should construe the statute so that "none of its provisions shall be rendered useless or redundant." *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981). Based on the Court's review of the words and punctuation used in N.C.G.S. § 6-19.1, we conclude that the statute is ambiguous.

The disputed language of N.C.G.S. § 6-19.1 is contained in the first half of the statute which reads that "[i]n any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action . . . ." Both parties argue that the grammatical structure of the statute supports only their own interpretation of the statute and precludes that of their opponent, and the Court of Appeals relied heavily on the placement of commas and indefinite articles for its interpretation.

Ordinarily, the placement and use of punctuation aids in the process of statutory interpretation. *Stephens Co. v. Lisk*, 240 N.C. 289, 293–94, 82 S.E.2d 99, 102 (1954) (citing *State v. Bell*, 184 N.C. 701, 115 S.E. 190 (1922)). But while punctuation "is intended to and does assist in making clear and plain the meaning of all things else in the English language," this Court has also recognized that punctuation "is not an infallible standard of construction," *Bell*, 184 N.C. at 706, 115 S.E. at 192. The statute at issue here demonstrates the fallibility of reliance on grammatical structure alone. Here each of the proposed constructions is marred by a punctuation or usage error. Thus, while we typically discuss statutory ambiguity in terms of the provision being equally susceptible of multiple interpretations, we see the opposite problem here—from a grammatical perspective, the provision at issue is equally *unsusceptible* of each proposed interpretation.

It is undisputed that the introductory phrase of N.C.G.S. § 6-19.1(a) sets out a broad category of actions—"any civil action"—in which, upon proper findings, the trial court may award attorney's fees. Likewise, everyone agrees that the clause immediately following the introductory phrase, which is set off by a pair of commas, delineates a subcategory of civil actions that are excluded from the provision—"an adjudication for the purpose of establishing or fixing a rate." The dispute in the instant case arises over the function of the next clause, which is also set off by a pair of commas, and reads as follows: "or a disciplinary action by a licensing board." There are two possible interpretations. Either the statute contains two broad categories of actions in which attorney's fees may be awarded—civil actions and disciplinary actions by licensing boards—or it contains two subcategories of civil actions excluded from the provision allowing the trial court to award attorney's fees—rate-fixing actions and disciplinary actions by licensing boards.

The second interpretation—that disciplinary actions are a second subcategory of civil actions excepted from the broad category of civil actions and therefore are not eligible for an award of attorney's fees—is the interpretation adopted by the Court of Appeals.

As the Court of Appeals pointed out, this construction has the benefit of parallel structure. *See Winkler II*, 261 N.C. App. at 112, 819 S.E.2d at 109 (quoting *Falin v. Roberts Co. Field Servs.*, 245 N.C. App. 144, 150, 782 S.E.2d 75, 79 (2016)). We agree with the Court of Appeals that, generally, "[e]very element of a parallel series must be a functional match of the others (word, phrase, clause, sentence) and serve the same grammatical function in the sentence (e.g., noun, verb, adjective, adverb). When linked items are not like items, the syntax of the sentence breaks down . . . ." *Falin*, 245 N.C. App. at 150, 782 S.E.2d at 79) (quoting The Chicago Manual of Style § 5.212 (16th ed. 2010)). In subsection 6-19.1(a) an adjective, "any," modifies a phrase, "civil action," while singular indefinite articles, "an" and "a," modify the phrases "adjudication for the purpose of establishing or fixing a rate" and "disciplinary action by a licensing board." This parallel use of singular indefinite articles ties together the phrases related to establishing and fixing a rate and disciplinary action by a licensing board and it differentiates those phrases from the phrase "civil action." This common grammatical form implies a common function: to set out exceptions to the general provision that the trial court may award attorney's fees in "any civil action."

This interpretation, however, fails to account for the excessive comma use throughout the relevant portion of the statute. The following

disputed portion of N.C.G.S. § 6-19.1(a) contains a series of three commas: "In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action . . . ." If the clauses related to establishing or fixing a rate and disciplinary actions are to be read as performing the same grammatical function within the sentence—i.e., modifying the phrase "any civil action"—the comma separating them is entirely superfluous.

The fact that the rate-fixing clause is set off by a pair of commas arguably might indicate that the clause is intended as an interrupting modifier, altering the meaning of the noun phrase immediately preceding it. Generally, however, a pair of commas setting off a descriptive phrase denotes a *nonrestrictive* clause—one that describes, but is not necessary to preserve the meaning of the sentence. *See* The Chicago Manual of Style § 6.29 (17th ed. 2017); Bryan A. Garner, The Redbook: A Manual on Legal Style § 1.6 (4th ed. 2018). Here, the modifying phrase—whatever it includes—is necessary to the sentence because without it, "any civil action" could be eligible for an award of attorney's fees without exception. It is clear that at least one—and possibly all—of the first three commas in N.C.G.S. § 6-19.1(a) are misplaced.

Because no interpretation of the statute is free from grammatical error, no plain meaning emerges from the language of N.C.G.S. § 6-19.1(a). Thus, we cannot rely on rules of grammar to guide us through our analysis. Typically, where the plain language of a statute is equally susceptible of multiple interpretations, we must attempt to discern the legislative intent behind the words in order to interpret the statute. Here, however, although the sentence is from a grammatical perspective equally incorrect in each interpretation, we nonetheless find the General Assembly could not have intended to except disciplinary actions by a licensing board from the category of civil actions because such disciplinary actions are not civil in nature.

Chapter 1 of the North Carolina General Statutes, which governs civil procedure, defines a civil "action" as "an ordinary proceeding *in a court of justice*, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense." N.C.G.S. § 1-2 (2019) (emphasis added). Disciplinary actions by licensing boards are administrative proceedings held before a board or commission, which creates its own regulations and enforces compliance upon certificate holders and licensees. Upon finding that there has been a violation,

administrative agencies choose between several possible remedies, including suspension or revocation of the certificate or license. *See*, *e.g.*, N.C.G.S. § 87-23 (2019). Neither the creation nor the initial enforcement of administrative regulations occurs before a "court of justice." *See Ocean Hill Joint Venture v. N.C. Dep't of Env't, Health & Nat. Res.*, 333 N.C. 318, 321, 426 S.E.2d 274, 276 (1993) (observing that although "[a]rticle IV, section 3 of the Constitution contemplates that discretionary judicial authority may be granted to an agency when reasonably necessary to accomplish the agency's purposes[,]. . . . an agency so empowered is not a part of the 'general court of justice' " (first quoting *In the Matter of Appeal from the Civil Penalty Assessed for Violations of the SPCA*, 324 N.C. 373, 379, 379 S.E.2d 30, 34 (1989); then quoting N.C. Const. art. IV § 2). Thus, proceedings before administrative agencies, including disciplinary actions by a licensing board, are not civil actions.

Indeed, a disciplinary action does not become a civil action until either party petitions for judicial review of the decision of the board or commission, and the matter becomes a contested case before a judge. *See Empire Power Co. v. N.C. Dep't of Env't, Health & Nat. Res.*, 337 N.C. 569, 594, 447 S.E.2d 768, 783 (1994) (noting that judicial review "is generally available only to aggrieved persons who have exhausted all administrative remedies made available by statute or agency rule" (citing N.C.G.S. § 150B-43 (1991))).

Construing the statute to allow the trial court to award attorney's fees for disciplinary actions by a licensing board is also consistent with the remainder of N.C.G.S. § 6-19.1(a), which contains an explicit exception to the statute. Specifically, the statute provides that "[n]othing in this section shall be deemed to authorize the assessment of attorney's fees for the administrative review portion of the case in contested cases arising under Article 9 of Chapter 131E of the General Statutes." Not only does this language convey an intent to allow the award of attorney's fees for administrative hearings, but it also shows that, if it had intended to do so, the legislature could have explicitly excepted Article 3A from the provisions of N.C.G.S. § 6-19.1.

The statute also provides that "the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency." Appellee argued that because disciplinary actions by a licensing board are considered a

"contested case" under Chapter 150B, it makes no sense to include "or a disciplinary action by a licensing board" in the statute unless it was intended to be an exclusion. This contention is incorrect.

The Administrative Procedure Act contains multiple articles and covers different types of proceedings. Administrative actions that become subject to judicial review have both administrative and judicial components. Disciplinary proceedings before licensing boards—like the one that is before us in this case—are covered by Article 3A of Chapter 150B of the North Carolina General Statutes. Under our interpretation of N.C.G.S. § 6-19.1, the separate reference to disciplinary proceedings found in that statutory provision authorizes awards of attorney's fees for both phases of such a proceeding. On the other hand, the provision authorizing attorney's fee awards in administrative proceedings conducted pursuant to Article 3 of Chapter 150B applies to a different set of cases, with the relevant language serving to authorize attorney's fee awards in both the administrative and judicial components of such proceedings, given that the judicial review portion is covered by the statutory reference to "civil actions" and the administration portion is covered by the additional language expressly authorizing fee awards in the administrative portion of such proceedings. For this reason, the interpretation of N.C.G.S. § 6-19.1 that we deem appropriate in this case does not render the statutory reference to the administrative portion of cases arising under Article 3 of Chapter 150B "useless or redundant." *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. at 556, 276 S.E.2d at 447 (stating that the court should construe the statute so that "none of its provisions shall be rendered useless or redundant").

Accordingly, we hold that the legislature intended to allow trial courts to award attorney's fees in a disciplinary action by a licensing board.

2. Substantial Justification and Special Circumstances

[2] Section 6-19.1 provides that a judge may award attorney's fees in eligible matters only upon a finding that the agency acted without substantial justification and that there are no special circumstances that would make the award of attorney's fees unjust. Because substantial justification existed to support the Board's claim in this case, we conclude that the trial court abused its discretion in awarding attorney's fees for both the administrative and judicial review proceedings.

We review a trial court's decision to award attorney's fees under N.C.G.S. § 6-19.1 for abuse of discretion. *See High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 234 N.C. App. 336, 338, 760 S.E.2d 750, 753

(2014) ("By the clear language of the statute, once the trial court makes the appropriate findings required in subsections (1) and (2) of N.C.G.S. § 6-19.1(a), its decision on whether or not to award attorney's fees is discretionary."). "To show an abuse of discretion and reverse the trial court's order[, the] appellant has the burden to show the trial court's rulings are 'manifestly unsupported by reason,' or 'could not be the product of a reasoned decision.' " *Id.* at 340, 760 S.E.2d at 753 (quoting *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 610, 617 S.E.2d 40, 50 (2005)).

The purpose of N.C.G.S. § 6-19.1 is to "curb unwarranted, ill supported suits initiated by State agencies," by requiring that the State's action be substantially justified. *Crowell Constructors v. State ex rel. Cobey*, 342 N.C. 838, 844, 467 S.E.2d 675, 679 (1996). This standard is not so stringent that the agency must "demonstrate the infallibility of each suit it initiates" or even prevail in the action. *Id.* Nor is the standard so lax that the State may avoid liability for attorney's fees by demonstrating merely that its suit is not frivolous. *Id.* (quoting *Pierce v. Underwood*, 487 U.S. 552, 566, 108 S. Ct. 2541, 2550 (1988)). Rather, this Court has adopted "a middle-ground objective standard to require the agency to demonstrate that its position, at and from the time of its initial action, was rational and legitimate to such degree that a reasonable person *could* find it satisfactory or justifiable in light of the circumstances then known to the agency." *Id.*

Throughout the proceedings in the instant case, the Board has contended that the deaths and injuries at the center of this controversy are "the precise kind of harm the legislature intended to bring under the authority of the Board 'in order to protect the public health, comfort and safety.' " *Winkler I*, 249 N.C. App. at 591, 790 S.E.2d at 735.

Specifically, N.C.G.S. § 87-23(a) grants the Board authority to do the following:

> [R]evoke or suspend the license of or order the reprimand or probation of any plumbing, heating, or fire sprinkler contractor, or any combination thereof . . . who fails to comply with any provision or requirement of this Article [2], or the rules adopted by the Board, or for gross negligence, incompetency, or misconduct, in the practice of or in *carrying on the business* of a plumbing, heating, or fire sprinkler contractor, or any combination thereof, as defined in this Article.

N.C.G.S. § 87-23(a) (2019) (emphasis added).

Subsection 87-21(a)(5)[1] of the North Carolina General Statutes, at the time of the events, defined "engaged in the business" as the act of or offer to perform installations, alterations, or restorations. N.C.G.S. § 87-21(a)(5) (2017). The terms "install," "alter" and "restore" were not defined in the statute. The term "restore" can mean a number of things, including "to put or bring back into existence or use" or "to bring back to or to put back into a former or original state." *Restore*, Merriam-Webster's Online Dictionary, https://www.merriam-webster.com/dictionary/restore (last visited May 26, 2020). The Board argued that Winkler's actions with regard to the pool heater were consistent with this definition.

According to the Board's unchallenged findings of fact, Winkler was asked to "examine the pool heater and get it running." Winkler then examined the heater and, "[a]long with the Best Western [H]otel maintenance staff," turned on the pool heater. Winkler's services were again requested following the death of two occupants, and he concluded that there was no gas leak, despite obvious signs of a leak. As a result of the gas leak, three people died and one person was seriously injured.

The Board argued that Winkler's actions "put [the pool heating system] back into use." That is, he restored the system. The Court of Appeals ultimately concluded that Winkler's actions in turning on the pool heating system did not rise to the level of a restoration. That decision is not before this Court, and we express no opinion on it. Even assuming that the Court of Appeals' decision in *Winkler I* was correct, we cannot agree, however, that the Board's arguments were irrational or illegitimate in light of the facts. Despite failing to prevail on the merits of its claim, the Board was substantially justified in contending that Winkler engaged in the type of conduct the Board was authorized to discipline.[2]

For the foregoing reasons, we hold that the trial court erred in awarding Winkler attorney's fees, pursuant to N.C.G.S. § 6-19.1, because there was substantial justification for the Board's claims.

MODIFIED AND AFFIRMED.

---

1. Following the events giving rise to this case, the statute was amended to include any person who "verifies, inspects, evaluates, tests, installs, alters or restores" plumbing or heating devices or offers to perform those services. N.C.G.S. § 87-21(a)(5) (2019).

2. Because the Board acted with substantial justification, we need not consider whether special circumstances existed that would make the award of attorney's fees unjust.

CHAMBERS v. MOSES H. CONE MEM'L HOSP.

[374 N.C. 737 (2020)]

CHRISTOPHER CHAMBERS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED	)	
v.	)	Guilford County
THE MOSES H. CONE MEMORIAL HOSPITAL; THE MOSES H. CONE MEMORIAL HOSPITAL OPERATING CORPORATION D/B/A MOSES CONE HEALTH SYSTEM AND D/B/A CONE HEALTH; AND DOES 1 THROUGH 25, INCLUSIVE	)	

No. 147PA18

ORDER

This Court's 5 June 2020 opinion is modified to recognize amicus counsel. Counsel listed in the opinion shall now read as:

> Higgins Benjamin, PLLC, by John F. Bloss, for plaintiff-appellant.
>
> Womble Bond Dickinson, LLP, by Philip J. Mohr and Brent F. Powell, for defendant-appellees The Moses H. Cone Memorial Hospital and The Moses H. Cone Memorial Hospital Operating Corporation.
>
> Patterson Harkavy LLP, by Burton Craige and Narendra K. Ghosh, for North Carolina Advocates for Justice; Carol L. Brooke, Jack Holtzman, and Clermont F. Ripley for North Carolina Justice Center; and William R. Corbett and Deborah Goldstein for Center for Responsible Lending, amici curiae.
>
> Joshua H. Stein, Attorney General, by Ryan Y. Park, Deputy Solicitor General, Daniel T. Wilkes, Assistant Attorney General, and Matthew C. Burke, Solicitor General Fellow, for the State of North Carolina, amicus curiae.
>
> Linwood Jones for North Carolina Healthcare Association, amicus curiae.

By Order of the Court in Conference, this 30th day of June, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 30th day of June, 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

STATE v. CAMPBELL

[374 N.C. 739 (2020)]

STATE OF NORTH CAROLINA	)	
	)	PETITION FOR *WRIT OF*
v.	)	*CERTIORARI* TO REVIEW DECISION
	)	OF N.C. COURT OF APPEALS
ANTIWUAN TYREZ CAMPBELL	)	

No. 97P20

SPECIAL ORDER

Defendant's petition for a writ of certiorari is allowed and the case is remanded to the Court of Appeals for reconsideration in light of *State v. Hobbs*, No. 263PA18 (N.C. May 1, 2020) and *State v. Bennett*, No. 406PA18 (N.C. Jun. 5, 2020).

By order of the Court in Conference, this the 5th day of June, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of June, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
~~Assistant~~ Clerk

STATE v. CHARLES

[374 N.C. 740 (2020)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Gaston County
	)	
RICKY FRANKLIN CHARLES	)	

No. 311A19

ORDER

The Court, acting on its own motion and in the exercise of its discretionary supervisory authority over the lower courts, amends the record on appeal in this case to include the attached Impaired Driving—Judgment Suspending Sentence entered on 18 April 2017 by Judge John K. Greenlee in Gaston County File No. 17 Cr 54022. In addition, also acting on its own motion and in the exercise of its discretionary supervisory authority, the Court issues a writ of certiorari for the limited purpose of remanding this case to the Court of Appeals for de novo consideration of the merits of defendant's challenges to the Impaired Driving—Judgment Suspending Sentence entered by Judge W. Todd Pomeroy on 26 April 2018 in Gaston County File No. 17 CrS 54022, with this order providing the Court of Appeals with the jurisdiction to hear and decide the substantive issues that defendant seeks to raise for its consideration.

By order of the Court in conference, this the 18th day of May 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of May 2020.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk

~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court
of North Carolina

STATE OF NORTH CAROLINA

File No. 16CR 54032

GASTON County GASTONIA Seat of Court

(NOTE: *This form should be used for only one DWI conviction. Multiple convictions sentenced under G.S. 20-179 may not be consolidated for judgment.*)

In The General Court Of Justice

☒ District ☐ Superior Court Division

STATE VERSUS

IMPAIRED DRIVING - JUDGMENT SUSPENDING SENTENCE

(For Offenses Committed Dec. 1, 2011 - Nov. 30, 2016)

☐ COMMITMENT ON SPECIAL PROBATION

G.S. 20-179

Name Of Defendant									
Ricky Franklin Charles									
Race	Sex	Drivers License No.	State	Date Of Birth	Date Of Offense	Attorney For State	Def. Found Not Indigent / Def. Waived Attorney	Attorney For Defendant	Appointed / Retained	Crt Rptr Initials
W	M	17449508	NC	8-12	4-9-16	H. Wellons		H. Clark	☒ / ☐	

Offense ☒ Impaired Driving (G.S. 20-138.1). ☐ Impaired Driving in a commercial vehicle (G.S. 20-138.2). ☐ Operating a commercial vehicle after consuming alcohol and this was the defendant's second or subsequent conviction of this offense (G.S. 20-138.2A). ☐ Operating a school bus, school activity bus, child care vehicle, ambulance, other EMS vehicle, firefighting vehicle, or law enforcement vehicle after consuming alcohol and this was the defendant's second or subsequent conviction of this offense (G.S. 20-138.2B).

The defendant was found guilty/responsible, pursuant to ☒ plea (☐ pursuant to *Alford*) (☐ of no contest) ☐ trial by judge ☐ trial by jury, of the offense specified above. The Court, based upon the determinations shown on the attached Determination of Sentencing Factors form (AOC-CR-311, Rev. 12/15), has imposed the following punishment level.

☐ Aggravated Level One. ☐ Level One. ☐ Level Two. ☐ Level Three. ☒ Level Four. ☐ Level Five.

The Court, having considered evidence, arguments of counsel and statement of defendant, ORDERS that defendant be imprisoned

for a minimum term of	for a maximum term of	
120 days	120 days	in the custody of the Misdemeanant Confinement Program.

☐ This sentence shall run at the expiration of sentence imposed in file number _____.

The defendant shall be given credit for _____ days spent in confinement prior to the date of this Judgment as a result of this charge ☐ and as an inpatient at a facility operated or licensed by the State for the treatment of alcoholism or substance abuse after the commission of the above offense. Credit shall be applied against the ☐ minimum and maximum terms above.

☐ imprisonment for special probation below. (NOTE: *No credit may be given for the first 24 hours spent in confinement.*)

SUSPENSION OF SENTENCE

Subject to the conditions set out below, the execution of this sentence is suspended and the defendant is placed on ☒ unsupervised probation for 24 months. ☐ supervised probation for _____ months, the Court having received evidence and having found as a fact that supervision is necessary.

SPECIAL PROBATION - G.S. 15A-1351

☐ A. As a condition of special probation, the defendant shall serve an active term of _____ ☐ days ☐ months ☐ Hours

☐ 1. in the custody of the Sheriff of this County. ☐ and pay jail fees.

☐ 2. as an inpatient in *(name treatment facility)* _____ shall follow the rules of that facility until discharged, and shall not leave its premises except as authorized under those rules.

NOTE: *This term shall NOT be reduced by good time, gain time, or parole, or, unless provided above, by jail or treatment time.*

☐ B. The defendant shall report in a sober condition to begin serving this term on: Day _____ Date _____ Hour _____ ☐ AM ☐ PM and shall remain in custody until: Day _____ Date _____ Hour _____ ☐ AM ☐ PM

☐ C. The defendant shall again report in a sober condition to continue serving this term on the same day of the week for the next _____ consecutive weeks, and shall remain in custody during the same hours each week until completion of the active term ordered.

☐ D. This term shall be served at the direction of the probation officer within _____ ☐ days ☐ months of this Judgment.

☐ E. Work release is recommended. ☐ F. Substance abuse treatment is recommended.

MONETARY CONDITIONS

The defendant shall pay to the Clerk of Superior Court the "Total Amount Due" shown below, plus the probation supervision fee if placed on supervised probation above, pursuant to a schedule ☐ determined by the probation officer. ☒ set out by the court as follows: Pay $600 bal. by Dec (State)

Costs	Fine	Restitution*	Attorney's Fees	Community Service Fee	EHA Fee/CAM Fee	Appt Fee/Misc	Total Amount Due
$ 290	$ 200	$	$	$ 250	$	$ 60	$ 1400

NOTE: *In addition to all other costs, G.S. 7A-304(a)(10) requires a fee of $100.00 for a conviction of any of the four offenses sentenced on this form.*

*See attached "Restitution Worksheet, Notice And Order (Initial Sentencing)" AOC-CR-611, which is incorporated by reference.

☐ The Court finds just cause to waive costs, as ordered on the attached ☐ AOC-CR-618. ☐ Other: _____.

REGULAR CONDITIONS OF PROBATION - G.S. 15A-1343(b)

NOTE: *Any probationary judgment may be extended pursuant to G.S. 15A-1342.*

The defendant shall: (1) Commit no criminal offense in any jurisdiction. (2) Possess no firearm, explosive device or other deadly weapon listed in G.S. 14-269. (3) Remain gainfully and suitably employed or faithfully pursue a course of study or vocational training, that will equip the defendant for suitable employment, and abide by all rules of the institution. (4) Satisfy child support and family obligations, as required by the Court.

If the defendant is on supervised probation, the defendant shall also: (5) Not abscond, by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer. (6) Remain within the jurisdiction of the Court unless granted written permission to leave by the Court or the probation officer. (7) Report as directed by the Court or the probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment. (8) Notify the probation officer if the defendant fails to obtain or retain satisfactory employment. (9) Submit at reasonable times to warrantless searches by a probation officer of the defendant's person and of the defendant's vehicle and premises while the defendant is present, for purposes directly related to the probation supervision, but the defendant may not be

Original - File Copy - DMV

Material opposite unmarked squares is to be disregarded as surplusage.

(Over)

AOC-CR-310C, Rev. 12/16, © 2016 Administrative Office of the Courts

A TRUE COPY
CLERK OF SUPERIOR COURT
GASTON COUNTY
By: _____ Deputy Clerk, Superior Court

required to submit to any other search that would otherwise be unlawful. (10) Submit to warrantless searches by a law enforcement officer of the defendant's person and of the defendant's vehicle, upon a reasonable suspicion that the defendant is engaged in criminal activity or is in possession of a firearm, explosive device, or other deadly weapon listed in G.S. 14-269 without written permission of the court. (11) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for the defendant by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors, or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used. (12) Supply a breath, urine, or blood specimen for analysis of the possible presence of prohibited drugs or alcohol when instructed by the defendant's probation officer for purposes directly related to the probation supervision. If the results of the analysis are positive, the probationer may be required to reimburse the Division of Adult Correction for the actual costs of drugs or alcohol screening and testing.

If the defendant is to serve an active sentence as a condition of special probation, the defendant shall also: (13) Obey the rules and regulations of the Division of Adult Correction governing the conduct of inmates while imprisoned. (14) If placed on supervised probation above, report to a probation officer in the State of North Carolina within seventy-two (72) hours of the defendant's discharge from the active term of imprisonment.

SPECIAL CONDITIONS OF PROBATION - G.S. 15A-1343(b1); 20-179

15. Obtain a substance abuse assessment and all recommended education or treatment. assessment within 60 days
☒ 16. Surrender the defendant's drivers license to the Clerk of Superior Court for transmittal/notification to the Division of Motor Vehicles; and not operate a motor vehicle until the defendant's driving privilege is restored by that Division, except as may be permitted in a limited privilege.
☒ 17. Complete 48 hours of community service during the first 120 days of the period of probation, as directed by the judicial service coordinator. The fee prescribed by G.S. 143B-708 is
☐ not due because it is assessed in a case adjudicated during the same term of court.
☒ to be paid ☒ pursuant to the schedule set out under Monetary Conditions above ☐ within _____ days of this Judgment and before beginning service.
☐ 18. Abstain from alcohol consumption for _____ ☐ days, ☐ months, as verified by a continuous alcohol monitoring (CAM) system.
☐ a. *(offenses committed prior to December 1, 2012, only)* The defendant shall pay to the Clerk the fees associated with the system.
☐ b. *(offenses committed on or after December 1, 2012)* The fees for the system shall be paid directly to the monitoring provider by
☐ the defendant. ☐ _____, the local government entity responsible for the defendant's incarceration in the local confinement facility, upon the Court's finding, for good cause shown, that the defendant should not be required to pay the fees and the local government's agreement to pay them.
☐ c. *(Levels 1 and 2, only, for offenses committed on or after December 1, 2012)* The defendant shall be given credit against this period of abstinence and monitoring for *(maximum of 60)* _____ days spent on CAM prior to trial.
☒ 19. Other:
VIOLATE NO LAWS OF THE STATE.

(Check any that apply - G.S. 20-179(r))
☐ The probation officer may transfer the defendant to unsupervised probation upon completion of ☐ the community service required by Special Condition No. 17 above. ☐ payment of the "Total Amount Due" on the reverse.

SPECIAL ALCOHOL CONCENTRATION FINDING

☐ The defendant's alcohol concentration was 0.15 or greater. ☐ Other: _____

ORDER OF COMMITMENT/APPEAL ENTRIES

☐ 1. It is ORDERED that the Clerk deliver two certified copies of this Commitment on Special Probation to the sheriff or other qualified officer and that the officer cause the defendant to be delivered with these copies to the custody of the agency named on the reverse to serve the sentence imposed or until the defendant shall have complied with the conditions of release pending appeal.
☒ 2. The defendant gives notice of appeal from the judgment of the District Court to the Superior Court. The current pretrial release order is modified as follows: same
NOTE: ***Withdrawal of appeal or remand to District Court requires that a new sentencing hearing be scheduled in District Court, unless certain conditions are met. G.S. 20-38.7(e).***
☐ 3. The defendant gives notice of appeal from the judgment of the Superior Court to the appellate division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

SIGNATURE OF JUDGE

Date	*Name Of Presiding Judge (Type Or Print)*	*Signature Of Presiding Judge*
4-18-17	John K. Greenlee	

CERTIFICATION

I certify that this Judgment and the attachment(s) marked below are true and complete copies of the originals.
☐ 1. Determination Of Sentencing Factors (AOC-CR-311, Rev. 12/15) ☐ 3. Others: _____
☐ 2. Restitution Worksheet, Notice And Order (Initial Sentencing) (AOC-CR-611)

Date	*Date Certified Copies Delivered To Sheriff*	*Signature Of Clerk*	☐ *Deputy CSC* ☐ *Asst. CSC* ☐ *Clerk Of Superior Court* SEAL

NOTE TO CLERK: ***If the defendant's conviction is based on a violation of an offense involving impaired driving while the defendant's drivers license is revoked as a result of a prior impaired driving license revocation as defined in G.S. 20-28.2, report DWI Defendant Registration Stop to DMV using menu item #9 in STARS. Also report the defendant's conviction to DMV in the usual manner. If there is a non-defendant vehicle owner, report registration stop to DMV using menu item #10 in STARS (unless the owner has been found to be an innocent owner).***

Material opposite unmarked squares is to be disregarded as surplusage.

AOC-CR-310C, Side Two, Rev. 12/16

STATE v. CHARLES

[374 N.C. 740 (2020)]

STATE OF NORTH CAROLINA File No. 16CR 54022

Gaston County

In The General Court Of Justice
☒ District ☐ Superior Court Division

STATE VERSUS

Name Of Defendant: Ricky Franklin Charles
Race: white | Sex: male | Date Of Birth: 8-13-67 | Social Security No.:
Attorney For State: H. Wellons | ☐ Def. Found Not Indigent ☐ Def. Waived Attorney
Attorney For Defendant: H. Clark | ☒ Appointed ☐ Retained
Offense: DWI Level 4

JUDGMENT/ORDER OR OTHER DISPOSITION

NOTE: (For use in recording Misdemeanor conviction levels under S.S.A.)

PLEA	VERDICT
☐ Guilty/Responsible ☐ No Contest	☐ Guilty/Responsible
☐ Guilty/Responsible ☐ No Contest	☐ Guilty/Responsible
☐ Not Guilty/Not Responsible	☐ Not Guilty/Not Responsible

PRIOR CONVICTIONS: No./Level 0 ☐ I (0) ☐ II (1-4) ☐ III (5+)

MISD. CLASS: ☐ 1 ☐ 2 ☐ 3

MISD. CLASS: ☐ 1 ☐ 2 ☐ 3

The defendant hereby gives Notice of Appeal from the judgment of the District Court entered on 4-18-17 to The Superior Court.

Defendant's Signature: Ricky Charles Date: 4-18-17

A TRUE COPY
CLERK OF SUPERIOR COURT
GASTON COUNTY
By: Assistant Deputy, Clerk Superior Court

Date	Name Of Presiding Judge (Type Or Print)	Signature Of Presiding Judge
4-18-17	John K. Greenlee	

APPEAL ENTRIES

☐ The defendant gives notice of appeal from the judgment of the District Court to the Superior Court.
☐ The current pretrial release order is modified as follows:

☐ The defendant gives notice of appeal from the judgment of the Superior Court to the Appellate Division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

Date	Name Of Presiding Judge (Type Or Print)	Signature Of Presiding Judge

AOC-CR-305, Rev. 7/95 Original - File

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

03 JUNE 2020

3A20	State v. Bryan Xavier Johnson	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent	1. Allowed **01/07/2020** 2. Allowed 3. ---
6P20	State v. Datrel K'Chaun Lyons	Def's PDR Under N.C.G.S. § 7A-31	Denied
26P10-4	Jorge Gevara v. Clerk Jane Doe of Anson County Courthouse	Petitioner's Pro Se Petition for Writ of Mandamus	Denied
49A20	State v. Faye Larkin Meader	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent	1. Allowed **02/07/2020** 2. Allowed **06/01/2020** 3. ---
54A19-3	State v. Rogelio Albino Diaz-Tomas	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent	1. Allowed **04/21/2020** 2. Allowed 3. ---
55P20	State of North Carolina, *ex rel.*, Michael S. Regan, Secretary, North Carolina Department of Environmental Quality, Division of Waste Management v. WASCO, LLC	Def's PDR Under N.C.G.S. § 7A-31	Denied
58P20	State v. Timothy Jerome Midgette	1. Def's Notice of Appeal Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. State's Motion to Accept Response as if Timely Filed	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot 4. Dismissed as moot
60P17-2	State v. Jesse Williams	Def's Pro Se Petition for Writ of Mandamus	Dismissed

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60A20	Ashley Deminski, as guardian *ad Litem* on behalf of C.E.D., E.M.D., and K.A.D. v. The State Board of Education, and the Pitt County Board of Education	1. Plt's Notice of Appeal Based Upon a Dissent 2. Plt's Notice of Appeal Based Upon a Constitutional Question 3. Plt's PDR as to Additional Issues	1. --- 2. Dismissed *ex mero motu* 3. Allowed
69A20	In the Matter of A.M.L., G.J.L., B.J.B., J.E.B., T.R.B., Jr.	Respondent-Mother's Motion to Deem Brief Timely Filed	Allowed **05/28/2020**
74P20	State v. Damion McCormick	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied
75P20	State v. Jesus Martinez-Vasquez	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Guilford County 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
89P19-2	State v. Brian Keith Robinson	Def's Pro Se Motion for PDR	Denied
96P20	State v. Harold Daeshaun Sanders	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 2. Def's Pro Se Motion to Appoint Counsel	1. Denied 2. Dismissed as moot
97P20	State v. Antiwuan Tyrez Campbell	Def's Petition for Writ of Certiorari to Review Decision of the COA	Special Order
99A20	In the Matter of J.E.B., II	1. Respondent-Mother's Petition for Writ of Certiorari to Review Decision of District Court, Gaston County 2. Petitioner's Motion to Dismiss Appeal 3. Guardian *ad Litem*'s Motion to Dismiss Appeal	1. Allowed **05/07/2020** 2. Allowed **05/07/2020** 3. Allowed **05/07/2020**
106P20	Anton Zachary Zak v. Shannon Denise Sweatt	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of District Court, Moore County	1. Denied 2. Denied
119P20	State v. Brandon Alan Parker	Def's PDR Under N.C.G.S. § 7A-31	Allowed

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133P20	Louann Novack v. Edward Kosciuszko	Plt's PDR Under N.C.G.S. § 7A-31	Denied
135P20	Wetherington v. NC Department of Public Safety, NC Highway Patrol	1. Respondent's Motion for Temporary Stay 2. Respondent's Petition for Writ of Supersedeas 3. Respondent's PDR Under N.C.G.S. § 7A-31 4. North Carolina Fraternal Order of Police and National Fraternal Order of Police's Motion for Leave to File Amicus Brief in Support of Response to PDR	1. Allowed **03/25/2020** Dissolved **06/03/2020** 2. Denied 3. Denied 4. Denied
137P20	Paul Kipland Mace v. North Carolina Department of Insurance	Petitioner's PDR Under N.C.G.S. § 7A-31	Denied
142PA18	DTH Media Corp. et al. v. Folt et al.	Def's Motion to Stay the Mandate	Special Order **05/20/2020**
150P20	In the Matter of S.R.	Respondent-Father's Pro Se PDR Under N.C.G.S. § 7A-31	Denied
152P20	State v. Kelvin Melton	Def's Pro Se Motion for Notice of Motion for Hearing	Dismissed
166P20	State v. Willie White	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Iredell County 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
167P20	TD Bank USA, N.A. as Successor-in-Interest to Target National Bank v. Abdolhossain Motealleh	Def's Pro Se Motion for Notice of Appeal to PDR	Denied
168P20	Walter Haywood Willoughby v. Public Officer	1. Plt's Pro Se Motion for Notice of Estoppel and Stipulation of Constitutional Challenge 2. Plt's Pro Se Motion to Intervene with an Injunction	1. Dismissed 2. Dismissed

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169P20	State v. Fernando Hernandez	Def's Pro Se Motion for Writ of Rights Enactment Clause	Dismissed
170P20	Bernica Van Yelverton v. Public Officer	1. Plt's Pro Se Motion for Notice of Estoppel and Stipulation of Constitutional Challenge 2. Plt's Pro Se Motion to Intervene with an Injunction 3. Plt's Pro Se Motion for Second Notice and Opportunity to Cure	1. Dismissed 2. Dismissed 3. Dismissed
171P20	Anthony Eugene Yelverton v. Public Officer	1. Plt's Pro Se Motion for Notice of Estoppel and Stipulation of Constitutional Challenge 2. Plt's Pro Se Motion to Intervene with an Injunction	1. Dismissed 2. Dismissed
172P20	Dilila Latrice Spencer v. Public Officer	1. Plt's Pro Se Motion for Notice of Estoppel and Stipulation of Constitutional Challenge 2. Plt's Pro Se Motion to Intervene with an Injunction	1. Dismissed 2. Dismissed
175P20	State v. Toriano Leverne White	1. Petitioner's Pro Se Motion to Place Hawkins on Administrative Leave 2. Petitioner's Pro Se Motion for Criminal Charges be Filed Against All Staff Participating in Treason	1. Dismissed 2. Dismissed
176P20	Erinn Denise Watkins v. Public Officer	1. Plt's Pro Se Motion to Correct Typographical Error 2. Plt's Pro Se Motion for Notice of Estoppel and Stipulation of Constitutional Challenge 3. Plt's Pro Se Motion to Intervene with an Injunction	1. Dismissed 2. Dismissed 3. Dismissed
181A93-4	State v. Rayford Lewis Burke	Def's Motion to Take Notice of State's Filing	Allowed **Ervin, J., recused**
181P20	State v. Alforinza A. Parks, Jr.	1. Def's Pro Se Motion for Appropriate Relief 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot

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184A20	State v. Fabiola Rosales Chavez	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **04/24/2020** 2. Allowed **05/18/2020** 3. ---
186P17-3	State v. Lenwood Lee Paige	1. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Hudson, J., recused**
194P03-6	State v. Edwin Wayne Joyce	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Randolph County 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed **05/05/2020** 2. Denied **05/05/2020** **Ervin, J., recused**
194P03-7	State v. Edwin Wayne Joyce	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **05/13/2020** **Ervin, J., recused**
194P20	Hall v. State of NC et al.	Pro Se Petition for Writ of Habeas Corpus	Denied **05/08/2020**
195P20	State v. James Lloyd Money	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Motion to Dissolve the Temporary Stay	1. Allowed **05/08/2020** 2. Dismissed as moot **05/28/2020** 3. Allowed **05/28/2020**
197P20	State v. Jeremy Johnson	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/11/2020** 2. 3.
198P20	State v. Rapheall William Knotts	Def's Pro Se Motion for Plea in the Jurisdiction	Denied **05/11/2020**
200P20	In the Matter of Timothy Thomas	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Dismissed **05/11/2020**

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210P16-5	Martin v. State of North Carolina, et al.	Petitioner's Pro Se Motion for Appeal from Interlocutory Order	Denied **05/07/2020**
217P20	State v. Ricardo Joseph Botts	1. Def's Emergency Petition for Writ of Prohibition 2. Def's Motion to Supplement	1. Denied **05/21/2020** 2. Allowed **05/21/2020**
218P14-2	State v. Winfred Scott Simpson	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Guilford County 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
219P20	State v. Justin Marqui Caldwell	Def's Pro Se Motion for a Fast and Speedy Trial	Dismissed **05/21/2020**
221P20	Charles A. Rippy, Jr. v. Eric Hooks, Secretary North Carolina Department of Public Safety	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **05/27/2020**
225A20	State v. Robert Prince	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas	1. Allowed **05/26/2020** 2.
227P20	State v. Gary M. Alston	Def's Pro Se Motion to Release Inmate/ Modify Judgment	Dismissed **05/27/2020**
233A20	State v. Johnathan Ricks	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas	1. Allowed **05/27/2020** 2.
245P20	Bel Dakota Limited Partnership v. Victor Channing	1. Def's Pro Se Motion for Temporary Stay 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of N.C. Court of Appeals	1. Denied **06/03/2020** 2. Denied **06/03/2020** 3. Denied **06/03/2020**
254P20	State v. Nadine D. Stubbs	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas	1. Allowed **06/03/2020** 2.
272A14	State v. Jonathan Douglas Richardson	Def's Pro Se Motion to Set Deadline for Full Appeal or Execution	Dismissed

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311A19	State v. Ricky Franklin Charles	State's Motion to Take Judicial Notice	Special Order **05/18/2020**
312A19	Ha, et al. v. Nationwide General Insurance Company	1. Def's Notice of Appeal Based Upon a Dissent 2. Amicus Curiae's (North Carolina Rate Bureau) Motion to Participate in Oral Argument	1. --- 2. Denied **05/13/2020**
315PA18-2	Cooper v. Berger, et al.	1. State of North Carolina's Motion for Leave to File an Amicus Brief 2. Defs' Motion for Extension of Time to File Brief 3. Defs' Motion to Set Briefing Schedule as Provided in the Motion	1. Allowed **05/19/2020** 2. Allowed **05/22/2020** 3. Allowed **05/22/2020**
339A18	The New Hanover County Board of Education v. Josh Stein, in his capacity as Attorney General of the State of North Carolina and North Carolina Coastal Federation and Sound Rivers, Inc., Intervenors	Plt's Petition for Rehearing	Special Order **05/18/2020**
364P93-2	State v. Kenneth B. Sidberry, Jr.	Def's Pro Se Motion for PDR	Dismissed
388A10	State v. Andrew Darrin Ramseur	Def's Motion to Take Judicial Notice	Denied
443P19	State v. Willie Lee Martin, III	1. Def's Notice of Appeal Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
446P19	Douglas Hoyt McMillan v. Shelly Diane McMillan	1. Plt's PDR Under N.C.G.S. § 7A-31 2. Plt's Motion to Deem PDR Timely 3. Plt's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA	1. Dismissed *ex mero motu* 2. Denied 3. Denied

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449P11-24	Charles Everette Hinton v. State of North Carolina, et al.	1. Plt's Pro Se Motion for Notice of Objections 2. Plt's Pro Se Motion for Demands for Trial by Jury and for Jury Trial	1. Dismissed 2. Dismissed **Ervin, J., recused**
473P19	State v. Jaquail Donaven Alston	Def's PDR Under N.C.G.S. § 7A-31	Denied
477A19	In re R.S.P., J.J.P.	Respondent-Mother's Motion to Withdraw Appeal	Allowed **06/01/2020**
483P19	In re Gary Gilley	Petitioner's Pro Se Petition for Writ of Mandamus	Dismissed
488P99-2	State v. Michael Deon Parker	1. Def's Pro Se Motion for PDR 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Petition for Writ of Mandamus	1. Denied 2. Allowed 3. Denied **Ervin, J., recused**
542P97-4	State v. Terrence L. Wright	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
580P05-17	In re David Lee Smith	1. Petitioner's Pro Se Petition for Writ of Mandamus 2. Petitioner's Pro Se Emergency Petition for Writ of Mandamus 3. Petitioner's Pro Se Motion for Appropriate Emergency Relief	1. Denied 2. Denied 3. Denied **Ervin, J., recused**

IN RE A.B.C.

[374 N.C. 752 (2020)]

IN THE MATTER OF A.B.C.

No. 233A19

Filed 17 July 2020

1. Appeal and Error—notice of appeal—timeliness—termination of parental rights—adjudication order—not a final order

A mother's appeal from an adjudication order in a termination of parental rights case was not untimely, even though it was filed more than thirty days after entry of the order, because an adjudication order finding at least one ground for termination is not a final order appealable under N.C.G.S. § 7B-1001, since the case must proceed to disposition before parental rights can be terminated. The mother's notice of appeal, timely filed after entry of the disposition order which concluded that termination was in the best interests of the child, was sufficient to appeal from both the adjudication and disposition orders.

2. Termination of Parental Rights—findings of fact—evidentiary support

In a termination of parental rights case, a finding of fact that a mother did not complete a substance abuse treatment program was disregarded where it did not accurately reflect the evidence and contradicted another of the trial court's findings. Two other findings regarding the mother's housing conditions at the time of the termination hearing were not supported by evidence or were incomplete.

3. Termination of Parental Rights—grounds for termination—willful failure to make reasonable progress—addiction

The trial court's determination that grounds existed to terminate a mother's parental rights on the basis that she willfully failed to make reasonable progress to correct the conditions which led to her child's removal from the home was supported by the court's unchallenged findings of fact regarding mother's lack of progress on her substance abuse issues.

4. Termination of Parental Rights—best interests of the child—findings—bond with parent

The trial court did not abuse its discretion by determining that termination of a mother's parental rights was in the best interest of the child where it considered the dispositional factors in N.C.G.S. § 7B-1110 and its findings, including one that the mother-child bond

was "similar to that of playmates," were supported by evidence—including testimony by the social worker who supervised visits. Moreover, in making findings regarding the child's relationship with his foster family, the trial court did not improperly relegate the decision of whether to terminate the mother's rights to a direct comparison or choice between the mother and the foster parent.

Justice EARLS dissenting.

Chief Justice BEASLEY and Justice DAVIS join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 21 March 2019 and 18 April 2019 by Judge William Fairley in District Court, Columbus County. This matter was calendared for argument in the Supreme Court on 19 June 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

David S. Tedder, Assistant County Attorney, for petitioner-appellee Columbus County Department of Social Services.

Womble Bond Dickinson (US) LLP, by John E. Pueschel, for appellee Guardian ad Litem.

Annick Lenoir-Peek for respondent-appellant mother.

HUDSON, Justice.

Respondent, the mother of minor child A.B.C. (Adam)[1], appeals from the trial court's order terminating her parental rights on the ground that she willfully failed to make reasonable progress to correct the conditions that led to Adam's removal from her care. *See* N.C.G.S. § 7B-1111(a)(2) (2019). Because we hold that the evidence and findings of fact support the trial court's conclusion that grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2), and that the trial court did not abuse its discretion in concluding that it was in the child's best interests to terminate respondent's parental rights, we affirm.

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

Factual and Procedural Background

This is the second appeal in this case. The following facts and procedural history are derived in part from the Court of Appeals' opinion in *In re A.B.C.*, 821 S.E.2d 308, 2018 WL 6053343 (N.C. Ct. App. 2018) (unpublished).

On 10 April 2015, bystanders found respondent and her roommate sleeping inside of a car in the parking lot of respondent's employer. Adam, who was four months old at the time, was crying in the back seat. The bystanders were unable to wake respondent or the roommate and called emergency responders.

After this event, respondent agreed to place Adam with a safety resource. The following week, on 17 April 2015, Columbus County Department of Social Services (DSS) received a referral alleging that respondent was found unresponsive in a car parked in a hospital parking lot. Respondent was admitted to the hospital for treatment and observation due to a possible drug overdose. After this second incident, the safety resource became unwilling to be the placement for Adam.

On 20 April 2015, DSS filed a juvenile petition alleging that Adam was neglected and dependent and took him into nonsecure custody. After a hearing, the trial court adjudicated Adam as dependent and dismissed the neglect allegation in an order entered 16 June 2015. In a separate disposition order entered the same day, the trial court ordered respondent to submit to a substance abuse assessment and a mental health assessment and to follow any resulting recommendations, comply with weekly random drug screens requested by DSS, enroll in and complete parenting classes, and establish suitable housing.

Respondent initially struggled to make progress on her case plan and was in and out of drug rehabilitation facilities and jail. On 5 July 2016, the trial court ceased reunification efforts with respondent and changed the permanent plan to guardianship with a court-approved caretaker with a secondary plan of adoption.

On 21 January 2017, respondent was arrested for violating her probation. She was released from jail in February 2017 and ordered to complete the six-month substance abuse program at a substance abuse treatment facility, Our House. After respondent completed the program at Our House, she was given the opportunity to continue with a residential substance abuse rehabilitation program at Grace Court where she could have resided with her child. However, respondent declined to enter the program at Grace Court, and she decided to live with her

boyfriend. While respondent was participating in the program at Our House, the trial court held a permanency planning hearing on 20 March 2017. In an order entered 30 March 2017, the trial court changed the permanent plan to adoption with a secondary plan of guardianship with a court-approved caretaker.

On 12 May 2017, DSS filed a petition to terminate respondent's parental rights alleging the grounds of neglect, willful failure to make reasonable progress toward correcting the conditions that led to Adam's removal from the home, willful failure to pay a reasonable portion of Adam's cost of care, dependency, willful abandonment, and that respondent's parental rights as to another child have been terminated and that she lacks the ability or willingness to establish a safe home. N.C.G.S. § 7B-1111(a)(1)–(3), (6)–(7), and (9) (2019). After multiple continuances, a hearing was held on the petition for termination on 3 and 17 January 2018. At the close of DSS's evidence, the trial court granted respondent's motion to dismiss the ground alleged by DSS concerning the fact that her parental rights as to another child had been terminated. On 1 February 2018, the trial court entered adjudication and disposition orders concluding that grounds existed to terminate respondent's parental rights based on her willful failure to make reasonable progress and that termination of respondent's parental rights was in Adam's best interests. The trial court dismissed the remaining alleged grounds, finding that DSS failed to satisfy its burden to prove the allegations. Respondent appealed to the Court of Appeals.

Before the Court of Appeals, respondent argued that the trial court erred in finding that she failed to make reasonable progress in correcting the conditions that led to Adam's removal from her care. *In re A.B.C.*, 2018 WL 6053343, at *2. The Court of Appeals concluded that there was "tension" between the trial court's findings that (1) respondent "willfully left the juvenile in foster care outside the home in excess of twelve months without showing to the Court's satisfaction that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile," and (2) "DSS 'failed to meet its burden to prove the allegations of . . . incapability of providing care and supervision as they relate to respondent.' " *Id.* at *3. The Court of Appeals reasoned that, "if DSS failed to show that Respondent was incapable of providing care and supervision for her child going forward, it suggest[ed] that Respondent had made at least some reasonable progress." *Id.* Therefore, the Court of Appeals vacated the termination order and remanded the case to the trial court "for additional findings that eliminate the arguable tension" in order to "permit

[the] Court to engage in a meaningful appellate review of the trial court's findings of fact and conclusions of law." *Id.* The Court of Appeals left it in the trial court's discretion whether to amend its findings based on the existing record, or whether to conduct further proceedings the trial court deemed necessary. *Id.*

On remand, the trial court did not take new evidence and on 21 March 2019, entered an amended adjudication order including additional findings of fact regarding the alleged grounds for termination. The trial court again found that grounds existed to terminate respondent's parental rights based on her willful failure to make reasonable progress toward correcting the conditions that led to Adam's removal from the home and found that DSS failed to meet its burden regarding the other alleged grounds for termination. In a separate amended disposition order entered 18 April 2019, the trial court concluded that termination of respondent's parental rights was in Adam's best interests. Respondent appealed.

Analysis

I. Motion to Dismiss

[1] As an initial matter, DSS filed a motion to dismiss respondent's appeal from the trial court's 21 March 2019 adjudication order arguing that her notice of appeal was untimely because it was filed more than thirty days after entry and service of that order.

Section 7B-1001 of the General Statutes of North Carolina sets out the orders from which a party may appeal in juvenile matters and the appropriate court to which they may be appealed. Pursuant to N.C.G.S. § 7B-1001, a final order "that terminates parental rights or denies a petition or motion to terminate parental rights" may be appealed directly to this Court. N.C.G.S. § 7B-1001(a1)(1) (2019). In juvenile cases, "[n]otice of appeal . . . shall be given in writing . . . and shall be made within 30 days after entry and service of the order . . . ." N.C.G.S. § 7B-1001(b) (2019).

DSS claims that N.C.G.S. § 7B-1001 provides that notice of appeal from the trial court's adjudication order in a termination of parental rights case must be filed within thirty days after entry and service of the order. However, an adjudication order in a termination of parental rights case is not listed as one of the orders from which a party may appeal under N.C.G.S. § 7B-1001 because it does not terminate parental rights; it determines only whether grounds exist to terminate parental rights.

The North Carolina Juvenile Code provides for a two-stage process for the termination of parental rights: adjudication and disposition. 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 grounds for termination under N.C.G.S. § 7B-1111(a). N.C.G.S. § 7B-1109(e), (f). If the petitioner fails to satisfy its burden of proving that grounds exist to terminate parental rights, then the trial court must enter an order denying the petition or motion for termination. Such order is appealable pursuant to the second part of N.C.G.S. § 7B-1001(a1)(1), permitting an appeal from an order denying a petition or motion to terminate parental rights.

However, if the trial court finds that at least one ground exists to terminate parental rights, the resulting adjudication order is not a final order appealable under N.C.G.S. § 7B-1001, as the case then proceeds to the dispositional stage where the trial court must "determine whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a). Thus, an adjudication order in which the trial court determines that at least one ground exists to terminate parental rights necessarily requires entry of a disposition order to address whether termination of parental rights is in the child's best interests.

Here, there was no final order terminating parental rights from which respondent could appeal pursuant to N.C.G.S. § 7B-1001 until the trial court entered its disposition order on 18 April 2019. *Cf. In re P.S.*, 242 N.C. App. 430, 432, 775 S.E.2d 370, 372 (concluding in the abuse, neglect, and dependency context that "[a]n adjudication order—even where it includes a temporary disposition—is not a final order" from which appeal of right lies under N.C.G.S. § 7B-1001), *cert. denied*, 368 N.C. 431, 778 S.E.2d 277 (2015); *In re Laney*, 156 N.C. App. 639, 643–44, 577 S.E.2d 377, 380 (concluding in the same context that the respondent-mother needed to notice an appeal from the final disposition order pursuant to N.C.G.S. § 7B-1001 in order for the adjudication order to be before the Court of Appeals), *disc. review denied*, 357 N.C. 459, 585 S.E.2d 762 (2003).[2] Respondent timely filed her notice of appeal within thirty days after entry and service of the disposition order, stating her desire to appeal both the adjudication order and the disposition order.

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2. We recognize that jurisdictional provisions of N.C.G.S. § 7B-1001 were recently amended to change the appellate court to which appeal of right lies in termination of parental rights cases. However, that amendment has no bearing on our determination that an adjudication order is not a final order from which a party has an immediate right to appeal under N.C.G.S. § 7B-1001. *See* S.L. 2017-41, § 8(a), 2017 N.C. Sess. Laws 214, 232–33.

Therefore, respondent's appeal of both the adjudication order and the disposition order is properly before this Court pursuant to N.C.G.S. § 7B-1001(a1)(1). As a result, we deny DSS's motion to dismiss.

II. Challenged Findings of Fact

[2] Respondent challenges several of the trial court's findings of fact. Findings of fact in support of a trial court's adjudication of grounds to terminate parental rights must be supported by clear, cogent, and convincing evidence. *In re B.O.A.*, 372 N.C. 372, 379, 831 S.E.2d 305, 310 (2019). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal. Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58–59 (2019) (citations omitted).

Respondent first challenges finding of fact 38, which states that respondent had engaged in multiple programs addressing drug abuse and treatment since the filing of the underlying juvenile petition, including the substance abuse treatment program at Our House, and that the "programs would have helped her acquire the ability to overcome factors that resulted in the child's placement but she did not do so." Respondent argues that this finding of fact conflicts with finding of fact 66, in which the trial court found that respondent completed the rehabilitation program at Our House in August 2017. We agree.

The trial court found in both finding of fact 33 and finding of fact 66 that respondent completed the substance abuse treatment program at Our House, and the evidence unequivocally demonstrates the same. To the extent that finding of fact 38 implies that respondent did not complete the program at Our House, it is not supported by the evidence, and therefore we disregard this specific portion of that finding of fact.

Respondent next challenges findings of fact 40 and 41, which state the following:

> 40. That throughout the life of the case respondent mother's housing has frequently been either jail or a treatment facility of some sort and she has not established stable housing.
>
> 41. That when not incarcerated or in a treatment facility respondent mother was and is currently staying with friends who provide accommodations. These friends and accommodations varied.

Respondent argues that these findings of fact fail to address her housing conditions at the time of the termination hearing. She argues that since she completed the substance abuse treatment program at Our House in August 2017, she had been living with her boyfriend in a three-bedroom home. We agree that these findings of fact are not supported by the evidence.

The trial court found that respondent "was and *is currently* staying with friends who provide accommodations." (Emphasis added). At the termination hearing, the social worker testified that "since [she] was involved in the case[,]" respondent's housing was "either jail or treatment facilities." Yet the social worker also testified that she was unaware of respondent's exact whereabouts at the time of the termination hearing and that respondent had informed her that she was living in Robeson County, although the social worker did not know the physical address. The social worker also testified that she had stopped being involved in the case on 1 September 2017. Thus, the social worker did not have knowledge of respondent's housing situation in the four months leading up to the termination hearing. Respondent and her boyfriend provided the only evidence regarding her housing situation from September 2017 through the termination hearing in January 2018. Respondent testified that she lived in a three-bedroom home with her boyfriend, with whom she had been in a relationship for about one year, and that she had been living with him there since completing the program at Our House in August 2017. Respondent's boyfriend also testified that they had been living in the home together since respondent was released from the program. Indeed, the trial court found that respondent opted to live with her boyfriend after she completed the program. Although the home was owned by the father of respondent's boyfriend, the trial court's finding of fact that states that respondent was currently staying with a friend who provided accommodations is supported by the evidence but is incomplete.

III. Grounds to Terminate Parental Rights

[3] Respondent argues that the trial court erred by concluding that grounds existed to terminate her parental rights based on her willful failure to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(2). Because the trial court's unchallenged findings of fact support the conclusion that respondent failed to make reasonable progress on her substance abuse issue which "was the core cause of the circumstances" that led to the child's removal from respondent's care, we affirm.

We review a trial court's adjudication that grounds exist to terminate parental rights to determine "whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings support the trial court's conclusions of law." *In re B.O.A.*, 372 N.C. at 379, 831 S.E.2d at 310 (citation omitted). "Unchallenged findings of fact made at the adjudicatory stage, however, are binding on appeal." *In re D.W.P.*, 373 N.C. 327, 330, 838 S.E.2d 396, 400 (2020) (citation omitted).

Pursuant to N.C.G.S. § 7B-1111(a)(2), a trial court may terminate parental rights if "[t]he 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). This Court has stated that "a trial judge should refrain from finding that a parent has failed to make 'reasonable progress . . . in correcting those conditions which led to the removal of the juvenile' simply because of his or her 'failure to fully satisfy all elements of the case plan goals.' " *In re B.O.A.*, 372 N.C. at 385, 831 S.E.2d at 314 (citation omitted). However, we have also stated that "a trial court has ample authority to determine that a parent's 'extremely limited progress' in correcting the conditions leading to removal adequately supports a determination that a parent's parental rights in a particular child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2)." *Id.* (citation omitted).

Here, the trial court's finding of fact 67 establishes that "substance abuse was the core cause of the circumstances that brought the child into foster care originally." In finding of fact 66, the trial court determined that respondent failed to make reasonable progress. The trial court found that respondent made only "marginal progress" due to her failure to continue her substance abuse treatment after she completed the six-month substance abuse treatment program at Our House, in that she:

a) declined further rehabilitative services at Grace Court in August of 2017, services which would have allowed her to reside with her child while receiving residential rehabilitation services;

b) entered a methadone program without any counseling or plan to wean or otherwise end her methadone dependence; and

c) the [c]ourt does not believe the respondent mother's contention that she is in counseling through AA or NA[ ] or any other recovery program.

Further, the trial court found that respondent's progress was not reasonable under the circumstances because her failure to continue with rehabilitation programs demonstrated that she "failed to apply th[e] capabilities" that she learned during the program at Our House toward resolving her "longstanding addiction" issue.

These unchallenged findings of fact[3] support the trial court's conclusion that respondent failed to make reasonable progress to correct the conditions that led to the removal of Adam from her care. Specifically, these findings of fact establish that, after participating in the program at Our House, respondent decided to address her "longstanding addiction" issue solely by entering a methadone program without any counseling plan to resolve her resultant dependence on that substance. Further, we note that it is not the role of this Court to second-guess the trial court's credibility determination, specifically that respondent's testimony concerning her participation in counseling programs was not credible. *See In re J.A.M.*, 372 N.C. 1, 11, 822 S.E.2d 693, 700 (2019) ("But an important aspect of the trial court's role as finder of fact is assessing the demeanor and credibility of witnesses, often in light of inconsistencies or contradictory evidence. It is in part because the trial court is uniquely situated to make this credibility determination that appellate courts may not reweigh the underlying evidence presented at trial."). Moreover, the fact that respondent decided to address her substance abuse issues in this manner—without counseling, all the while having the available option to continue with another residential rehabilitation program that would have allowed her to reside with her child—after she completed the program at Our House is of great significance. As the trial court explained, respondent's approach demonstrated that she failed to apply the tools that she learned during the program at Our House to adequately address her substance abuse issue—the "core cause" of the child's removal from her care—by the time of the termination hearing. Therefore, the trial

3. Respondent does not challenge findings of fact 66 and 67 in her brief. In fact, she uses the veracity of finding of fact 66 to challenge the trial court's finding of fact 38. Because findings of fact 66 and 67 are sufficient to support the trial court's conclusion that grounds existed to terminate respondent's parental rights, we need not further address finding of fact 38 beyond our discussion above. *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58–59 (2019) ("Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." (citation omitted)).

court's findings of fact support the conclusion that respondent failed to make reasonable progress toward correcting the conditions which led to the child's removal from her care. N.C.G.S. § 7B-1111(a)(2).

Accordingly, we hold that the trial court did not err in concluding that grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2).

IV. Disposition under N.C.G.S. § 7B-1110

[4] Respondent also contends that the trial court abused its discretion under N.C.G.S. § 7B-1110(a) by determining it was in Adam's best interests to terminate her parental rights. Because we conclude that the trial court did not abuse its discretion, we affirm the trial court's decision to terminate respondent's parental rights.

If the trial court finds grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it proceeds to the dispositional stage where it must "determine whether terminating the parent's rights is in the juvenile's best interest" based on the following factors:

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

N.C.G.S. § 7B-1110(a). It is well-established that the trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed only for abuse of discretion. *In re D.L.W.*, 368 N.C. at 842, 788 S.E.2d at 167; *In re L.M.T.*, 367 N.C. 165, 171, 752 S.E.2d 453, 457 (2013). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Dispositional findings not challenged by respondent-mother are binding on appeal. *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 65 (2019) (citation omitted).

Here, the trial court made the following all-encompassing finding of fact concerning the factors in subsection 7B-1110(a):

> 13. That the minor child is almost 3 years of age; that the likelihood of adoption is extremely high; that termination of parental rights will aid in the accomplishment of the permanent plan of the juvenile; that the bond between the juvenile and respondent mother is similar to that of playmates . . . that the quality of the relationship between the juvenile and the proposed adoptive parent is similar to that of parent/child.

The only part of this finding of fact that respondent challenges is the trial court's finding that the relationship between her and the child "is similar to that of playmates."

The finding of fact concerning the relationship between respondent and the child being similar to that of playmates, however, is supported by the testimony of the social worker who supervised respondent's visits with the child. Specifically, the social worker testified that (1) the child associated his visits with respondent with "play"; (2) the child did not refer to respondent as "Mom" during the visits, and respondent had to instruct him to call her "Mom"; (3) respondent and the child played very loudly during the visits such that the social worker had to tell them to "calm down"; and (4) the social worker never observed respondent assume a "supervision or a parental role" during the visits.

Respondent's only other challenge to the trial court's finding of fact concerning the relationship between respondent and the child being similar to that of playmates is that the "limited circumstances" of the supervised visits did not allow respondent to have an "opportunity to show her ability to provide care for [the child]." Respondent does not, however, point us to any authority or evidence in support of the proposition that the context of a supervised visit had a confounding effect on her ability to form or demonstrate a parental bond with the child.

Finally, respondent argues that the trial court abused its discretion in its analysis of the best interests of the child because it improperly made the decision of whether to terminate parental rights into a choice between respondent and the child's foster parent. Respondent relies on the Court of Appeals' opinion in *In re Nesbitt* for the proposition that it is improper for the trial court to "relegate[ ] [the decision of whether to terminate parental rights] to a choice between the natural parent and the foster family." 147 N.C. App. 349, 360–61, 555 S.E.2d 659, 667 (2001). *In re Nesbitt* quoted from this Court's decision in *Peterson v. Rogers*,

337 N.C. 397, 445 S.E.2d 901 (1994), to support that proposition. *In re Nesbitt*, 147 N.C. App. at 361, 555 S.E.2d at 667 ("Our Supreme Court has held that 'even if it were shown, . . . that a particular couple desirous of adopting a child would *best* provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child *adequately*.' " (quoting *Peterson*, 337 N.C. at 401, 445 S.E.2d at 904)).

Here, by construing the trial court's finding of fact 13 in conjunction with findings of fact 18–21, 29, and 31, respondent argues that the trial court improperly relegated the decision concerning whether to terminate respondent's parental rights into one involving a choice between respondent and the child's foster parent. Respondent asserts that findings of fact 18–21, 29, and 31 "portrayed the foster home as 'better' than [respondent's]." Findings of fact 18–21, 29, and 31 are reproduced as follows:

> 18. That the juvenile has been placed with [the foster parent] since he was approximately 4 months. [The foster parent's] 3-year[-old] granddaughter lives with [the foster parent] and the juvenile. The granddaughter and the juvenile get along very well together.
>
> 19. That [the foster parent] has been responsible for the juvenile's day-to-day care and supervision for approximately the last 30 months. The de facto relationship between [the foster parent] and the juvenile is akin to mother/son in that she provides for the emotional and physical needs of the juvenile. [The foster parent] appropriately guides and supervises the juvenile together with providing care and discipline.
>
> 20. That the juvenile looks to [the foster parent] for guidance, comfort and security.
>
> 21. That the juvenile is healthy and happy in the care of [the foster parent] and the relationship between the two is extremely close and significant to the juvenile.
>
> . . . .
>
> 29. That this [c]ourt acknowledges that respondent mother loves the juvenile but the relationship between respondent mother and the juvenile is not akin to the relationship between [the foster parent] and the juvenile.

. . . .

31. That the bond that exists between the minor child and respondent mother is good but not parental, and is most similar to a bond between playmates.

We note that the Court of Appeals' decision in *In re Nesbitt* is not binding on this Court, moreover the findings of fact quoted here fail to demonstrate that the trial court relegated the decision of whether to terminate respondent's parental rights to a decision between respondent and the foster parent. *See In re Nesbitt*, 147 N.C. App. at 361, 555 S.E.2d at 667. Specifically, findings of fact 18–21 and 31 involve no comparison between respondent and the foster parent whatsoever. Further, although finding of fact 29 does make a comparison between respondent's and the foster parent's relationship with the child, the trial court was not endeavoring to determine whose relationship with the child was qualitatively "better." Viewing finding of fact 29 in light of the trial court's conclusion of law concerning the best interests of the child demonstrates that the trial court's ultimate assessment of respondent's relationship with the child was that it was not "akin" to a parental relationship. The trial court's conclusion of law regarding the best interests of the child is reproduced as follows:

> 3. That the minor child is almost 3 years of age; that the likelihood of adoption is extremely high; that termination of parental rights will aid in the accomplishment of the primary permanent plan of the juvenile; that the bond between the juvenile and respondent mother is akin to playmates; . . . that the quality of the relationship between the juvenile and the proposed adoptive parent is similar to that of parent/child and adoption is extremely high.

The trial court's conclusion of law on the issue of the best interests of the child is virtually identical to the trial court's finding of fact 13, and it draws no direct comparison between respondent and the foster parent. The trial court's conclusion of law merely follows the directive of N.C.G.S. § 7B-1110(a) to evaluate both the "bond" between respondent and the juvenile and the "quality of the relationship" between the juvenile and the proposed adoptive parent.

Further, the trial court's determination in its conclusion of law that respondent's relationship with the child was "*akin to* playmates," illuminates the reasoning behind the trial court's statement in finding of fact 29 that respondent's relationship with the child was not "*akin to* the relationship between [the foster parent] and the juvenile." (Emphases

added). Thus, it appears that finding of fact 29 simply communicated that respondent's relationship with the child was not "akin" to a parental relationship. The trial court's mention of the foster parent in finding of fact 29 serves as somewhat of an inartful proxy for describing the quality of the parental relationship.

Accordingly, the trial court's conclusion that it was in the child's best interests to terminate respondent's parental rights was supported by evidence in the record, was reached according to the directive of N.C.G.S. § 7B-1110(a), and was not otherwise arbitrary. Therefore, because the trial court's decision was not an abuse of its discretion, we affirm that decision.

Conclusion

Because we hold that the evidence and findings of fact support the trial court's conclusion that grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2), and that the trial court did not abuse its discretion in concluding that it was in the child's best interests to terminate respondent's parental rights, we affirm.

AFFIRMED.

Justice EARLS dissenting.

In vacating the trial court's original "Order of Adjudication on Termination of Parental Rights" finding grounds to terminate respondent-mother's parental rights to her son Adam, the Court of Appeals directed the trial court to resolve the central factual question of how respondent-mother failed to make reasonable progress toward correcting the conditions that led to Adam being removed from her care when the evidence failed to establish that she was incapable of providing proper care and supervision for Adam. *In re A.B.C.*, 821 S.E.2d 308, 2018 WL 6053343 (N.C. Ct. App. 2018) (unpublished). The Court of Appeals held that doing so was necessary to "permit th[e] [c]ourt to engage in meaningful appellate review of the trial court's findings of fact and conclusions of law." *Id.* at *1. On remand, the trial court's minimal new findings of fact do not address this contradiction, and are not based on "clear, cogent, and convincing evidence" that supports the legal conclusion that the respondent failed to make reasonable progress to correct the issue that led to Adam being removed from her care. *See* N.C.G.S. § 7B-1111(a)(2) (2019).

Contrary to the majority's characterization, this is not a question of whether to accept the trial court's credibility determination regarding

whether or not respondent attended counseling programs through Alcoholics Anonymous (AA) or Narcotics Anonymous (NA). The issue here is whether the trial court adequately addressed the Court of Appeals direction on remand; whether the findings of fact made by the trial court are supported by clear, cogent, and convincing evidence in the record; and whether the trial court's findings adequately support its conclusions of law. The trial court's finding of fact, adopting language used by the Court of Appeals, that respondent made only "marginal progress" towards correcting the conditions that led to the removal of the child from her care is directly contradicted by its finding of fact that DSS "has failed to carry its burden of proof as to [the] alleged incapacity of the respondent mother to provide proper care and supervision of the child, … indeed, the respondent mother demonstrated such capabilities by completing a rehabilitation program at 'Our House' in August, 2017. … Thus, the [c]ourt cannot say by clear, cogent and convincing evidence that the respondent mother is 'incapable' of providing proper care and supervision." Not only did respondent complete the rehabilitation program, she was no longer homeless, had a stable living arrangement in a three-bedroom home, and was living with and parenting her younger child. I dissent and would reverse the trial court's termination orders because petitioners have failed to establish any grounds to terminate respondent's parental rights as to Adam.

In its earlier opinion in this case, the Court of Appeals stated the following:

> It is likely that the trial court's findings mean that Respondent made some marginal improvements since the filing of the petition and, thus, was not totally incapable of providing care and supervision for her child, but that, nonetheless, Respondent's progress was not enough to demonstrate "to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2). But because of the important liberty interests that are implicated when a court terminates parental rights, we will remand this case for additional findings that eliminate the arguable tension identified by Respondent and permit this Court to engage in a meaningful appellate review of the trial court's findings of fact and conclusions of law. *See In re A.B.*, 239 N.C. App. 157, 172, 768 S.E.2d 573, 581-82 (2015).

> On remand, the trial court, in its discretion, may amend its findings based on the existing record, or may conduct any further proceedings that the court deems necessary.

In re A.B.C., 2018 WL 6053343, at *3. Hearing no new evidence,[1] the trial court simply amended its prior order to include the above-quoted language of the Court of Appeals, failing to even correct the date of the order. The first sixty-two paragraphs of the amended order are exactly the same as the prior Order. Indeed, the only new findings are contained in finding of fact 66. There, the trial court paraphrased the passage from the Court of Appeals opinion excerpted above and identified its three reasons why respondent's progress with regard to her case plan was not adequate. Namely that she declined to live at Grace Court following the residential treatment program, that her methadone program did not include counseling or other plan to end her methadone dependence, and that she was not receiving counseling through AA, NA or any other recovery program. These findings of fact do not support the trial court's conclusion that respondent failed to make reasonable progress to correct the conditions that led to the removal of Adam from her care.

At the time of the termination hearing, respondent had successfully completed a six-month residential substance abuse program at a rehabilitation facility and had been drug-free for nearly one year. Respondent continued her substance abuse rehabilitation by voluntarily participating in a methadone program, a medication-based therapy program for treating opioid addiction. Although the trial court found that respondent declined to enter Grace Court after her completion of the program at Our House, respondent was never ordered to participate in the additional program. A parent's decision not to attend an optional long-term residential rehabilitation program after successfully completing an initial six-month residential rehabilitation program and voluntarily participating in an out-patient treatment program does not show a lack of reasonable progress by the parent.

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1. While the Court of Appeals left to the trial court's discretion whether new evidence should be heard, I would note that as with neglect, a trial court must consider evidence of changed circumstances at the time of the TPR hearing to terminate parental rights under N.C. Gen. Stat. § 7B-1111(a)(2). *In re O.C.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396 (2005) ("to find grounds to terminate a parent's rights under G.S. § 7B-1111(a)(2), the trial court must . . . determine . . . that as of the time of the hearing, . . ., the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child"); *see also In re A.B.*, 253 N.C. App. 29, 30, 799 S.E.2d 445, 447 (2017) ("Where the trial court's findings and conclusions do not adequately account for respondent-mother's circumstances at the time of the termination hearing, as required to support a termination of her parental rights under N.C.G.S. § 7B-1111(a)(1) or (2), we vacate and remand.")

Moreover, the evidence and supported findings also show that respondent had been living in a three-bedroom home with her boyfriend for five months and that she was engaging in regular visitation with Adam that went well. Although respondent's progress on her case plan regarding housing is partly attributed to her relationship with her boyfriend, respondent's "case plan does not and cannot require that she alone be responsible for providing her housing and transportation." *In re C.N.*, 831 S.E.2d 878, 884 (N.C. Ct. App. 2019); *see also id.* ("Nothing in the record suggests or supports the finding that the Respondent-mother's dependence on her present boyfriend for housing, transportation, and for providing her a cell phone bears any relation to the causes of the conditions of the removal of [the children] from their mother's home.").

The trial court found that it did not believe respondent's testimony that she was in counseling. However, DSS bore the burden of proving by clear, cogent, and convincing evidence that grounds existed to terminate respondent's parental rights. N.C.G.S. § 7B-1109(f). Aside from respondent's testimony, DSS did not present any evidence of respondent's participation, or lack thereof, in counseling and therapy. DSS's only evidence during the adjudication stage of the hearing was from a child support enforcement supervisor, who did not testify as to respondent's participation in counseling, and a social worker, who had not been involved in respondent's case for the four months prior to the termination hearing. The social worker testified that DSS "[was] not aware of any completion of any of the goals" of respondent's case plan. However, it is undisputed that respondent participated in the residential rehabilitation program at Our House from February 2017 through August 2017. Additionally, the social worker stopped being involved in the case on 1 September 2017 and did not testify regarding respondent's actions or inactions from September 2017 through the termination hearing in January 2018. An absence of evidence is far from clear, cogent, and convincing evidence that respondent did not complete the requirements of the case plan.

Although respondent did not complete every aspect of her case plan, "[a] parent's failure to fully satisfy all elements of the case plan goals is not the equivalent of a lack of 'reasonable progress.' " *In re J.S.L.*, 177 N.C. App. 151, 163, 628 S.E.2d 387, 394 (2006). The trial court found that respondent successfully completed the court-ordered six-month residential substance abuse program and continued seeking substance abuse treatment by voluntarily participating in a methadone program. Evidence was also presented that respondent remained drug-free after completing the residential substance abuse program, obtained suitable

housing as required by her case plan, and regularly visited with Adam, during which she behaved appropriately.

The trial court's finding of fact regarding respondent's participation in a methadone program is particularly inappropriate as a basis for concluding that she has not made reasonable progress. It is undisputed that respondent was drug tested frequently as part of her probation and methadone treatment. Respondent testified that she saw a therapist once a month and that a medical decision had been made not to wean her from methadone while she was experiencing back pain. Even though the trial court specifically found that respondent's statements about counseling were not believable, it is for a medical professional, not the trial court, to determine whether and how respondent's duly prescribed medications should be discontinued. As long as she was meeting the requirements of the methadone program she was enrolled in, respondent would, in fact, be held accountable for *not being compliant* if she chose to stop taking a medication being prescribed for her. Moreover, drug addiction is a brain disease. *See, e.g.*, Nora D. Volkow, George F. Koob, and A. Thomas McLellan, *Neurobiologic Advances from the Brain Disease Model of Addiction*, 374 N. Engl. J. Med. 363 (2016) (reviewing recent advances in neurobiology of addiction to clarify link between addiction and brain function and to broaden understanding of addiction as a brain disease.) A parent who is following a doctor's orders in a treatment program should not have that fact held against her, just as one would not conclude that a diabetic relying on medication to control their diabetes rather than diet and exercise is failing to make reasonable progress towards good health.

Finally, respondent argues that she could have resumed custody of Adam as evidenced by her having custody of her younger daughter Amy. While not determinative, this Court has certainly considered it relevant when a parent has previously had their parental rights terminated as to another child. Here, the fact that respondent was parenting another child without any evidence of neglect should have been relevant to the issue of whether respondent made reasonable progress towards addressing the conditions that led to her son being removed from her care.

Willfulness "is established when the respondent had the ability to show reasonable progress but was unwilling to make the effort." *In re Fletcher*, 148 N.C. App. 228, 235, 558 S.E.2d 498, 502 (2002). In the context of a termination of parental rights proceeding, "the word 'willful' connotes purpose and deliberation." *See, e.g.*, *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995). The trial court's finding that respondent declined to enter a second, optional long-term residential

rehabilitation program and its finding that she was participating in the methadone program without a plan to wean off of the methadone, along with its finding that it did not believe respondent's testimony that she was in counseling, do not support its conclusion that respondent willfully left her child in care and did not make reasonable progress to correct the conditions that led to Adam's removal from her care. *See In re C.N.*, 831 S.E.2d at 884 (holding that the trial court's findings that the respondent-mother "had not been consistent in her treatment, was not fully compliant with her case plan, and had only recently re-engaged in some services" did not support the trial court's conclusion that the respondent-mother had not made reasonable progress); *cf. In re I.G.C.*, 373 N.C. 201, 205–06, 835 S.E.2d 432, 435 (2019) (affirming an order terminating parental rights under N.C.G.S. § 7B-1111(a)(2) where, despite findings that the respondent-mother complied with her case plan by completing multiple parenting courses, participating in domestic violence and substance abuse treatment, and testing negative at three recent drug screens, there were additional findings that the respondent-mother's substance abuse and domestic violence treatment were shorter in duration and less intense than recommended, she never completed a court-ordered substance abuse assessment, and she admitted that she would not feel comfortable caring for the children for another "year, year and a half" because she feared she would relapse). Therefore, the trial court erred in concluding that grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2).

Respondent also claims the trial court abused its discretion under N.C.G.S. § 7B-1110(a) by determining that it was in Adam's best interests to terminate her parental rights. Having concluded that the trial court erred in adjudicating grounds for terminating respondent's parental rights under N.C.G.S. § 7B-1111(a), there is no need to address this issue. *In re Young*, 346 N.C. 244, 252, 485 S.E.2d 612, 617 (1997).

The statute concerning the dispositional phase of a termination of parental rights proceeding provides that, where "circumstances authorizing termination of parental rights do not exist, the court shall dismiss the petition." N.C.G.S. § 7B-1110(c) (2019). I would therefore reverse the trial court's orders and remand the cause for the dismissal of DSS's petition. *See Young*, 346 N.C. at 253, 485 S.E.2d at 618.

Chief Justice BEASLEY and Justice DAVIS join in this dissenting opinion.

IN RE J.C.L.

[374 N.C. 772 (2020)]

IN THE MATTER OF J.C.L.

No. 336A19

Filed 17 July 2020

1. Termination of Parental Rights—adjudication—findings of fact—sufficiency of evidence

Clear, cogent, and convincing evidence supported multiple findings of fact in the trial court's order terminating a father's parental rights to his son, including findings regarding the father's lack of progress in addressing his substance abuse, anger issues, Medicaid insurance coverage, and unwillingness to learn about his son's special needs. Conversely, some findings were not supported by the evidence and were disregarded on appeal.

2. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect

The trial court properly terminated a father's parental rights to his son on grounds of neglect, where the father's lack of progress in completing his case plan with the Department of Social Services indicated a reasonable likelihood of future neglect if his son were returned to his care.

3. Termination of Parental Rights—best interests of the child—weighing factors—evidentiary support

The trial court did not abuse its discretion in concluding that termination of a father's parental rights to his three-year-old son was in the child's best interests. First, the evidence supported the trial court's findings that the child was placed in a pre-adoptive home and had a high likelihood of adoption. Second, although the record contained some evidence weighing against terminating the father's parental rights, the trial court properly weighed the factors in determining the child's best interests (N.C.G.S. § 7B-1110), thereby reaching a decision that was neither arbitrary nor manifestly unsupported by reason.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 7 May 2019 by Judge Emily G. Cowan in District Court, Henderson County. This matter was calendared for argument in the Supreme Court on 19 June 2020 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Susan F. Davis, Assistant County Attorney, for petitioner-appellee Henderson County Department of Social Services.

Michelle FormyDuval Lynch, GAL Appellate Counsel, for appellee Guardian ad Litem.

Anné C. Wright for respondent-appellant father.

MORGAN, Justice.

Respondent father appeals from an order terminating his parental rights to his minor child, J.C.L. (Josiah).[1] We affirm the trial court's determination.

The Henderson County Department of Social Services (DSS) filed a petition on 6 December 2016, alleging that Josiah was a neglected juvenile in that (1) respondent and Josiah's mother had used marijuana in front of Josiah and Josiah's half-sibling; (2) respondent and the mother had committed the offense of shoplifting in the presence of the children; (3) respondent had engaged in acts of domestic violence against the children's grandmother in their presence; and (4) the family did not have stable housing. DSS filed a supplemental petition on 27 February 2017, adding allegations that (1) respondent and the mother had taken Josiah and Josiah's half-sibling to Greenville, South Carolina, to avoid juvenile court proceedings; (2) respondent had used inappropriate discipline upon Josiah's half-sibling; (3) respondent and the mother had not enrolled the children in school; (4) the mother had failed to appropriately supervise the children while living at a temporary shelter; (5) respondent and the mother were seen screaming at and hitting each other in the temporary shelter's parking lot; and (6) the mother had tested positive for marijuana. DSS had initially left custody of Josiah with respondent and the mother but obtained nonsecure custody of him by order entered 27 February 2017.

After a hearing on 1 June 2017, the trial court entered an order adjudicating Josiah to be a neglected juvenile. In its separate disposition order, the trial court continued custody of Josiah with DSS and granted weekly supervised visitation to respondent. The trial court ordered respondent to (1) submit to random drug and alcohol screenings as requested by DSS; (2) refrain from further criminal activity, including

1. The minor child will be referenced throughout this opinion as "Josiah," which is a pseudonym used to protect the child's identity and for ease of reading.

illegal drug use, in Josiah's presence; (3) participate in family-centered therapy and comply with all referrals and recommendations; (4) address his anger management issues in therapy; (5) demonstrate stable income sufficient to meet the family's needs; (6) obtain and maintain an appropriate residence for the family; (7) maintain contact and cooperate with DSS; (8) participate in a formal budgeting counseling program and implement a monthly budget; (9) complete parenting classes and demonstrate age-appropriate parenting skills; (10) complete individual and/or family therapy if recommended by his mental health assessment; and (11) pay child support.

By order entered 1 November 2017, the trial court established the primary permanent plan for Josiah as reunification with respondent and the mother and set the secondary permanent plan as adoption. The trial court continued with these plans until 10 September 2018, when it entered an order finding that both respondent and the mother had not made adequate progress under their plans, had not actively participated in their plans, had not cooperated with DSS, and had not cooperated with the guardian *ad litem*. The trial court changed Josiah's primary permanent plan to adoption and his secondary permanent plan to guardianship.

DSS filed a petition to terminate the parental rights of both parents to Josiah on 1 October 2018. As grounds for termination, DSS alleged the grounds of neglect and failure to make reasonable progress to correct the conditions that led to Josiah's removal from the home. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019). DSS filed an amended petition on 18 January 2019, adding additional factual allegations to support its alleged grounds. After a hearing which began on 7 March 2019 and ended on 4 April 2019, the trial court entered an order on 7 May 2019 terminating both respondent and the mother's parental rights to Josiah. The trial court concluded that both grounds existed to terminate parental rights as alleged by DSS and that termination of parental rights, including the parental rights of respondent as Josiah's father, was in Josiah's best interests.[2] Respondent appeals.

We review a trial court's adjudication of the existence of grounds to terminate parental rights "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253

2. The trial court's order also terminated the parental rights of Josiah's mother, but she is not a party to this appeal.

(1984)). "Unchallenged findings of fact made at the adjudicatory stage are binding on appeal." *In re Z.V.A.*, 373 N.C. 207, 211, 835 S.E.2d 425, 429 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). Additionally, "[a] trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379, 831 S.E.2d 305, 310 (2019) (citing *In re Moore*, 306 N.C. 394, 403–04, 293 S.E.2d 127, 132 (1982)). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019).

Adjudicatory Findings of Fact

[1] We first address respondent's challenges to several of the trial court's findings of fact. Respondent first challenges Finding of Fact 52 which states:

> 52. The parents have been late with rent several months [and] have received disconnect notices from the utility company. The parents have not been successful in connecting the gas in order for the heat in the home to function. For the past two winters they have not had heat except for one small space heater in the main living area, which did not adequately heat the home.

Respondent contends that the portion of this finding that states that respondent's home was only heated by one small space heater is unsupported by the evidence, because the social worker's testimony regarding this fact was hearsay and was contradicted by other testimony. Respondent did not raise any objection, either on a hearsay ground or upon any other basis, to the social worker's testimony at trial. He has thus waived his hearsay argument on appeal, and the social worker's testimony must be considered to be competent evidence. N.C. R. App. P. 10(a)(1); *See also*, *e.g.*, *In re F.G.J.*, 200 N.C. App. 681, 693, 684 S.E.2d 745, 753–54 (2009) (holding "any objection has been waived, and the testimony must be considered competent evidence" where no objection on hearsay grounds was made by either parent at the hearing). Moreover, because the trial court's finding is supported by the social worker's testimony, it is deemed conclusive for appellate review purposes. Respondent does not challenge the remainder of Finding of Fact 52; accordingly, the entire finding of fact is binding on appeal.

Respondent next contends that Finding of Fact 40 is not supported by clear, cogent, and convincing evidence. In Findings of Fact 37 through 39, the trial court specified that respondent had received two

alternative substance abuse treatment recommendations because his Medicaid insurance had been discontinued, that the social worker had told respondent that he needed to contact DSS to reinstate his insurance, that these discussions between the social worker and respondent had occurred repeatedly from 6 February to 16 April 2018, that respondent reapplied for his insurance on 17 April 2018, and that his insurance was reinstated on 18 April 2018. In Finding of Fact 40, the trial court then determined:

> 40. [Respondent] could have rectified his insurance (Medicaid) problems in early February 2018 if he had gone to Rutherford County DSS. However, it took him over two months to go to Rutherford County DSS to get his Medicaid reinstated.

Respondent contends that this finding is not supported by the evidence, because respondent testified that the required appointment could not be made for the same day and that sometimes there is a waiting period of several months to get an appointment. Respondent's testimony, however, was presented in the context of Josiah's need for therapy due to respondent's failure to complete his case plan in the preceding twenty-four months:

> Q. . . . Do you think [Josiah] would need therapy?
>
> A. Of course. After what he's been through, I'm sure. As with [Josiah's half-sibling], being bounced around everywhere.
>
> Q. Well, wouldn't it be true, sir, that if you all had finished your case plan sooner than 24 months, they wouldn't have been bounced around?
>
> . . . .
>
> [A]: I don't think it's the case plan. I think it's the constant continuances in this case. It's not our fault. Things happen in life, you know. Medicaid appointments can't be made the same day. Sometimes appointments are six months away.

Nothing in respondent's testimony suggests that respondent attempted to contact DSS before 17 April 2018 to reinstate his Medicaid insurance, or that the appointments to which respondent was referring in this portion of his testimony were with DSS for the purpose of reinstating his Medicaid insurance as opposed to an attempt to schedule therapy

appointments for Josiah. Consequently, we hold that the trial court's Finding of Fact 40 is supported by the social worker's testimony and thus binding on appeal.

Respondent also argues that the completion timeframe set forth in Finding of Fact 41 is not supported by the evidence. This factual finding states:

> 41. [Respondent] completed a basic level substance abuse course six weeks ago, however this course did not include[] group or individual counseling.

The certification of completion of the course in question displays a completion date of 19 December 2018. To the extent that this finding of fact recognizes respondent's completion date was later than 19 December 2018, we agree with respondent. On the other hand, respondent does not challenge the portion of Finding of Fact 41 that his substance abuse course did not include group or individual counseling, and this segment of the factual finding is binding on appeal.

Respondent next challenges Finding of Fact 50:

> 50. [Respondent] struggles with recurrent anger issues, and has become inappropriately belligerent with the Social Worker, the Social Worker Supervisor and the Program Manager on multiple occasions. [Respondent's] main reaction to conflict or to things that make him angry or frustrated is to remove himself from the situation, leaving in a fit, and not dealing with whatever it is that has him upset. This at times, leads to an inability to obtain necessary information as it relates to the juvenile.

To the extent that this finding stands for the proposition that he was displaying issues with anger in the period leading up to, or at the time of, the termination hearing, respondent asserts that Finding of Fact 50 is unsupported by the evidence. The social worker's testimony, however, establishes that respondent struggled with recurrent anger issues, became belligerent with DSS employees, stormed out of rooms during meetings with DSS personnel, and generally dealt with situations that angered him by leaving the situation. Although the social worker testified that she had seen a "slight change over the last several months" with regard to respondent's anger issues, this improvement was due in part to the social worker's new discussion tactics by avoiding opposition with respondent.

Respondent also asserts that his decision to leave frustrating situations is a technique developed in conjunction with the Family Centered Treatment (FCT) clinician with whom respondent had worked in order to help respondent to deal with his anger management issues, thereby showing that respondent was making reasonable progress toward satisfying the requirements of his case plan. However, the clinician's testimony focused only upon the manner in which respondent dealt with anger when respondent was under stress due to interactions with Josiah and did not address more generalized situations which might invoke respondent's anger. In the limited circumstances about which the social worker testified, respondent was reported to have handed Josiah to his mother while stepping away until respondent could calm down. The trial court's finding of fact at issue, in contrast, relates to respondent's general reactions when he became angry—particularly with adults involved in the case—and how respondent reacted inappropriately by leaving the situation in an enraged state. We hold that the trial court's Finding of Fact 50 regarding respondent's inability to restrain his emotions when interacting with the DSS employees who were working to ensure Josiah's care and attempting to reunify Josiah with respondent is supported by the social worker's testimony.

Next, respondent challenges Finding of Fact 28 which states:

> 28. [Respondent's 10 January 2018 Comprehensive Clinical Assessment] recommended that [respondent] engage with outpatient substance abuse therapy including group and individual counseling as well as to follow through with his physical health needs through regular care by his physician.

Respondent represents that the recommendations from the 10 January 2018 assessment referenced in Finding of Fact 28 are instead correctly stated in Finding of Fact 36:

> 36. The CCA completed by [respondent] on January 10, 2018 recommended two avenues in which to address his substance abuse issues. [Respondent] was to participate in basic level substance abuse services to address his diagnoses of Cannabis Use Disorder, Moderate[;] and Stimulant Use Disorder (Methamphetamines) Mild as well as to identify preliminary goals and corresponding stages of change and complete a relapse prevention plan; OR engage in individual therapy to address his diagnoses of Cannabis Use Disorder, Moderate[;] and

> Stimulant Use Disorder (Methamphetamines) Mild as well as to identify preliminary goals and corresponding stages of change and to complete a relapse prevention plan. In addition, if [respondent] is unsuccessful in abstaining from illegal substance[s] or legal substances not prescribed, he shall participate in Substance Abuse Intensive Outpatient Services.

We agree with respondent that Finding of Fact 36 accurately sets forth the recommendations of his 10 January 2018 Comprehensive Clinical Assessment. Finding of Fact 28 also includes recommendations from respondent's FCT clinician, from whose program respondent was terminated at the end of August 2018. This Court will further consider this portion of Finding of Fact 28 accordingly.

Respondent additionally submits that Finding of Fact 42 is not supported by the evidence. This finding of fact states:

> 42. [Respondent] has not completed individual and group counseling/therapy.

Respondent contends that the recommendation made by his FCT clinician at the time that respondent was terminated from the Family Centered Treatment program was that he "continue" participating in substance abuse treatment with group and individual counseling, which respondent completed in December 2018. However, the trial court found that respondent's basic level substance abuse course did not encompass group or individual counseling, and respondent has not challenged this finding. Although respondent testified that he was engaged in some individual therapy, respondent could not articulate the services that he received from the therapist apart from his statement that she provided "safe, you know, practices and, you know, solutions, recommended agencies or groups that we can take." Accordingly, we are not persuaded by respondent's challenge to Finding of Fact 42.

The Court next addresses respondent's objections to Findings of Fact 72 and 74. The findings state:

> 72. [Respondent] blames his lack of completing the court's reunification requirements on other people.
>
> . . . .
>
> 74. The juvenile has been out of the home for 769 days. The parents are not taking responsibility for why the juvenile came into custody, nor have they completed the court's reunification requirements.

Respondent claims that these findings are not supported by clear, cogent, and convincing evidence, because the FCT clinician testified that the clinician observed the parents "progressing and taking responsibility for DSS's involvement," the October 2018 letter from the FCT clinician identified behaviors displayed by respondent of "ownership" and "less blaming," and respondent testified that respondent had learned not to blame other people. Although respondent may have shown some behaviors characterized by "ownership" and "less blaming" in sessions with the FCT clinician, at the hearing, respondent blamed the continuances allowed in the case, rather than respondent's inability to meet the requirements of his case plan, as the reason why the case had gone on for so long. Respondent further stated that the delay was not his fault. The social worker added testimony that, during the entirety of the case, respondent never accepted any responsibility for the circumstances that led to Josiah coming into DSS custody. These findings of fact numbered 72 and 74 are thus supported by record evidence.

Respondent likewise challenges Finding of Fact 60 which provides:

> 60. The juvenile has special needs. He is physically aggressive (biting, kicking, hitting). He has extreme tantrum behaviors that can last from minutes to hours especially if he is not getting his way or is being told no. He recently has begun being aggressive with animals in the foster home (throwing and hitting them with toys, pulling tails and ears and kicking) despite all attempts at redirection.

Respondent contends that there is no evidence to support the portion of this finding which recites that Josiah had kicked any animals or hit them with toys. We agree with respondent's contention and therefore disregard said portion of Finding of Fact 60. Respondent otherwise concedes that this factual finding is supported by the evidence, but offers that Josiah's behaviors are merely the normal behaviors of a two-year-old child and are not likely to be long-lasting.[3] This argument is entirely speculative and unsupported by any evidence presented at the hearing. Rather, the evidence showed that Josiah's behaviors were extreme for a child of his age and were serious enough to require Josiah to begin occupational therapy and behavior therapy treatments.

Respondent poses challenges to Findings of Fact 70 and 71, which included these determinations of the trial court:

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3. Josiah was three years old at the time of the termination hearing.

> 70. Neither parent has taken the opportunity to learn about the special needs of the juvenile.
>
> 71. [Respondent] does not know the special needs of the juvenile. He blames DSS for any problems associated with the juvenile.

Respondent posits that it is unclear to what opportunities the trial court refers in Finding of Fact 70, because there was no evidence presented at the hearing regarding any opportunities for respondent to learn more about Josiah's special needs other than at the termination hearing itself. Respondent also claims that he was rightfully confused about what special needs Josiah has, because there is no definition of the term "special needs" in the North Carolina General Statutes; as a result, the meaning of this term is fluid and dependent upon the context in which it is used. Respondent further argues that there is no evidence that he blamed DSS for Josiah's special needs.

In making this argument, respondent ignores the thirteen Child and Family Team Meetings DSS held or attempted to hold with him over the course of the case in an effort to discuss Josiah's needs. Respondent either failed to attend, refused to attend, or cancelled nine of these thirteen sessions. The uncontroverted evidence in this case establishes that Josiah has special needs. Respondent admitted that he did not know what those needs were and rejected the fact that Josiah had special needs, asserting that he thought special needs were "like autism or Downs Syndrome." He blamed Josiah's aggressive behavior on Josiah's placement in daycare while in DSS custody and, although he admitted Josiah would need therapy, he asserted that this need was due to Josiah being "bounced around everywhere" while in DSS custody. Respondent refused to take any ownership of his role in Josiah's placement with DSS. The evidence shows that respondent was given numerous opportunities over the duration of the matter to learn about Josiah's special needs, but respondent failed to do so and instead blamed Josiah's problems on DSS. Any confusion held by respondent about Josiah's special needs is the consequence of respondent's failure to engage in his case plan and is not the result of the lack of a statutory definition for the term "special needs" as applied to Josiah. Accordingly, we hold that Findings of Fact 70 and 71 are supported by clear, cogent, and convincing evidence.

Respondent lastly challenges Findings of Fact 44 and 69:

> 44. [Respondent] has stated he will not take any medications for any reason to assist him in managing mental health symptoms.

. . . .

> 69. The parents missed 90% of the meetings that have to do with the juvenile's special needs.

We agree with respondent's arguments concerning these referenced findings of fact. With regard to Finding of Fact 44, the social worker testified that over the course of respondent's participation in FCT, respondent was never prescribed medication to manage any mental health symptoms, thus rendering respondent's statement that he *would* refuse to take medications, if prescribed, to be irrelevant with respect to his progress on his case plan. With regard to Finding of Fact 69, as noted above, the uncontroverted evidence was that respondent missed or cancelled nine of thirteen meetings intended to address the juvenile's special needs—a rate of 70% rather than 90%. Consequently, we disregard Findings of Fact 44 and 69 in our analysis of the trial court's adjudicatory conclusions of law.

Conclusion of the Existence of the Ground of Neglect

[2] This Court now addresses respondent's argument that the trial court erred in concluding that grounds exist to terminate his parental rights based on neglect. A trial court may terminate parental rights when it concludes that the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1) (2019). A neglected juvenile is defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare . . . ." N.C.G.S. § 7B-101(15) (2019).

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent.

In re D.L.W., 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984)). "When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212, 835 S.E.2d 425, 430 (2019) (citing *Ballard*, 311 N.C. at 715, 319 S.E.2d at 232). We agree that "[a] parent's failure to make progress in completing a case plan is indicative of a likelihood of

future neglect." *In re M.J.S.M.*, 257 N.C. App. 633, 637, 810 S.E.2d 370, 373 (2018) (citing *In re D.M.W.*, 173 N.C. App. 679, 688–89, 619 S.E.2d 910, 917 (2005)).

By orders entered 7 July 2017, the trial court adjudicated Josiah to be a neglected juvenile and established a case plan for respondent. In its termination order, the trial court made numerous findings which demonstrated respondent's lack of progress and concluded that there was a reasonable likelihood that the neglect would reoccur if Josiah were returned to respondent's care. As discussed in part above, the trial court found: (1) respondent engaged in Family Centered Treatment, which is traditionally a nine- to twelve-month program, from August 2016 to August 2018, and completed only two of the four phases of the program, struggled with ownership of past trauma and experiences, never followed through with the requirements to progress in the program, and was discharged due to his inability to complete his goals; (2) after the commencement of the termination proceeding, respondent enrolled in a parenting program that was not sanctioned by DSS, attended four classes, and failed to complete the program; (3) respondent completed a Comprehensive Clinical Assessment on 10 January 2018 that recommended two different avenues by which he could responsibly address his substance abuse issues, but respondent prolonged his engagement of substance abuse services due in part to his willful delay in reinstating his Medicaid insurance coverage; (4) respondent completed a basic level substance abuse course in December 2018 but it did not include group or individual counseling, which had been recommended when he was discharged from the FCT program; (5) respondent informed the social worker that he would never really stop smoking marijuana, respondent was arrested for possession of marijuana and methamphetamine on 2 December 2017, respondent was convicted of said charges on 10 May 2018, and respondent was incarcerated for these convictions until 9 July 2018; (6) DSS requested that respondent submit to twenty-three drug screens, of which eight were positive for marijuana—including one taken the day after he was released from incarceration—eight of which were negative, and seven to which respondent refused to submit; (7) respondent struggled with recurrent anger issues and his main reaction to conflict, or situations that angered or frustrated him, was to remove himself from the situation, leaving in an enraged state and not addressing the issue that made him angry; (8) although respondent lived in the same home since September 2017, he was late with rent several months, he received several disconnect notices from the utility company, and he was not able to have gas connected to the residence as the home's source for heat, thus leading to respondent's use of a space heater that

inadequately heated the home; (9) respondent did not enroll in a formal budgeting program as ordered, even though he was referred to three different programs; (10) respondent attended only one appointment with Foothills Credit Counseling on 10 April 2018, with said appointment revealing that respondent's budget operated with a monthly deficit, that respondent's budget did not include the cost of having Josiah or Josiah's half-sibling in the home, that respondent's expenses had increased since the analysis of his budget, and that respondent's financial situation continued to be extremely tenuous; (11) respondent did not know the details of Josiah's special needs and failed or refused to attend eight of thirteen Child and Family Team Meetings to discuss Josiah's needs; (12) respondent continued to deny the reasons for DSS's custody of Josiah through 22 January 2019, blamed DSS for Josiah's issues, and blamed others for respondent's failure to complete components of his court-ordered case plan; and (13) respondent did not take responsibility for the reasons for Josiah's custody with DSS, and respondent's progress over the course of two years to resolve the issues which led to Josiah's custody with DSS was not sufficient for the trial court to have found that Josiah would receive proper care and supervision from respondent during an unsupervised visit or trial home placement.

Although respondent made some progress toward completing his court-ordered case plan, his success was extremely limited and insufficient in light of Josiah's placement in DSS custody for over two years. We agree with the trial court that its findings demonstrate that there is a likelihood of repetition of neglect in the event that Josiah is returned to respondent's care and custody. This Court therefore affirms the trial court's adjudication on the ground of neglect to terminate respondent's parental rights.[4]

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4. We note that respondent also expressly argues that the trial court's findings regarding respondent's tenuous financial situation are insufficient to support a finding of the likelihood of repetition of neglect. In support of his argument, respondent cites *In re Nesbitt*, 147 N.C. App. 349, 555 S.E.2d 659 (2001), in which the Court of Appeals concluded that a parent's inability to "mak[e] ends meet from month to month" is not "a legitimate basis upon which to terminate parental rights" on the ground of failure to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(2). *Id.* at 358–59, 555 S.E.2d at 665–66. *Nesbitt*, however, is inapposite here, because, while N.C.G.S. § 7B-1111(a)(2) states in part that "[n]o parental rights . . . shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty," *id.*, the ground of neglect does not have a similar prohibition, *see* N.C.G.S. § 7B-101(15), -1111(a)(1). Moreover, the trial court did not premise its finding of neglect solely on respondent's tenuous financial situation, which is only one of several factors supporting the trial court's conclusion that there is a likelihood of repetition of neglect should Josiah be returned to respondent's care and custody.

Due to our conclusion that the trial court did not err in adjudicating the ground of neglect, we need not address respondent's arguments regarding the ground of failure to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(2). *See In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019).

Best Interests Determination

[3] Respondent argues that the trial court abused its discretion in concluding that it was in Josiah's best interests to terminate respondent's parental rights. We disagree with respondent's contention.

Once a trial court has adjudicated that grounds exist to terminate parental rights, it proceeds to the dispositional stage of a termination of parental rights hearing. N.C.G.S. § 7B-1110 (2019). At disposition, a trial court must consider the following factors and make findings as to any of them which it deems relevant:

(1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

(3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

Id. A trial court's determination of whether termination of parental rights is in a juvenile's best interests "is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. 3, 6, 832 S.E.2d 698, 700 (2019) (citing *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016)). This high standard of review requires a showing that "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015).

In the present case, the trial court made the following findings of fact in support of its conclusion that termination of respondent's parental rights was in Josiah's best interests:

1. The juvenile is three years of age.

> 2. There is a high likelihood that the juvenile will be adopted. The juvenile was placed in a pre-adoptive home on January 18, 2019.
>
> 3. This [c]ourt has previously adopted a permanency plan for this juvenile of adoption, and termination of the parental rights as ordered herein will aid in the accomplishment of this plan.
>
> 4. As to the bond between the juvenile and [his parents,] the [c]ourt finds as follows: There is a bond between the juvenile and his parents. However, the parents have not raised the juvenile since he was six months of age. The parents do not know his special needs, much less how to appropriately address those needs.
>
> 5. As to the relationship between the juvenile and the prospective adoptive parents, the [c]ourt finds as follows: [T]he juvenile refers to the prospective adoptive parents as Mom and Dad. He consistently relies on them to meet his basic needs, goes to them for comfort and has a secure attachment to them. The prospective adoptive parents ensure that the juvenile attends occupational therapy and behavioral therapy.
>
> 6. The juvenile is in the same pre-adoptive home as his half-brother.

Respondent only challenges the trial court's findings that there is a "high likelihood" that Josiah will be adopted and that he was "placed in a pre-adoptive home on January 18, 2019." Respondent represents that the evidence only established that Josiah's placement was in a "*potential* pre-adoptive" home, and not a "pre-adoptive" home. This argument rests upon a distinction without a difference, as all pre-adoptive homes are by their nature inherently potential. The social worker testified that Josiah's current placement providers had expressed an interest in adopting Josiah and his half-sibling, that the home of these providers was considered a "therapeutic home" for Josiah's half-sibling, that the providers were participating in the half-sibling's therapy appointments, and that the providers were taking Josiah to his own appointments. Additionally, although Josiah had been placed with his current placement providers for less than three months, he was already referring to them as "Mom" and "Dad." This evidence supports the trial court's findings that Josiah had been placed in a pre-adoptive home, and that there was a high likelihood of Josiah's adoption.

Respondent further argues that the trial court abused its discretion in concluding that termination of parental rights is in Josiah's best interests in light of respondent's strong bond with Josiah, Josiah's loving and affectionate relationship with his paternal grandmother, the period of less than three months that Josiah had been in the pre-adoptive home, and the FCT clinician's opinion that, given more time, respondent potentially could have completed all of the steps of the clinical process. While we recognize that the record in this case contains some evidence and the trial court's order contains some findings of fact that support respondent's position, nonetheless it is the province of the trial court to weigh the relevant factors in determining Josiah's best interests. *See In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 66 (2019). The trial court's findings show a reasoned conclusion which was not reached arbitrarily. Accordingly, we hold that the trial court did not abuse its discretion in determining that termination of respondent's parental rights is in Josiah's best interests. Therefore, we affirm the trial court's order.

AFFIRMED.

IN THE MATTER OF J.J.B., J.D.B.

No. 277A19

Filed 17 July 2020

Termination of Parental Rights—best interests of the child—dispositional factors—competent evidence

The trial court did not abuse its discretion by deciding that termination of both parents' parental rights, rather than guardianship, was in the best interests of the children after considering and weighing the dispositional factors in N.C.G.S. § 7B-1110(a), including the bond the children had with their parents. The court's finding that the two children had a "very strong bond" with their foster parents, despite the children having lived with them for only three months, was supported by the evidence, and the court made an unchallenged finding that the children were highly adoptable. The trial judge's verbal statement suggesting that the foster parents "honor" the relationship the children had with their parents was neither part of the written order nor an acknowledgment that termination was not in the children's best interests.

IN RE J.J.B.

[374 N.C. 787 (2020)]

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 8 April 2019 by Judge William B. Davis in District Court, Guilford County. This matter was calendared in the Supreme Court on 19 June 2020 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

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

Poyner Spruill LLP, by Andrew H. Erteschik and N. Cosmo Zinkow, for appellee Guardian ad Litem.

Robert W. Ewing for respondent-appellant mother.

Surratt Thompson & Ceberio PLLC, by Christopher M. Watford, for respondent-appellant father.

EARLS, Justice.

Respondents, mother and father of the minor children, appeal from the trial court's order terminating their parental rights to J.J.B. and J.D.B. ("John" and "Jessica").[1] After careful review, we affirm.

On 19 July 2016, the Guilford County Department of Health and Human Services (DHHS) received a Child Protective Services (CPS) report claiming that John and Jessica lived in an injurious environment due to domestic violence between respondents. The report alleged that respondent-father had entered the respondent-mother's home while intoxicated and assaulted her. Respondent-mother was observed to have several injuries, including bleeding from both nostrils, a swollen upper lip, a contusion to her lip, and a three-inch-long scratch on the right side of her neck, under her jawline. Respondent-mother told law enforcement that respondent-father hit her with "maybe like a backhand type of thing." Law enforcement officers stated that they could smell alcohol on respondent-father's breath, that he was acting in an aggressive manner and making inflammatory statements, and that they eventually tasered him in order to effectuate his arrest.

1. The minor children J.J.B. and J.D.B. will be referred to throughout this opinion as "John" and "Jessica," which are pseudonyms used to protect the identity of the juveniles and for ease of reading.

On 26 July 2016, social workers interviewed John and Jessica, and the children reported seeing respondent-father push his way into their home and hit respondent-mother. John and Jessica told the social worker that respondent-mother was screaming and yelling, they were scared, and Jessica was crying. They stated that police were called to the home, and respondent-father was taken to jail.

On 29 July 2016, a Team Decision Making meeting was held, and both respondents were present. Respondent-father denied the allegations and stated that he did not remember much of what happened. Respondent-father entered into a safety agreement in which he agreed to have no contact with the juveniles unless supervised by the paternal grandmother. Respondent-father also agreed to complete a substance abuse assessment and follow all recommendations and attend a domestic violence intervention program.

On 9 September 2016, social workers met with the juveniles' older siblings. Social workers asked them if they had seen respondent-father, and they reported having seen him on three occasions since school began on 29 August 2016, in violation of the safety agreement. Social workers also learned that the family was residing with respondent-father's sister. Social workers then visited John and Jessica at school, and they also reported having seen respondent-father.

On 23 September 2016, DHHS filed a petition alleging that John and Jessica were neglected and dependent juveniles. In addition to the events outlined in the CPS report, DHHS alleged that respondent-mother had a CPS history which included reports of sexual abuse involving John and Jessica's older siblings, substance abuse issues, and domestic violence. DHHS also alleged that respondent-mother had a criminal history which included multiple drug-related charges. DHHS further claimed that respondent-father had numerous drug-related convictions and charges and had pending misdemeanor criminal charges, including possession of marijuana paraphernalia, resisting a public officer, disorderly conduct, and assault on a female. DHHS stated that no suitable relative had been identified for placement of the juveniles, and it was contrary to the juveniles' safety and best interests to remain in the custody of either respondent. Accordingly, DHHS obtained nonsecure custody of the juveniles and placed them in a group home.

On 5 January 2017, the trial court adjudicated John and Jessica neglected and dependent juveniles. Respondent-mother was ordered to comply with her case plan, which included: completing a psychological evaluation and following all recommendations; participating in

a domestic violence victims' group; obtaining and maintaining appropriate housing and employment; and completing a parent assessment and training program and following all recommendations. Respondent-father was also ordered to enter into a case plan with DHHS, and a meeting was scheduled for him to do so. Respondent-father subsequently entered into a case plan, which included: completing a psychological evaluation and substance abuse assessment and following all recommendations; participating in a domestic violence intervention program; obtaining and maintaining appropriate housing and employment; and completing a parent assessment and training program and following all recommendations. Both respondents were granted separate, supervised visitation. On 8 February 2017, the trial court set the permanent plan for the juveniles as reunification with a concurrent plan of adoption.

On 15 September 2017, John and Jessica were placed in a licensed foster home after a disrupted trial home placement with respondent-mother. In a permanency planning review order entered on 9 May 2018, the trial court found that respondents were not making adequate progress, were minimally participating and cooperating with DHHS and the guardian ad litem for the juveniles, and were acting in a manner inconsistent with the juveniles' health and safety. The trial court changed the primary permanent plan for the juveniles to adoption with a secondary permanent plan of reunification. The trial court further ordered DHHS to proceed with filing a petition to terminate respondents' parental rights.

On 29 August 2018, DHHS filed a motion to terminate respondents' parental rights on the grounds of neglect, willful failure to make reasonable progress, failure to pay support, and dependency. *See* N.C.G.S. § 7B-1111(a)(1)–(3), (6) (2017).[2] On 8 April 2019, the trial court entered an order in which it determined grounds existed to terminate respondent-father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1)–(3), but dismissed the allegation as to N.C.G.S. § 7B-1111(a)(6). The trial court further determined that grounds existed to terminate respondent-mother's parental rights as alleged in the motion. The trial court also concluded it was in John's and Jessica's best interests that both respondents' parental rights be terminated. Accordingly, the trial court terminated their parental rights. Both respondents appeal.

Respondents argue on appeal that the trial court erred when it determined termination of their parental rights was in John's and Jessica's

2. This statute was amended in non-pertinent part effective 1 October 2018 by N.C. Session Laws 2018-47, § 2 (June 22, 2018).

best interests. We conclude that the trial court's ruling was not an abuse of discretion.

A termination-of-parental-rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). If, during the adjudicatory stage, the trial court finds grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it proceeds to the dispositional stage where it must "determine whether terminating the parent's rights is in the juvenile's best interest" based on the following factors:

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

N.C.G.S. § 7B-1110(a) (2019).

Both respondents initially argue that this Court should utilize a *de novo* standard of review on appeal, rather than an abuse of discretion standard, and that under such review it would be clear that terminating their parental rights is not in John's and Jessica's best interests. However, this Court recently "reaffirm[ed] our application of an abuse of discretion standard of review to the trial court's determination of 'whether terminating the parent's rights is in the juvenile's best interest[s.]' " *In re Z.A.M.*, 374 N.C. 88, 99–100, 839 S.E.2d 792, 800 (2020) (quoting N.C.G.S. § 7B-1110(a)). "Under this standard, we defer to the trial court's decision unless it is 'manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* at 100, 839 S.E.2d at 800 (quoting *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998)).

In the instant case, in finding of fact 38 the trial court made the following findings concerning the factors set forth in N.C.G.S. § 7B-1110(a):

> a. The age of the juveniles: [John and Jessica] are seven years, and seven months old.

b. The likelihood of adoption for the juveniles is high. The juveniles are placed in a preadoptive home. [John and Jessica] are young and healthy with great personalities.

c. The primary permanent plan for the juveniles is adoption. Termination of parental rights of each parent is necessary in order to free the juveniles for adoption and accomplish the permanent plan for the juveniles. The termination of [respondents'] parental rights will allow the juveniles to be legally free to be adopted and have the permanence they crave.

d. There is a strong bond between the juveniles and [respondents]. The juveniles enjoy spending time with [respondents] and respond positively to all visits. [Respondents] have a deep love for the juveniles and care for them.

e. The juveniles have a very strong bond with their current caregivers, even though they were just placed in this home three months ago. The juveniles seek comfort, advice and support from their current caregivers. [John] describes this placement as his home. [Jessica] calls the preadoptive parents "mom" and "dad". The juveniles and preadoptive parents say their prayers together and the juveniles look to the preadoptive parents to meet their emotional needs. On January 31, 2019, [the social worker] went to the foster home to complete a routine monthly visit. The juveniles were terrified that they were going to be moved from this home and ran to the foster mother for protection.

f. The [c]ourt considers as relevant the time the juveniles have been in foster care, the number of placements the juveniles have been placed in, and that the juveniles are thriving in the[ir] current foster/preadoptive home. [John's] mental health behaviors have decreased, [Jessica] is eating more, and her medical condition of psoriasis has improved. Although the juveniles and [respondents] are bonded to one another, neither parent is in a position to provide adequate care and supervision to the juveniles as of today's hearing, nor are they likely to within the reasonably foreseeable future. [Respondents] have had more than sufficient time to address the needs that led to removal of the juveniles.

We review the trial court's dispositional findings of fact to determine whether they are supported by competent evidence. *In re K.N.K.*, 374 N.C. 50, 57, 839 S.E.2d 735, 740 (N.C. 2020). Dispositional findings not challenged by respondents are binding on appeal. *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 65 (2019) (citations omitted).

The sole finding challenged on appeal is finding of fact 38(e). Respondent-father argues that the evidence did not support the trial court's finding of fact that John and Jessica have a "very strong bond" with their foster parents. However, the juveniles' guardian ad litem testified at the termination hearing that John and Jessica were "quite bonded" to their caregivers. The guardian ad litem testified that John was "very comfortable and . . . very talkative and affectionate" towards his caregivers. The guardian ad litem witnessed John refer to his caregivers as "mom and dad" when saying his prayers. Jessica was described as being "very playful with [the caregivers] and . . . also very comfortable and jumping on backs to go up the steps[.]" In addition to the guardian ad litem's testimony, the foster care social worker testified that John and Jessica were "terrified" that they would be moved out of their foster home. The social worker testified that at one point, Jessica "literally hopped on [the] foster mom and would not let go of her and [John] was right on the side of her."

Respondent-father claims that while petitioner did produce some evidence of a bond between John and Jessica and their caregivers, it was inadequate to support the trial court's finding in light of the brief period of time they had been placed with the caregivers. Nevertheless, the above testimony permits the reasonable inference that John and Jessica were "very bonded" to their foster parents. *See In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167–68 (2016) (stating that it is the trial judge's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom); *see also Scott v. Scott*, 157 N.C. App. 382, 388, 579 S.E.2d 431, 435 (2003) (stating that when the trial court sits as fact-finder, it is the sole judge of the credibility and weight to be given to the evidence, and it is not the role of the appellate courts to substitute its judgment for that of the trial courts).

Respondent-father additionally contends that the trial court failed to consider the effect permanent severance would have on the juveniles in light of the uncertainty that their current caregivers would adopt them. Respondent-father claims that, should there be no adoption, the effect of terminating respondents' parental rights would be to render John and

Jessica "legal orphan[s]." *In re J.A.O.*, 166 N.C. App. 222, 227, 601 S.E.2d 226, 230 (2004).

In re J.A.O. is distinguishable from the instant case. In *In re J.A.O.*, the juvenile had "a history of being verbally and physically aggressive and threatening, and he ha[d] been diagnosed with bipolar disorder, attention deficit hyperactivity disorder, pervasive developmental disorder, borderline intellectual functioning, non-insulin dependent diabetes mellitus, and hypertension." *Id.* at 228, 601 S.E.2d at 230. The juvenile had "been placed in foster care since the age of eighteen months and ha[d] been shuffled through nineteen treatment centers over the last fourteen years." *Id.* at 227, 601 S.E.2d at 230. As a result, the guardian ad litem argued at trial that the juvenile was unlikely to be a candidate for adoption, and termination was not in the juvenile's best interests, because it would "cut him off from any family that he might have." *Id.* Despite this evidence, and despite finding that there was only a "small possibility" that the juvenile would be adopted, the trial court concluded that it was in the juvenile's best interests that the mother's parental rights be terminated. *Id.* at 228, 601 S.E.2d at 230. On appeal, the Court of Appeals reversed. The Court of Appeals balanced the minimal possibilities of adoption "against the stabilizing influence, and the sense of identity, that some continuing legal relationship with natural relatives may ultimately bring" and determined that rendering J.A.O. a legal orphan was not in his best interests. *Id.*

Here, the evidence does not show that John or Jessica have the serious issues the juvenile had in *In re J.A.O.* The only basis for respondent-father's contention is mere speculation that because John and Jessica had been placed with their caregivers for a relatively short time, issues could arise after a "honeymoon" period, and there was no evidence of record as to why previous placements failed for John and Jessica. However, unlike the juvenile in *In re J.A.O.*, John and Jessica are in a preadoptive placement, and the trial court made an unchallenged finding that John and Jessica are highly adoptable. Additionally, while the mother in *In re J.A.O.* had made reasonable progress towards correcting the conditions which led to the removal of her son from her care, respondents here failed to make such progress. Instead, the trial court found at disposition that respondents were not in a position to provide adequate care for the juveniles and were unlikely to be able to do so for the foreseeable future. Consequently, we conclude that respondent-father's argument is without merit.

Both respondents argue that the trial court should not have terminated their parental rights in light of the strong bond they had with John

and Jessica. The trial court did find that John and Jessica had a strong bond with respondents and that respondents deeply loved their children. However, "the bond between parent and child is just one of the factors to be considered under N.C.G.S. § 7B-1110(a), and the trial court is permitted to give greater weight to other factors." *In re Z.L.W.*, 372 N.C. at 437, 831 S.E.2d at 66. Here, when considering the other factors set forth in N.C.G.S. § 7B-1110(a), the trial court found: that John and Jessica also had a strong bond with their foster parents; there was a strong likelihood of adoption; and termination of respondents' parental rights would aid in the permanent plan of adoption. The trial court also found that, when considering other relevant factors, John and Jessica were "thriving" in their preadoptive home. Furthermore, the trial court found the juveniles craved permanence, but respondents were not in a position to provide care for the juveniles, nor were they likely to be able to do so for the foreseeable future. Therefore, we conclude the trial court appropriately considered the factors set forth in N.C.G.S. § 7B-1110(a) when determining John's and Jessica's best interests and that the trial court's determination that respondents' strong bond with John and Jessica was outweighed by other factors was not manifestly unsupported by reason.

Respondents further argue that, given the strong bond between themselves and John and Jessica, the trial court should have considered other dispositional alternatives, such as guardianship. The GAL argues that this claim was abandoned because neither parent asked the trial court to consider guardianship as an alternative. More fundamentally, the paramount consideration must always be the best interests of the child. As we explained in *Z.L.W.*,

> [w]hile the stated policy of the Juvenile Code is to prevent "the unnecessary or inappropriate separation of juveniles from their parents," N.C.G.S. § 7B-100(4) (2017), we note that "the best interests of the juvenile are of paramount consideration by the court and . . . when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a *safe, permanent home within a reasonable amount of time*," *id.* § 7B-100(5) (2017) (emphasis added); *see also In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 251 (emphasizing that "the fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody [is] that the best interest of the child is the polar star").

Id. (alterations in original). Consequently, in *Z.L.W.*, we held the trial court did not abuse its discretion in determining termination, rather

than guardianship, was in the best interests of the juveniles. *Id.* In the instant case, as in *In re Z.L.W.*, the trial court's findings of fact demonstrate that it considered the dispositional factors set forth in N.C.G.S. § 7B-1110(a) and "performed a reasoned analysis weighing those factors." *In re Z.A.M.*, 374 N.C. at 101, 839 S.E.2d at 801. Accordingly, "[b]ecause the trial court made sufficient dispositional findings and performed the proper analysis of the dispositional factors," *id.*, we conclude the trial court did not abuse its discretion by concluding that termination, rather than guardianship, was in John's and Jessica's best interests.

Both respondents lastly argue that the trial court erred by terminating their parental rights because statements made by the trial judge at the conclusion of the termination hearing demonstrated that, in fact, termination was not in John's and Jessica's best interests. After ruling that termination of respondents' parental rights was in the juveniles' best interests, the trial court made the following statement:

> THE COURT: I will say this: this is not part of the order and you may be thinking maybe it's out of order, but I understand the pre-adoptive placement parents are here, –
>
> MS. GERSHON: Yes.
>
> THE COURT: – so I hope that even though parental rights have been terminated in this case, we've heard how much these children love their parents, but I hope that maybe there'll be found some ways to honor that. I'm not going to say anything more specific. I guess it's really not my place to, but to continue to honor that relationship despite the order from today's hearing.

Respondent-father asserts that the trial court's statement communicates "its belief that the children will [be] better off with being able to love their parents and by being loved by their parents." Respondent-father argues that the trial court's desire in this regard is inconsistent with its decision to terminate their parental rights.

As is clear from the context, the trial court's statement to the caregivers that they should "honor" the relationship between respondents, John, and Jessica was advice to the prospective adoptive parents, not a repudiation of the ruling just announced from the bench. Even assuming *arguendo* that the trial court had the authority to do so, the trial court's written order contains no decree that the caregivers continue the juveniles' relationship with respondents. *See*, *e.g.*, *In re A.U.D.*, 373 N.C. 3, 10, 832 S.E.2d 698, 702 (2019) (concluding that the trial court's oral

findings are subject to change before the final order was entered, and there was no error "based merely on the fact that there were differences between the findings orally rendered at the hearing and those set forth in the written order."); *see also* N.C.G.S. § 1A-1, Rule 58 (2019) (stating that "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court"). In fact, the trial court specifically stated that the comments were not a part of its order. Additionally, the trial court's order indicates its awareness of the effect of termination by acknowledging that its "[o]rder completely and permanently terminate[d] all rights and obligations of [respondents] to the juveniles." *See* N.C.G.S. § 7B-1112 (2019) (providing that an order terminating parental rights "completely and permanently terminates all rights and obligations of the parent to the juvenile and of the juvenile to the parent arising from the parental relationship").

We therefore hold the trial court's conclusion that termination of respondents' parental rights was in John's and Jessica's best interests did not constitute an abuse of discretion. Accordingly, we affirm the trial court's order terminating respondents' parental rights.

AFFIRMED.

IN THE MATTER OF J.O.D.

No. 298A19

Filed 17 July 2020

1. Termination of Parental Rights—grounds for termination—neglect—substance abuse—probability of future neglect

The trial court properly terminated a father's parental rights after concluding that there existed a high probability of future neglect of the child based on the father's persistent substance abuse issues and domestic discord in the home. The findings of fact in support of that conclusion were in turn supported by clear, cogent, and convincing evidence.

2. Termination of Parental Rights—no-merit brief—neglect—willful failure to make reasonable progress

The trial court's termination of a mother's parental rights—based on neglect and leaving her child in a placement outside the home without making reasonable progress to correct the conditions

that led to his removal—was affirmed where her counsel filed a no-merit brief and the order was based on clear, cogent, and convincing evidence supporting the statutory grounds for termination.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 17 May 2019 by Judge J.H. Corpening II in District Court, New Hanover County. This matter was calendared for argument in the Supreme Court on 19 June 2020 but determined on the records and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Jennifer G. Cooke for petitioner-appellee New Hanover County Department of Social Services.

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

Sydney Batch, for respondent-appellant mother.

Anné C. Wright for respondent-appellant father.

DAVIS, Justice.

In this case, we consider whether the trial court erred by terminating the parental rights of respondent-father and respondent-mother (collectively, respondents) to J.O.D. (Joshua).[1] We conclude that the trial court made sufficient findings of fact, which were supported by clear, cogent, and convincing evidence, to support its conclusion that grounds existed to terminate respondent-father's parental rights on the basis of neglect. Respondent-mother's counsel has filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We are satisfied that the issues identified by counsel in respondent-mother's brief lack merit. Accordingly, we affirm the trial court's order terminating respondents' parental rights.

Factual and Procedural Background

Respondents are the parents[2] of Joshua, who was born on 12 November 2017. On 5 December 2017, New Hanover County Department of Social

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

2. The trial court found that although no father was listed on Joshua's birth certificate and no paternity testing was performed, respondent-father had never denied that

Services (DSS) obtained nonsecure custody of Joshua and filed a juvenile petition in District Court, New Hanover County, alleging that he was a neglected juvenile. The petition alleged that: (1) Joshua's meconium tested positive for cocaine and methadone and that he had been treated with morphine and clonidine for withdrawal shortly after his birth; (2) respondent-mother had consistently tested positive for barbiturates, cocaine, and methadone prior to Joshua's birth and admitted to consistent heroin use during her pregnancy; (3) respondent-father admitted to having an opiate addiction for the past ten years; and (4) on 21 November 2017, respondent-mother tested positive for methadone, cocaine, benzoylecgonine, and norcocaine, and respondent-father tested positive for methadone, benzoylecgonine, cocaine, cocaethylene, morphine, norcocaine, and heroin.

On 14 February 2018, the trial court entered an order adjudicating Joshua to be a neglected juvenile. The trial court ordered respondent-mother to comply with the terms of a family services agreement by: (1) engaging in a substance abuse program and complying with any and all recommended services; (2) completing a comprehensive clinical assessment and complying with any and all recommendations; (3) submitting to random drug screens as requested by DSS and the guardian *ad litem* (GAL); (4) completing a parenting education program and demonstrating the skills that she had learned during her interactions with Joshua; and (5) maintaining verifiable employment and housing.

Respondent-father was also ordered to comply with the terms of a family services agreement by: (1) engaging in a substance abuse program and complying with any and all recommended services; (2) submitting to random drug screens as requested by DSS and the GAL; (3) completing a parenting education program and demonstrating the skills that he had learned during his interactions with Joshua; and (4) maintaining verifiable employment and housing. Joshua remained in DSS custody following the 14 February 2018 order.

Following a hearing on 18 October 2018, the trial court entered a permanency planning order on 9 November 2018. The trial court found that respondents had been participating in DSS's Intensive Reunification Program (IRP) and were initially successful. However, in July 2018, respondents were discharged from the program due to their continued drug use and failure to consistently engage in services required for the program. Respondents' overnight visits with Joshua were suspended on

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Joshua was his biological son and respondent-mother had never named any other male as Joshua's putative father.

9 June 2018 due to positive drug screens, and they were given the option of weekly supervised visitation for two hours.

Respondent-mother had maintained housing and obtained employment. However, she had failed both to engage in required counseling since 26 June 2018 and to participate in recommended relapse prevention group services since June 2018. Respondent-mother, who admitted to relapsing, submitted to seven drug screens from June to August of 2018, all of which showed positive results for cocaine, and failed to submit to random drug screens requested by DSS on five occasions in July, September, and October of 2018.

The trial court further found that respondent-father had maintained housing and was receiving social security disability benefits. He had not participated in counseling since 7 August 2018, and he had failed to participate in recommended relapse prevention group services since July 2018. He also admitted to relapsing, testing positive for cocaine on four occasions between June and August of 2018 and testing positive for marijuana and amphetamines on 2 October 2018. Respondent-father failed to submit to drug screens requested by DSS on seven occasions from June to October of 2018. The trial court changed the permanent plan to adoption with a concurrent plan of reunification and ordered DSS to file a petition to terminate respondents' parental rights within sixty days.

On 2 January 2019, DSS filed a petition to terminate respondents' parental rights, alleging that they had neglected Joshua and that such neglect was likely to reoccur if he were returned to respondents, *see* N.C.G.S. § 7B-1111(a)(1) (2019), and that they had willfully left Joshua in foster care or a placement outside the home for more than twelve months without making reasonable progress to correct the conditions that led to his removal, *see* N.C.G.S. § 7B-1111(a)(2).

Following a hearing held from 15 April to 17 April 2019, the trial court entered an order on 17 May 2019 concluding that both grounds alleged in the petition existed so as to warrant the termination of respondents' parental rights. The trial court also determined that it was in Joshua's best interests that respondents' parental rights be terminated. *See* N.C.G.S. § 7B-1110(a) (2019). Respondents gave notice of appeal to this Court pursuant to N.C.G.S. § 7B-1001(a1)(1).

Analysis

I. Respondent-Father's Appeal

[1] On appeal, respondent-father contends that the trial court erred in concluding that there was a likelihood of future neglect of Joshua by him

and that he did not make reasonable progress to correct the conditions that led to Joshua's removal. *See* N.C.G.S. § 7B-1111(a)(1)–(2). Because only one ground is necessary to support a termination of parental rights, we address respondent-father's arguments as they relate to the ground of neglect. *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982) ("If either of the . . . grounds aforesaid is supported by findings of fact based on clear, cogent and convincing evidence, the order appealed from should be affirmed."); *see also* N.C.G.S. § 7B-1111(a) ("The court may terminate the parental rights upon a finding of one or more [grounds for termination.]").

Our Juvenile Code provides for a two-step process for the termination of parental rights—an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019). During the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under section 7B-1111(a). N.C.G.S. § 7B-1109(e), (f). If the trial court finds that a ground exists for termination, the matter proceeds to the dispositional stage, at which point the trial court must "determine whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a).

We review a trial court's adjudication "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). The trial court's conclusions of law are reviewable de novo on appeal. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019) (citing *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009)).

Subsection 7B-1111(a)(1) allows for the termination of parental rights if the trial court finds that the parent has neglected his or her child to such an extent that the child fits the definition of a "neglected juvenile" under N.C.G.S. § 7B-101(15). N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is statutorily defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare[.]" N.C.G.S. § 7B-101(15) (2019).

Generally, "[t]ermination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination

hearing." *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984)). However, "if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *Id.* at 843, 788 S.E.2d at 167. When determining whether future neglect is likely, "the trial court must consider all evidence of relevant circumstances or events which existed or occurred *either before or after* the prior adjudication of neglect." *In re Ballard*, 311 N.C. at 716, 319 S.E.2d at 232–33. "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *Id.* at 715, 319 S.E.2d at 232.

In its termination order, the trial court found that Joshua was adjudicated to be a neglected juvenile on 17 January 2018 and determined that "[r]epetition of neglect is certain given [respondents'] lack of sobriety." The trial court made the following pertinent findings of fact in support of its conclusion that grounds existed to terminate respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(1): Before Joshua was born, respondent-father had struggled with an opiate addiction for several years. Joshua was born in November 2017 at thirty-three weeks gestation, and his meconium tested positive for cocaine and methadone. On 13 November 2017, DSS received a report and initiated an investigation due to concerns about respondents' substance abuse. On 21 November 2017, respondent-father tested positive for methadone, benzoylecgonine, cocaine, cocaethylene, morphine, norcocaine, and heroin, and respondent-mother tested positive for methadone, cocaine, benzoylecgonine, and norcocaine. Respondent-father's case plan included participating in substance abuse treatment, completing parenting classes, and obtaining and maintaining appropriate and stable housing and verifiable income.

The trial court further found that in January 2018, respondent-father completed the Substance Abuse Intensive Outpatient Program (SAIOP) at Coastal Horizons Center, Inc. On 23 January 2018, respondents were accepted into DSS's IRP. Initially, they were actively engaged in the program and complied with recommended services by engaging in substance abuse treatment, medication management, and daily methadone dosing; by participating in weekly therapy; and by working with a parenting coach and demonstrating the skills that they had learned during their interactions with Joshua. Due to their progress with their case plans, on 26 April 2018, respondents' visitation was expanded to include three unsupervised overnight visits. However, on 30 May 2018,

respondent-father tested positive for benzoylecgonine, cocaine, cocaethylene, and norcocaine, and, on 1 June 2018, he tested positive for cocaine. He denied using controlled substances and offered multiple explanations for the positive results. Respondent-mother also tested positive for benzoylecgonine, cocaine, norcocaine, and cocaine metabolite on 30 May 2018.

Respondents' level of compliance with the IRP began to wane in June 2018. They missed multiple parental coaching sessions, sessions with their counselor, and visits with Joshua. On 8 June 2018, respondents admitted to relapsing and to continued use of controlled substances. Due to repeated positive drug screens and their failure to appropriately address their substance abuse concerns, respondents' overnight visits with Joshua were suspended on 9 June 2018, and respondents were discharged from the IRP on 25 July 2018.

The trial court also found that on 23 October 2018, respondent-father completed an updated comprehensive clinical assessment, which resulted in diagnoses of cannabis, alcohol, anxiolytic, cocaine, and opioid use disorders. It was recommended that he re-engage in SAIOP and participate in community support and twelve-step support groups. It was further recommended that he engage in individual and group therapy for maintenance of relapse prevention and recovery after his completion of SAIOP.

From 26 October 2018 to 14 December 2018, respondent-father attended seventeen out of twenty-three SAIOP group sessions. After reporting that he could no longer sit down for the entirety of the three-hour group sessions due to ongoing physical issues with his multiple sclerosis, a modified schedule was presented to respondent-father on 16 January 2019, which included attending a relapse prevention group one time per week for one hour, a support group meeting one time per week for one hour, and an individual counseling session once per month for one hour. By the time of the termination hearing in mid-April, respondent-father had only attended three group sessions and three individual sessions.[3]

The trial court made detailed findings regarding the results of respondent-father's drug tests. On 11 January 2019, respondent-father's underarm hair follicles tested positive for cocaine metabolite

3. While finding of fact 31 states that respondent-father attended only "two group sessions," it lists three separate dates. The testimony at the termination hearing demonstrates that respondent-father attended three group sessions.

benzoylecgonine, cocaine, cocaethylene, and norcocaine, and, on 15 February and 7 March 2019, his underarm hair follicles tested positive for cocaine metabolite benzoylecgonine, cocaine, and cocaethylene. The trial court found that hair screens using underarm hair were "not equivalent to hair screens using head hair" because while hair removed from the scalp would show "three months of use assuming one half inch hair growth per month[,]" hair removed from the underarm "could show use within one year as the blood supply is not as abundant."

On 15 February 2019, respondent-mother informed a social worker that respondent-father was excessively drinking alcohol, and respondent-father tested positive for alcohol on 4 March, 11 March, 14 March, 18 March, and 12 April 2019 with "high levels of alcohol in his system." The trial court found that respondent-father did not appreciate the "gravity of his drinking problem" and did not "accept that he has an alcohol addiction."

On 27 February 2019, respondent-mother made allegations of domestic violence perpetrated by respondent-father. On 15 March 2019, respondent-father was ordered to complete the Domestic Violence Offender Program as part of his case plan, but he had failed to initiate the program at the time of the termination hearing. Despite the "current discord in the home" and respondents' insistence that they were separated, respondents remained in an ongoing relationship.

In his brief, respondent-father does not dispute the trial court's prior adjudication of neglect. Rather, he challenges several of the trial court's findings of fact as unsupported by clear, cogent, and convincing evidence and the trial court's conclusion of law that there was a "high probability that the neglect will continue in the foreseeable future." We address his contentions in turn.

A. Findings of Fact

Respondent-father argues that the portion of finding of fact 36 that states he showed "high" levels of alcohol in his system is not supported by the evidence and is contradicted by the portion of finding of fact 35, which provides that "[i]t is not possible to quantify the amount of alcohol . . . included in the levels identified." Respondent-father asserts that the word "high" should be stricken from finding of fact 36. We disagree.

In finding of fact 34, which has not been challenged, the trial court listed the results of respondent-father's random drug screens conducted from 19 November 2018 to 18 March 2019. During that testing, respondent-father tested positive for EtG and EtS with levels greater than

25,000 ng/ml on 4, 11, 14, and 18 March 2019. Daniel Shapiro, a physician's assistant and the lead clinician at Medac Corporate Health, testified at the termination hearing that "EtG and EtS is our 80-hour alcohol test. It picks up alcohol in the system in the urine up to 80 hours after the use of alcohol." The "[c]ut-off" level for the detection of EtG is 500 ng/ml and 100 ng/ml for EtS. The following exchange took place at the termination hearing between counsel for respondent-father and Mr. Shapiro:

> Q. So there's a — there's a possibility as far as the EtG and the EtS amounts are concerned with my client specifically, like, it's possible that he could have one beer every day and they could result in the numbers that he has. Or he could have three beers in one setting. And, I mean, you can't — I guess the point is you can't distinguish whether it's one or the other?
>
> A. I can't say for sure. You have to, you know, talk to a physiologist to get that answered.
>
> Q. Right.
>
> A. But I — I can say that the 25,000 is a high level. It is.
>
> . . . .
>
> A. We have had positive EtG and EtS levels periodically throughout time and I don't see too many that high.

This testimony supports the trial court's finding that although it was not possible to quantify the number of alcoholic drinks respondent-father had consumed in order for his levels to read greater than 25,000 ng/ml for EtG and EtS, Mr. Shapiro considered EtG and EtS levels greater than 25,000 ng/ml to constitute a "high" level. The portions of findings of fact 35 and 36 at issue are therefore not mutually exclusive. Clear, cogent, and convincing evidence exists to support the challenged portion of finding of fact 36.

Next, respondent-father challenges the portion of finding of fact 60 providing that "[r]espondent-[p]arents obtained and maintained independent housing . . . [in] Wilmington, North Carolina throughout the case. They continue residing in the home." At the termination hearing, respondents testified that respondent-mother had moved out of the house in February 2019. Yet, unchallenged finding of fact 57 establishes that on 14 March 2019, DSS visited respondent-father's home to see if respondent-mother continued to live in the home and discovered that respondent-mother was present. A DSS foster care social worker

testified that a week prior to the termination hearing, she "stopped by the home" and respondent-mother's belongings were still in the home. At the termination hearing, respondent-father testified that respondent-mother's name was on the lease to the residence and that he had not yet removed her name from the lease. When asked if respondent-mother was "still contributing to the bills" at the house, respondent-father answered "[s]he tries."

Based on the foregoing, the trial court made the reasonable inference that respondents continued to live together at the time of the termination hearing. *See In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68 (stating that it is the trial court's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom). Although there was record evidence that would have supported a contrary decision, "this Court lacks the authority to reweigh the evidence that was before the trial court." *In re A.U.D.*, 373 N.C. 3, 12, 832 S.E.2d 698, 704 (2019); *see also In re Montgomery*, 311 N.C. at 110–11, 316 S.E.2d at 252–53 ("[O]ur appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary.").

Respondent-father also argues that finding of fact 58 is not supported by clear, cogent, and convincing evidence. Finding of fact 58 states that respondents "are consistently seen together at Coastal Horizons for their daily doses [of methadone]. Caitlyn Garner and Kelly Long have seen them together consistently since their claims to be apart." However, this finding of fact is not necessary to affirm the trial court's conclusion that grounds existed under N.C.G.S. § 7B-1111(a)(1) to terminate respondent-father's parental rights, and we therefore decline to address it. *See In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58–59 (2019) ("[W]e review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." (citing *In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133)).

B. Conclusions of Law

Respondent-father also argues that the trial court's determination that there was a "high probability that the neglect will continue in the foreseeable future" and its determination that DSS had established the grounds alleged in the petition to terminate respondent-father's parental rights were not supported by sufficient evidence and competent findings of fact. We are not persuaded.

As an initial matter, respondent-father correctly notes that the trial court's determination that neglect is likely to reoccur if Joshua was returned to his care is more properly classified as a conclusion of law. *See In re S.D.*, 839 S.E.2d 315, 330 (N.C. 2020). The determination that DSS established the grounds alleged in the petition to terminate respondent-father's parental rights is likewise a conclusion of law. *See id.* Although the trial court labeled these conclusions of law as findings of fact, "findings of fact [which] are essentially conclusions of law . . . will be treated as such on appeal." *State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008) (alterations in original) (citation omitted).

In the present case, the trial court's conclusion of law that there was a high likelihood of a repetition of neglect if Joshua was returned to respondent-father's care is supported by the following factual findings, which are either unchallenged—and therefore binding on appeal—or supported by clear, cogent, and convincing evidence as discussed above: respondent-father relapsed in May 2018; he failed to successfully complete SAIOP after re-engaging with the program in October 2018; he failed to appreciate the gravity of his alcohol problem and to accept that he had an alcohol addiction; he did not engage in the Domestic Violence Offender Program; he made a choice to remain in a relationship with and to live with respondent-mother, who continued to struggle with addiction; and there was current domestic discord in the home between respondents.

In reaching its conclusion, the trial court relied heavily on respondent-father's lack of sobriety. Respondent-father asserts that he "overcame years of substance abuse and addiction" when Joshua was born, "took responsibility" for his relapse and re-engaged in substance abuse treatment, and "maintained his sobriety for a considerable period of time." While we recognize respondent-father's initial progress from the end of January until May of 2018—during which he actively engaged in the IRP and complied with recommendations received from his comprehensive clinical assessments—the evidence and findings of fact establish that he had failed to make meaningful progress in addressing his addiction issues by the time of the termination hearing. *See In re M.A.W.*, 370 N.C. 149, 154–55, 804 S.E.2d 513, 517–18 (2017) (holding that a respondent's failure to comply with the terms of his case plan with respect to addressing ongoing substance abuse issues—along with other relevant findings of fact—supported the trial court's decision to terminate the respondent's parental rights on the basis of neglect).

The trial court was entitled to conclude that based upon respondent-father's long history of substance abuse, his relapse in May 2018,

his failure to follow the recommendations of his updated comprehensive clinical assessment, and his failure to appreciate the gravity of his alcohol use and to accept that he had an alcohol addiction, there was a probability that there would be a repetition of neglect based on his lack of sobriety. *See In re J.A.M.*, 372 N.C. 1, 9, 822 S.E.2d 693, 698–99 (2019) (quoting *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999)) (stating that in neglect cases involving newborns, "the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future . . . neglect of a child based on the historical facts of the case").

The trial court's findings of fact demonstrate that respondent-father completed an updated comprehensive clinical assessment on 23 October 2018, in which he was diagnosed with, among other things, alcohol use disorder. It was recommended that he re-engage in SAIOP. To accommodate his needs arising out of his issues with multiple sclerosis, a modified schedule was offered to him in January 2019, which required him to attend a relapse prevention group one time per week for one hour, attend a support group meeting one time per week for one hour, and attend an individual counseling session once per month for one hour. By the time of the termination hearing, he had attended only three group sessions and three individual sessions.

The trial court's findings of fact further show that respondent-father tested positive for cocaine on 11 January, 15 February, and 7 March 2019. But because the hair source was his underarm hair, the trial court found that "[h]air removed from under the arm could show use within one year." Although the results of these tests could not conclusively establish that respondent-father was using cocaine at the time of the termination hearing, respondent-father tested positive for alcohol on 4, 11, 14, and 18 March 2019, showing "high levels of alcohol in his system." Respondent-father also tested positive for alcohol at Coastal Horizons Center, Inc. on 12 April 2019, just days before the termination hearing. The trial court found that because respondent-father suffered from hepatitis C, "alcohol use could kill him." Nevertheless, he failed to "accept that he has an alcohol addiction" and to "appreciate the gravity of his drinking problem."

Respondent-father argues that the fact that he "has drank alcohol is not sufficient by itself to support a determination of neglect without proof of an adverse impact on Joshua." In addition to the fact that his argument seeks to minimize the severity of his alcohol addiction, however, he ignores the fact that his alcohol abuse was not the sole factor upon which the trial court's decision was based. As discussed above,

the trial court also considered respondent-father's relapses, his failure to successfully complete SAIOP, his failure to initiate the Domestic Violence Offender Program, his choice to remain in a relationship with and live with respondent-mother, who continued to struggle with addiction issues of her own, and the current domestic discord in the home in concluding that there was a high likelihood of a repetition of neglect.

Respondent-father also argues that the trial court erred in concluding that there was a likelihood of future neglect if Joshua was returned to his care because he demonstrated during his visitations with Joshua that he had "obtained the skills and knowledge necessary to appropriately parent." It is true that findings of fact 15 and 16 demonstrate that when respondents were actively engaged in the IRP, they were working with a parenting coach and demonstrating the skills learned during their interactions with Joshua. Because respondents were showing improvement at the time, on 26 April 2018, visitation was expanded to unsupervised, overnight visits.

Nonetheless, respondent-father fails to take into account the evidence showing that he was unable to sustain this initial progress. Finding of fact 19 demonstrates that respondent-father tested positive for benzoylecgonine, cocaine, cocaethylene, and norcocaine on 30 May 2018 and tested positive for cocaine on 1 June 2018. Respondent-mother tested positive for cocaine, among other substances, near the end of May 2018. Findings of fact 20 and 21 indicate that although DSS had arranged for respondents to participate in the ABC program, they were never able to begin the program due to continued positive drug screens and Joshua not being in the home. Ultimately, on 9 June 2018, respondents' overnight visits were suspended due to the positive drug screens, as reflected in finding of fact 24. Moreover, the trial court found in its 9 November 2018 permanency planning order that despite being offered weekly two-hour supervised visits with Joshua following the suspension of overnight visits, respondents had failed to consistently participate in scheduled visitation.

Finally, respondent-father asserts that the trial court appears to have based its conclusion that there was a likelihood of future neglect "on the failure of [respondent-mother] to appropriately treat her addictions" and that the trial court erred in making this conclusion given that respondent-father "understood and agreed that contact with [respondent-mother] had to be limited unless and until she successfully engaged in treatment for her substance abuse." The trial court's findings of fact recognize that respondent-mother continued to struggle with her addiction and reflect the fact that the trial court considered respondent-father's continuing

relationship with respondent-mother. The trial court noted the "current domestic discord" between respondents. The trial court's findings of fact establish that on 8 March 2019, respondent-mother reported to Joshua's foster parent that respondent-father had "trashed" their home, pushed her, hit her, and threw her belongings out of the home. Due to respondent-mother's continued reports of domestic problems in the home, empowerment classes were added to her case plan and the Domestic Violence Offender Program was added to respondent-father's case plan. Neither respondent-mother nor respondent-father had initiated the programs aimed at addressing these issues. Moreover, respondent-mother admitted to slapping respondent-father in the face, and there was evidence that there had "been frequent and loud disputes" between respondents. There was nothing improper about the trial court relying on this evidence in making its findings of fact.

Furthermore, we are unconvinced that respondent-father "understood and agreed" that contact with respondent-mother had to be limited unless or until she successfully engaged in substance abuse treatment. At the time of the termination hearing, evidence existed—as reflected in the trial court's findings of fact—that respondents continued to live together and maintain a relationship. Findings of fact 56 and 59 establish that at the time of the termination hearing, respondent-mother was two months pregnant with respondent-father's child and, "despite their insistence that they [were] separated[,]" respondents were still in a relationship—having repeatedly told their social worker that they remained a couple. Thus, the trial court was not required to credit respondent-father's testimony that he would separate from respondent-mother in order to regain custody of Joshua. *See In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68.

Based on the foregoing, we hold that the trial court did not err by determining that grounds existed under N.C.G.S. § 7B-1111(a)(1) to terminate respondent-father's parental rights. Furthermore, respondent-father does not challenge the trial court's conclusion that termination of his parental rights was in Joshua's best interests. *See* N.C.G.S. § 7B-1110(a). Accordingly, we affirm the trial court's 17 May 2019 order terminating respondent-father's parental rights.

II. Respondent-Mother's Appeal

[2] Respondent-mother's counsel has filed a no-merit brief on her behalf pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. Counsel has advised respondent-mother of her right to file pro se written arguments on her own behalf with this Court, and counsel

has provided her with the documents necessary to do so. However, respondent-mother has not submitted any written arguments.

We independently review issues contained in a no-merit brief filed pursuant to Rule 3.1(e). *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). In her brief, respondent-mother's counsel identified two issues that could arguably support an appeal but stated why she believed both of these issues lacked merit. Based upon our careful review of the issues identified in the no-merit brief in light of our consideration of the entire record, we are satisfied that the trial court's 17 May 2019 order was supported by competent evidence and based on proper legal grounds.

Conclusion

For the reasons stated above, we affirm the trial court's order terminating respondents' parental rights.

AFFIRMED.

IN THE MATTER OF J.S., C.S., D.R.S., D.S.

No. 395PA19

Filed 17 July 2020

1. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—dependency

The trial court properly terminated a mother's parental rights to her four children under N.C.G.S. § 7B-1111(a)(2) after finding that the mother made some progress on her family services plan but willfully failed to make reasonable progress in correcting the filthy, hazardous living conditions which led to the children's removal from her home. Furthermore, the trial court did not err in simultaneously finding the mother mentally incapable of parenting her children for purposes of N.C.G.S. § 7B-1111(a)(6) where, according to a psychologist's testimony, the mother's cognitive limitations affected her childrearing abilities but not her ability to clean her home.

2. Termination of Parental Rights—best interests of child—consideration of factors

When determining the best interests of a mother's three minor sons, the trial court properly considered each factor in N.C.G.S. § 7B-1110(a) and did not need to enter written factual findings as to

those factors in the absence of conflicting evidence concerning any factor. Moreover, the trial court did not abuse its discretion in concluding that termination of the mother's parental rights was in the children's best interests where all three children were under the age of twelve; the youngest was with a potential adoptive placement and was "100 percent likely" to be adopted; the Department of Social Services had placed the other two in therapeutic foster homes and planned to move them into an adoptive home; and none of the children had a bond with the mother.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 11 July 2019 by Judge Jeanie R. Houston in District Court, Wilkes County, and on writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 10 September 2018 by Judge William F. Brooks in District Court, Wilkes County. This matter was calendared for argument in the Supreme Court on 19 June 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Daniel S. Johnson, for petitioner-appellee Wilkes County Department of Social Services.

Robert C. Montgomery for appellee Guardian ad Litem.

Peter Wood for respondent-appellant mother.

MORGAN, Justice.

Respondent-mother appeals from the trial court's orders terminating her parental rights to the minor children Donald, Jimmy, Charles, and Dora.[1] By order entered on 28 October 2019, this Court granted respondent's petition for writ of certiorari to review the trial court's 10 September 2018 permanency planning order which eliminated reunification with respondent from the children's permanent plans and relieved petitioner Wilkes County Department of Social Services (DSS) from further efforts to reunify respondent with her children. We now affirm the trial court's orders in their entirety.

1. We use pseudonyms chosen by respondent to protect the juveniles' identities and for ease of reading. We note that the trial court also terminated the parental rights of the respective fathers of Donald, Jimmy, and Charles, none of whom are a party to this appeal. Dora's father relinquished his parental rights prior to the institution of these proceedings.

Factual Background and Procedural History

On 9 May 2016, DSS obtained nonsecure custody of respondent's children and filed juvenile petitions alleging that they were neglected based on the following:

> Several [Child Protective Services] reports have c[o]me into the Wilkes DSS office . . . with concerns of an injurious environment due to the living conditions [in] the home. The child[ren were] placed into a safety resource placement with the maternal grandmother . . . . Mother was given 10 days to get the home cleaned. The home has not been cleaned up. There is animal feces in every room of the home, clothing is piled up in every room, medications are left out in children's reach, food & garbage is piled up in every room. There is also a concern for improper supervision because the children continue to go back up to the mother's home which places the children in an injurious environment to [their] welfare.

Respondent entered into a DSS family services case plan on 31 May 2016 in which she agreed to (1) obtain a mental health assessment and comply with all treatment recommendations; (2) submit a written explanation of why her children were in DSS custody; (3) complete parenting classes, submit a written report of what she learned, and incorporate those lessons into her interactions with the children; (4) obtain and maintain suitable employment; (5) sign a voluntary support agreement and pay child support; (6) obtain and maintain housing free from safety hazards and otherwise suitable for her children; (7) participate in DSS's In-Home Aide Program and work to address issues identified by the aide; (8) maintain regular contact with her social worker; (9) submit to and pass random drug screens; (10) attend all scheduled visitations with her children; and (11) refrain from illegal activity.

At a hearing on 7 June 2016, respondent stipulated to the allegations in the juvenile petitions filed by DSS and consented to an adjudication of neglect. The trial court entered its "Adjudication and Disposition Order" on 26 July 2016, adjudicating respondent's children to be neglected and maintaining them in DSS custody. On 4 April 2017, the trial court established a primary permanent plan of reunification for each child with a secondary plan of adoption for Dora and Jimmy and a secondary plan of custody with a court-approved caretaker for Donald and Charles. After successive hearings reviewing respondent's progress toward reunification, the trial court entered a permanency planning order on 10 September

2018 that changed each child's primary permanent plan to adoption with a secondary plan of custody with a court-approved caretaker.

DSS filed petitions to terminate respondent's parental rights to the children on 29 November 2018. The trial court held a hearing on the petitions for termination on 3 April 2019 and entered orders terminating respondent's parental rights on 11 July 2019. Respondent filed notices of appeal from the termination orders. This Court subsequently granted respondent's petition for writ of certiorari to review the trial court's 10 September 2018 permanency planning order that eliminated reunification from the children's permanent plans. *See* N.C.G.S. § 7B-1001(a1)(2), (a2) (2019) (prescribing preservation and notice requirements for appeal from an order eliminating reunification as a permanent plan); *see also* N.C. R. App. P. 21(a)(1) (allowing review by writ of certiorari "when the right to prosecute an appeal has been lost by failure to take timely action"). In her brief to this Court, however, respondent does not bring forward any issues related to this 10 September 2018 permanency planning order. *See generally* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief . . . will be taken as abandoned."). As a result, we have no basis for finding any error in the permanency planning order that was the subject of respondent's petition for writ of certiorari.

In her brief, respondent argues that the trial court erred in adjudicating the existence of grounds to terminate her parental rights under N.C.G.S. § 7B-1111(a). She further contends that the trial court abused its discretion under N.C.G.S. § 7B-1110(a) by concluding that termination of her parental rights was in the best interests of Donald, Jimmy, and Charles.

Adjudication

[1] "We review a district court's adjudication [under N.C.G.S. § 7B-1111(a)] 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *In re N.P.*, 839 S.E.2d 801, 802–03 (N.C. 2020) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)); *see also* N.C.G.S. § 7B-1109(f) (2019). Unchallenged findings of fact "are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019). Moreover, we review only those findings needed to sustain the trial court's adjudication. *Id.* at 407, 831 S.E.2d at 58–59.

The issue of whether a trial court's findings of fact support its conclusions of law is reviewed de novo. *See State v. Nicholson*, 371 N.C. 284,

288, 813 S.E.2d 840, 843 (2018). However, an adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order. *In re B.O.A.*, 372 N.C. 372, 380, 831 S.E.2d 305, 311 (2019); *accord In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 132 (1982). Therefore, if this Court upholds the trial court's order in which it concludes that a particular ground for termination exists, then we need not review any remaining grounds. *In re C.J.*, 373 N.C. 260, 263, 837 S.E.2d 859, 861 (2020).

In the present case, the trial court concluded that there were four statutory grounds for terminating respondent's parental rights, including her failure to make reasonable progress under N.C.G.S. § 7B-1111(a)(2). Subsection 7B-1111(a)(2) authorizes termination of parental rights if "[t]he 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 agree with the Court of Appeals that an adjudication under N.C.G.S. § 7B-1111(a)(2) requires that a child be " 'left' in foster care or placement outside the home pursuant to a court order" for more than a year at the time the petition to terminate parental rights is filed. *In re A.C.F.*, 176 N.C. App. 520, 527, 626 S.E.2d 729, 734 (2006). "This is in contrast to the nature and extent of the parent's *reasonable progress*, which is evaluated for the duration leading up to the hearing on the motion or petition to terminate parental rights." *Id.* at 528, 626 S.E.2d at 735.

We also agree with the Court of Appeals that a finding that a parent acted "willfully" for purposes of N.C.G.S. § 7B-1111(a)(2) "does not require a showing of fault by the parent." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996). " '[A] respondent's prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness "regardless of her good intentions," ' and will support a finding of lack of progress . . . sufficient to warrant termination of parental rights under section 7B-1111(a)(2)." *In re J.W.*, 173 N.C. App. 450, 465–66, 619 S.E.2d 534, 545 (2005) (quoting *In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93 (2004)), *aff'd per curiam*, 360 N.C. 361, 625 S.E.2d 780 (2006).

"[P]arental 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)." *In re B.O.A.*, 372 N.C. 372, 384, 831 S.E.2d 305, 313 (2019). However, in order for a respondent's noncompliance

with her case plan to support the termination of her parental rights, there must be a "nexus between the components of the court-approved case plan with which [the respondent] failed to comply and the 'conditions which led to [the child's] removal' from the parental home." *Id.* at 385, 831 S.E.2d at 314 (quoting N.C.G.S. § 7B-1111(a)(2)); *see also In re Y.Y.E.T.*, 205 N.C. App. 120, 131, 695 S.E.2d 517, 524 (explaining that a "case plan is not just a check list" and that "parents must demonstrate acknowledgement and understanding of why the juvenile entered DSS custody as well as changed behaviors"), *disc. review denied*, 364 N.C. 434, 703 S.E.2d 150 (2010).

We note that the trial court here entered a separate termination order for each of respondent's children. The findings of fact and conclusions of law supporting the trial court's adjudications are essentially identical in each termination order. In order to facilitate our discussion of the salient matters in this case involving all four of the juveniles, we shall refer therefore to the findings of fact and conclusions of law as enumerated in the termination order entered by the trial court in the child Dora's case.

The trial court's adjudicatory findings recount the reasons for the children's removal from respondent's home on 9 May 2016 and their subsequent adjudication by the trial court as neglected. Specifically, the findings of fact describe the filthy and hazardous conditions in respondent's home, respondent's failure to improve those conditions when given time to do so, and respondent's violation of the DSS safety plan by retrieving the children from their placement with the maternal grandmother. The findings of fact also list the requirements of respondent's family services case plan signed on 31 May 2016.

The trial court made the following additional findings of fact regarding respondent's conduct after DSS obtained nonsecure custody of her children:

> 14. The Respondent-Mother completed the following items on her plan: she participated in parenting classes; she submitted a written statement concerning what she learned during parenting classes; she paid small amounts of child support; she contacted her social worker on a somewhat regular basis; she attended visitation with the minor child; she passed all drug screens; and, she refrained from illegal activity.
>
> 15. The Respondent-Mother failed to obtain and maintain appropriate housing. The Respondent-Mother's housing

has been a consistent concern while the minor child has been in DSS custody.

16. DSS offered services to the Respondent-Mother through its in-home aide program after she signed her case plan. This program was intended to assist the Respondent-Mother in making improvements to the condition of her home and to make appropriate decisions on behalf of her children.

17. On multiple occasions, the Respondent-Mother stated that she thought the in-home aide worker was there to clean her house for her. After numerous arguments with the in-home aide worker, DSS closed its in-home aide services at the Respondent-Mother's request.

18. Although the Respondent-Mother made small improvements to her home, DSS social workers consistently found that it was unsanitary, cluttered, and unfit for children. The Respondent-Mother lives with a disabled relative, who would leave jars of urine in the home. The Respondent-Mother also had numerous pets that defecated in the home.

19. The Respondent-Mother failed to obtain and maintain consistent employment. She has told DSS that her job is to manage the trailer park adjacent to her home. In late 2018 to early 2019, she worked briefly for a temporary service at Hobes' Hams in North Wilkesboro.

20. The Respondent-Mother was ordered to pay child support for the minor child and her siblings. The Respondent-Mother has made small payments and has consistently maintained a child support arrearage.

. . . .

22. During visits between the minor child, her siblings, and the Respondent-Mother, ... [t]he Respondent-Mother . . . consistently made inappropriate comments to the children regarding when they would be returning to her home.

. . . .

24. The Respondent-Mother struggled during visits with age appropriate interactions and conversations with the minor child. . . .

> 25. The minor child has been in DSS custody since May 2016. . . .
>
> 26. The Respondent-Mother failed to make any reasonable progress in correcting the conditions which led to the removal of the minor child from her home.

To the extent respondent does not except to these findings of fact, they are binding on appeal. *In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58.

Based on its findings of fact, the trial court concluded that each child had been residing in a "placement outside of the Respondent-Mother's home for more than twelve (12) months and the Respondent-Mother willfully left the minor child in such placement without making any reasonable progress to correct the conditions which led to the removal of the minor child." The determination that respondent acted "willfully" is a finding of fact rather than a conclusion of law. *See*, *e.g.*, *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). However, the trial court's placement of this finding in its conclusions of law is immaterial to our analysis. *See State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009). We are obliged to apply the appropriate standard of review to a finding of fact or conclusion of law, regardless of the label which it is given by the trial court. *See Burns*, 287 N.C. at 110, 214 S.E.2d at 61–62.

Respondent challenges the trial court's findings of fact that respondent "failed to make any reasonable progress in correcting the conditions which led to the removal of" her children and that she acted "willfully" in this regard. Respondent contends that the evidence showed that she "lacked 'the ability to show reasonable progress' " as a result of the cognitive limitations and personality issues identified by Dr. Nancy F. Joyce in a "Psychological/Parental Fitness Assessment" performed on respondent in October and November of 2017.

Respondent also characterizes the contested factual findings as "irreconcilably inconsistent" with the trial court's additional finding that she lacked the "capability to provide for the proper care of the minor child[ren] . . . as a result of her mental limitations as found by the examination psychologist Dr. Joyce," as well as the trial court's adjudication of grounds to terminate respondent's parental rights based on the children's status as dependent juveniles under N.C.G.S. § 7B-1111(a)(6). *See* N.C.G.S. § 7B-101(9) (2019) (defining "[d]ependent juvenile"). According to respondent, she "could not simultaneously have lacked the capacity to parent the children" for purposes of N.C.G.S. § 7B-1111(a)(6) "while also willfully failing to take steps to regain custody" for purposes of N.C.G.S. § 7B-1111(a)(2).

The record in this case shows that the children were removed from respondent's home on 9 May 2016 as a result of its "filthy and unsafe condition" as well as respondent's failure to abide by a DSS safety plan that placed the children with their maternal grandmother. Respondent consented to the trial court's adjudication of the children as neglected juveniles based on the conditions in the home and respondent's failure to remedy them. At the time of the termination hearing on 3 April 2019, respondent had met several conditions of her case plan—completing parenting classes, maintaining regular contact with DSS, attending visitations with the children, passing drug screens, and refraining from illegal activity—but had failed to make meaningful progress in improving the conditions of her home. *Cf. In re A.R.A.*, 373 N.C. 190, 198, 835 S.E.2d 417, 423 (2019) (affirming adjudication under N.C.G.S. § 7B-1111(a)(2) despite the respondent's completion of some case plan requirements where she failed to resolve "the primary reason for the removal of her children—the presence of the father in the home").

Contrary to respondent's assertion, we see no irreconcilable inconsistency between the trial court's finding that respondent willfully failed to make reasonable progress in correcting the conditions that led to the children's removal from her home on 9 May 2016 and the trial court's determination that respondent is incapable of providing proper care and supervision for her four children under N.C.G.S. § 7B-1111(a)(6).

As the Court of Appeals has explained,

> the issue of whether or not the parent is in a position to actually regain custody of the children at the time of the termination hearing is not a relevant consideration under N.C.[G.S.] § 7B-1111(a)(2), since there is no requirement for the respondent-parent to regain custody to avoid termination under that ground. Instead, the court must only determine whether the respondent-parent had made "reasonable progress under the circumstances . . . in correcting those conditions which led to the removal of the juvenile." N.C.[G.S.] § 7B-1111(a)(2). Accordingly, the conditions which led to removal are not required to be corrected completely to avoid termination. Only reasonable progress in correcting the conditions must be shown.

In re L.C.R., 226 N.C. App. 249, 252, 739 S.E.2d 596, 598 (2013). The "reasonable progress" standard enunciated in N.C.G.S. § 7B-1111(a)(2) therefore did not require respondent to completely remediate the conditions that led to the children's removal or to render herself capable of

being reunified with her children. In applying this standard, we conclude that the evidence supports the trial court's finding that respondent acted willfully in failing to make reasonable progress toward correcting the conditions that led to the children's removal from her home.

In her written report,[2] Dr. Joyce diagnosed respondent with a "Mild Intellectual Disability" and an "Unspecified Personality Disorder" and opined, *inter alia*, "that [respondent] lacks the cognitive skills necessary to manage a home as well as the children[-]rearing responsibilities for four children." The trial court accurately summarized the results of respondent's psychological assessment in its findings of fact. As respondent observes, the trial court expressly accepted Dr. Joyce's conclusion that respondent "does not have the capability to provide for the proper care of the [four children] as a result of her mental limitations."

Notwithstanding respondent's cognitive deficits, Dr. Joyce did not find that respondent lacked the ability to clean the home or to maintain it in a condition suitable for children in order to address the principal cause of the children's removal from her home. As the trial court found, Dr. Joyce did report that respondent appeared to lack the capacity to manage a home while simultaneously rearing four children. However, even when respondent was relieved of her child-rearing responsibilities when DSS took the children into nonsecure custody on 9 May 2016, respondent still failed to materially improve the conditions in her home.

The evidence and the uncontested findings of fact show that respondent refused to cooperate with the in-home aide who was provided by DSS to assist respondent in addressing the conditions in the home. For example, when asked why she had refused the in-home aide's services, respondent testified as follows:

> I felt like that she was pushing me a little harder. I understand that she was—yes, I should have listened, but I just . . . . felt like I was being pushed too hard, and I felt like she was staying up in my business all the time wanting —I felt like she was my mother and trying to tell me what to do.

Such evidence establishes that respondent was capable of complying with the important aspects of her case plan.

In light of respondent's refusal to work with the in-home aide provided by DSS and the fact that respondent was afforded almost three

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2. Although Dr. Joyce was deceased by the time of the termination hearing, the trial court admitted her report into evidence.

years to achieve a home environment suitable for her children, we conclude that the trial court did not err by finding that respondent failed to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(2) under these conditions and by finding that her failure to do so was willful. *See In re Bishop*, 92 N.C. App. 662, 669, 375 S.E.2d 676, 681 (1989) ("[R]espondent has been afforded almost double the statutory . . . period in which to demonstrate her willingness to correct the conditions which led to the removal of her children. Her failure to do so supports a finding of willfulness regardless of her good intentions."); *see also In re Nolen*, 117 N.C. App. 693, 699–700, 453 S.E.2d 220, 224–25 (1995) (concluding that respondent's "sporadic efforts to improve her situation" did not preclude a finding of willfulness where she "had more than three and one-half times the statutory period of twelve months in which to take steps to improve her situation, yet she has failed to do so"). In light of the extended length of time that respondent was given to be successful in completing her case plan, the trial court's findings of fact demonstrate that it duly considered respondent's partial completion of her case plan as well as her limited cognitive abilities as diagnosed by Dr. Joyce. *See In re Bishop*, 92 N.C. App. at 669, 375 S.E.2d at 681 (upholding adjudication while acknowledging "respondent's contentions that her inability to improve her situation stems from her mental disability, her poverty, and other personal problems"); *see also In re I.G.C.*, 373 N.C. 201, 206, 835 S.E.2d 432, 435 (2019) (noting that the trial court "considered all of respondent-mother's efforts up to the time of the termination hearing, weighed the evidence before it, and then made findings which showed that respondent-mother . . . had not made reasonable progress"). Consequently, respondent's challenge to the trial court's adjudication is overruled.

Because we hold that the trial court properly adjudicated a ground for terminating respondent's parental rights under N.C.G.S. § 7B-1111(a)(2), we need not review respondent's arguments regarding the three additional grounds for termination found by the trial court. *See In re A.R.A.*, 373 N.C. at 194, 835 S.E.2d at 421; *In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 53 (2019).

Disposition

[2] Respondent also challenges the trial court's conclusion that it is in the best interests of Donald, Jimmy, and Charles to terminate her parental rights. Respondent does not contest the trial court's determination with regard to Dora.

At the dispositional stage of a termination proceeding, the trial court must "determine whether terminating the parent's rights is in the

juvenile's best interest." N.C.G.S. § 7B-1110(a) (2019). In doing so, the trial court must "consider the following criteria and make written findings regarding the following that are relevant":

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

Id. Although the trial court must consider each of the factors in N.C.G.S. § 7B-1110(a), written findings of fact are required only "if there is 'conflicting evidence concerning' the factor, such that it is 'placed in issue by virtue of the evidence presented before the [trial] court[.]' " *In re A.R.A.*, 373 N.C. at 199, 835 S.E.2d at 424 (second alteration in original) (quoting *In re H.D.*, 239 N.C. App. 318, 327, 768 S.E.2d 860, 866 (2015)).

The trial court's dispositional findings are binding on appeal if supported by any competent evidence. *In re K.N.K.*, 839 S.E.2d 735, 740 (N.C. 2020). The trial court's determination of a child's best interests under N.C.G.S. § 7B-1110(a) is reviewed only for abuse of discretion. *In re A.U.D.*, 373 N.C. 3, 6, 832 S.E.2d 698, 700 (2019). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *In re K.N.K.*, 839 S.E.2d at 740 (citation omitted).

Respondent asserts that the trial court failed to comply with N.C.G.S. § 7B-1110(a) because it "did not consider [certain] statutorily mandated factors" in assessing each of her sons' best interests. She specifically contends that "[t]he court did not address [each child's] permanent plan, the bond with his placement, the probability of adoption[,] and whether or not termination would help accomplish the permanent plan." *See* N.C.G.S. § 7B-1110(a)(2)–(3), (5).

We find no merit in respondent's argument. In the termination orders concerning Donald, Jimmy, and Charles, the trial court concluded that "[*b*]*ased upon the factors set forth in N.C.G.S. § 7B-1110*, it is in the best interest of the minor child for the [respondent's] parental rights to be terminated." (Emphasis added.) Since there was no conflicting

evidence about the likelihood of each child's adoption or the facilitation of each child's permanent plan of adoption if respondent's parental rights were terminated, the trial court was not required to make written findings under N.C.G.S. § 7B-1110(a)(2)–(3). *See In re A.R.A.*, 373 N.C. at 200, 835 S.E.2d at 424. Likewise, the absence of any conflicting evidence regarding Charles's strong bond with his prospective adoptive parents obviated the need for written findings on this issue under N.C.G.S. § 7B-1111(a)(5). Finally, because no prospective permanent placement had been identified for Donald and Jimmy, the factor in N.C.G.S. § 7B-1110(a)(5) did not apply to those two children. *Id.* To the extent that respondent contends that the trial court violated the statutory mandate in N.C.G.S. § 7B-1110(a) as to its determination of the best interests of each juvenile, her argument is overruled.

Respondent also challenges the merits of the trial court's determination that terminating her parental rights was in each child's best interests. According to respondent, "Charles, Jimmy, and Donald had zero adoptive possibilities" due to their "tremendous behavioral problems." With no hope of adoption, she argues that the trial court's decision to terminate her parental rights amounts to a needless and "arbitrary" separation of a mother from her children. *See* N.C.G.S. § 7B-100(4) (2019) (articulating policy goal of "preventing the unnecessary or inappropriate separation of juveniles from their parents"). Respondent notes that she attended all of her scheduled visitations with her children. Moreover, she contends that "Donald and Jimmy wanted to return to live with their mother." Given the strength of the family relationship, respondent submits that the trial court should have maintained the existing arrangement that she had with her sons, which "was working."

Respondent's characterization of the circumstances is inconsistent with both the evidence from the termination hearing and the trial court's uncontested findings of fact. At the time of the termination hearing, Donald was eleven years old, Jimmy was ten years old, and Charles was eight years old. Charles was in a potential adoptive placement, while Donald and Jimmy were in therapeutic foster homes. When asked at the termination hearing about the likelihood of Charles's adoption if respondent's parental rights were terminated, the DSS adoption social worker testified that adoption "is 100 percent likely."

The DSS adoption social worker acknowledged that Donald and Jimmy "had some pretty significant behavioral problems" when the two children entered DSS custody, but described both juveniles' marked improvement in therapeutic foster care. In responding to the query about Donald's and Jimmy's prospects for being "levelled down" from

therapeutic foster care, the DSS adoption social worker said, "I think right now it's just a matter of finding an appropriate possible adoptive home, because their behaviors are so much better. I think that they could easily be levelled down, but just again, need to be a home where they had plenty of the same structure that they needed . . . ."[3] She expressed a preference for placing Donald and Jimmy together and confirmed that DSS planned to move them into an adoptive home "[o]nce a placement is found." Based on this testimony offered by the DSS adoption social worker, respondent's contention that Donald and Jimmy had only a "speculative and remote" chance for adoption is unsupported by the record.[4]

Respondent also mischaracterizes the evidence concerning the bond between her and her two sons. The trial court expressly found that none of respondent's sons had a bond with respondent. Respondent does not except to the trial court's findings of fact as to any of the children and is therefore bound by its determinations. *In re A.R.A.*, 373 N.C. at 195, 835 S.E.2d at 421.

In our assessment of the record, we discern some evidence of a bond between respondent and Jimmy and, to a lesser extent, between respondent and Donald. The guardian *ad litem* described Donald as having "more of [a] bond with the grandmother than [respondent]. His bond

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3. The guardian *ad litem* noted Donald's need for "a consistent home with structure, logical consequences, and either an only child or children who are of similar age" as well as Jimmy's need for "a structured and emotionally supportive environment" to address "his attention seeking behaviors."

4. For this reason, we are unpersuaded by respondent's invocation of the Court of Appeals' decision reversing an order terminating parental rights in *In re J.A.O.*, 166 N.C. App. 222, 601 S.E.2d 226 (2004). The sixteen-year-old boy in *In re J.A.O.* had cycled through nineteen different treatment centers due to his "verbally and physically aggressive and threatening" behavior, and he had been diagnosed with "bipolar disorder, attention deficit hyperactivity disorder, pervasive developmental disorder, borderline intellectual functioning, non-insulin dependent diabetes mellitus, and hypertension." *Id.* at 223, 228, 601 S.E.2d at 227, 230. Adoption was "highly unlikely," and the guardian *ad litem* recommended against terminating the respondent-mother's parental rights. *Id.* at 224, 226, 601 S.E.2d at 228, 229. In light of the devotion shown to the child by his mother, and "balancing the minimal possibilities of adoptive placement against the stabilizing influence, and the sense of identity, that some continuing legal relationship with natural relatives may ultimately bring," the Court of Appeals held that the trial court abused its discretion in terminating the mother's parental rights. *Id.* at 228, 601 S.E.2d at 230 (quoting *In re A.B.E.*, 564 A.2d 751, 757 (D.C. 1989)).

Here, the DSS adoption social worker expressed optimism about Donald and Jimmy's prospects for adoption. The guardian *ad litem* also recommended terminating respondent's parental rights so that Donald and Jimmy could "have a permanent, safe home." The holding of the Court of Appeals in *In re J.A.O.* is thus inapposite.

with [respondent] seems to be more towards what [she] can get or do for him." Moreover, as respondent relates, Jimmy told the guardian *ad litem* that he "want[ed] to go back home and live with [his] mom and uncle." Donald also stated a desire "to go back home, with his mother or grandmother." However, the DSS adoption social worker who supervised the majority of respondent's visitations with the children testified that she "d[id not] see a bond" between respondent and any of the children. As the finder of fact, the trial court was entitled to credit this testimony of the DSS adoption social worker over any conflicting evidence. *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167–68 (2016). Additionally, in light of the trial court's uncontested finding of fact that respondent was incapable of raising her children, the fact that Donald and Jimmy may have expressed a preference to return home is noteworthy but not determinative.

Conclusion

We affirm the adjudications in regard to all four children. Respondent has not challenged the trial court's disposition regarding Dora and based on the evidence in the record and the trial court's findings of fact, the trial court did not abuse its discretion by deciding to terminate respondent's parental rights to Donald, Jimmy, and Charles. All three children had been in foster care for almost three years and had no realistic prospect of being reunified with respondent. Charles was in an adoptive placement, and DSS was hopeful of finding adoptive homes for Donald and Jimmy. *Cf. In re A.R.A.*, 373 N.C. at 200, 835 S.E.2d at 424 ("[T]he absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights." (alteration in original) (quoting *In re D.H.*, 232 N.C. App. 217, 223, 753 S.E.2d 732, 736 (2014))). Contrary to respondent's assertion, leaving her sons in their current foster placements with periodic visitation by respondent was not "working" as a "plan." This arrangement was not only contrary to the permanent plan established by the trial court, it also served to deny to the juveniles the prospect of "a safe, permanent home within a reasonable amount of time" as contemplated by the Juvenile Code. N.C.G.S. § 7B-100(5). Accordingly, we affirm the termination orders.

AFFIRMED.

IN RE K.L.T.

[374 N.C. 826 (2020)]

IN THE MATTER OF K.L.T.

No. 329A19

Filed 17 July 2020

1. Termination of Parental Rights—grounds for termination—neglect—findings of fact—sufficiency of evidence

The trial court erred by determining that a mother's parental rights should be terminated on the ground of neglect, where its findings regarding the mother's compliance with her case plan, relationship issues, therapy participation, parenting skills, and home environment were not supported by clear, cogent, and convincing evidence and partially relied on speculation. Further, one of the court's ultimate findings linking the mother's history to the likelihood of future neglect failed to take into account the mother's positive steps to address domestic violence issues since the child was removed from her care, including obtaining a divorce from and taking out a protective order against the child's father with whom she had been in an abusive relationship, engaging in therapy, and writing a detailed safety plan in anticipation of regaining custody of her child.

2. Termination of Parental Rights—grounds for termination—dependency—conclusion of law—evidentiary support

The trial court erred in terminating a mother's parental rights on the ground of dependency where the trial court's conclusion that the mother was incapable of providing a safe, permanent home for the child was not supported by the record. Instead, evidence demonstrated that the mother adequately addressed her past history of abusive relationships, displayed appropriate parenting techniques, and obtained suitable housing.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 8 May 2019 by Judge Betty J. Brown in District Court, Guilford County. This matter was calendared for argument in the Supreme Court on 19 June 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

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

Rosenwood, Rose & Litwak, PLLC, by Nancy S. Litwak, for appellee Guardian ad Litem.

David A. Perez for respondent-appellant mother.

DAVIS, Justice.

Respondent-mother appeals from the trial court's order terminating her parental rights in her son K.L.T. (Kirk),[1] who was born in March 2011. Although the trial court's order also terminates the parental rights of Kirk's father (respondent-father), he is not a party to this appeal. Based on our determination that the trial court erred in concluding that grounds existed to terminate respondent-mother's parental rights, we reverse.

Factual and Procedural Background

Respondent-mother, who is legally blind, has five children. Kirk is her youngest child and the sole offspring of her marriage to respondent-father, who was her third husband and whom she divorced in April 2018. Mr. L., respondent-mother's second husband, is the father of her four eldest children, Jack, Brooke, Becky, and Justin. Jack and Brooke were no longer minors when these proceedings commenced, and Becky attained the age of majority in May 2017.

On 26 August 2016, the Guilford County Department of Health and Human Services (GCDHHS) obtained nonsecure custody of Becky, Justin, and Kirk and filed juvenile petitions alleging that they were abused, neglected, and dependent juveniles. The juvenile petition filed by GCDHHS regarding Kirk summarized the family's "extensive" Child Protective Services (CPS) history in Orange County dating back to 2004, which included "numerous substantiated neglect reports against [respondent-father] for inappropriate discipline of . . . [Becky] and [Justin]" and against respondent-mother "because she was complicit in [respondent-father's] inappropriate discipline of her children."

The juvenile petition first summarized three CPS reports made about the family in March and April of 2016, each of which was investigated and substantiated by GCDHHS. These reports described the physical abuse of Brooke, Becky, Justin, and Kirk by respondent-father. One report alleged that respondent-father "beats four-year-old [Kirk]

1. We use pseudonyms and initials throughout this opinion in order to protect the privacy of the juveniles referenced herein.

with items such as hangers, a broom, and a wooden back scratcher," leaving visible bruises on the child. Another report alleged that respondent-father had physically and sexually assaulted respondent-mother's cognitively-impaired adult daughter, Brooke. Respondent-father admitted to a GCDHHS social worker in March of 2016 that he had engaged in oral sex with Brooke. When the social worker questioned respondent-mother about the incident, she acknowledged that respondent-father's sexual abuse of Brooke was "wrong" but also blamed Brooke for "sitting on [respondent-father's] lap and moving around."

The juvenile petition next recounted GCDHHS's efforts to work with the family before taking the minor children into custody in 2016. For example, when respondent-father refused to leave the home, GCDHHS provided a hotel room for respondent-mother and the children. In addition, the juvenile petition alleged that respondent-mother had refused to seek a domestic violence protective order (DVPO) against respondent-father, violated her GCDHHS safety plan by allowing respondent-father to drive her to one of Becky's medical appointments, and "coached [Becky] on what to say to the CPS Investigator."

The juvenile petition also alleged that GCDHHS received a report that respondent-father had confined the family to a bedroom in the residence and demanded to know who had made the CPS reports. The episode was overheard by Brooke's therapist, who was on speakerphone with Brooke as it happened. Respondent-mother initially denied the report during a family meeting with GCDHHS but later admitted she was "intimidated by [respondent-father] and did not tell the truth during the meeting."

The juvenile petition further detailed an incident occurring at a Child and Family Team Meeting on 23 August 2016 in which respondent-father denied any abuse of the children and physically assaulted a social worker in the presence of Justin, Kirk, and respondent-mother. The juvenile petition accused respondent-father of abusing the children and of "perpetrat[ing] domestic violence against [respondent-mother], in particular by exerting power and control over her, isolating her, and physically assaulting her." Respondent-mother was depicted as contributing to an injurious home environment "due to [her] enabling of [respondent-father's] behavior, her repeated refusal to leave him, and her failure to protect the children."

After the children were taken into GCDHHS custody, respondent-mother entered into a case plan with GCDHHS on 3 October 2016, requiring her to address the issues of domestic violence, mental and

emotional health, and parenting skills, and requiring her to maintain suitable housing. At a hearing on 19 October 2016, respondent-mother, respondent-father, and Mr. L. stipulated to facts consistent with the allegations contained in the juvenile petitions and consented to the children being adjudicated as neglected and dependent juveniles. At the hearing, GCDHHS dismissed the allegations of abuse. By order entered 14 November 2016, the trial court adjudicated Becky, Justin, and Kirk to be neglected and dependent juveniles and ordered that the children remain in GCDHHS custody. The trial court awarded respondent-mother one hour per week of supervised visitation with each of the children and ordered her to comply with the requirements of her case plan.

In its adjudication and disposition order, the trial court noted that Kirk had been suspended from kindergarten for violent behavior and was hospitalized in September 2016 after "reporting that he was hearing voices." At the time of the adjudication and disposition hearing on 19 October 2016, Kirk had begun trauma-based therapy and was diagnosed with attention deficit hyperactivity disorder and oppositional defiant disorder. The trial court found that Kirk "require[d] continued redirection and constant supervision" from his foster parents and that GCDHHS was "exploring a higher level of care for [Kirk] due to his placement and mental health needs." In order to meet his need for a higher level of care, Kirk was moved to a new therapeutic foster home on 14 November 2016.

The trial court held seven permanency planning review hearings between 14 December 2016 and 6 February 2019. During this interval, Becky aged out of juvenile court jurisdiction, and the court granted Mr. L. full custody of Justin and terminated its jurisdiction over him pursuant to N.C.G.S. § 7B-911. In addition, respondent-mother separated from respondent-father in October 2016 and obtained a divorce judgment on 2 April 2018. Respondent-mother also successfully sought a DVPO against respondent-father on 22 February 2017 and renewed the DVPO through February 2021.

With regard to Kirk, the trial court initially established a primary permanent plan of reunification with a concurrent secondary plan of adoption. After concluding that further reunification efforts with respondent-father would be futile, the trial court changed Kirk's primary permanent plan to reunification with respondent-mother on 29 August 2017. At the next permanency planning review hearing on 10 January 2018, however, the trial court found that respondent-mother "has not made adequate progress within a reasonable period of time under [her case] plan." The trial court changed Kirk's primary permanent plan to

adoption with a concurrent secondary plan of reunification with respondent-mother and ordered GCDHHS to initiate termination of parental rights proceedings as to both parents.

GCDHHS filed a petition seeking the termination of both respondents' parental rights with regard to Kirk on 25 June 2018 on the grounds of neglect and dependency. The trial court held a hearing on 26 and 27 March 2019 and entered an order terminating respondents' parental rights on 8 May 2019. The trial court found that although respondent-mother had complied with the formal requirements of her case plan, a likelihood of future neglect existed due to: (1) her history of domestic violence and abusive partners; (2) her questionable new online relationship; (3) her failure to meaningfully engage in therapy; and (4) her failure to exercise control over her household environment. The trial court also concluded that termination of respondent-mother's parental rights was proper based on the ground of dependency. Finally, the trial court determined that the termination of her parental rights was in Kirk's best interests. Respondent-mother filed a notice of appeal.

Analysis

On appeal, respondent-mother argues that the trial court erred in finding the existence of grounds to terminate her parental rights to Kirk based on neglect and dependency. She further asserts that the trial court erred in concluding that it was in Kirk's best interests that her parental rights be terminated. *See* N.C.G.S. § 7B-1110(a) (2019).

A proceeding to terminate parental rights is comprised of an adjudicatory phase and a dispositional phase. "We review a trial court's adjudication under N.C.G.S. § 7B-1111 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). It is well established that "[f]indings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal. Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58–59 (2019). We review the trial court's conclusions of law de novo. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019). With regard to the dispositional phase, the trial court's determination of whether termination of parental rights is in the juvenile's best interests is reviewed under an abuse of discretion standard. *In re E.H.P.*, 372 N.C. at 392, 831 S.E.2d at 52.

I. Adjudication of Neglect

[1] Under subsection 7B-1111(a)(1), the trial court may terminate the parental rights of a parent if "[t]he parent has . . . neglected the juvenile." N.C.G.S. § 7B-1111(a)(1) (2019). The Juvenile Code defines "[n]eglected juvenile" as a minor child "whose parent . . . does not provide proper care, supervision, or discipline . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019). In order to constitute actionable neglect, the conditions at issue must result in "some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment." *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (citations omitted).

"The petitioner seeking termination [under N.C.G.S. § 7B-1111(a)(1)] bears the burden of showing by clear, cogent and convincing evidence that such neglect exists at the time of the termination proceeding." *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984). Our case law makes clear that "if the child has been separated from the parent for a long period of time [at the time of the termination hearing], there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016). "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re K.N.*, 373 N.C. 274, 282, 837 S.E.2d 861, 867 (2020) (citation omitted).

The trial court found that Kirk was adjudicated to be neglected in 2016 and that there was a "strong likelihood of the repetition of neglect" if Kirk was returned to respondent-mother's care due to her "inability to demonstrate an ability to correct the conditions that led to removal." Specifically, the trial court found that respondent-mother's behavior indicated a likelihood of future neglect due to: (1) her history of domestic violence and abusive partners; (2) her questionable new online relationship; (3) her failure to meaningfully engage in therapy; and (4) her failure to exercise control over her household environment.

Respondent-mother concedes Kirk's prior adjudication of neglect but challenges the trial court's finding as to the likelihood of a repetition of neglect. Respondent-mother also takes exception to many of the trial court's evidentiary findings in support of the adjudication of neglect. We review her arguments in turn.

A. Findings of Fact

1. Completion of Case Plan

Respondent-mother first challenges the trial court's finding that she did not fully comply with the requirements of her case plan. Respondent-mother's 2016 case plan required her to address deficiencies in her parenting skills, housing and employment, mental and emotional health, and domestic violence issues. We agree with respondent-mother that the record demonstrates that she completed each of these requirements.

Specifically, she (1) successfully completed a twelve-session domestic violence support group on 30 January 2017; (2) obtained a psychological evaluation and parenting assessment on 3 November 2016 by a clinical psychologist, Michael A. McColloch, Ph.D., who did not recommend any additional treatment; (3) completed the Parent Assessment Training and Education (PATE) program; (4) completed outpatient therapy with Tabitha McGeachy at Peculiar Counseling & Consulting, PLLC, on 2 March 2017, accomplishing all treatment goals with no additional treatment recommended; (5) completed two courses of outpatient psychotherapy from May to September of 2017 and from May to November of 2018 with Joanna Hudson, LCSW, at Family Service of the Piedmont, Inc., who did not recommend any further therapy; (6) separated from respondent-father and obtained a judgment of divorce on 2 April 2018; (7) obtained a DVPO against respondent-father on 22 February 2017 and renewed the DVPO through February 2021; (8) maintained stable income through monthly disability benefits and part-time employment as a musician at her church; (9) moved into a three-bedroom townhouse appropriate for Kirk on 29 May 2017; (10) consistently attended visitation, engaged in appropriate interactions with Kirk, complied with suggestions made by her visitation supervisor, and demonstrated no significant defects in her parenting techniques; (11) attended Kirk's school meetings and otherwise participated in shared parenting with his foster parents; and (12) remained current on her monthly child support obligation of $291.08, which began on 1 July 2018. Thus, the record shows respondent-mother's compliance with each requirement set out in her case plan.

2. Domestic Violence and Personal Relationships

Respondent-mother next contests the trial court's findings of fact regarding her tendency to fall victim to abusive and unsafe relationships. Specifically, she challenges findings of fact 31, 32, 37, and 42 in which, in part, the trial court voiced its concerns regarding a new online relationship into which she had recently entered. The trial court made

the following findings regarding respondent-mother's online relationship with a former high school classmate, Milton Leon Westray, who lived in Philadelphia, Pennsylvania:

> 31. . . . In December 2017, GCDHHS confirmed with the Mother that the Mother was in a new relationship. The Mother explained she was involved in an online relationship with a former high school classmate by the name of Milton Leon Westray. When GCDHHS researched Mr. Westray using the name, date of birth and place of birth provided by the Mother, GCDHHS received a report indicating that Milton Leon Westray was deceased. After receiving this information, the Mother conducted an independent search and obtained the same result. The Mother ultimately decided that the deceased was her classmate's father. However, Mr. Westray and his father do not share the same birth date. The Mother could not account for this discrepancy and continues to pursue this online relationship.
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> 32. The Mother cannot account for the discrepancy in birth dates because she has not demanded an explanation from Mr. Westray. The Mother's actions are singularly focused on her romantic pursuits. She married her third husband [, respondent-father,] eighteen months after divorcing her second husband. She entered into th[e] relationship [with Mr. Westray] prior to ending the marriage with [respondent-father] and describes her current relationship as "developing." Perhaps, the Mother has not questioned Mr. Westray because she would then be required to make a decision. The Mother is deserving of a logical and verifiable response. If such a response is not forthcoming, the Mother should end the relationship, period. The Mother does not appear motivated to forego romantic liaisons until her circumstances are stable.
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> 37. . . . The Mother has shown a selfish preoccupation with her romantic attachments even when those attachments are unhealthy and harmful to the Mother and her children. The Mother's mindless attachments will in all likelihood subject [Kirk] to repeated harm and result in [his] eventual removal. . . .

. . . .

> 42. . . . Although the Mother initiated divorce proceedings, obtained a 50-B Domestic Violence Protective Order and renewed the protective order twice, the [c]ourt is concerned about the Mother's involvement in yet another relationship since the juvenile's removal in 2016 without addressing adverse issues from her prior relationships. The concerns and red flags raised in this new relationship causes the Court to question the Mother's judgment. . . .

The trial court relied heavily on the existence of this online relationship as a basis for its determination that respondent-mother was likely to repeat her prior neglect of Kirk. Respondent-mother objects to these findings of fact, arguing that they are unsupported by the evidence of record, insofar as they (1) depict her response to the concerns raised by GCDHHS about Mr. Westray, and (2) extrapolate more broadly about her judgment and priorities. We agree with respondent-mother that key portions of the trial court's findings of fact concerning Mr. Westray—and the inferences drawn by the trial court therefrom—are unsupported by the evidence. Because of the great weight placed by the trial court on this relationship, we deem it appropriate to discuss this issue in some detail.

The evidence shows that, upon being informed of respondent-mother's new online relationship, GCDHHS obtained from her the man's full name, Milton Leon Westray, and date of birth, which was in August 1966. Using this information, GCDHHS requested a nationwide criminal record check and received a report indicating that a Milton Westray, a/k/a, *inter alia*, "Westray, Milton L Jr.," died on 19 May 2012. We note, however, that the report lists two different dates of birth for the deceased Milton Westray: "08/XX/1966" and "03/1959." Moreover, the report purports to be based on information derived from credit reporting services, such as Experian, as well as e-mail and phone records and an obituary—rather than from any official government source.[2]

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2. Despite GCDHHS's repeated references during the termination hearing to a "death certificate," there is no evidence suggesting that GCDHHS ever obtained the deceased Mr. Westray's death certificate or any other official record to confirm its belief that respondent-mother had fallen victim to an online impostor. Aside from the results of the criminal record search, which are based on unofficial sources and list two different birthdates for the deceased Mr. Westray, the record contains only a two-line death notice for "Milton Westray" published on Philly.com. This notice makes no reference to the decedent's date of birth or any other identifying information.

When respondent-mother was presented with GCDHHS' concerns, she "conducted an independent search" into the death of Milton Westray but did not obtain the same result as GCDHHS. To the contrary, respondent-mother's research led her to conclude that the Milton Westray who died in May 2012 was her friend's father—Milton L. Westray, *Sr.* Her search revealed that although the two men "[had] the same name," they were two different individuals with different birthdates.[3]

In addition, she testified that she did, in fact, confront her online correspondent with GCDHHS's concerns. In response, he provided her with copies of his driver's license and birth certificate, and she provided these items to GCDHHS. Respondent-mother also stated that she asked Mr. Westray to appear at the termination hearing in order to prove his identity but that he could not afford to travel to North Carolina. Her counsel also offered to have Mr. Westray testify by telephone from a local department of social services office in Philadelphia, but both GCDHHS and the guardian *ad litem* objected to the use of this procedure.

In addition to the lack of any official record that would have enabled the trial court to definitively conclude that respondent-mother's online correspondent was an impostor, we are of the view that the larger inferences drawn by the trial court about respondent-mother's character, motivations, and judgment do not flow from the evidence in the record. The record is devoid of any indication that respondent-mother's online communications with Mr. Westray posed any risk to Kirk. Respondent-mother testified that Mr. Westray has not asked her to provide any financial or other private information, Mr. Westray has never tried to take advantage of her in any way, and that the two have no current plans to meet in person. GCDHHS lacks the authority to prohibit respondent-mother from engaging in social interaction in the absence of any legitimate basis for believing that such interaction was likely to cause harm to Kirk, and such evidence was absent here. Moreover, the evidence shows that respondent-mother did, in fact, take steps to address the concerns that GCDHHS had about Mr. Westray. Accordingly, we agree with respondent-mother that the evidence regarding this issue does not support the trial court's conclusion that there was a likelihood of future neglect.

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3. The trial court was, of course, not required to accept respondent-mother's testimony as credible. However, the termination order does not contain any indication that the trial court chose to disbelieve her testimony on this issue or as to the other issues relied upon by the trial court in concluding that termination was warranted. Instead, at times, the termination order either ignores respondent-mother's testimony altogether or fails to characterize it accurately.

3. Mental and Emotional Health

Respondent-mother also challenges certain findings of fact by the trial court related to the mental and emotional health component of her case plan. After acknowledging respondent-mother's successful completion of an initial course of psychotherapy with Ms. Hudson in September 2017, the trial court found as follows:

> 29. The Mother returned to out-patient therapy with Ms. Hudson on May 5, 2018 and was discharged on November 4, 2018 after nine additional sessions. During these sessions, the Mother addressed parenting in the wake of domestic violence and verbalized her understanding of potential issues that might arise for her children due to their exposure to domestic violence. *However, the Mother did not discuss with her therapist, Ms. Hudson, that at a prior hearing, in the underlying case, the Mother defended her beliefs about the culpability of her cognitively impaired daughter's actions regarding the sexual assault by [respondent-father] and concluded her cognitively impaired daughter was partly responsible for the sexual assault.* The Mother also failed to discuss her three failed marriages, two of which[ ] were with men who exhibited aggression and subjected the Mother and her children to physical and emotional abuse. The Mother married [respondent-father] just eighteen months after she divorced her second husband. The Mother's involvement in her current relationship [with Mr. Westray] began prior to her divorce from [respondent-father]. *The Mother's choice in partners and hurried attachments are issues requiring in-depth therapy to avoid repeated mistakes.*

(Emphases added.) Respondent-mother takes exception to the italicized portions of this finding of fact.

In her report dated 16 October 2018, respondent-mother's therapist, Ms. Hudson, stated that "[i]t is my assessment that [respondent-mother] has engaged in meaningful conversations about the effect that domestic violence has had on her family, as well as the initial concern that she somehow held her then-teenage daughter responsible for the sexual abuse perpetrated by an adult in the home." Similarly, Ms. Hudson testified at the termination hearing as follows:

> Q. . . . Did [respondent-mother] tell you that she had come to court and testified that originally she blamed her

daughter as part of the reason why her husband, [respondent-father], sexually assaulted her daughter?

A. I don't recall if I learned about that from her or from the [GCDHHS] referral or where I got that information.

Q. Did you all talk about it?

A. That [it] was a concern, yes.

Q. And what did she say?

A. That she does not hold her daughter responsible for what happened to her.

Q. Did you ask her then why did she testify to that in court?

A. We did not discuss her testimony. We were just discussing [the] issue.

Respondent-mother testified that she believed with "99 percent" certainty she had, in fact, discussed this issue in therapy with Ms. Hudson and she recalled explaining to Ms. Hudson that she had been "scared at the time just by the nature of the type of person [respondent-father] was." In any event, even if there was evidence to support the trial court's findings of fact concerning whether respondent-mother and Ms. Hudson specifically discussed her prior testimony regarding the culpability of her daughter for the abuse committed by respondent-father, the undisputed testimony of both respondent-mother and Ms. Hudson demonstrates that they *did* discuss the key underlying issue that respondent-mother's daughter was not responsible for the sexual abuse.

Respondent-mother next contends that there is no evidence to support the trial court's finding that her "choice in partners and hurried attachments are issues requiring in-depth therapy to avoid repeated mistakes." We agree. To be sure, the evidence shows that respondent-mother has been divorced three times and that her two most recent husbands, Mr. L. and respondent-father, were abusive. However, none of the treatment professionals who worked with respondent-mother on the subjects of domestic violence, mental and emotional health, or parenting believed she needed additional treatment in order to avoid such abusive relationships in the future. Moreover, the evidence concerning respondent-mother's actions since separating from respondent-father in October 2016 does not support a finding that she is in danger of repeating her past mistakes in tolerating domestic violence or abuse. To

the contrary, the evidence showed that she took appropriate action by divorcing respondent-father and obtaining a DVPO against him.

Respondent-mother also challenges the following finding of fact regarding her therapy:

> 42. . . . Although the Mother has participated in individual therapy, there is no clear, convincing evidence that the Mother has incorporated the knowledge or techniques obtained through therapy into her everyday life. It is concerning to this [c]ourt that Ms. Hudson, the therapist, indicated that there were pertinent issues that were not discussed during the course of the therapeutic relationship between the Mother and the therapist. The [c]ourt expressed its concern that if the therapist were not given a full, true and complete picture of the issues that led to the juvenile's removal from the home, those issues and concerns were not addressed and still exist. . . .

Once again, we find merit in respondent-mother's arguments. A faulty premise underlies the trial court's finding that "there is no clear, convincing evidence" of respondent-mother's successful integration of the lessons she learned during therapy into her daily life. Under N.C.G.S. § 7B-1109(f), it was GCDHHS's burden—as petitioner—to prove by clear, cogent, and convincing evidence the existence of facts establishing grounds for the termination of respondent-mother's parental rights under N.C.G.S. § 7B-1111(a). It was not respondent-mother's burden to prove that such grounds did *not* exist.

Moreover, evidence was presented that respondent-mother (1) divorced and ceased all contact with respondent-father; (2) relocated from an isolated rural area in Brown Summit, North Carolina, to the city of Greensboro, where she has ready access to transportation (via the city bus system); and (3) cultivated an additional social support network by joining the board of directors of a local disability rights organization. Respondent-mother also devoted many hours—with the assistance of Ms. Hudson—to developing a detailed safety plan for Kirk in anticipation of regaining custody of the child.

We discern no evidence in the record supporting the trial court's assertion that respondent-mother's progress in therapy was hindered by her failure to discuss with her therapist specific aspects of her CPS history or her past relationships in the precise manner referenced by the trial court. None of respondent-mother's treatment providers believed she required additional therapy, and their testimony and reports indicate

that they addressed with her the issues that led to Kirk's removal from her custody.

4. Parenting Skills

Respondent-mother next challenges the trial court's findings of fact concerning her parenting skills. The trial court made the following findings of fact with regard to this issue:

> 30. Prior to a hearing in October 2018, GCDHHS informed the Mother that [respondent-father] had notified GCDHHS that he was going to attend the hearing. GCDHHS recommended to the Mother that she advise her daughter [, Brooke,] of [respondent-father's] intentions and encourage the daughter to stay away since the daughter had been sexually assaulted by [respondent-father]. The Mother did not elect to act on the recommendation of [GCDHHS]. The Mother's explanation as to why she did not act on [GCDHHS's] recommendation caused the [c]ourt grave concerns as to the Mother's ability to protect any juvenile.
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> 37. The Mother has not demonstrated the ability to care for the juvenile without GCDHHS'[s] involvement. The Mother has shown a selfish preoccupation with her romantic attachments even when those attachments are unhealthy and harmful to the Mother and her children. The Mother's mindless attachments will in all likelihood subject the juvenile to repeated harm and result in the juvenile's eventual removal. . . .
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> 38. The juvenile has been in the custody of GCDHHS since August 26, 2016 and the Mother has only progressed to supervised visitation.

Respondent-mother challenges the trial court's finding that she disregarded GCDHHS's recommendation to discourage Brooke from attending the hearing in October 2018, which respondent-father was expected to attend. Respondent-mother testified that she "told [Brooke and Becky] not to come" to the hearing, "but they insisted on coming." Neither GCDHHS nor the guardian *ad litem* has identified any evidence in the record contradicting respondent-mother's testimony on this issue, nor have we located any such evidence.

The record does support the trial court's finding that respondent-mother was never allowed unsupervised visitation with Kirk during the pendency of this case. But, as respondent-mother observes, she "could not force the trial court to give her unsupervised visits with her child" despite having complied with her case plan and having displayed appropriate parenting techniques in her supervised visitations with Kirk.

The record shows that the trial court temporarily suspended Kirk's visitations with respondent-mother and his siblings in 2017 on the recommendation of Kirk's therapist. The therapist sought to avoid Kirk's "re-traumatization" through contact with his family members pending his adjustment to foster care. As acknowledged by the GCDHHS supervisor, the suspension of respondent-mother's visitation with Kirk did not result from any inappropriate action by respondent-mother during the visits. The record also includes a letter from Kirk's therapist dated 9 January 2018 recommending that Kirk's supervised visits with respondent-mother and his siblings resume. Once again, there is no indication that this recommendation was based on concerns about respondent-mother's parenting ability.

The record demonstrates that respondent-mother resolved all of the apparent risks posed to her minor children by divorcing and obtaining a DVPO against respondent-father, avoiding any subsequent abusive romantic relationships, completing therapy, obtaining suitable housing, cultivating greater independence and additional social support, and otherwise fully complying with her case plan. Dr. McColloch, who performed respondent-mother's psychological evaluation and parenting assessment in November 2016, concluded that "it is appropriate to return the children to this mother in the near future—if [respondent-father] or another abuser is not in the home. The current interventions appear appropriate for this mother's needs." Respondent-mother's March 2017 discharge summary from Peculiar Counseling & Consulting, PLLC, reported that she "has made tremendous progress" and "has met all [treatment] goals." Ms. Hudson likewise reported that she did "not recommend[] any further treatment" for respondent-mother, that respondent-mother "has made a great deal of progress," and that respondent-mother "presents as more confident, more knowledgeable about the issues that brought her children into foster care, and more prepared to resume full-time care of her youngest son." Respondent-mother's treatment providers were thus consistent in their assessment of her positive response to treatment and her prospects for resuming a parental relationship with Kirk.

5. Housing and Home Environment

Respondent-mother also contests several of the trial court's findings of fact related to her housing and home environment. Although the trial court acknowledged that the physical structure of respondent-mother's three-bedroom townhouse "provides an appropriate environment for the juvenile[,]" the trial court's findings of fact refer to several episodes reflecting respondent-mother's alleged inability to maintain a suitable home environment for Kirk.

The trial court found that respondent-mother currently shared her residence with her adult daughters Brooke and Becky. The trial court then recounted a series of incidents arising from this living arrangement, stating as follows:

> 26. On December 18, 201[8], a GCDHHS social worker made an unannounced visit and noted the following concerns regarding the cleanliness of the home: overflowing trash can, kitchen sink full of dirty dishes, unkempt floors and grimy bathroom fixtures. The Mother utilizes a cleaning service that had just cleaned the home the day before on December 17, 2018. The GCDHHS social worker voiced concerns regarding the condition of the home since the service had just been at the home twenty-four hours prior. The social worker also expressed concerns that the other adult occupants of the home were not contributing to home maintenance. The Mother informed the social worker that her two adult daughters were only responsible for cleaning their individual rooms. The Mother was responsible for the other areas of the house.
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> 33. . . . The daughters brought dogs into the home *against the Mother's preference and her expressed dislike of dogs. The dogs eventually had to be given away because her daughters did not adequately care for the animals. It was reported that one of the daughters had allowed a boyfriend to move in.* The Mother denies that the boyfriend resided there. Upon further research, GCDHHS was able to verify the boyfriend's criminal record which was not favorable. *Until the unannounced home visit* [on *18 December 2018*], *the daughters were not required to assist in home maintenance and apparently were not*

> *required to clean behind themselves.* The Mother has since discussed home maintenance with her daughters and has divided housekeeping tasks among the three of them.
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> 34. Within the last few months, one of the daughters was attacked [at] the Mother's residence by a neighbor for whom the daughter had babysat. *Notwithstanding that the Mother is not currently permitted to have minor children in her home, the Mother did nothing to protect her daughter or stop the attack from occurring.* The identity and behavior of occupants, potential occupants and visitors in the Mother's home is pertinent and necessary to [e]nsure the safety of everyone in the household. *It is essential that the Mother exercise dominion and authority over her household. Thus far, the Mother considers the needs and preferences of everyone else superior to her own. The Mother cannot maintain a safe, stable environment for the juvenile if she retains this conciliatory attitude. The Mother needs to know and understand who is in her home as well as the individual's stated purpose there. The Mother cannot ensure and has not demonstrated that her home functions according to the Mother's desires. Until the Mother is able to demonstrate that, the juvenile would be subject to danger and harm if the juvenile were returned to the Mother's care.*

(Emphases added). Respondent-mother takes issue with the italicized portions of these findings.

With regard to Brooke's and Becky's cleaning responsibilities in the home before the GCDHHS home visit on 18 December 2018, the evidence as to this issue was that respondent-mother did, in fact, require her daughters to keep their own rooms clean. As to the presence of dogs in the home, respondent-mother points to evidence demonstrating that she mandated that Brooke and Becky keep the two dogs caged and out of her way while she was downstairs. Moreover, when her daughters failed to take care of the dogs to her satisfaction, she required them to give the dogs away. Furthermore, it is not apparent from the trial court's order how the presence of the dogs gave rise to a likelihood that Kirk would be neglected.

With regard to the findings of fact concerning Brooke's boyfriend, respondent-mother testified that the boyfriend never actually moved into the residence and was not allowed to visit after she learned of his criminal record. A report submitted by social worker Cynthia Johnson indicated that Brooke's boyfriend was "living on and off at the home" during December 2017 and that respondent-mother initially "didn't really have knowledge that he had been staying on and off in the home." Respondent-mother testified that she forbade him from visiting the home once she found out about his background. There is no evidence in the record suggesting that he continued to visit after she forbade him from doing so.

Respondent-mother also objects to finding of fact 34's depiction of an incident in July 2018 during which Brooke was assaulted outside of respondent-mother's residence by the mother of a child that Brooke had been babysitting. The GCDHHS supervisor testified that the child's mother came to the residence after the child told her that Brooke had struck her with a shoe. During the incident, the mother punched Brooke in the face and hit her with a shoe several times before being restrained by Becky. Respondent-mother subsequently reported the incident to GCDHHS, informing GCDHHS that she encouraged Brooke to file criminal charges but that Brooke refused.

Respondent-mother testified she had been upstairs with her door open while Brooke was babysitting the child downstairs. She was unaware that the child's mother had come to the residence until she "heard major commotion outside [her] window," at which time she "went downstairs and outside." By the time respondent-mother reached the scene of the incident, the child's mother was gone. We are unable to find any evidence in the record to support the trial court's statement in finding of fact 34 that respondent-mother was not permitted to have minor children in her home. Furthermore, it is unclear what respondent-mother could have done to prevent this incident from occurring.

The remainder of finding of fact 34 consists of a series of generalizations or inferences drawn by the trial court. It is the province of the trial court when sitting as the fact-finder to assign weight to particular evidence and to draw reasonable inferences therefrom. *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68. Such inferences, however, "cannot rest on conjecture or surmise. This is necessarily so because an inference is a permissible conclusion drawn by reason from a premise established by proof." *Sowers v. Marley*, 235 N.C. 607, 609, 70 S.E.2d 670, 672 (1952) (citations omitted). Accordingly, an appellate court may review the reasonableness of the inferences drawn by the trial court from the evidence.

We conclude that the majority of the trial court's inferences in finding of fact 34 are based merely on conjecture. The incidents described in the trial court's findings of fact do not give rise to a reasonable inference that respondent-mother's "conciliatory attitude" renders her unable to "maintain a safe, stable environment for [Kirk]," or that "[Kirk] would be subject to danger and harm if . . . returned to the Mother's care."

As for the cleanliness issues identified by the trial court, we do not believe that they are sufficiently indicative of respondent-mother's inability to control her household as to support a conclusion that a likelihood of future neglect exists. Although the GCDHHS social worker found respondent-mother's residence cluttered and dirty on one occasion, the evidence also shows that respondent-mother promptly addressed the issue by assigning Brooke and Becky additional cleaning responsibilities. The trial court's findings of fact show that respondent-mother was employing a cleaning service for her residence prior to this incident, and there is no evidence that the cleanliness of the home remained a problem at the time of the termination hearing in March 2019. Although the trial court noted that cleanliness concerns were the subject of several CPS reports filed about the family in Orange County between 2003 and 2012, no such concerns were raised in any of the CPS reports received by GCDHHS between 2014 and 2016. Moreover, a lack of cleanliness in the home was not a cause of Kirk's adjudication as a neglected and dependent juvenile in 2016.

The remaining incidents cited in the trial court's findings of fact do not support the larger inferences drawn by the trial court about respondent-mother's ability to protect Kirk or provide him with a safe home environment. The findings of fact show that respondent-mother tried to accommodate Brooke's and Becky's desires to have dogs but then required the dogs to be given away when her daughters proved unable to care for them. Respondent-mother also barred Brooke's boyfriend from the residence upon learning of his criminal history. Neither of these events is sufficient to support the trial court's conclusion that respondent-mother is unwilling or unable to control her household so as to prevent harm to Kirk. Likewise, the attack on Brooke in 2018 was an isolated incident occurring eight months prior to the termination hearing. We see nothing inherently dangerous in respondent-mother's decision to permit her adult daughter to babysit a nine-year-old girl. Nor does the record contain any evidence that respondent-mother possessed any ability to predict or prevent the incident involving Brooke and the child's mother.

B. Conclusions of Law/Ultimate Findings

The trial court made the following ultimate findings in support of its conclusion of law that "[g]rounds exist to terminate the parental rights of [respondent-mother] pursuant to N.C.G.S. §[ ]7B-1111(a)(1)," all of which are contested by respondent-mother:

> 36. The Mother's [CPS] history alone, which dates back to 2000, supports the likelihood of repeat[ed] neglect. . . .
>
> 37. The Mother has not demonstrated the ability to care for the juvenile without GCDHHS'[s] involvement. The Mother has shown a selfish preoccupation with her romantic attachments even when those attachments are unhealthy and harmful to the Mother and her children. The Mother's mindless attachments will in all likelihood subject the juvenile to repeated harm and result in the juvenile's eventual removal. The juvenile has dealt with enough instability already in his young life.
>
> . . . .
>
> 40. Based on the Mother's . . . inability to demonstrate an ability to correct the conditions that led to removal the probability of repetition of neglect is high. . . . [T]he neglect continues to date and there is a strong likelihood of the repetition of neglect if the juvenile is returned to [the Mother].

We agree with respondent-mother that the findings of fact in the trial court's termination order that are actually supported by evidence of record are insufficient to support the trial court's ultimate finding that there was a likelihood of repetition of neglect. Accordingly, we hold that the trial court erred in determining that grounds existed for termination under N.C.G.S. § 7B-1111(a)(1).

We note that the above-quoted portion of finding of fact 36 represents a misunderstanding of the applicable legal standard for establishing future neglect for purposes of N.C.G.S. § 7B-1111(a)(1). "Termination of parental rights for neglect may not be based solely on past conditions which no longer exist." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997). The trial court may not rely upon a parent's history alone to find a likelihood of future neglect but "must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect. [One] determinative factor[ ] must

be . . . the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232 (citation omitted). "If past neglect is shown, the trial court also must then consider evidence of changed circumstances." *In re M.A.W.*, 370 N.C. 149, 152, 804 S.E.2d 513, 516 (2017).

In past cases involving families with a history of domestic violence, this Court has determined that a continued likelihood of future neglect is present when the parent continues to participate in domestic violence, fails to truly engage with her counseling or therapy requirements, or fails to break off the relationship with the abusive partner. For example, in *In re D.L.W.*, we considered whether the trial court erred by terminating the parental rights of a mother on the basis of neglect where the family had a history of "significant domestic violence between the parents." 368 N.C. at 836–37, 788 S.E.2d at 164. After the initial neglect adjudication and the removal of the juveniles from the mother's care, the mother's case plan required her to participate in counseling and remedy the domestic violence issues that were endangering her children. *Id.* at 838, 788 S.E.2d at 164.

The Court ultimately held that a likelihood of future neglect existed because (1) the trial court "received police reports and heard testimony regarding [the mother's] participation in multiple incidents involving domestic violence since the 2013 adjudication and removal of the juveniles"; (2) the mother "had not articulated an understanding of what she learned in her domestic violence counseling sessions"; and (3) the mother "continued in a relationship with the Respondent Father" despite the "ongoing domestic violence" between them. *Id.* at 843–44, 788 S.E.2d at 167–68; *see also In re D.W.P.*, 373 N.C. 327, 334, 838 S.E.2d 396, 402 (2020) (finding a likelihood of future neglect based on the mother's failure to complete all required therapy and counseling, as well as her decision to "maintain[ ] a relationship with [her partner] despite domestic violence incidents").

In contrast to those cases, respondent-mother here has not been involved in any reported incidents of domestic violence since her separation from respondent-father. As discussed above, following the removal of Kirk from her care in 2016, respondent-mother moved out, separated from respondent-father, and ultimately divorced him in April 2018. She also obtained a DVPO against respondent-father on 22 February 2017 and renewed the DVPO through February 2021. In addition, respondent-mother fully completed all of the therapy and counseling courses required by her case plan. Respondent-mother also devoted hours to writing up a detailed safety plan for Kirk in anticipation of regaining custody of him.

In this safety plan, she acknowledged her role in failing to protect the children from the prior abuse by respondent-father and stated that she found her children "IN NO WAY responsible for what they experienced." She articulately detailed the lessons she learned during counseling, and her safety plan for Kirk included high levels of supervision and structure, educational and extracurricular activities, and steps for avoiding "triggers" that may remind Kirk of prior trauma, including ensuring that respondent-father remains "blocked on all avenues" of potential contact with Kirk or other family members. In addition, each of her care providers stated that respondent-mother had satisfactorily addressed all concerns about her ability to safely and effectively parent her children and required no further counseling.

The trial court's finding of a likelihood of repetition of neglect in the future crosses the line separating a reasonable inference from mere speculation. Accordingly, we hold that the trial court erred in concluding that respondent-mother's parental rights should be terminated on the basis of neglect under N.C.G.S. § 7B-1111(a)(1).

II. Adjudication of Dependency

[2] Respondent-mother also challenges the trial court's adjudication of dependency under N.C.G.S. § 7B-1111(a)(6) as an additional ground for termination. Subsection 7B-1111(a)(6) authorizes the termination of parental rights in cases where

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

N.C.G.S. § 7B-1111(a)(6); *see also* N.C.G.S. § 7B-101(9). As the Court of Appeals has held, in order to sustain an adjudication of dependency, the trial court's findings of fact must establish "both (1) the parent's [in] ability to provide care or supervision, and (2) the [un]availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005).

Respondent-mother contests the trial court's ultimate conclusion of law in support of its adjudication under N.C.G.S. § 7B-1111(a)(6), which was based on the following findings of fact:

> 42. [The Mother] is incapable of providing a safe, permanent home for the juvenile. Although the Mother has participated in individual therapy, there is no clear, convincing evidence that the Mother has incorporated the knowledge or techniques obtained through therapy into her everyday life. It is concerning to this [c]ourt that Ms. Hudson, the therapist, indicated that there were pertinent issues that were not discussed during the course of the therapeutic relationship between the Mother and the therapist. . . . Although the Mother initiated divorce proceedings, obtained a 50-B Domestic Violence Protective Order and renewed the protective order twice, the [c]ourt is concerned about the Mother's involvement in yet another relationship [i.e., with Mr. Westray] since the juvenile's removal in 2016 without addressing adverse issues from her prior relationships. The concerns and red flags raised in this new relationship causes the [c]ourt to question the Mother's judgment. The Mother has not recommended anyone else to provide appropriate alternative care for the juvenile.
>
> . . . .
>
> 46. Grounds exist to terminate the parental rights of [the Mother] pursuant to . . . [N.C.G.S.] §[ ]7B-1111(a)(6) of the North Carolina General Statutes.

Based on our thorough review of the record, we conclude that the trial court erred by determining that respondent-mother was incapable of providing a safe, permanent home for Kirk. As set out above, the record shows that respondent-mother—among other things—eliminated the threat posed to Kirk by respondent-father, confronted her own history of violent domestic relationships to the satisfaction of her multiple treatment providers, displayed appropriate parenting techniques during her visits with Kirk, and obtained a suitable residence with ready access to transportation and social support.

We are unable to agree with the trial court that the isolated incidents referenced in its termination order are sufficient to satisfy the requirements of N.C.G.S. § 7B-1111(a)(6). Accordingly, based on our careful

review of the record, we hold that the trial court erred by terminating respondent-mother's parental rights on the ground of dependency.[4]

Conclusion

For the reasons set out above, we reverse the trial court's 8 May 2019 order terminating respondent-mother's parental rights.

REVERSED.

IN THE MATTER OF K.R.C.

No. 389A19

Filed 17 July 2020

Termination of Parental Rights—petition to terminate parental rights—denied—alleged mistake of law—findings of ultimate fact—conclusions of law—sufficiency

In an order denying a mother's petition to terminate the father's parental rights to their child, the trial court's statement that the mother failed to prove that "necessary grounds" for termination existed did not indicate that the court mistakenly believed the mother had to prove multiple grounds for terminating the father's rights. However, the order was still vacated and remanded because the trial court failed to make sufficient, specific findings of ultimate fact—as required under N.C.G.S. §§ 7B-1109(e) and -1110(c)—and sufficient conclusions of law to allow for meaningful appellate review.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 6 May 2019 by Judge Paul A. Hardison in District Court, Pitt County. This matter was calendared in the Supreme Court on 19 June 2020 and determined without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

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4. Respondent-mother also asserts that the trial court abused its discretion by determining that it is in Kirk's best interests for her parental rights to be terminated. Having concluded that the trial court erred by finding the existence of grounds to terminate respondent-mother's parental rights under N.C.G.S. § 7B-1111(a), however, we need not address this issue. *See In re Young*, 346 N.C. 244, 252, 485 S.E.2d 612, 617 (1997).

Miller & Audino, LLP, by Jay Anthony Audino, for petitioner-appellant mother.

Matthew D. Wunsche, GAL Appellate Counsel, for appellee Guardian ad Litem.

W. Gregory Duke for respondent-appellee father.

MORGAN, Justice.

Petitioner, the mother of the minor child K.R.C. (Katie)[1], appeals from the trial court's order denying her petition to terminate the parental rights of respondent, Katie's biological father. Because the trial court failed to make sufficient findings of fact and conclusions of law to allow for meaningful appellate review, we vacate the trial court's order and remand for further proceedings.

Factual Background and Procedural History

Katie was born in April 2014. Petitioner mother and respondent father were not married to each other, and after Katie's birth, the child resided with petitioner in Pitt County. Soon after Katie was born, the District Court, Pitt County, entered a temporary custody order granting sole custody of Katie to petitioner due to respondent's mental health issues—respondent was hospitalized for three days with suicidal ideations in late January 2014—and his threatening conduct. Petitioner obtained an *ex parte* domestic violence protective order (DVPO) against respondent on 13 June 2014. On 12 July 2014, respondent was charged with assault on a female, interference with emergency communications, and second-degree trespass after he went to petitioner's residence, took petitioner's telephone from her when she tried to call 911 for help, and choked petitioner when she refused to allow him to see Katie.

During the summer of 2014, Katie was the subject of a series of child protective services (CPS) reports received by the Pitt and Beaufort County Departments of Social Services (DSS). The report received on 16 June 2014 alleged that respondent was experiencing suicidal thoughts again and had made indirect threats, such as advising petitioner to take out a life insurance policy on Katie. On 12 July 2014, a report alleged that petitioner had been contacting respondent and asking to see him,

1. A pseudonym chosen by the parties.

and that Katie had been severely sunburned during a beach trip with petitioner. It was further reported on 18 August 2014 that petitioner was unstable and possibly suffering from post-partum depression, and that petitioner's stepmother had mental health issues. Respondent later acknowledged that he had made the latter two of these CPS reports.

Due to petitioner's employment with Pitt County DSS, the CPS reports were investigated by Lenoir County DSS, which arranged for Beaufort County DSS (BCDSS) to provide services to the family. On 12 September 2014, petitioner contacted BCDSS and admitted to having ongoing contact with respondent. Petitioner acknowledged that she had allowed respondent to spend the night in her residence with Katie present on at least two occasions, had sexual relations with respondent while Katie was in the home on two other occasions, and had otherwise allowed respondent to visit with Katie.

Following these disclosures from petitioner, Katie was placed in kinship care with the child's maternal grandparents. Respondent objected to the placement, however, and threatened to remove Katie from the grandparents' home. On 15 September 2014, BCDSS obtained nonsecure custody of Katie and filed a juvenile petition alleging that Katie was a neglected juvenile.

Respondent submitted to a psychological evaluation by Dr. Anne L. Mauldin. In her report issued in November 2014, Dr. Mauldin noted that respondent was under a psychiatrist's care for attention-deficit/hyperactivity disorder (ADHD) and mood disorder related to his hospitalization. Based on her examination of respondent, Dr. Mauldin found "a high degree of fit with the diagnostic criteria for ADHD as well as Cluster B personality disorders, specifically Antisocial personality disorder and Borderline personality disorder." She described these personality disorders as characterized by "intense, shifting moods and . . . problems with impulse control" as well as rigid but shifting attitudes about other people and "problems maintaining relationships." Because of the negative implications of these diagnoses for parenting, Dr. Mauldin deemed it "critical that [respondent] . . . be under the care of a psychiatrist and be in treatment with a skilled psychotherapist . . . who utilizes Dialectical Behavioral Therapy (DBT.)"

The trial court adjudicated Katie to be a neglected juvenile on 3 December 2014, finding that she lived in an environment injurious to her welfare "in light of the substantial amount of domestic violence, aggression, and mental issues displayed by [respondent.]" *See* N.C.G.S. § 7B-101(15) (2019). Although petitioner "ha[d] not actively done anything

to injure [Katie]," the trial court found that petitioner had "continued to allow [respondent] to have access to the child in spite of seeking criminal charges, a [DVPO,] and a temporary custody order to prevent him from having such access."

The trial court entered its initial disposition order on 31 December 2014, maintaining Katie in the legal custody of BCDSS and authorizing her continued placement with her maternal grandparents. Although BCDSS had developed out-of-home family services agreements (OHFSA) for both parents, the trial court found as a fact that respondent had not signed his OHFSA and had "informed BCDSS that he is not going to complete services in order to work a plan of reunification." As a result, the trial court ceased reunification efforts toward respondent and established a permanent plan for Katie of reunification with petitioner. To achieve reunification, petitioner was ordered to comply with the conditions of her OHFSA.

The trial court ordered that respondent comply with the requirements of his OHFSA, which included anger management treatment and DBT. The trial court also ordered respondent to abstain from using marijuana and from posting material on social media about the case. Although respondent was attending supervised visitations with Katie and behaving appropriately toward his daughter during those visits, the trial court found that his ongoing hostility and aggression toward BCDSS staff required the relocation of his visits to the Family Violence Center (FVC) in Greenville. The trial court granted respondent two hours of biweekly supervised visitation with Katie but required him to contact the FVC to arrange the visits.

An initial permanency planning hearing was conducted by the trial court on 6 March 2015. That court entered an order on 24 March 2015 awarding petitioner sole legal and physical custody of Katie in fulfillment of the permanent plan. The trial court made findings that respondent had not visited Katie since the time that respondent's visits were moved to FVC, that respondent had "done nothing to eliminate the safety risks that led to this juvenile coming into care," that respondent was "unfit to raise a minor child or to be in the presence of a minor child unsupervised," and that respondent had mental health issues "prevent[ing] him from appreciating the risks he poses[] to a minor child." Based upon these findings, respondent was ordered by the trial court to have no further visitation with Katie. The order also forbade petitioner and respondent to have any contact with one another, whether "direct or indirect." In its 24 March 2015 order, the trial court waived further review hearings and relieved the parties and counsel from further responsibility in

the case. The trial court retained jurisdiction in the case, however, concluding that respondent's "general noncompliance" and "mental health warrant a continued need for state intervention and jurisdiction for this minor child." *See* N.C.G.S. § 7B-201(a) (2019).

On 18 August 2017, more than twenty-six months after regaining custody of Katie, petitioner filed a petition to terminate respondent's parental rights. Petitioner alleged the following statutory grounds for termination: (1) neglect; (2) leaving Katie in a placement outside the home for more than twelve months without making reasonable progress to correct the conditions that led to her removal; (3) failure to pay a reasonable portion of the cost of Katie's care; (4) dependency; and (5) abandonment. N.C.G.S. § 7B-1111(a)(1)–(3), (6)–(7) (2019). Respondent filed an answer to the petition denying each of these alleged termination grounds.

The trial court held an adjudicatory hearing on 6 and 9 November 2018. On the second day of the hearing, petitioner voluntarily dismissed her claim under N.C.G.S. § 7B-1111(a)(3) (failure to pay a reasonable portion of the cost of the juvenile's care), conceding that the application of the ground only arose when a juvenile is in DSS custody. At the conclusion of the presentation of evidence, respondent moved to dismiss petitioner's remaining claims on the basis of insufficient evidence. With regard to his alleged failure to make reasonable progress under N.C.G.S. § 7B-1111(a)(2), respondent argued that this ground for termination was also inapplicable because Katie was removed from petitioner's care for only six months between September 2014 and March 2015 and thus was not in a "placement outside the home for more than [twelve] months" as required by the governing statute. N.C.G.S. § 7B-1111(a)(2). After hearing from each party, the trial court took the matter under advisement, deferring the dispositional hearing pending its ruling on adjudication.

In a ruling captioned "Termination Order" which was entered on 6 May 2019, the trial court denied the petition, concluding that "[p]etitioner ha[d] failed her burden to prove by clear, cogent and convincing evidence that the necessary grounds exist to terminate the [r]espondent's parental rights." Petitioner filed timely notice of appeal after she was served with the order on 19 June 2019. *See* N.C.G.S. § 7B-1001(b) (2019).

Analysis

Petitioner begins with two related arguments which we consider together. She first challenges the trial court's conclusion of law that she failed to prove that "the necessary *grounds* exist" to support

the termination of respondent's parental rights. (Emphasis added). Petitioner claims that the pluralization of the term "ground" illustrates that the trial court mistakenly believed that petitioner was obliged to prove multiple "necessary grounds" for termination under N.C.G.S. § 7B-1111(a). Petitioner also contends that this sole conclusion of law of the trial court fails to disclose the specific deficiencies in petitioner's evidence regarding her burden of proof. In her second argument, petitioner asserts that the trial court failed to make sufficient findings of fact to support its conclusion regarding the lack of statutory grounds upon which to terminate respondent's parental rights.

In addressing the trial court's use of the term "necessary grounds" in its conclusion of law, we first recognize that at the adjudicatory stage of a termination of parental rights proceeding, the petitioner has the burden to prove the existence of at least one statutory ground for termination by clear, cogent, and convincing evidence. N.C.G.S. § 7B-1109(f) (2019). It is well-established that proof of any single statutory ground for termination is sufficient to meet the petitioner's burden. *See*, *e.g.*, *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982). Accordingly, "[a]fter an adjudication that *one or more grounds* for terminating a parent's rights exist," the trial court must proceed to disposition and "determine whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2019) (emphasis added).

While this Court agrees with petitioner that proof of multiple grounds for termination is not necessary for an adjudication under N.C.G.S. § 7B-1109(e), we are not persuaded that, by itself, the trial court's use of the phrase "necessary grounds" which pluralizes the term "ground" connotes the commission of error by the trial court.

Among the common meanings of "grounds" is the "[b]asis or justification for something, as in 'grounds for divorce.' " https://www.yourdictionary.com/grounds (last visited June 30, 2020).[2] In addition, as shown by the following passage from our Rules of Civil Procedure which are codified in the North Carolina General Statutes, legal references often use the terms "ground" and "grounds" interchangeably to denote a single basis or reason:

> It is not *ground* for objection that the information sought will be inadmissible at the trial if the information sought

2. *See also* https://www.merriam-webster.com (search "DICTIONARY" for "grounds") ("4 a: a basis for belief, action, or argument // *ground* for complaint —often used in plural // sufficient *grounds* for divorce")

> appears reasonably calculated to lead to the discovery of admissible evidence nor is it *grounds* for objection that the examining party has knowledge of the information as to which discovery is sought.

N.C.G.S. § 1A-1, 26(b)(1) (2019) (emphasis added). This same tendency appears in our case law. *Compare In re E.H.P.*, 372 N.C. 388, 391, 831 S.E.2d 49, 52 (2019) ("At the adjudication stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence that *grounds exist* for termination pursuant to section 7B-1111 of the General Statutes." (emphasis added)), *with id.* at 395, 831 S.E.2d at 53 ("As previously noted, an adjudication of *any single ground* in N.C.G.S. § 7B-1111(a) *is sufficient* to support a termination of parental rights." (emphasis added)). Likewise, in case citations, the phrase "*rev'd on other grounds*" may refer to a single alternative rationale for reversing a lower court's decision. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 501 tbl.T.8 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015). In light of this frequent interchangeable usage of the terms "ground" and "grounds" in legal authorities to refer to a singular basis for a decision, we are unwilling to conclude, without more than the trial court's facial reference to "grounds" in the order here, that the trial court harbored a mistaken belief that multiple statutory grounds for termination were necessary in order to terminate respondent's parental rights.

We do agree, however, with petitioner that the limited findings of fact and the single conclusion of law included in the trial court's "Termination Order" do not permit meaningful appellate review, and therefore they are insufficient to support the trial court's decision denying her petition. The pertinent statute governing adjudications, N.C.G.S. § 7B-1109, provides that the trial court "shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent." N.C.G.S. § 7B-1109(e) (2019). In addition to placing the burden of proof on the petitioner, the statute specifies that "all [adjudicatory] findings of fact shall be based on clear, cogent, and convincing evidence." N.C.G.S. § 7B-1109(f) (2019).

Here, the trial court concluded that petitioner had failed to prove any of her alleged grounds for terminating respondent's parental rights under N.C.G.S. § 7B-1111(a). In such circumstances, when the court "determine[s] that circumstances authorizing termination of parental rights do not exist," the dispositional statute provides that "the court

shall dismiss the petition or deny the motion,[3] *making appropriate findings of fact and conclusions*." N.C.G.S. § 7B-1110(c) (2019) (emphasis added).

We have previously held that N.C.G.S. § 7B-1109(e) "places a duty on the trial court as the adjudicator of the evidence"[4] which is equivalent to the duty imposed by Rule 52(a)(1) of the North Carolina Rules of Civil Procedure. *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 59 (2019) (citing N.C.G.S. § 1A-1, Rule 52(a)(1) (2019)). Rule 52(a)(1) mandates that, "[i]n all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon[.]" N.C.G.S. § 1A-1, Rule 52(a)(1). In explaining the trial court's obligation arising under N.C.G.S. § 7B-1109(e), we quoted a prior decision of this Court which applied Rule 52(a)(1):

> [W]hile Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

In re T.N.H., 372 N.C. at 407–08, 831 S.E.2d at 59 (quoting *Quick v. Quick*, 305 N.C. 446, 451–52, 290 S.E.2d 653, 658 (1982) (emphasis and alteration in original)). "The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent

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3. When a juvenile is the subject of a pending abuse, neglect, or dependency proceeding, a party seeking termination of parental rights may file a motion in the cause in lieu of a petition. *See* N.C.G.S. § 7B-1102 (2019). As a technical matter, N.C.G.S. § 7B-1110(c) directs the trial court to *dismiss* a petition and to *deny* a motion. However, we shall refer to the trial court's disposition in this case as denying petitioner's petition, as that wording is used in the "Termination Order."

4. The fact-finding requirement which is essential to support the trial court's dispositional determination of a child's best interests is governed by N.C.G.S. § 7B-1110(a) (2019), which provides that the court "shall consider the following [six] criteria and *make written findings regarding the following that are relevant*[.]" *Id.* (emphasis added); *see also In re A.R.A.*, 373 N.C. 190, 199, 835 S.E.2d 417, 424 (2019) ("[A] factor is 'relevant' if there is 'conflicting evidence concerning' the factor, such that it is 'placed in issue by virtue of the evidence presented before the [district] court[.]' " (second and third alterations in original) (quoting *In re H.D.*, 239 N.C. App. 318, 327, 768 S.E.2d 860, 866 (2015))).

a correct application of the law." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980).

By its own terms, N.C.G.S. § 7B-1109(e) applies equally to instances in which the trial court "adjudicate[s] the existence *or nonexistence* of any of the circumstances set forth in G.S. 7B-1111[.]" *Id.* (emphasis added). Subsection 7B-1110(c) expressly requires the trial court to "mak[e] appropriate findings of fact and conclusions" when denying relief based on the absence of statutory grounds for termination. Consequently, we interpret N.C.G.S. § 7B-1109(e) as placing the same duty on the trial court to "find the facts specially and state separately its conclusions of law thereon," regardless of whether the court is granting or denying a petition to terminate parental rights. N.C.G.S. § 1A-1, Rule 52(a)(1); *see also In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 59.

In its "Termination Order," the trial court found dozens of evidentiary facts recounting the parties' respective actions during the course of the underlying juvenile proceeding and describing respondent's current employment, mental health diagnosis, and family life. Nonetheless, the trial court found none of the ultimate facts required to support an adjudication of "the existence *or nonexistence* of any of the circumstances set forth in G.S. 7B-1111 . . . ." N.C.G.S. § 7B-1109(e) (emphasis added). Combined with the trial court's bare conclusion of law[5] that petitioner failed to prove that "the necessary grounds exist to terminate the [r]espondent's parental rights[,]" these evidentiary findings do not meet the requirements of Rule 52(a)(1) as applied to adjudicatory orders under N.C.G.S. §§ 7B-1109(e) and -1110(c).

"Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts." *Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951). We have recognized that

> 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

5. We note the trial court also concluded that it "ha[d] jurisdiction over the matter pursuant to N.C.G.S. § 7B-1101 [(2019),]" and that respondent's parental rights "should not be terminated." Neither of these additional conclusions alters our view that the court's adjudicatory finds are inadequate.

> 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); *see also In re N.D.A.*, 373 N.C. 71, 76, 833 S.E.2d 768, 772–73 (2019) (defining "an 'ultimate finding [a]s a conclusion of law or at least a determination of a mixed question of law and fact' [which] should 'be distinguished from the findings of primary, evidentiary, or circumstantial facts.' " (quoting *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491, 57 S. Ct. 569, 574, 81 L. Ed. 755, 762 (1937)).

Compliance with the fact-finding requirements of N.C.G.S. §§ 7B-1109(e) and -1110(c) is critical because

> [e]ffective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Quick, 305 N.C. at 458, 290 S.E.2d at 661 (quoting *Coble*, 300 N.C. at 714, 268 S.E.2d at 190).

Here, petitioner presented the trial court with four potential grounds for the termination of respondent's parental rights: neglect under N.C.G.S. § 7B-1111(a)(1); lack of reasonable progress under N.C.G.S. § 7B-1111(a)(3); dependency under N.C.G.S. § 7B-1111(a)(6); and abandonment under N.C.G.S. § 7B-1111(a)(7). The trial court neglected to find the ultimate facts which would be dispositive of any of these grounds. Moreover, the trial court's general conclusion of law singly offers no analysis of the legal standards applied to petitioner's claims.

Subdivision 7B-1111(a)(1) authorizes the trial court to terminate one's parental rights upon proof that "[t]he parent has . . . neglected the juvenile." N.C.G.S. § 7B-1111(a)(1). The trial court found that Katie had been adjudicated as neglected on 3 December 2014, but made no findings on the dispositive question of whether respondent was neglecting Katie at the time of the termination hearing within the meaning of N.C.G.S. § 7B-101(15) (2019). *See*, *e.g.*, *In re Young*, 346 N.C. 244, 248,

485 S.E.2d 612, 615 (1997) ("A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding.").

Similarly, with regard to N.C.G.S. § 7B-1111(a)(2), the trial court's findings do not address whether respondent "willfully left the juvenile in foster care or placement outside the home for more than 12 months"[6] and, if so, whether "reasonable progress under the circumstances has been made [by respondent] in correcting those conditions which led to the removal of the juvenile." *Id.*; *see also In re O.C.*, 171 N.C. App. 457, 464, 615 S.E.2d 391, 396 (articulating "two[-]part analysis" for adjudications under N.C.G.S. § 7B-1111(a)(2)), *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005); *In re C.C.*, 173 N.C. App. 375, 384, 618 S.E.2d 813, 819 (2005) (reversing termination of parental rights under N.C.G.S. § 7B-1111(a)(2) where "the trial court's order does not contain adequate findings of fact that respondent acted 'willfully' or . . . adequate findings on respondent's progress").

An adjudication of dependency under N.C.G.S. § 7B-1111(a)(6) requires a showing that (1) "the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and . . . there is a reasonable probability that such incapability will continue for the foreseeable future[,]" and (2) "the parent lacks an appropriate alternative child care arrangement." *Id.* "Thus, the trial court's findings regarding this ground 'must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements.' " *In re L.R.S.*, 237 N.C. App. 16, 19, 764 S.E.2d 908, 910 (2014) (quoting *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005)).

Because proof of both the parent's incapability to provide proper care and supervision and the parent's lack of an alternative child care

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6. We do not reach the merits of respondent's contention that N.C.G.S. § 7B-1111(a)(2) would seem inapplicable to the facts of this case inasmuch as Katie was in her mother's custody at the time that the petition was filed. *See generally In re A.C.F.*, 176 N.C. App. 520, 526, 626 S.E.2d 729, 734 (2006) (measuring the period of "more than twelve months" under N.C.G.S. § 7B-1111(a)(2) as "beginning when the child was 'left' in foster care or placement outside the home pursuant to a court order, *and ending when the motion or petition for termination of parental rights was filed*"); *see also* N.C.G.S. § 7B-101(18b) (2019) (defining "[r]eturn home or reunification" as "[p]lacement of the juvenile *in the home of either parent* or placement of the juvenile in the home of a guardian or custodian from whose home the child was removed by court order" (emphasis added)).

arrangement is required to terminate parental rights under N.C.G.S. § 7B-1111(a)(6), a trial court may adjudicate the nonexistence of this ground by finding the absence of either element, or by finding the petitioner's failure to prove either element by clear, cogent, and convincing evidence. N.C.G.S. § 7B-1109(c); *see also* N.C.G.S. §§ 7B-1109(e), -1110(c). In the instant case, the trial court made neither of these potential findings.

We note that petitioner does not argue on appeal that the evidence supported the termination of respondent's parental rights for dependency. Although petitioner does not expressly abandon this termination ground, nonetheless its omission from the pertinent arguments of her appellate brief implies that she recognizes that the circumstances contemplated by N.C.G.S. § 7B-1111(a)(6) do not exist in this case. As discussed, the statutory provision requires proof here that respondent's inability to provide for Katie's care and supervision rendered her "a dependent juvenile within the meaning of G.S. 7B-101[.]" N.C.G.S. § 7B-1111(a)(6). Section 7B-101 defines a "[d]ependent juvenile" as

> in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement.

N.C.G.S. § 7B-101(9) (2019). Regardless of respondent's abilities, Katie was not "in need of assistance or placement" at the time that the petition was filed because she was in the legal and physical custody of her mother. *Id.* Accordingly, Katie was not "a dependent juvenile within the meaning of G.S. 7B-101" as required to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(6).

Finally, N.C.G.S. § 7B-1111(a)(7) authorizes the termination of parental rights if "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition . . . ." *Id.* Although not defined by North Carolina's Juvenile Code, "abandonment imports any wil[l]ful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). This Court has specifically held that the issue of the willfulness of a parent's conduct is "a question of fact to be determined from the evidence." *Id.*

The trial court's findings in the present case offer no assessment regarding the willfulness of respondent's conduct toward Katie on the matter of abandonment during the six months at issue under N.C.G.S. § 7B-1111(a)(7). *See In re I.R.L.*, 263 N.C. App. 481, 484, 823 S.E.2d 902, 905 (N.C. Ct. App. 2019) (remanding for further findings where "[t]he trial court's order fails to address the willfulness of Father's conduct, a required element under N.C. Gen. Stat. § 7B-1111(a)(4) and (7)"). The inadequacy of the trial court's findings is further displayed by its failure to identify "the determinative six-month period" governing its abandonment inquiry. *In re C.B.C.*, 373 N.C. 16, 23, 832 S.E.2d 692, 697 (2019).

In urging this Court to affirm the "Termination Order," both respondent and the guardian *ad litem* (GAL) emphasize the large number of evidentiary findings made by the trial court. They cite the Court of Appeals decision of *In re B.C.T.*, 828 S.E.2d 50 (N.C. Ct. App. 2019) as disclaiming the need for particular "magic words" in the trial court's findings of fact.[7] *Id.* at 58. However, the sufficiency of the trial court's order is not measured merely by the quantity of findings or the trial court's parlance. We are simply unable to undertake meaningful appellate review of the trial court's decision based upon a series of evidentiary findings which are untethered to any ultimate facts which undergird an adjudication pursuant to N.C.G.S. § 7B-1111(a) or to any particularized conclusions of law which would otherwise explain the trial court's reasoning.[8]

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7. We announced a similar principle in affirming an order that ceased reunification efforts toward a respondent-parent under the statutory predecessor to N.C.G.S. § 7B-906.2(b) (2019), which required the court to make certain findings of fact before ceasing such efforts:

> While [the trial court's] findings of fact do not quote the precise language of [former N.C.G.S. §] 7B-507(b), the order embraces the substance of the statutory provisions requiring findings of fact that further reunification efforts "would be futile" or "would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time."

In re L.M.T., 367 N.C. 165, 169, 752 S.E.2d 453, 456 (2013). In *In re L.M.T.*, we opined that "[t]he trial court's written findings must address the statute's concerns, but need not quote its exact language." *Id.* at 168, 752 S.E.2d at 455. Because the order *sub judice* lacks any ultimate findings addressing the gravamen of N.C.G.S. § 7B-1111(a), we need not consider the degree to which our holding in *In re L.M.T.* applies to an adjudicatory order entered pursuant to N.C.G.S. §§ 7B-1109(e) and -1110(c).

8. We must decline to speculate about how the evidentiary facts led the trial court to conclude that petitioner had failed to prove the existence of any of her alleged grounds for termination. To indulge in such conjecture would exceed the proper scope of appellate review, thus undermining the purpose of Rule 52(a)(1) and the coordinate requirements of N.C.G.S. § 7B-1109(e) "to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct

The Court of Appeals faced a different, though instructively relevant, issue in *In re B.C.T.*, where the trial court's dispositional order included a finding, unsupported by evidence, that a certain party was "a fit and proper person to have the care, custody, and control of the [j]uvenile." *In re B.C.T.*, 828 S.E.2d at 58. The order also included a conclusion of law "[t]hat it is in the best interests of the [j]uvenile for [the party] to be granted the care, custody, and control of the [j]uvenile." *Id.* In reversing and remanding for a new hearing, the Court of Appeals "noted that the trial court need not use 'magic words' in its findings of fact or conclusions of law, if the evidence and findings overall make the trial court's basis for its order clear." *Id.* However, just as the use of specific terminology was not necessary in *In re B.C.T.* to sustain the custody award, conversely the trial court's use of such terms in the present case as "fit and proper person" and "best interests of the [j]uvenile" was insufficient to substantiate its order. *Id.* ("Here, we have disposition orders with 'magic words' but no evidence to support some of the crucial findings of fact and thus no support for the related conclusions of law.").

Because the "Termination Order" under review here does not contain any of the "magic words" associated with an adjudication under N.C.G.S. § 7B-1111(a), we find the holding of *In re B.C.T.* to be inapplicable, even though the analysis employed in that decision aids our examination. The issue before the Court in this case is not the lack of supporting evidence for the trial court's findings and conclusions, but a lack of adequate findings and conclusions which would "make the trial court's basis for its order clear." *Id.*

Respondent and the GAL also reference the Court of Appeals opinion of *In re S.R.G.*, 200 N.C. App. 594, 684 S.E.2d 902 (2009), *disc. review and cert. denied*, 363 N.C. 804, 691 S.E.2d 19 (2010) (*S.R.G. II*), for the principle that a trial court's failure to address an alleged ground for termination in its order amounts to a tacit "non-adjudication of that ground." They appear to argue, by way of extension of this holding from *In re S.R.G.*, that a trial court's order does not need to address *any* of the specific grounds for termination alleged by a petitioner when the trial court concludes that none of the alleged grounds exist. To hold otherwise, the GAL contends, would require all future orders terminating parental rights "to list all of the grounds that [the trial court] had not

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application of the law." *Coble*, 300 N.C. at 712, 268 S.E.2d at 189; *see also Godfrey v. Zoning Bd. of Adjustment of Union Cty.*, 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986) ("Fact finding is not a function of our appellate courts.").

adjudicated," thereby imposing "an unnecessary new requirement" on trial courts and creating "a potential pitfall for other petitioners."

Respondent and the GAL, in their respective positions, misconstrue *S.R.G. II*, which involved an appeal which was lodged after remand of the Court of Appeals' prior decision in *In re S.R.G.*, 195 N.C. App. 79, 671 S.E.2d 47 (2009) (*S.R.G. I*). The petitioner in *S.R.G. I* alleged four grounds for terminating the respondent's parental rights, including neglect and abandonment under N.C.G.S. § 7B-1111(a)(1) and (7). *Id.* at 81, 671 S.E.2d at 49. The trial court originally entered an order terminating the respondent's parental rights, finding "as its sole basis for termination" that the respondent had willfully abandoned the child. *Id.* at 82, 671 S.E.2d at 50. In the respondent's appeal in *S.R.G. I*, the Court of Appeals held that the trial court had erred in adjudicating abandonment based on the respondent's "actions during the relevant six[-]month period[.]" *Id.* at 87, 671 S.E.2d at 53. The cause was remanded to the trial court "for further action consistent with this opinion." *Id.* at 88, 671 S.E.2d at 53.

On remand, the trial court entered a new order terminating the respondent's parental rights on the grounds of neglect under N.C.G.S. § 7B-1111(a)(1). *S.R.G. II*, 200 N.C. App. at 597, 684 S.E.2d at 904. In *S.R.G. II*, the Court of Appeals held that the "law of the case" doctrine barred the trial court from adjudicating a new ground for termination on remand which had not been found in its original order. *Id.* at 597–98, 684 S.E.2d at 904–05. The Court of Appeals reasoned that N.C.G.S. § 7B-1109(e) provides that the trial court "*shall adjudicate the existence or nonexistence of any of the circumstances* set forth in G.S. 7B–1111" at the adjudicatory hearing. *Id.* at 598, 684 S.E.2d at 905. This statutory language required the trial court to address all of the petitioner's alleged grounds at the initial termination hearing. Therefore, the Court of Appeals concluded, the "consequence" of the trial court's original order adjudicating the existence of abandonment under N.C.G.S. § 7B-1111(a)(7) was "the nonexistence of the other two grounds alleged by [the petitioner.]" *Id.*

At first glance, *S.R.G. II* might appear to support the joint position of respondent and the GAL that a trial court's failure to address an alleged ground for termination amounts to a proper adjudication of the nonexistence of the alleged ground. While a trial court's failure to address an alleged ground can imply that the trial court was not persuaded it existed, it tells a reviewing court nothing about how or why the trial court reached such a conclusion. The Court of Appeals did not affirm the reasoning of the trial court's original termination order or otherwise imply that the trial court's silence was sufficient to comply with

the requirement that courts "find the facts" under N.C.G.S. § 7B-1109(e). The opinion in *S.R.G. II* instead noted that the petitioner had "failed in *S.R.G.* [*I*] to cross-assign error" to the trial court's non-adjudication of the two grounds in its original order. *S.R.G. II*, 200 N.C. App. at 599, 684 S.E.2d at 905; *see also* N.C. R. App. P. 10(c), 28(c) (allowing appellee to "present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment"). Because the petitioner "did not preserve this issue" by raising it on appeal in *S.R.G. I*, the law of the case doctrine barred the Court of Appeals from addressing any new potential errors in the original termination order in *S.R.G. II*. *Id.*

Furthermore, both *S.R.G. I* and *S.R.G. II* involved a trial court's order terminating parental rights. The trial court's order in the current case denied petitioner's termination petition pursuant to N.C.G.S. § 7B-1110(c). This distinction makes a difference, for as previously discussed, an adjudication of any statutory ground for termination under N.C.G.S. § 7B-1111(a) triggers the trial court's duty to proceed to disposition in order to "determine whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a). In the context of a termination order, therefore, the trial court's failure to address more than the single ground needed to terminate parental rights will often be harmless, albeit erroneous, under N.C.G.S. § 7B-1109(e).

By contrast, when the trial court denies a petition at the adjudicatory stage pursuant to N.C.G.S. § 7B-1110(c), the order must allow for appellate review of the trial court's evaluation of *each and every* ground for termination alleged by the petitioner. In this circumstance, the implementation of a principle that a trial court's silence on an alleged ground amounts to a proper adjudication of its nonexistence would hinder appellate review and effectually nullify the statutory requirement that the trial court "mak[e] appropriate findings of fact and conclusions." N.C.G.S. § 7B-1110(c).

Contrary to the GAL's assertion, our conclusion that a trial court must comply with N.C.G.S. §§ 7B-1109(e) and -1110(c) in denying a petition for the termination of parental rights is neither novel nor contrary to existing case law. Rather than placing an "unnecessary new" burden on the trial courts of the state, our holding merely reiterates that the trial courts must make findings of "those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached." *Quick*, 305 N.C. at 451, 290 S.E.2d at 657. This requirement is consistent with the trial court's duty regarding the entry of judgments following

civil bench trials under N.C.G.S. § 1A-1, Rule 52(a)(1), *see id.* at 450–51, 290 S.E.2d at 657, and reinforced by this Court in our decision in *In re T.N.H.*, 372 N.C. at 407–08, 831 S.E.2d at 59.

Conclusion

We hold that the trial court erred in its failure to enter sufficient findings of ultimate fact and conclusions of law to support its dismissal of the petitioner's termination of parental rights petition pursuant to N.C.G.S. § 7B-1110(c). Therefore, we vacate the "Termination Order" and remand this matter to the trial court for the entry of additional findings and conclusions. *See Coble*, 300 N.C. at 714, 268 S.E.2d at 190; *In re I.R.L.*, 823 S.E.2d at 906. On remand, we leave to the discretion of the trial court whether to hear additional evidence. *See, e.g.*, *In re I.R.L.*, 823 S.E.2d at 906. In light of our determination, we do not address petitioner's remaining arguments on appeal.

VACATED AND REMANDED.

IN THE MATTER OF M.A., B.A., A.A.

No. 301A19

Filed 17 July 2020

1. Termination of Parental Rights—grounds for termination—neglect—probability of repeated neglect—domestic violence

The trial court did not err by determining that a father's parental rights to his children were subject to termination on the grounds of neglect where the trial court found that a substantial probability existed that the children would be neglected if they were returned to the father's care, based on findings that included the father's lengthy history of domestic violence in the presence of the children, his failure to fully follow the trial court's order to participate in domestic violence treatment, and testimony regarding 911 calls relating to domestic disturbances at his residence.

2. Termination of Parental Rights—best interests of the child—statutory factors—likelihood of adoption

The trial court did not abuse its discretion by concluding that termination of a mother's parental rights would be in the best interests of her children where the trial court made detailed findings of

fact addressing each of the relevant criteria in N.C.G.S. § 7B-1110(a) and the findings were supported by competent evidence. Further, the children's strong bond with their parents and their desire to return to their parents' home did not preclude a finding that the children were likely to be adopted.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 7 May 2019 by Judge Denise S. Hartsfield in District Court, Forsyth County. This matter was calendared for argument in the Supreme Court on 19 June 2020 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Theresa A. Boucher, *Assistant County Attorney*, *for petitioner-appellee Forsyth County Department of Social Services.*

Michelle FormyDuval Lynch, *GAL Appellate Counsel*, *for appellee Guardian ad Litem.*

Mary McCullers Reece for respondent-appellant father.

Richard Croutharmel for respondent-appellant mother.

ERVIN, Justice.

Respondent-father Earl A. and respondent-mother Peggy A. appeal from an order entered by the trial court terminating their parental rights in their minor children M.A., B.A., and A.A.[1] After careful consideration of the parents' challenges to the trial court's termination order, we conclude that the order in question should be affirmed.

I. Factual Background

On 2 August 2017, the Forsyth County Department of Social Services filed petitions alleging that Maria, Brenda, and Andrew were neglected juveniles and obtained the entry of orders placing the children in nonsecure custody.[2] In these petitions, DSS alleged that substance abuse and

1. M.A., B.A., and A.A. will, respectively, be referred to throughout the remainder of this opinion as "Maria," "Brenda," and "Andrew," which are pseudonyms used to protect the juveniles' identities and for ease of reading.

2. In addition, DSS obtained nonsecure custody of respondent-mother's oldest son, A.J., who will be referred to throughout the remainder of this opinion as "Adam."

domestic violence in the presence of the children had caused it to offer in-home services to the family and to subsequently seek to have the children removed from the family home. In addition, the petitions alleged that DSS had had extensive prior dealings with the children's family, including their placement in DSS custody from 19 April 2011 through 6 November 2012, and the fact that they had been the subject of a prior adjudication of neglect.[3]

The petitions came on for hearing before the trial court on 21 March 2018. On 30 May 2018, the trial court entered an order determining that the children were neglected juveniles "in that they received improper care and supervision from [the parents] and [ ] were allowed to live in an environment injurious to their wellbeing." The trial court's order detailed ongoing instances of domestic violence and substance abuse that had occurred in the presence of the children despite the fact that the parents had entered into a family services agreement with DSS that prohibited such conduct. As a precondition for allowing them to reunify with the children, the trial court ordered the parents to obtain substance abuse and domestic violence assessments and follow all resulting treatment recommendations; "[s]ubmit to random drug testing"; "[e]ngage in supervised visits with [the] children and demonstrate consistency and safe parenting skills during visits"; "[e]stablish and maintain stable, safe, adequate housing to meet [the] children's basic needs"; and notify DSS "of any change in residency, telephone number, or employment." In addition, respondent-father was ordered to "[p]rovide [DSS] with names of all physicians . . . prescribing him controlled substances" and to "[s]ign releases to all doctors providing treatment for him[.]"

After a permanency planning hearing held on 11 June 2018, the trial court entered an order on 11 July 2018 that established the primary permanent plan for all three children as adoption, with a secondary permanent plan of guardianship. In addition, the trial court ordered the cessation of efforts to reunify the parents with the children and

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Respondent-father is not Adam's father. In view of the fact that any issues concerning DSS' involvement with Adam are not before the Court in connection with this appeal, we will refrain from discussing those issues in the remainder of this opinion.

3. The children were adjudicated to be neglected juveniles due to domestic violence and substance abuse by means of an order entered by the trial court on 4 August 2011. However, the Court of Appeals reversed the trial court's adjudication order and remanded that case to the District Court, Forsyth County, for further proceedings. *In re M.A.*, No. COA11-1238, 2012 WL 1316378 (N.C. Ct. App. April 17, 2012) (unpublished). On remand, the trial court entered an order on 25 July 2012 finding the children to be neglected juveniles on the basis of domestic violence and substance abuse.

instructed DSS to file petitions seeking to have the parents' parental rights in the children terminated.[4]

On 14 August 2018, DSS filed a petition seeking to have the parents' parental rights in the children terminated based upon neglect and willful failure to make reasonable progress toward correcting the conditions that led to the children's removal from the family home. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019). The termination petition came on for hearing before the trial court on 4 February 2019. On 7 May 2019, the trial court entered an order terminating both parents' parental rights in the children on the basis of both grounds for termination alleged in the termination petition. In addition, the trial court concluded that termination of the parents' parental rights would be in the children's best interests. The parents noted an appeal to this Court from the trial court's termination order.[5] In seeking relief from the trial court's termination order before this Court, respondent-father argues that the trial court erred by finding that grounds existed to support the termination of his parental rights in the children while respondent-mother argues that the trial court erred by determining that termination of her parental rights would be in the children's best interests.

II. Legal Analysis

A. Standard of Review

According to well-established North Carolina law, termination of parental rights proceedings involve the use of a two-stage process. 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 grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6, 832 S.E.2d 698, 700 (2019) (quoting N.C.G.S. § 7B-1109(f)). "If [the trial court] determines that one or more grounds 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[s] to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110).

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4. The parents filed notices preserving their right to seek appellate review of the 11 July 2018 order by the Court of Appeals pursuant to N.C.G.S. §§ 7B-1001(a)(5).

5. Although the parents noted appeals to this Court from the 11 July 2018 order, they have not contended in their briefs that the challenged order is legally erroneous, thereby abandoning any challenge that they might have otherwise been entitled to make to the lawfulness of that order. *See* N.C.R. App. P. 28(b)(6).

B. Respondent-Father's Appeal

[1] As an initial matter, we will address respondent-father's contention that the trial court erred by determining that his parental rights in the children were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(1) and (2). "This Court reviews a trial court's adjudication decision pursuant to N.C.G.S. § 7B-1109 in order to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law, with the trial court's conclusions of law being subject to de novo review on appeal." *In re N.D.A.*, 373 N.C. 71, 74, 833 S.E.2d 768, 771 (2019) (cleaned up) (citations omitted). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). "Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *Id.* at 407, 831 S.E.2d at 58–59 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). "[A] finding of only one ground is necessary to support a termination of parental rights." *In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019).

According to N.C.G.S. § 7B-1111(a)(1), a trial judge may terminate a parent's parental rights in a child in the event that it finds that the parent has neglected his or her child in such a way that the child has become a neglected juvenile as that term is defined in N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1) (2019). A neglected juvenile is "[a]ny juvenile less than 18 years of age . . . whose parent . . . does not provide proper care, supervision, or discipline" or "who lives in an environment injurious to the juvenile's welfare." *Id.* § 7B-101(15).

> [I]n 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 the event that a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible. In such circumstances, the trial court may find that a parent's parental rights in a child are subject to termination on the grounds of neglect in the event that the petitioner makes a showing of past neglect and a likelihood of future neglect by the parent.

In re N.D.A., 373 N.C. at 80, 833 S.E.2d at 775 (cleaned up) (citations omitted). "When determining whether future neglect is likely, the trial court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.A.M.*, 374 N.C. 88, 95, 839 S.E.2d 792, 797 (2020) (citing *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)). "A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re M.J.S.M.*, 257 N.C. App. 633, 637, 810 S.E.2d 370, 373 (2018) (citation omitted).

In light of the testimony, prior orders, and a report prepared by the guardian ad litem that was introduced into evidence at the termination hearing, the trial court found that "[respondents], the parents of [Maria], [Brenda] and [Andrew,] have neglected their children" and that "[t]here is a strong probability of repeated neglect of [Maria], [Brenda] and [Andrew] should they be returned to the care[,] custody[,] and control of [respondents]." In support of these ultimate findings, the trial court made numerous evidentiary findings concerning the progress that respondent-father had made toward satisfying the requirements of his case plan in the course of concluding that the progress that he made toward the achievement of that goal had not been reasonable.

Although respondent-father acknowledges the existence of the trial court's earlier determination that the children were neglected juveniles, he challenges its finding that there was a substantial probability that the children would be neglected in the event that they were returned to his care. Among other things, respondent-father argues that the challenged trial court finding was erroneous because he had "made reasonable progress in addressing substance use, domestic violence, and maintenance of a stable home and income." In support of this contention, respondent-father asserts that several of the trial court's factual findings lack sufficient evidentiary support to the extent that they indicate that he had failed to make reasonable progress toward satisfying the requirements of his case plan. A careful review of the record persuades us that the trial court's findings concerning respondent-father's failure to adequately address the issue of domestic violence have ample evidentiary support and are, standing alone, sufficient to support a determination that there was a likelihood of future neglect in the event that the children were returned to respondent-father's care.

Respondent-father acknowledges that the trial court identified domestic violence as the central problem that resulted in the children's removal from the family home in the 30 May 2018 adjudication order. In that order, the trial court detailed the incidents of domestic violence that

had occurred in the family home during March and July 2017, resulted in the intervention of law enforcement officers, and caused the removal of the children from the parent's care before noting that the children had previously been in DSS custody and that "the issues for [ ] removal [in this instance were] similar to the prior removal reasons." According to the trial court, "[t]here was ongoing constant domestic violence in the home between [the parents,]" "[t]here were numerous 911 calls due to domestic violence[,]" "[respondent-mother] ha[d] made numerous attempts to leave the home with the juveniles[,]" "[respondent-mother] admitted to . . . ongoing issues of domestic violence with [respondent-father,]" and "this is clearly a case where domestic violence between [respondents] has made this environment injurious to their children." In order to remedy the problems resulting from the ongoing domestic violence between the parents and in an effort to achieve reunification, the trial court had ordered respondent-father to "[p]articipate in a domestic violence assessment at Family Services or with the COOL Program and follow all recommendation[s]."

In its termination order, the trial court found that:

> 26. [Respondent-father] attended 4 domestic violence classes: an intake session on April 7, 2018, and classes on May 5, 2018, May 12, 2018, May 17, 2018, and May 26, 2018. He was discharged unsuccessfully on August 15, 2018.
>
> 27. [Respondent-father] has failed to demonstrate the concepts taught in domestic violence classes. The [guardian ad litem] for the children learned of an incident at the [respondent-father's] home involving a disturbance for which law enforcement was called in November 2018.
>
> . . . .
>
> 34. . . . [Respondent-father] has failed to fully engage in domestic violence treatment.

Although respondent-father does not contend that Finding of Fact Nos. 26 and 27 lack sufficient evidentiary support, he does assert that these findings fail to support the trial court's determination that he had failed to make reasonable progress in addressing his domestic violence problems in light of the surrounding circumstances.

A careful review of the record evidence satisfies us that Finding of Fact Nos. 26, 27, and 34 are supported by clear, cogent and convincing evidence. At the termination hearing, the social worker testified that respondent-father had not complied with the trial court's order to

complete domestic violence classes. In spite of the fact that respondent-father enrolled in domestic violence classes provided by the COOL Program on 7 April 2018 and attended four classes on 5, 12, 17, and 26 May 2018, there was no evidence that he had had any further involvement in or had completed that or any other domestic violence program as of the date of a review hearing held on 5 December 2018. In addition, the social worker testified that the staff of the COOL Program had indicated that respondent-father had not attended any classes since 26 May 2018 and that respondent-father had not demonstrated the ability to utilize the concepts that he had been taught in the domestic violence classes that he had attended. Furthermore, the guardian ad litem testified that he had received a report that there had been 911 calls relating to disturbances at respondent-father's home approximately every other month during 2018. Although the report did not provide any details relating to these calls, the guardian ad litem asserted that the number of calls made during 2018 was similar to the number of calls relating to respondent-father's residence shown in an earlier report and "ma[d]e the point that the house, or the home ha[d] the same pattern of behavior [as] the last time [he] ran the 911 report[.]" In our opinion, this evidence provides ample support for Finding of Fact Nos. 26, 27, and 34 and demonstrates that respondent-father failed to fully engage in domestic violence treatment.

In seeking to persuade us to reach a different result with respect to this issue, respondent-father argues that the record evidence shows that he was attentive and engaged during the four domestic violence classes that he did attend. According to respondent-father, his limited attendance constituted reasonable progress under the circumstances, with it not being "surpris[ing] that [he] stopped attending [the domestic violence classes]" given that the trial court had ended the stipend for his expenses that was being drawn from the children's accounts, reduced his visitation with the children, and eliminated reunification as the permanent plan. In addition, respondent-father points to the social worker's testimony that, prior to the termination hearing, respondent-father "thought the rights had already been terminated with prior court proceedings." Finally, respondent-father contends that, "[i]n the context of the case, even though [he] did not complete the COOL [P]rogram, he was reasonably addressing the issues relating to domestic violence." We do not find these arguments persuasive.

In light of the lengthy history of domestic violence between the parents dating back to the initial DSS involvement with the family in 2011, the trial court did not err by determining that respondent-father's limited

attendance at and his failure to complete the COOL Program constituted a failure to fully engage in domestic violence treatment and a lack of reasonable progress toward addressing the issue of domestic violence. Although the 11 July 2018 order did end respondent-father's ability to obtain access to a $25 monthly stipend from the children's accounts, reduce respondent-father's visitation with the children, and eliminate reunification as the permanent plan for the children, that order did not terminate respondent-father's parental rights in the children. On the contrary, the 11 July 2018 order contained provisions requiring respondent-father to address the concerns that had resulted in the children's removal from the family home, including a requirement that he complete domestic violence classes. In addition, the 11 July 2018 order authorized monthly visits with the children, which respondent-father continued to attend through November 2018. Simply put, respondent-father's mistaken belief that his parental rights in the children had been terminated was unreasonable and does not either justify his failure to address the issue of domestic violence or render the minimal progress that he did make toward addressing the issue of domestic violence reasonable. *See In re B.O.A.*, 372 N.C. 372, 385, 831 S.E.2d 305, 314 (2019) (explaining that the trial court has the authority to decide whether a parent's limited progress toward compliance with the provisions of his or her case plan was reasonable). In the event that respondent-father is contending that he was unable to continue participating in domestic violence classes because he could not afford them in the absence of the monthly stipend, any such argument is refuted by the fact that financial assistance was available through the COOL Program and the fact that respondent-father had never "at any given point stopped by the office with . . . concerns about the financial barriers."

Similarly, respondent-father argues that the trial court had erred by finding that he had failed to make reasonable progress toward correcting the conditions that had led to the children's removal from the family home given that, even though he and respondent-mother continued to live together, the record contained no evidence that there had been ongoing conflict between them. Although the record does not contain any definitive indication that there had been recent instances of domestic violence between the two parents, it did contain evidence tending to show that law enforcement officers had been summoned to address disturbances at respondent-father's home at a level that was similar to the rate at which such calls had been made during earlier stages of this proceeding. Moreover, given the long history of domestic violence between the parents, which resulted in determinations that the children were neglected juveniles in both 2011 and 2018, the absence of

evidence that there had been any recent incidents of domestic violence between the parents does not suffice to establish that respondent-father had adequately addressed the issue of domestic violence given his failure to make reasonable efforts to complete required domestic violence education.[6] As a result, we conclude that the record does not support respondent-father's assertion that there was no longer any reason for concern that he would be involved in incidents of domestic violence with respondent-mother.

Aside from his argument that he had made reasonable progress toward addressing the conditions that had led to the children's removal from the family home, respondent-father contends that there has been a substantial change in circumstances because he is no longer required to interact with Adam. More specifically, respondent-father asserts that "several of the incidents preceding the neglect adjudication arose from conflicts between [himself] and [Adam]" and that a psychologist who had evaluated him had concluded that, while he was capable of parenting his own children, Adam's behaviors exceeded respondent-father's parenting capabilities. In view of the fact that Adam's permanent plan did not involve a return to respondent-father's home, respondent-father argues that the principal obstacle to his ability to parent the children would no longer be present there. This aspect of respondent-father's challenge to the trial court's order reflects little more than his failure to comprehend the underlying domestic violence problem confronting the family and rests upon a failure to accept responsibility for the domestic violence that plagued the family home.

The trial court's order reflects a clear understanding of the lengthy history of domestic violence in the family home and respondent-father's failure to make reasonable progress toward addressing the principal obstacle toward reunification that had been identified in the trial court's initial adjudication and disposition order. For that reason, we hold that the trial court's findings support its determination that "[t]here is a strong probability of repeated neglect of [Maria], [Brenda,] and [Andrew] should they be returned to the care[,] custody and control of . . . [respondent-father]"[7] and that respondent-father's parental rights

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6. As an additional matter, the trial court noted that respondent-mother's oldest son, Adam, was involved in a physical altercation with respondent-father on 29 July 2017 that stemmed from Adam's intervention into a physical altercation between the parents for the purpose of protecting respondent-mother.

7. As a result of our determination that the trial court's findings of fact concerning respondent-father's failure to adequately address the issue of domestic violence suffice to support its determination that his parental rights in the children were subject to

in the children were subject to termination on the grounds of neglect pursuant to N.C.G.S. § 7B-1111(a)(1). In addition, given that the existence of a single ground for termination suffices to support the termination of a parent's parental rights in a child, *see In re A.R.A.*, 373 N.C. at 194, 835 S.E.2d at 421, and that respondent-father has not challenged the lawfulness of the trial court's best interests determination, we affirm the trial court's termination order with respect to respondent-father.

C. Respondent-Mother's Appeal

[2] Next, we will address respondent-mother's contention that the trial court erred by finding that the termination of her parental rights would be in the best interests of the children. The trial court's best interests determination is governed by N.C.G.S. § 7B-1110, which provides that:

> [t]he court may consider any evidence, including hearsay evidence as defined in [N.C.G.S. §] 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2019). "The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. at 6, 832 S.E.2d at 700; *see also In*

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termination on the basis of neglect, we need not address respondent-father's challenge to the trial court's findings relating to the issues of substance abuse, the suitability of respondent-father's home, and the nature and extent of respondent-father's contacts with DSS. *See In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58–59 (stating that "we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights").

re Z.A.M., 374 N.C. at 99–100, 839 S.E.2d. at 800 (reaffirming the use of an abuse of discretion standard of review for the purpose of reviewing a trial court's best interests determination pursuant to N.C.G.S. § 7B-1110(a)). An "[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re A.U.D.*, 373 N.C. at 6–7, 832 S.E.2d at 700–01 (quoting *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015)). "The trial court's dispositional findings of fact are reviewed under a 'competent evidence' standard." *In re K.N.K.*, 374 N.C. 50, 57, 839 S.E.2d 735, 740 (2020) (citation omitted).

In its termination order, the trial court made detailed findings of fact that addressed each of the relevant statutory criteria. More specifically, the trial court found that Andrew was thirteen years old, that Brenda was twelve years old, and that Maria was nine years old at the time of the termination hearing and that each of the children had spent approximately thirty-eight months of their lives in DSS custody. In addition, the trial court found that, while no prospective adoptive families had been identified for the children, an adoption recruiter had become involved, so that the likelihood that each child would be adopted was very high. Furthermore, the trial court found that termination of the parents' parental rights in the children was necessary to effectuate the permanent plan of adoption; that the children had strong bonds with their parents and with the caregivers in the group home in which they had been placed; that the children were doing well in school and therapy and had no special needs; that the adoption recruiter was working to locate a family who would be willing to adopt all three children; that the children understood that the situation with their parents was not getting better; and that the children were not resistant to the plan of adoption. Finally, the trial court found that the adoption recruiter believed that there were no barriers to the children's adoption and that the guardian ad litem recommended that the parents' parental rights in the children be terminated given that the children had been in foster care for a lengthy period of time and needed a safe, permanent home.

Although respondent-mother acknowledges that "[t]he trial court made findings concerning the enumerated factors of N.C. Gen. Stat. § 7B-1110(a)," she questions the sufficiency of the evidentiary support for certain of the trial court's findings and faults the trial court for failing to make findings concerning the extent to which the children would consent to being adopted. As an initial matter, respondent-mother disputes the validity of the trial court's determination in Finding of Fact Nos. 37, 43, and 49 that the likelihood that the children would be adopted was

"very high." According to respondent-mother, the fact that the children "were placed in a group home with no identified adoptive placements[;]" that "[t]he adoption recruiter testified that it could be up to two years before an adoptive family is found[;]" that the children had strong bonds with respondents and wanted to be returned to their care; and that, since Brenda and Andrew were more than twelve years old, they must consent to be adopted fatally undermined the trial court's findings relating to the adoptability issue.

The trial court's finding that there was a high likelihood that the children would be adopted has adequate record support. A social worker with responsibility for handling this matter testified that she believed that all three children had "a great likelihood of adoption[.]" In addition, the social worker's testimony tended to show that the children had adjusted well to their current placement, that they had formed bonded relationships with their caregivers and other children who lived in the group home in which the children resided, that the children had no special needs and were not on medication, and that the children were generally doing well in school and succeeding in therapy. In addition to describing the circumstances in which the children currently found themselves, the guardian ad litem testified that he had no concerns about the children's ability to bond with an adoptive family and that termination of the parents' parental rights in the children would be in the children's best interests given their need for safety and permanence. In light of this testimony, we have no hesitation in concluding that the trial court's findings with respect to the issue of adoptability have ample record support.

In addition, we conclude that respondent-mother's argument that the likelihood that the children would be adopted was not high and her assertion that the trial court's statement in Finding of Fact No. 56 that there were "no barriers to adoption" was devoid of sufficient evidentiary support lack persuasive force. Although respondent-mother is correct in stating that no adoptive placement had been identified for the children, the absence of such a placement does not preclude the termination of a parent's parental rights in his or her children. *See In re A.R.A.*, 373 N.C. at 200, 835 S.E.2d at 424 (finding no error in the trial court's best interests determination despite the absence of an identified adoptive placement for the juvenile) (citing *In re D.H.*, 232 N.C. App. 217, 223, 753 S.E.2d 732, 736 (2014)). The adoption recruiter assigned to work with the children testified that she first met with the children on 3 December 2018, that she was in the initial phase of attempting to find an adoptive placement for them, and that the second stage in that process, which

included participation in adoption-related events, would begin in several months. In spite of the fact that the adoption recruiter did state that the longest that it had taken to complete an adoption in the cases in which she had been involved was "probably 18 months, two years[,]" her testimony to that effect did not constitute an estimate of the amount of time that it would take to find an adoptive placement for the children in this case. Instead, the adoption recruiter testified that "[e]ach situation really is different," with the trial court having clarified that the adoption recruiter's testimony was "based on the kids that she has worked with in the past." Simply put, the record does not support respondent-mother's assertion that the adoption recruiter testified that "it could be up to two years before an adoptive family is found" for the children.

Moreover, contrary to the assumption upon which this particular aspect of respondent-mother's argument rests, the possibility that the adoption process would be a lengthy one does not preclude a finding that there is a high likelihood that the children will be adopted. On the contrary, the adoption recruiter testified that there were no barriers to the children's adoption and that the termination of the parents' parental rights in the children would be in their best interests by making them eligible for listing with adoption services agencies and making additional avenues for identifying an adoptive family available to them. As a result, the testimony provided by the adoption recruiter supports the trial court's findings that there were no barriers to the children's adoption and that there was a high likelihood that the children would be adopted.

In addition, respondent-mother argues that the likelihood that the children would be adopted was not high given that the children had strong bonds with the parents, that the children wanted to return to their parents' care, and that Brenda and Andrew would be required to consent to any adoption because they were over twelve years old, *see* N.C.G.S. § 48-3-601(1) (2019), with this aspect of respondent-mother's argument being directed against Finding of Fact Nos. 47, 53, and 55. A careful review of the record evidence, however, satisfies us that the relevant findings of fact have sufficient support given that the record contains evidence tending to show that, while the children hoped that they could return to their parents' care and while they would like for this outcome to come to pass, the intensity of their hopes that such an outcome would ever happen had diminished given the passage of time and missed parental visits. In addition, the record contains evidence tending to show that the children were aware that the adoption recruiter was looking for an adoptive family and that Andrew and Brenda had expressed preferences concerning the composition of any adoptive family that might

become available, a fact that suggests that these two children had begun to accept the idea that they would be adopted. Although the guardian ad litem testified that Maria did not want to be adopted and simply wished to return to the parents' care, the record also contains evidence tending to show that even she understood that the problems that the parents had been experiencing had not been resolved. According to the adoption recruiter, even though the children wanted to return to the family home, they acknowledged that conditions there had not improved. As a result, we hold that the trial court's findings that the children understood that the parents had not addressed the issues that had resulted in their removal from the family home and that Andrew and Brenda did not resist the idea of adoption had adequate evidentiary support.[8]

In spite of the fact that the existence of a close bond between the children and the parents, the children's preference for returning to the parental home, and the necessity for certain of the children to consent to an adoption are clearly relevant to a trial court's best interests determination, we are not satisfied that these facts preclude a finding that the children are likely to be adopted. Instead of ignoring these issues, the trial court addressed them in Finding of Fact Nos. 39, 45, and 51 and considered them in the course of making its ultimate best interests determination. Similarly, while the trial court is entitled to consider the children's wishes in determining whether termination of their parents' parental rights would be appropriate, their preferences are not controlling given that the children's best interests constitute "the 'polar star' of the North Carolina Juvenile Code." *In re T.H.T.*, 362 N.C. 446, 450, 665 S.E.2d 54, 57 (2008); *see also Clark v. Clark*, 294 N.C. 554, 577, 243 S.E.2d 129, 142 (1978) (stating that "[t]he expressed wish of a child . . . is . . . never controlling upon the court, since the court must yield in all cases to what it considers to be for the child's best interests, regardless of the child's personal preference"). As a result, given that the trial court's findings of fact have adequate evidentiary support and given that the trial court considered all of the relevant factors before determining that termination of the parents' parental rights would be in the children's best interests, the trial court did not commit any prejudicial error of law in the course of making its best interests determination.

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8. The guardian ad litem's testimony at the termination hearing does not support the trial court's finding that Maria was not resistant to adoption. However, a finding that Maria opposed being adopted did not preclude a determination that termination of the parents' parental rights in the children would not be in their best interests, rendering the trial court's error in this respect harmless in light of the other surrounding facts and circumstances.

Furthermore, respondent-mother argues that the trial court erred by failing to make findings of fact concerning the extent to which Brenda and Andrew would consent to be adopted. To be sure, N.C.G.S. § 48-3-601 provides that a juvenile over the age of twelve must consent to an adoption. N.C.G.S. § 48-3-601(1) (2019). On the other hand, N.C.G.S. § 48-3-601 governs adoption, rather than termination of parental rights, proceedings. In addition, N.C.G.S. § 48-3-603(b) provides that a trial judge may dispense with the requirement that a child who is twelve years of age or older consent to an adoption "upon a finding that it is not in the best interest of the minor to require the consent." *Id.* § 48-3-603(b)(2). For that reason, any refusal on the part of Brenda and Andrew to consent to a proposed adoption would not preclude their adoption in the event that the trial judge made the necessary findings. As a result, given that a refusal on the part of one or more of the children to consent would not necessarily preclude their adoption, we hold that the trial court was not required to make findings and conclusions concerning the extent, if any, to which Brenda and Andrew were likely to consent to any adoption that might eventually be proposed.

Similarly, respondent-mother argues that the trial court erred in making Finding of Fact Nos. 40, 46, and 52, in which it found that the children had strong relationships and had bonded with the persons responsible for their care in the group home in which they lived. Instead of arguing that these findings lack sufficient evidentiary support, respondent-mother contends that the challenged findings are irrelevant because N.C.G.S. § 7B-1110(a)(5) requires consideration of the "quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement," N.C.G.S. § 7B-1110(a)(5) (2019), rather than the quality of the relationship between the children and the persons caring for them in their current non-adoptive placement. To be sure, the trial court could not make a finding concerning the quality of the children's relationship with any prospective adoptive parent because no such persons had been identified. On the other hand, the trial court's findings concerning the ability of the children to bond with their current caregivers did tend to support a conclusion that the children were adoptable given their ability to develop a bond with other human beings. Thus, the trial court did not err by making findings of fact concerning the bond between the children and their current caretakers.

Finally, respondent-mother challenges Finding of Fact No. 57, in which the trial court found that "[p]overty is not the cause for [respondents'] neglect of their children." In response, respondent-mother argues

that "poverty was most certainly an issue that impacted [her] ability to reunify with the juveniles." Although respondent-mother is correct in noting that her parental rights are not subject to termination in the event that her inability to care for her children rested solely upon poverty-related considerations, *see* N.C.G.S. § 7B-1111(a)(2) (2019) (providing that "[n]o parental rights . . . shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty"), the challenged trial court finding appears to relate to the trial court's decision that grounds for the termination of respondent-mother's parental rights existed, a determination that respondent-mother has not challenged on appeal, rather than to the trial court's best interests determination. However, to the extent that the trial court intended for Finding of Fact No. 57 to relate to the dispositional, as well as the adjudicatory, stage of the present proceeding, we conclude that Finding of Fact No. 57 is supported by the unchallenged findings that respondent-mother failed to comply with substance abuse treatment; failed to demonstrate sustained sobriety; failed to obtain domestic violence counseling and demonstrate the ability to use the concepts that she had learned during that process; continued to reside with respondent-father; and failed to consistently keep FCDSS aware of changes in her employment, residence, and contact information and conclude that the trial court's decision that it would be in the children's best interests for respondent-mother's parental rights to be terminated did not rest solely upon respondent-mother's poverty.

Thus, with a single exception, we conclude that the trial court's findings of fact had ample evidentiary support. Moreover, in spite of the existence of record evidence tending to show that the children were strongly bonded to the parents and wanted to return to their care, the termination order establishes that the trial court performed a reasoned best-interests analysis and did not abuse its discretion by determining that the termination of respondent-mother's parental rights in the children would be in their best interests. For that reason, given that respondent-mother has not challenged the trial court's determination that grounds for the termination of her parental rights in the children existed, we hold that the trial court did not err by terminating respondent-mother's parental rights in the children. As a result, the trial court's termination order is affirmed with respect to both parents.

AFFIRMED.

IN RE M.C.

[374 N.C. 882 (2020)]

IN THE MATTER OF M.C., M.C., M.C.

No. 272A19

Filed 17 July 2020

Termination of Parental Rights—grounds for termination—neglect—sufficiency of findings—evidence of changed circumstances

The trial court's conclusion that grounds existed to terminate a mother's parental rights for neglect was supported by sufficient findings of fact, which were supported by clear, cogent, and convincing evidence, where the children were exposed numerous times to domestic violence between their parents and the mother repeatedly returned to her relationship with the abusive father. The trial court was not required to consider in its findings the mother's evidence of changed circumstances—that the father had received a long prison sentence and that she would not return to a relationship with him—in light of the history of the couple's relationship and the fact that the trial court did not have to believe the mother's testimony.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 29 April 2019 by Judge Joseph Moody Buckner in District Court, Orange County. This matter was calendared in the Supreme Court on 19 June 2020 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Stephenson & Fleming, LLP, by Deana K. Fleming, for petitioner-appellee Orange County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Tiffany M. Burba and Spencer J. Guld, for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellant mother.

HUDSON, Justice.

Respondent appeals from the trial court's orders terminating her parental rights to M.C. (Megan), M.C. (Miranda), and M.C. (Margot).[1] We affirm.

1. Pseudonyms have been used to protect the identity of the juveniles and for ease of reading.

Respondent and the children's father, Walter, were married in September 2010. Miranda was born in February 2012. Respondent and Walter divorced in April 2013, though they maintained an "on and off" relationship subsequent to the divorce. Megan was born in August 2016.

On 15 February 2017, Orange County Department of Social Services (DSS) received a report alleging neglect of Miranda and Megan due to their exposure to domestic violence. The report alleged Walter was verbally abusive, possessed a firearm, and that respondent was afraid for her life. Walter was arrested and charged for this incident. The report also alleged there had been an incident during the previous week where Walter pushed respondent against a wall and punched her in the face. When Miranda attempted to intervene, Walter threw her across the room. Law enforcement was not notified of that incident.

As a result of the report, DSS conducted an assessment and decided to provide in-home services to the family. DSS determined there was a history of domestic violence. Respondent had obtained five previous domestic violence protective orders (DVPOs) against Walter, though each was subsequently violated, and she obtained a sixth following the February 2017 incidents. As part of a safety plan, DSS mandated respondent and Walter have no contact for three months. Services were recommended to address the domestic violence, respondent's mental health, and Walter's substance abuse.

As with the previous DVPOs, Walter violated the sixth, and respondent became pregnant with Margot during the mandated no-contact period. In June 2017, respondent informed her social worker that she had resumed her relationship with Walter and that services were no longer needed. Respondent and Walter moved back in together on 19 June 2017.

On 21 June 2017, Walter became enraged because respondent lost her wallet, and he told her over the phone that he would put her "in the ground." When he subsequently showed up at her workplace, the police were called, and Walter was arrested for violating the DVPO. Respondent amended her DVPO to prevent Walter from contacting her or the children.

On 27 June 2017, DSS filed juvenile petitions alleging Miranda and Megan were neglected but allowed the children to remain in respondent's physical custody. On 12 July 2017, respondent entered into a consent order with DSS in which she agreed to have no contact with Walter. On 1 August 2017, respondent's social worker learned that respondent went to the emergency room on 21 July 2017, accompanied by Walter and the children. The social worker also learned that respondent was

staying at the apartment she had previously shared with Walter, though she claimed to be staying with her mother. DSS took Miranda and Megan into non-secure custody on 2 August 2017. They were placed in the home of their maternal grandmother.

Following a hearing on 17 August 2017, Miranda and Megan were adjudicated to be neglected juveniles. The trial court concluded it was in the best interests of the children for DSS to maintain custody and allowed respondent one hour of visitation with the children per week. The court also ordered respondent to complete a mental health assessment and follow all recommendations, to sign a release for her treatment providers to release relevant information to DSS, and to abide by the DVPO against Walter.

Walter was incarcerated for violating the DVPO from the end of July 2017 to November 2017. During that period, respondent was "highly engaged" and attended weekly visitations with the children, as well as a weekly domestic violence support group and monthly therapy sessions.

Margot was born in January 2018. Because respondent was progressing with her case plan and "on track for reunification," DSS did not remove Margot from her care. Respondent continued to make progress throughout the beginning of 2018. She continued therapy, started a parenting program, and claimed to be "done" with Walter. DSS expanded respondent's visitation with Miranda and Megan, allowing respondent to be supervised by her mother instead of DSS and to visit the children in their grandmother's home.

On 22 March 2018, respondent was seen with Walter in the DSS parking lot. When confronted by her social worker the next day, respondent admitted having been in contact with Walter since December 2017. She also admitted she and Walter had argued in the car after leaving the DSS parking lot, and she had left Margot in the car with Walter following the argument. As a result of these admissions, DSS filed a petition alleging Margot was a neglected juvenile and obtained non-secure custody the same day.

Following Margot's removal, both parents appeared to make efforts toward reunification. They agreed to not contact each other but indicated their ultimate goal was reunification as a family. Less than one month after Margot's removal, however, respondent and Walter were seen at a funeral together. DSS was informed they arrived together and held hands during the ceremony.

In the weeks that followed, Walter was repeatedly observed driving respondent's car. DSS was aware respondent and Walter continued

seeing each other during the summer of 2018 and advised respondent that her relationship with Walter would prevent reunification with her daughters. Despite these warnings, the relationship continued.

After a permanency planning hearing on 16 August 2018, the trial court changed the children's primary permanent plan to adoption with a secondary plan of reunification. DSS moved the children from their placement with respondent's mother into an adoptive foster home.

After the permanency planning hearing, DSS lost contact with Walter, and he ceased all services with the agency. Respondent continued to report that she and Walter were still together. On 30 October 2018, respondent told her social worker that her relationship with Walter was stable and free of violence. At their next weekly meeting, the social worker learned that Walter had threatened to kill respondent on 29 October 2018 and 30 October 2018 and had threatened to burn down her apartment on one of those occasions. Respondent sought another DVPO in November 2018. Respondent again reported to DSS that she was not seeing Walter anymore and would not allow his presence to keep her from getting her children back.

Police saw Walter and respondent together in her car at her apartment complex on 13 November 2018. The officers spoke with her, but respondent and Walter left together in her car before the officers could serve Walter with the DVPO. Two days later, the property manager at respondent's apartment complex saw Walter enter respondent's apartment alone and called the police. Respondent later reported that she had given Walter a key. On 1 December 2018, two days after Walter was served with the DVPO, respondent called the police to report that Walter had taken her debit card and her car. Respondent later reported she had previously given him the PIN for the debit card. Police were waiting for Walter when he arrived back at the apartment. He became aggressive toward the officers, was arrested, and charged with violating the DVPO and resisting arrest.

On 16 November 2018, DSS filed motions to terminate respondent's and Walter's parental rights to each of the children. Following a hearing on 21 February 2019, the trial court adjudicated grounds to terminate respondent's and Walter's parental rights to the children. The court further concluded that the termination of respondent's and Walter's parental rights was in the best interests of the children. Respondent appeals.[2]

2. Walter did not appeal the trial court's orders and is not a party to this appeal.

Termination of parental rights consists of a two-stage process: adjudication and disposition. 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 grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6, 832 S.E.2d 698, 700 (2019) (quoting N.C.G.S. § 7B-1109(f)).

On appeal, respondent argues the trial court erred in adjudicating the existence of grounds to terminate her parental rights under N.C.G.S. § 7B-1111(a)(1), (2), and (6). As "an adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights," *In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 53 (2019), we need only to address respondent's arguments as to the ground of neglect under N.C.G.S. § 7B-1111(a)(1).

"We review a trial court's adjudication under N.C.G.S. § 7B-1111 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *In re E.H.P.*, 372 N.C. at 392, 831 S.E.2d at 52 (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). "[A]ppellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. at 110–11, 316 S.E.2d at 252–53. Unchallenged findings are deemed binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). "Moreover, we review only those [challenged] findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58–59 (2019). The trial court's conclusions of law are reviewed de novo. *In re N.D.A.*, 373 N.C. 71, 74, 833 S.E.2d 768, 772 (2019).

A neglected juvenile is one "whose parent, guardian, custodian, or caretaker; does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare[.]" N.C.G.S. § 7B-101(15) (2019). Termination of parental rights for neglect "requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167 (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984)).

Respondent challenges several of the trial court's findings of fact. She first contends there is no evidence to support the trial court's finding

of fact 35 and 37[3] that she and Walter had dinner together for his birthday. While there was no testimony at the termination hearing related to the dinner meeting, the social worker's adjudicatory hearing report, admitted into evidence without objection, describes multiple meetings between respondent and Walter, including the birthday dinner, in violation of the no-contact orders and DVPOs. Respondent does not challenge the court's findings concerning these additional meetings between respondent and Walter, including their appearance together at a funeral and a court hearing, as well as Walter's ongoing use of respondent's car and his presence in her apartment.

Assuming, *arguendo*, the evidence is insufficient to support the trial court's finding about the shared birthday dinner, the remaining unchallenged findings establish respondent's continued engagement with Walter, notwithstanding the DVPOs and voluntary consent orders. Accordingly, the erroneous finding is not necessary to support the trial court's legal determination that grounds existed for the termination of respondent's parental rights. *In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58–59.

Respondent next challenges the trial court's finding of fact 47 and 49:

> It is likely that the neglect experienced by the juvenile in the care of Respondent mother will repeat or continue if the juvenile is returned to Respondent mother's care and custody. Specifically, this court finds the following facts:
>
> . . . .
>
> b. Respondent mother minimizes the risk to herself, the juvenile, and her siblings.
>
> c. Respondent mother has had contact with Respondent father despite DVPO's she sought, agreements not to have contact, and orders of this court as set forth herein.
>
> d. Respondent mother has engaged in and completed several domestic violence education and support

3. The trial court entered a separate termination order for each child, which resulted in differences between the numbering of the findings of fact in 17 JT 39 and 17 JT 40 with 18 JT 19. As such, respondent's challenges to a single finding of fact refer to two numbers, both of which we include. Because the orders contain findings of fact and conclusions of law which are essentially identical, any quotes are from a representative order entered in file number 17 JT 39.

groups with the Compass Center, but she continued to maintain a relationship with Respondent father.

e. Respondent mother has engaged in individual therapy, but she continued to have contact with and maintain a relationship with Respondent father.

f. Respondent mother's continued relationship with Respondent father despite engagement in services and no contact orders, and failure to maintain a safe home free from domestic violence subjects the juvenile to the likelihood of repetition of neglect if the juvenile were returned to her care and custody.

Respondent argues her testimony at the termination hearing contradicts the finding that she minimizes the risk to herself or the children. At the hearing, she acknowledged it was a "terrible decision to get back together with [Walter] in March 2018 and she was sorry for having done so." She testified that she was no longer in a relationship with Walter, and she would not return to him again.

Respondent also challenges the trial court's finding that there would be a likely repetition of neglect if the children were returned to her care. She asserts her trial testimony, as well as Walter's possible incarceration for offenses with long prison sentences, are evidence of changed circumstances at the time of the termination hearing, which the trial court failed to consider in its findings.

Respondent cites *In re A.B.*, 253 N.C. App. 29, 799 S.E.2d 445 (2017), to support her assertion that the trial court failed to make adequate findings related to the evidence of changed circumstances. In that matter, the Court of Appeals determined "the trial court's findings and conclusions do not adequately account for respondent-mother's circumstances at the time of the termination hearing." *Id.* at 38, 799 S.E.2d at 452. In that case both a social worker and the respondent "presented testimony that would support additional findings up to the time of the termination hearing," and the Court "believe[d] the evidence would support different inferences and conclusions regarding the likelihood of a repetition of neglect based on evidence regarding respondent-mother's circumstances at the time of the hearing." *Id.* at 35, 799 S.E.2d at 451. That testimony included evidence of the respondent's (1) unbroken period of negative drug screens, (2) participation in therapy, (3) separation from the children's father and her obtaining a DVPO against him, (4) full-time employment, (5) consistent and appropriate visitation with her children, and (6) her willingness and ability to meet minimal living

standards for the children, all of which had been at issue at the adjudication hearing. *Id.* at 36–37, 799 S.E.2d at 451–52.

At the time of the termination hearing in this matter, Walter was in jail on pending felony and misdemeanor charges. This, along with respondent's testimony that she was no longer in a relationship with Walter and would not return to him, is the extent of the changed circumstances respondent presented. At the outset, the trial court heard respondent's evidence of purported "changed circumstance," but it "was not required to credit [respondent's] testimonial evidence, particularly in light of other testimony admitted during the hearing." *In re Z.V.A.*, 373 N.C. 207, 212, 835 S.E.2d 425, 430 (2019) (citing *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68).

Further, "[i]n predicting the probability of repetition of neglect, the court 'must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.' " *In re M.P.M.*, 243 N.C. App. 41, 48, 776 S.E.2d 687, 692 (2015) (quoting *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999)), *aff'd per curiam*, 368 N.C. 704, 782 S.E.2d 510 (2016).

In addition to the above challenged finding of fact, the trial court found numerous other unchallenged findings that show respondent repeatedly prioritized her relationship with Walter over the safety of Miranda, Megan, and Margot by continuing to allow Walter in her life and around the children; by violating court orders; and by lying to her social workers, doctors, and family members in the process. Walter has been confined for varying lengths of time during the course of the children's lives, and each time he was released, respondent welcomed him back into the home. We conclude respondent's evidence of changed circumstances does not "support different inferences and conclusions regarding the likelihood of a repetition of neglect based on evidence regarding [respondent's] circumstances at the time of the hearing." *In re A.B.*, 253 N.C. App at 35, 799 S.E.2d at 451. Moreover, respondent's refusal to acknowledge the effect of domestic violence on the children and her inability to sever her relationship with Walter, even during or immediately following his periods of incarceration, supports the trial court's determination that the neglect of the children would likely be repeated if they were returned to respondent's care. *See In re Z.V.A.*, 373 N.C. at 212, 835 S.E.2d at 430 (affirming a finding of neglect based on a respondent's inability to sever a relationship with an unsafe parent).

Respondent also asserts that finding of fact 8 is actually a conclusion of law, and as such this Court "must assess it in the context of whether

findings contained elsewhere in the TPR orders support it." Finding of fact 8 states, in relevant part, that DSS has proved "by clear and convincing evidence that grounds exist to terminate [respondent's] parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) . . . as set forth herein." We agree that this finding is better labeled as a conclusion of law. *Matter of Adoption of C.H.M.*, 371 N.C. 22, 28, 812 S.E.2d 804, 809 (2018) ("[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." (citation omitted)); *see also In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675–76 (1997) ("The determination of neglect requires the application of [statutory] legal principles . . . and is therefore a conclusion of law." (citation omitted)). The trial court's labels are not binding upon this Court, and we "may reclassify them as necessary before applying the appropriate standard of review." *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc.*, 366 N.C. 505, 512, 742 S.E.2d 781, 786 (2013) (citing *In re Foreclosure of Gilbert*, 211 N.C. App. 483, 487–88, 711 S.E.2d 165, 169 (2011)).

Thus, having determined the challenged findings of fact are supported by clear, cogent, and convincing evidence, and having reviewed the findings as a whole, we conclude the findings of fact support the trial court's conclusion that DSS proved "by clear and convincing evidence that grounds exist to terminate [respondent's] parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) . . . ." *In re E.H.P.*, 372 N.C. at 392, 831 S.E.2d at 52.

Finally, respondent argues that the trial court erred as its conclusions of law do not include the phrase "probability of future neglect." She asserts this renders the orders reversible. However, the trial court did make findings regarding the probability of future neglect, stating, "It is likely that the neglect experienced by the juvenile in the care of Respondent mother will repeat or continue if the juvenile is returned to Respondent mother's care and custody," and that the juvenile was subjected to "the likelihood of repetition of neglect if the juvenile were returned to [respondent's] care and custody." Again, the trial court's labels are not binding upon this Court, and we "may reclassify them as necessary before applying the appropriate standard of review." *N.C. Farm Bureau Mut. Ins. Co.* 366 N.C. at 512, 742 S.E.2d at 786. To the extent these determinations are more appropriately treated as conclusions of law, we will consider them as such, and we conclude there are sufficient findings of fact, supported by clear, cogent, and convincing evidence, to support the trial court's conclusion that grounds existed to terminate respondent's parental rights for neglect under N.C.G.S. 7B-1111(a)(1).

For the foregoing reasons, none of respondent's arguments demonstrate that the trial court erred in terminating her parental rights. Accordingly, we affirm the termination orders.

AFFIRMED.

IN THE MATTER OF N.G.

No. 303A19

Filed 17 July 2020

1. Termination of Parental Rights—grounds for termination—parental rights to another child terminated involuntarily—mental health issues

The trial court did not err by concluding that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(9) to terminate a father's parental rights where it was undisputed that his parental rights to another child had been terminated involuntarily and sufficient evidence supported the trial court's findings that the father suffered from antisocial personality disorder, he lied to the county department of social services to conceal his identity, and he made only minimal efforts toward treatment for his mental health issues. Even assuming the diagnosis of antisocial personality disorder was stale, the findings nonetheless supported the conclusion that the father was unable to provide a safe home for his child because the nature of the disorder made change unlikely, he lacked interest in and cancelled appointments for treatment, and he engaged in incidents of deception.

2. Termination of Parental Rights—best interests of the child—statutory factors—parent not promoting child's well-being—foster family eager to adopt

The trial court did not abuse its discretion by determining that termination of a mother's parental rights was in her child's best interests where the trial court considered the statutory factors and found that the mother had demonstrated that she would not promote her child's well-being, there had been no progress toward returning the child home after 26 months in social services' care, and the child's foster family was meeting all her needs and eager to adopt her.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 15 May 2019 by Judge J.H. Corpening II in District Court, New Hanover County. This matter was calendared for argument in the Supreme Court on 19 June 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

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

N.C. Administrative Office of the Courts, Guardian ad Litem Division, by Michelle FormyDuval Lynch, Staff Attorney, for appellee Guardian ad Litem.

Sydney Batch for respondent-appellant mother.

Jeffrey L. Miller for respondent-appellant father.

HUDSON, Justice.

Respondents appeal from the trial court's order terminating their parental rights to N.G. (Natasha).[1] After careful review, we affirm.

Factual and Procedural Background

On 15 February 2017, the New Hanover County Department of Social Services (DSS) filed a juvenile petition alleging that Natasha was a neglected and dependent juvenile. DSS claimed that respondent-mother was "chronically homeless" and suffered from untreated mental health conditions. DSS asserted that respondent-mother's homelessness had contributed to Natasha being "excessively" tardy and absent from school and that it was affecting Natasha's school performance. DSS further alleged that respondent-father had provided care for Natasha in the past but was currently prevented from doing so due to respondent-mother's actions. DSS obtained nonsecure custody of Natasha and placed her with respondent-father.

On 20 February 2017, the trial court held a second seven-day custody hearing. At that time, DSS advised the trial court that (1) respondent-father had misled DSS as to his correct name and date of birth, and (2)

1. The minor child N.G. will be referred to throughout this opinion as "Natasha," which is a pseudonym used to protect the identity of the child and for ease of reading.

respondent-father was a party in an active termination of parental rights case that was on appeal. The trial court removed Natasha from her placement with respondent-father and placed her in foster care.

On 13 April 2017 and 25 May 2017, DSS filed amended juvenile petitions that added additional allegations concerning respondent-father. DSS claimed that respondent-father was not suitable for placement because he had mental health issues and had his parental rights terminated as to another child. DSS alleged that his diagnosis of antisocial personality disorder prevented him from providing a safe home for Natasha. DSS again alleged that respondent-father had actively misled DSS as to his identity prior to the filing of the original juvenile petition.

On 31 July 2017, the trial court adjudicated Natasha a dependent juvenile after respondents stipulated to the allegations in the juvenile petition. DSS voluntarily dismissed the allegation of neglect. The trial court determined that pursuant to N.C.G.S. § 7B-901(c)(2), reunification efforts with respondent-father were not required because he previously had his parental rights to another child involuntarily terminated. The trial court ordered that custody of Natasha would remain with DSS and that the permanent plan should be reunification with respondent-mother. The trial court further ordered respondent-mother to complete a case plan that required her to establish stable housing and income and complete a mental health assessment and follow all recommendations. Both respondents were granted visitation.

The trial court held a review hearing on 13 September 2017. At the review hearing, respondent-father requested temporary placement of Natasha and expanded visitation. Respondent-father testified, however, that he did not want legal custody of Natasha because he wanted respondent-mother to have legal custody. The trial court found as a fact that respondent-father had bought Natasha clothes and school supplies and furnished her with a telephone. The trial court made no changes in custody and ordered that the permanent plan for Natasha should continue to be reunification with respondent-mother.

A permanency planning review hearing was held on 7 February 2018. In an order entered on 15 March 2018, the trial court found that respondent-father had not been forthcoming with identifying information and had failed to acknowledge previous concerns regarding DSS involvement. Respondent-father requested that the trial court consider ordering DSS to work toward reunification efforts with him. He stated that he was willing to pay for another evaluation from Dr. Len Lecci who performed a psychological evaluation of respondent-father in his other

termination of parental rights case involving a sibling of Natasha's in 2014. Further, he requested additional visitation with Natasha. The trial court found, however, that respondent-father was not making progress towards a plan of reunification and had not provided evidence that he had engaged in necessary services on his own. The trial court ordered that a concurrent plan of adoption be added for Natasha.

Following a subsequent permanency planning hearing held on 30 August 2018, the trial court modified the permanent plan for Natasha to adoption with a concurrent plan of reunification. The trial court found that respondent-father had presented no evidence that he had engaged in services to address his untreated mental health issues and had consistently failed to acknowledge the concerns his mental health issues would raise regarding his ability to care for Natasha. The trial court found as a fact that there was a poor prognosis for change based on respondent-father's psychological evaluation. The trial court further found that respondent-mother had failed to attend individual therapy as recommended and that a psychological evaluation revealed that she exhibited a personality pattern profile associated with paranoid and narcissistic personality disorders. It was noted that individuals with diagnoses such as respondent-mother's are often resistant to treatment and have difficulty forming therapeutic relationships. Additionally, the trial court found that respondent-mother had failed to secure permanent stable housing and was participating in her case plan to a minimal degree.

A subsequent permanency planning hearing was held on 7 February 2019. In an order entered on 18 March 2019, the trial court found that neither parent was making adequate progress toward reunification and that adoption should be pursued. The trial court ordered DSS to pursue termination of respondents' parental rights.

On 14 December 2018, DSS filed a petition to terminate respondents' parental rights. DSS alleged grounds to terminate respondent-mother's parental rights to Natasha based on neglect, willful failure to make reasonable progress, and dependency. *See* N.C.G.S. § 7B-1111(a)(1), (2), and (6) (2019). DSS alleged grounds to terminate respondent-father's parental rights to Natasha based on neglect, willful failure to make reasonable progress, failure to legitimize, willful abandonment, and the fact that his parental rights with respect to another child had been terminated involuntarily and he lacked the ability or willingness to establish a safe home. *See* N.C.G.S. § 7B-1111(a)(1), (2), (5), (7), and (9).

On 15 May 2019, the trial court entered an order concluding that grounds existed to terminate respondents' parental rights. The trial

court found that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) and (2) to terminate both respondents' parental rights, and that additional grounds existed to terminate respondent-father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(5), (7), and (9). The trial court dismissed the allegation of dependency as to respondent-mother. The trial court further concluded that termination of respondents' parental rights was in Natasha's best interests. Accordingly, the trial court terminated their parental rights. Respondents appealed.

Analysis

A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under subsection 7B-1111(a) of our General Statutes. N.C.G.S. § 7B-1109(f). We review a trial court's adjudication "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. at 111, 316 S.E.2d at 253 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). If the petitioner meets its burden during the adjudicatory stage, "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, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110).

I. Respondent-Father

[1] Respondent-father challenges the multiple grounds found by the trial court to terminate his parental rights. We first consider respondent-father's argument that the trial court erred by concluding that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(9) to terminate his parental rights. N.C.G.S. § 7B-1111(a)(9) provides for termination of parental rights where "[t]he parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home." N.C.G.S. § 7B-1111(a)(9). "A 'safe home' is defined by the Juvenile Code as one 'in which the juvenile is not at substantial risk of physical or emotional abuse or neglect.' " *In re T.N.H.*, 372 N.C. 403, 412, 831 S.E.2d 54, 61 (2019) (quoting N.C.G.S. § 7B-101(19) (2017)).

Here, the trial court made the following findings of fact relevant to its adjudication of grounds to terminate respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(9):

> 11. That Ms. Sullivan spoke to Respondent-Father about the concerns with Respondent-Mother's care for the Juvenile and Respondent-Father did not intervene. Respondent-Mother had placed the Juvenile with Respondent-Father prior to [DSS's] involvement and allowed the Respondent-Mother to take the Juvenile back into her care prior to [DSS's] involvement.
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> 12. That when the Juvenile came into care, Respondent-Father was explored for placement. Respondent-Father provided [DSS] with a different last name and birth date than his own and that fictitious information was used for system checks to determine if he was a proper placement. Based on the fictitious information, the Juvenile was placed with Respondent-Father. At the initial seven-day hearing, concerns about Respondent-Father's identity were expressed and [DSS] learned Respondent-Father's correct name and date of birth. The appropriate record checks were completed and revealed that he had a prior Child Protective Services history with [DSS] and his rights to another of his children were involuntarily terminated. The Juvenile was removed from his placement after one night with Respondent-Father and placed in the same foster home as her sibling. Respondent-Father admits that he was untruthful with [DSS], and went along with it while knowing he was doing wrong.
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> . . . .
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> 15. That [DSS] did not enter into a case plan with Respondent-Father. All efforts towards reunification with him were ceased at the Adjudication and Disposition Hearing on June 26, 2017. The Respondent-Father stipulated, in part, that his parental rights were terminated to another child.
>
> 16. That Respondent-Father had a case plan in New Hanover County Case Number 14 JA 84, and his rights to that child were terminated in New Hanover County Case Number 14 JT 84, In the Matter of [I.S.D.], entered February 3, 2016. . . .

. . . .

23. That Dr. Len Lecci previously evaluated Respondent-Father for his 2014 case involving a sibling to this Juvenile. [DSS] moved to introduce into evidence as *Petitioner's Exhibit "4"*, Dr. Lecci's CV, and *Petitioner's Exhibit "5"*, Respondent-Father's Psychological Evaluation dated November 5, 2014 with addendum dated January 7, 2015. No party present objected and said exhibits were received into evidence. It was stipulated by all parties that Dr. Lecci was qualified as an expert in clinical psychology and parental competency.

24. That Dr. Lecci diagnosed Respondent-Father with Antisocial Personality Disorder. This diagnosis came from a compilation of Respondent-Father's clinical interview, diagnostic/standardized tests, and collateral information. Most of the tests have built in measures to determine lying and defensiveness. Respondent-Father was elevated on all measures which is text book grossly underreporting. While Respondent-Father does not have cognitive issues to parent, his had the highest elevation on the L scale which is for lying. He was elevated for the defensiveness score as well as his superlative score. Elevations of these scores are problematic as the client may be aware that he is lying and providing "Pollyanna" responses. A client with these scores may have no sense of other people's distress or grossly underreporting about a situation. Initially, Dr. Lecci's diagnosis was limited due to Respondent-Father's extreme defensiveness, but Dr. Lecci did include Cannabis abuse, in partial remission, and Antisocial Personality Disorder remains to be ruled out but could be confirmed with some collateral information. Dr. Lecci opined that if an Antisocial Personality Disorder was an accurate diagnosis, then continued and longstanding dishonesty would be expected, and any adaptive change in the near future is unlikely. Short term interactions with a person with Antisocial Personality Disorder would have that person presenting favorably, be likeable and consistent with Respondent-Father's presentation. Underneath, that person would not be truthful, give complex inaccuracies with a self-serving nature, are hedonistic, impulsive, inpatient, irresponsible and have assaultive behavior. After

collecting and reviewing collateral information, Dr. Lecci gave a formal diagnosis of Antisocial Personality Disorder to Respondent-Father. Antisocial Personality Disorder is marked by extensive lying and a complete disregard for social or moral standards. As a result, Respondent-Father's self-report should be taken with extreme caution and should be verified by external sources whenever possible. A person with Antisocial Personality Disorder is hard to treat as this is a longstanding behavior and the person does not realize that a change in behavior is needed, and therefore will not seek assistance. Antisocial Personality Disorder is part of who that person is and does not bode well for parenting. The person would place self-interests over the best interests of the child. Adaptive change is unlikely in those with Antisocial Personality Disorder, and treatment is therefore not recommended at this time.

25. That Dr. Lecci has not evaluated Respondent-Father since 2014 and cannot give a current diagnosis but a change would be unusual due to Respondent-Father's lack of interest in treatment or change.

26. That Mr. Joseph Rengifo evaluated Respondent-Father on March 25, 2019. Attorney Oring moved to introduce into evidence as *Respondent-Father's Exhibit "1"*, Respondent-Father's Treatment Report dated March 25, 2018. No party present objected and said exhibits were received into evidence. Mr. Rengifo was qualified as an expert in clinical psychology and counseling.

27. That Mr. Rengifo diagnosed Respondent-Father with Adjustment Disorder, unspecified, and Personal History of Spouse or Partner Violence, Physical. This diagnosis came from Respondent-Father's self-report and diagnostic/standardized tests. Respondent-Father provided Mr. Rengifo with maybe four pages of Dr. Lecci's report, less than fifteen minutes worth of reading, and without the addendum in which Dr. Lecci's confirmed Respondent-Father's diagnosis. Mr. Rengifo was not aware that Dr. Lecci had confirmed his diagnosis of Antisocial Personality Disorder for Respondent-Father, of the physical abuse allegations made by the child to whom his rights were terminated, of the physical allegation made by a former girlfriend, of the extent of physical violence and use of weapons, that

Respondent-Father was not a victim as he reported, or of Respondent-Father's drug use. Mr. Rengifo is a counselor and does not prepare a psychological evaluation but believes he needed this information to complete a proper diagnosis and treatment plan.

28. That Mr. Rengifo met with Respondent-Father four times. The first meeting was for screening, the second and third were evaluations, and the fourth was for information gathering and developing a treatment plan. Based on the information that Respondent-Father provided, Mr. Rengifo opined that Respondent-Father currently suffers from anger issues but he has not seen Respondent-Father enough to determine a complete diagnosis. Mr. Rengifo uses weekly meetings to work a treatment plan and the length of that treatment is dependent on the information provided by the client and that client's individual progress. A treatment plan has not [been] discussed with Respondent-Father because Respondent-Father has cancelled his appointments since the information gathering meeting.

. . . .

36. That there are still concerns with the lack of efforts by Respondent-Father, as well as his anger management, prior termination of parental rights, and lack of mental health treatment.

. . . .

42. That parental rights of Respondent-Father to [I.S.D.] were terminated by this [c]ourt on February 3, 2016 in New Hanover County Case Number 14 JT 84, In the Matter of [I.S.D.].

. . . .

53. The Court took judicial notice of the underlying 17 JA 400 file as the North Carolina Court of Appeals allows including all attachments to the Petition for Termination of Parental Rights consisting of orders and the birth certificate of the child. The Court notes that the child has been in the legal custody of [DSS] since April 13, 2017 and is placed in a pre-adoptive foster home.

"Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58 (citation omitted).

Respondent-father asserts that findings of fact 12, 15–16, 23–28, 31–32, 36–37, 39–40, 42, 44, 47–48, and 53 are not supported by sufficient evidence. We disagree.

We initially note that in reviewing the findings, we limit our review to those challenged findings that are necessary to support the trial court's determination that respondent-father's parental rights should be terminated pursuant to N.C.G.S. § 7B-1111(a)(9). *In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58–59 (citing *In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133). Here, findings of fact 31–32, 37, 39–40, and 47 pertain to the trial court's conclusions that grounds existed to terminate respondent-father's parental rights for neglect, failure to make reasonable progress, or failure to legitimize Natasha. N.C.G.S. § 7B-1111(a)(1), (2), and (5). Findings of fact 44 and 48 do not concern grounds for termination, but instead pertain to the trial court's determination that termination of respondents' parental rights would be in Natasha's best interests. N.C.G.S. § 7B-1110(a). We note that respondent-father does not challenge the trial court's conclusion that termination of his parental rights would be in Natasha's best interests. Thus, we decline to review these findings of fact.

Addressing respondent-father's challenges to the findings of fact relevant to the trial court's determination that grounds existed to terminate his parental rights pursuant to N.C.G.S. § 7B-1111(a)(9), we conclude that the evidence supports the challenged findings of fact. First, we address finding of fact 12, which summarizes both respondent-father's misrepresentation to DSS and the fact that his rights were terminated as to another child. Respondent-Father stipulated at the adjudicatory hearing on the initial juvenile petition that his parental rights to another child had been involuntarily terminated, and that his mental health concerns did not allow him to provide a safe home for Natasha. Additionally, a social worker testified at the termination hearing that there was initial confusion regarding respondent-father's identity because he provided a fictitious name. Furthermore, respondent-father admitted at the termination hearing that he provided DSS with a false name. This finding is supported by clear, cogent, and convincing evidence of record.

Second, we address findings of fact 15, 16, and 42 regarding the termination of respondent-father's parental rights as to another child. As stated previously herein, respondent-father stipulated that his parental

rights to another child had been involuntarily terminated. Furthermore, in that case the Court of Appeals held that respondent-father had not made sufficient progress on his case plan and affirmed the order terminating his parental rights to the other child. *In re I.S.D.*, 797 S.E.2d 384, 2017 WL 1056327 (N.C. Ct. App. 2017) (unpublished). These findings are properly supported by the record evidence.

Third, findings of fact 23 through 25 address (1) Dr. Lecci's qualification as an expert, (2) the admission of Dr. Lecci's *curriculum vitae* and evaluation of respondent-father, (3) respondent-father's diagnosis and testing, and (4) Dr. Lecci's opinion that a change in respondent-father would be unusual due to his lack of interest in treatment or change. Dr. Lecci's evaluation of respondent-father and his *curriculum vitae* were introduced into evidence without objection and were part of the record at the termination hearing. Respondent-father's diagnosis of antisocial personality disorder, his cognitive issues, and his behavioral issues were outlined in Dr. Lecci's evaluation. Dr. Lecci also testified regarding these issues at the termination hearing. These findings are supported by clear, cogent, and convincing evidence of record.

Fourth, we address findings of fact 26 through 28 regarding Mr. Rengifo's evaluation, diagnosis, and proposed treatment of respondent-father. Mr. Rengifo was qualified as an expert in clinical psychology and counseling, and his report was part of the record at the termination hearing. Mr. Rengifo's evaluation contains his diagnoses of respondent-father and the process by which he evaluated respondent-father. Mr. Rengifo testified that respondent-father did not provide him with the addendum to Dr. Lecci's report and thus had not provided him with all the information necessary for him to make a proper diagnosis. Mr. Rengifo also testified that he did not believe respondent-father had anger issues, but he also stated that he did not see respondent-father enough to make a proper diagnosis. Thus, the trial court's portion of finding of fact 28 that states that Mr. Rengifo opined that respondent-father had anger issues is not supported by the evidence and is disregarded. The remainder of these findings of fact are supported by clear, cogent, and convincing evidence.

Fifth, in finding of fact 36, the trial court stated that there were still ongoing concerns regarding respondent-father's "lack of efforts . . . as well as his anger management, prior termination of parental rights, and lack of mental health treatment." This finding of fact is supported by the testimony provided by a social worker at the termination hearing. The social worker testified that prior to reunification, respondent-father needed to address several issues, including anger management, mental health, and other concerns that had arisen in connection with this

prior termination of parental rights case. The social worker also testified that the only efforts made by respondent-father to access DSS services did not occur until February 2019 or later—which was after DSS filed the petition to terminate respondent-father's parental rights and after Natasha had been in DSS custody for almost two years.

Lastly, finding of fact 53 concerns the trial court taking judicial notice of the underlying case file, the date when DSS was granted custody of Natasha, and Natasha's foster home placement. These facts are supported by the record. The trial court took judicial notice of the underlying case file at the termination hearing without objection. Furthermore, the record demonstrates that Natasha was placed in DSS custody no later than March 2017 and was placed in a pre-adoptive foster home.

Respondent-father next contends that there were insufficient findings of fact with supporting evidence to lead to the conclusion that at the time of the termination hearing he lacked the ability or willingness to establish a safe home for Natasha. We are not persuaded.

The trial court's findings of fact establish that Dr. Lecci evaluated respondent-father in 2014 and made an addendum to his report in 2015. Dr. Lecci diagnosed respondent-father with antisocial personality disorder. This disorder is "marked by extensive lying and a complete disregard for social or moral standards." The trial court found as a fact that a person with antisocial personality disorder is difficult to treat because it is "part of who that person is." The trial court also found that respondent-father's disorder "does not bode well for parenting" and that "[t]he person would place self-interests over the best interests of the child."

Additionally, the trial court found that a person with antisocial personality disorder was unlikely to change and that change would be "unusual" in respondent-father's case due to his "lack of interest in treatment or change." Respondent-father's later conduct, which was consistent with Dr. Lecci's diagnosis, only served to confirm that respondent-father still suffered from antisocial personality disorder. Specifically, after DSS filed the juvenile petition alleging that Natasha was neglected and dependent, respondent-father lied to DSS by providing a false name and date of birth in order to have Natasha placed with him. Furthermore, when respondent-father was evaluated by Mr. Rengifo in 2019, he provided Mr. Rengifo with only part of Dr. Lecci's report. Conspicuously absent from the portion of Dr. Lecci's report that respondent-father provided to Mr. Rengifo was Dr. Lecci's diagnosis of antisocial personality disorder. This exemplifies Dr. Lecci's opinion that because of respondent-father's disorder, "continued and longstanding

dishonesty would be expected." Respondent-father's failure to provide Mr. Rengifo with a full and accurate report is also consistent with another feature of antisocial personality disorder, which is lying in order to present oneself favorably.

Finally, we note the trial court's finding of fact that Mr. Rengifo was unable to discuss a treatment plan with respondent-father because respondent-father cancelled his appointments. These findings of fact are all supported by clear, cogent, and convincing evidence of record, and they fully support the trial court's conclusion that respondent-father lacked the ability or willingness to establish a safe home for Natasha, and that his argument that this conclusion is not supported by the evidence and the findings of fact is without merit.

Respondent-father further argues that the trial court relied solely on an outdated 2014 psychological report to determine that he had antisocial personality disorder and that he could not effectively raise Natasha, and he argues that there was insufficient evidence that he lacked the ability or willingness to provide a safe home for Natasha at the time of the termination hearing. However, even assuming *arguendo* that the diagnosis was stale, the trial court's findings of fact detailed above support its conclusion that respondent-father was unable to provide a safe home for Natasha at the time of the termination hearing. The evidence and findings of fact discussed above demonstrate: (1) the fact that change in respondent-father would be unexpected; (2) his apparent lack of interest in treatment or change; (3) his more recent incidents of deception and dishonesty, which were consistent with his diagnosis; and (4) that his cancellation of appointments resulted in Mr. Rengifo being unable to discuss a treatment plan with him. Therefore, respondent-father's argument that the record evidence and the trial court's findings fail to establish that he lacked the ability to provide Natasha with a safe home at the time of the termination hearing is without merit.

Respondent-father concedes in his brief, and there are numerous supported findings of fact in the record, that his parental rights with respect to another child have been terminated involuntarily by a court of competent jurisdiction. For the reasons discussed above, we further conclude that the record evidence and findings of fact support the trial court's determination that respondent-father lacked the willingness or ability to establish a safe home for Natasha. Accordingly, we hold that the trial court did not err by concluding that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(9) to terminate respondent-father's parental rights.

The trial court's conclusion that a ground for termination existed pursuant to N.C.G.S. § 7B-1111(a)(9) is sufficient in and of itself to support termination of respondent-father's parental rights. *In re T.N.H.*, 372 N.C. at 413, 831 S.E.2d at 62. As such, we need not address respondent-father's arguments regarding N.C.G.S. § 7B-1111(a)(1), (2), and (5). Furthermore, respondent-father does not challenge the trial court's conclusion that termination of his parental rights was in Natasha's best interests. *See* N.C.G.S. § 7B-1110(a). Accordingly, we affirm the trial court's order terminating respondent-father's parental rights.

II. Respondent-Mother

[2] Respondent-mother's sole argument on appeal is that the trial court abused its discretion when it determined that termination of her parental rights was in Natasha's best interests. We disagree.

If the trial court finds a ground to terminate parental rights under N.C.G.S. § 7B-1111(a), it proceeds to the dispositional stage where it must "determine whether terminating the parent's rights is in the juvenile's best interest" based on the following factors:

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

N.C.G.S. § 7B-1110(a). The trial court's assessment of a juvenile's best interest at the dispositional stage is reviewed only for abuse of discretion. *In re D.L.W.*, 368 N.C. at 842, 788 S.E.2d at 167; *In re L.M.T.*, 367 N.C. 165, 171, 752 S.E.2d 453, 457 (2013). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Here, in its termination order, the trial court found as fact:

> 44. That there is a bond between Respondent-Parents and the Juvenile.

45. That the child is strongly bonded with her foster parents who [have] been addressing her medical, emotional, educational and daily needs. Her school attendance has improved as have her grades. She is in the girl scouts and attends church on a weekly basis. She is in the same foster [home] as her sister, who was removed from Respondent-Mother's care at the same time. She is thriving and improving by leaps and bounds.

46. That the foster parents are eager to adopt this minor child.

. . . .

48. That the conduct of Respondent-Parents . . . has been such as to demonstrate that they will not promote the minor child's health, physical and emotional wellbeing and there is a foreseeable likelihood of repetition of neglect of this child. It is in the best interests of [Natasha] that the parental rights of Respondent-Parents and Unknown Father are terminated.

49. That Attorney Advocate Morey Everett moved to introduce into evidence as *Guardian ad Litem's Exhibit "1"*, a detailed report for the Court dated April 8, 2019, prepared by Peter Maloff, Volunteer Guardian ad Litem. Ms. Maloff was present at the time of the entry of *Guardian ad Litem's Exhibit "1"*. No objection was made and said report was received into evidence and considered by the Court on the issue of best interest.

50. That [Natasha] is ten years old. She is bonded with her foster parents, who are eager to adopt her. She is making progress in her current home, which is providing her with a safe and stable environment in which to thrive. The termination of parental rights of the Respondent-Parents and Unknown Father will aid in establishment of the permanent plan of adoption, as this is the only obstacle to adoption at this time.

51. That taking into consideration all of the factors detailed above, that the best interests of [Natasha] would be served by the termination of the parental rights of [respondents], and that those rights are terminated so that the child can be afforded an opportunity for adoption

> and permanence. After twenty-six (26) months in [DSS's] care, the child is no closer to returning home. She is currently in a foster home that is meeting all of her needs with foster parents that are eager to adopt her. Additionally, the child is young, there needs to be a permanent plan for the child, and this family can provide it. Termination of Respondent-Parents' . . . parental rights would help achieve the permanent plan of adoption and provide the permanence this child deserves.

Dispositional findings not challenged by respondent-mother are binding on appeal. *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 65 (2019) (citation omitted). Here, respondent-mother challenges finding of fact 51. However, evidence in the record supports the trial court's finding of fact. The evidence demonstrates that Natasha was removed from respondent-mother's care in February 2017 and the termination hearing was held in March and April of 2019. Therefore, Natasha was not in respondent-mother's care for a span of twenty-six months. Respondent-mother does not contest the trial court's conclusion that grounds existed to terminate her parental rights, and we have determined that grounds existed to terminate respondent-father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(9).

In further support of finding of fact 51, regarding Natasha's foster home, a social worker testified that (1) Natasha had been in the foster home for almost two years, (2) her foster mom "attends to all of [Natasha's] medical needs," (3) her attendance and grades at school were "right back where [they] should be," and (4) "she participate[d] in Girl Scouts." Additionally, the guardian *ad litem*'s report to the trial court indicated that Natasha's foster parents were interested in adopting her. The social worker further testified that (1) the foster home was a stable environment for Natasha, (2) the only remaining obstacle to adoption was termination of respondents' parental rights, and (3) it was in Natasha's best interests that Natasha be adopted by the foster parents. This evidence supports the challenged finding of fact.

The remaining portion of finding of fact 51 contains the trial court's ultimate finding that Natasha's best interests would be served by termination of respondents' parental rights. "[A]n 'ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact' and should 'be distinguished from the findings of primary, evidentiary, or circumstantial facts.' " *In re N.D.A.*, 373 N.C. 71, 76, 833 S.E.2d 768, 773 (2019) (quoting *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491, 57 S. Ct. 569, 574, 81 L. Ed. 755, 762 (1937)). This Court reviews

termination orders "to determine whether the trial court made sufficient factual findings to support its ultimate findings of fact and conclusions of law, regardless of how they are classified in the order." *In re Z.A.M.*, 839 S.E.2d 792, 798 (N.C. 2020).

We initially note that the trial court properly considered the statutory factors set forth in N.C.G.S. § 7B-1110(a) when determining Natasha's best interests. The trial court made uncontested findings of fact that (1) Natasha had a strong bond with her foster parents, (2) the foster parents were providing for Natasha's needs, (3) Natasha was thriving in their care, and (4) termination of respondents' parental rights would aid in the permanent plan of adoption.

The bulk of respondent-mother's argument concerns her claims that the trial court failed to consider: (1) the importance of preserving family integrity; (2) the "devastating affect" that termination of respondents' parental rights would have on Natasha; and (3) the fact that respondent-father was "perfectly capable of providing a stable and loving home for Natasha." We disagree.

While the stated policy of the Juvenile Code is to prevent "the unnecessary or inappropriate separation of juveniles from their parents," N.C.G.S. § 7B-100(4) (2019), "the best interests of the juvenile are of paramount consideration by the court and . . . when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a *safe, permanent home within a reasonable amount of time*." N.C.G.S. § 7B-100(5) (emphasis added); *see also In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 251 ("[T]he fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody [is] that the best interest of the child is the polar star."). Thus, while preserving family integrity is an appropriate consideration in the dispositional phase of the termination hearing, the best interests of the juvenile remain paramount.

Here, the trial court also found that respondents' conduct demonstrated that they would not promote Natasha's health, physical, and mental well-being. The trial court further found, after consideration of all the statutory factors, that Natasha was no closer to returning home than she was on the day she entered into DSS's care. Meanwhile, a family who was meeting all of her needs was willing to adopt her and provide her with permanence. Thus, the trial court could properly conclude based on its dispositional findings of fact that preserving family integrity was not in Natasha's best interests.

The remainder of respondent-mother's arguments are contingent on respondent-father's retention of his parental rights. However, because we have already determined that the trial court properly terminated respondent-father's parental rights, these arguments lack merit. We therefore hold that the trial court's conclusion that termination of respondent-mother's parental rights was in Natasha's best interests did not constitute an abuse of discretion.

Conclusion

We conclude that the trial court correctly determined that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(9) to terminate respondent-father's parental rights. We further conclude that the trial court did not abuse its discretion by determining that termination of respondent-mother's parental rights was in Natasha's best interests. Accordingly, we affirm the trial court's order terminating respondents' parental rights.

AFFIRMED.

IN THE MATTER OF R.A.B.

No. 402A19

Filed 17 July 2020

Termination of Parental Rights—no-merit brief—sexual abuse of child

The termination of a father's parental rights was affirmed where his counsel filed a no-merit brief and the termination was based on his sexual abuse of the child. The termination order was based on clear, cogent, and convincing evidence supporting the statutory grounds for termination.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review orders entered on 11 July 2019 by Judge Regina M. Joe in District Court, Moore County. This matter was calendared for argument in the Supreme Court on 19 June 2020 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Jerry D. Rhoades, Jr. for petitioner-appellees.

Edward Eldred for respondent-appellant father.

NEWBY, Justice.

Respondent-father appeals from the trial court's 11 July 2019 adjudication and disposition orders terminating his parental rights to the minor child R.A.B. (Rose).[1] Counsel for respondent-father has filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude the issue identified by counsel in respondent-father's brief as arguably supporting the appeal is meritless and therefore affirm the trial court's orders.

On 3 February 2014, a Catawba County grand jury indicted respondent-father based on criminal conduct against Rose, including one count of first-degree rape of a child, four counts of taking indecent liberties with a child, and three counts of first-degree sexual offense with a child. Rose's mother was charged with taking indecent liberties with a child. DSS had already filed a juvenile petition, and on 10 March 2014, Rose was adjudicated an abused and neglected juvenile. DSS received custody of Rose. On 20 October 2014, the trial court entered an order ceasing reunification efforts with both parents and setting the permanent plan for Rose as adoption. On 4 December 2014, DSS placed Rose with petitioners. On 18 December 2015, petitioners were granted guardianship of Rose with the parents' consent.

On 24 February 2017, respondent-father was convicted by a jury of first-degree rape of a child, four counts of taking indecent liberties with a child, and three counts of first-degree sexual offense with a child. Respondent-father appealed to the North Carolina Court of Appeals, and the Court of Appeals found no error in defendant's conviction for rape but reversed defendant's remaining convictions and remanded for resentencing. *State v. Blankenship*, 259 N.C. App. 102, 814 S.E.2d 901 (2018), *disc. review denied*, 372 N.C. 295, 827 S.E.2d 98 (2019).

On 2 October 2018, petitioners filed a petition to terminate respondent-father's parental rights. Rose's mother had previously relinquished her parental rights and consented to adoption and thus was not named as a party. Petitioners alleged that respondent-father had raped and sexually assaulted Rose and that grounds existed to terminate his parental rights for abuse and/or neglect. *See* N.C.G.S. § 7B-1111(a)(1) (2019).

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

Following a hearing held on 16 May 2019, the trial court entered orders on 11 July 2019 terminating respondent-father's parental rights.

On 31 July 2019, respondent-father gave timely notice of appeal pursuant to N.C.G.S. §§ 7A-27(a)(5) and 7B-1001(a1)(1), but improperly designated the Court of Appeals as the court to which appeal was being taken. On 19 November 2019, respondent-father filed a petition for writ of certiorari seeking review of the trial court's orders. On 19 December 2019, petitioners moved to dismiss respondent-father's appeal. On 20 December 2019, we granted respondent-father's petition for writ of certiorari and denied petitioners' motion to dismiss the appeal.

Counsel for respondent-father has filed a no-merit brief on his client's behalf under Rule 3.1(e) of the Rules of Appellate Procedure. In his brief, counsel identified one issue that could arguably support an appeal, but also stated why he believed the issue lacked merit. Counsel has advised respondent-father of his right to file *pro se* written arguments on his own behalf and provided him with the documents necessary to do so. Respondent-father has not submitted written arguments to this Court.

We carefully and independently review issues identified by counsel in a no merit brief filed pursuant to Rule 3.1(e) in light of the entire record. *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). After conducting this review, we are satisfied the trial court's 11 July 2019 orders are supported by clear, cogent, and convincing evidence and based on proper legal grounds. Accordingly, we affirm the trial court's orders terminating respondent-father's parental rights.

AFFIRMED.

IN RE S.M.M.

[374 N.C. 911 (2020)]

IN THE MATTER OF S.M.M.

No. 299A19

Filed 17 July 2020

1. Termination of Parental Rights—remand from appellate court—motion to reopen evidence—trial court's discretion—mere speculation

In a termination of parental rights case on remand from the Court of Appeals for dispositional findings on the juvenile's likelihood of adoption, the trial court did not abuse its discretion by denying the mother's motion to reopen the evidence. The Court of Appeals left the decision whether to take new evidence on remand to the trial court's discretion; further, the mother's motion offered mere speculation rather than a forecast of relevant evidence bearing upon the juvenile's best interests.

2. Termination of Parental Rights—dispositional evidence—bifurcated hearings—not required

The trial court in a termination of parental rights case was not required to conduct a separate dispositional hearing where it heard dispositional evidence with adjudicatory evidence and applied the correct evidentiary standards to each.

3. Termination of Parental Rights—likelihood of adoption—findings—evidentiary support

In a termination of parental rights case, the trial court's findings of fact regarding the juvenile's likelihood of adoption—including her mental health, her behavioral issues, and her biological family being an obstacle to stability—were supported by competent evidence and properly complied with the Court of Appeals' remand instructions.

4. Termination of Parental Rights—best interests of the child—likelihood of adoption—abuse of discretion analysis

The trial court did not abuse its discretion by concluding that termination of a mother's parental rights was in her daughter's best interests where the court's dispositional findings addressed all the relevant criteria required by N.C.G.S. § 7B-1110(a). As required by the Court of Appeals' mandate in a prior opinion in the matter, the trial court properly considered the daughter's likelihood of adoption—concluding that a necessary condition to adoptability was

the stability and closure that could result only from termination of her mother's parental rights, and recognizing the possibility that the daughter may never achieve adoptability.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 30 April 2019 by Judge Christy E. Wilhelm in District Court, Cabarrus County. This matter was calendared for argument in the Supreme Court on 19 June 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Hartsell & Williams, PA, by H. Jay White and Austin "Dutch" Entwistle III, for petitioner-appellee Cabarrus County Department of Human Services.

Womble Bond Dickinson (US) LLP, by Jacob S. Wharton and Ryan H. Niland, for appellee Guardian ad Litem.

Mercedes O. Chut for respondent-appellant mother.

EARLS, Justice.

Respondent appeals from an order terminating her parental rights to her minor child, S.M.M. (Sarah).[1] We hold the trial court properly complied with the Court of Appeals' mandate on remand from *In re S.M.M.*, 822 S.E.2d 329, 2019 N.C. App. LEXIS 13, 2019 WL 190200 (N.C. Ct. App. 2019) (unpublished), and the court's conclusion that termination of respondent's parental rights is in Sarah's best interests does not constitute an abuse of discretion.

The Cabarrus County Department of Human Services (CCDHS) obtained non-secure custody of Sarah and filed a petition alleging she was a neglected juvenile on 5 November 2015.[2] After a hearing on 14 April 2016, the trial court entered an order adjudicating Sarah to be a neglected juvenile and continuing her in CCDHS custody. On 30 May 2017, CCDHS filed a motion in the cause to terminate

1. The minor child will be referred to throughout this opinion as "Sarah," which is a pseudonym used to protect the child's identity and for ease of reading.

2. A full recitation of the underlying factual and procedural history of this case can be found in the Court of Appeals' opinion in *In re S.M.M.*, 822 S.E.2d 329, 2019 N.C. App. LEXIS 13, 2019 WL 190200.

respondent's parental rights to Sarah based on the grounds of neglect, failure to make reasonable progress, failure to pay a reasonable portion of the cost of Sarah's care, dependency, and abandonment. *See* N.C.G.S. § 7B-1111(a)(1)–(3), (6)–(7) (2019). The trial court entered an order terminating respondent's parental rights on 9 April 2018, concluding the grounds alleged by CCDHS existed and termination was in Sarah's best interests. Respondent appealed, and the Court of Appeals affirmed the trial court's adjudication of grounds based on neglect but reversed the court's best interests determination. *In re S.M.M.*, 822 S.E.2d 329, 2019 N.C. App. LEXIS 13, 2019 WL 190200. The Court of Appeals concluded the trial court's dispositional findings of fact did not address Sarah's likelihood of adoption, *see* N.C.G.S. § 7B-1110(a)(2) (2019), which was placed at issue by testimony at the hearing from a social worker and from Sarah's guardian *ad litem* (GAL). The Court of Appeals remanded for the trial court to make findings of fact on this statutory factor. *In re S.M.M.*, 2019 N.C. App. LEXIS 13, at *13, 2019 WL 190200, at *5.

On remand, respondent filed a motion to reopen the evidence to present additional evidence of Sarah's likelihood of adoption, including evidence of the changes in her and Sarah's circumstances since the original termination hearing. After a 28 March 2019 hearing on the motion to reopen evidence, the trial court denied the motion by order entered 23 April 2019.

The trial court entered its amended order terminating respondent's parental rights on 30 April 2019. The court made multiple new findings of fact regarding Sarah's likelihood of adoption and again concluded termination of respondent's parental rights was in Sarah's best interests. Respondent appeals.

[1] We first address respondent's argument that the trial court abused its discretion in denying her motion to reopen the evidence. Respondent contends the trial court could not comply with the mandate from the Court of Appeals without reopening the evidence, because the trial court could not make the necessary findings on Sarah's adoptability without considering her circumstances at the time of the remand hearing. Additionally, respondent contends the trial court was required to reopen the evidence despite the Court of Appeals' mandate leaving it to the trial court's discretion because "[w]henever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of that child *must be heard and considered* by the trial court, subject to the discretionary powers of the trial court to exclude cumulative testimony." *In re Shue*, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984) (emphasis added). Respondent argues

the Court of Appeals remanded the matter to the trial court for a new best interests determination, which thus required the trial court to hear any additional evidence proffered by the parties.

Contrary to respondent's assertion, the trial court was not required to reopen evidence on remand on the facts of this case. It is well established that the mandate of an appellate court "is binding upon [the trial court] and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered." *Lea Co. v. N.C. Bd. of Transp.*, 323 N.C. 697, 699, 374 S.E.2d 866, 868 (1989) (alteration in original) (quoting *D & W, Inc. v. Charlotte*, 268 N.C. 720, 722, 152 S.E. 2d 199, 202 (1966)). The mandate of the Court of Appeals required the trial court to make findings of fact regarding Sarah's likelihood of adoption, a factor that must be considered in determining the best interests of a juvenile when terminating parental rights, *see* N.C.G.S. § 7B-1110(a)(2), and about which particular findings of fact must be made when conflicting evidence places the factor at issue. *See, e.g.*, *In re A.U.D.*, 373 N.C. 3, 10–11, 832 S.E.2d 698, 702–03 (2019) (holding that a trial court is not required to make written findings concerning factors set out in section 7B-1110(a) in the absence of conflicting evidence relating to the factor in question). The Court of Appeals here held that the evidence at the original hearing placed the likelihood of adoption factor at issue, but the trial court failed to make the requisite findings of fact. *In re S.M.M.*, 2019 N.C. App. LEXIS 13, at *13, 2019 WL 190200, at *5.

The Court of Appeals remanded the matter for the sole purpose of allowing the trial court to make the required findings, *id.*, not for a new dispositional hearing where the court would have been required to hear any relevant evidence as to Sarah's best interests. *Shue*, 311 N.C. at 597, 319 S.E.2d at 574. The Court of Appeals did note that "[t]he trial court retains the discretion to supplement its order as it sees fit, so long as it complies with the statute." *In re S.M.M.*, 2019 N.C. App. LEXIS 13, at *13, n3, 2019 WL 190200, at *5, n3. However, the opinion was silent as to whether the trial court should take new evidence on remand and, therefore, the Court of Appeals left that decision to the trial court's sound discretion. *See, e.g.*, *In re J.M.D.*, 210 N.C. App. 420, 428, 708 S.E.2d 167, 173 (2011) ("Whether on remand for additional findings a trial court receives new evidence or relies on previous evidence submitted is a matter within the discretion of the trial court." (quoting *Hicks v. Alford*, 156 N.C. App. 384, 389, 576 S.E.2d. 410, 414 (2003))).

Most significantly, although respondent made general representations about the degree to which all children change between the ages

of 10 and 12, nothing in respondent's motion identified any specific circumstances or forecast any particular changes in Sarah's life that would have any bearing on the question of the likelihood of her adoption. Mere speculation that some facts may have changed in the eighteen months since the court originally heard the evidence is not sufficient to demonstrate that the trial court abused its discretion in denying respondent's motion to reopen the evidence on remand. Absent any forecast of relevant testimony or other evidence bearing upon the Court's ultimate determination of the child's best interests, the trial court's decision to refrain from reopening the record is entirely consistent with this Court's general admonition that a trial court must always hear any relevant and competent evidence concerning the best interests of the child. *See In re Shue*, 311 N.C. at 597, 319 S.E.2d at 576. In this case there was simply no further relevant and competent evidence to be heard by the trial court on remand.

The trial court was able to make the required findings concerning the likelihood of Sarah's adoption from the evidence presented at the original hearing. The new findings satisfy the mandate of the Court of Appeals, and we hold the trial court did not abuse its discretion in denying respondent's motion to reopen the evidence.

[2] Respondent further contends the trial court never conducted a dispositional hearing and thus, never received proper dispositional evidence. However, the hearing transcript shows the trial court heard dispositional evidence from a CCDHS social worker and the GAL and received the GAL's dispositional report into evidence. Although the dispositional evidence was intertwined with adjudicatory evidence, a trial court is not required to bifurcate the hearing into two distinct stages. *See*, *e.g.*, *In re R.B.B.*, 187 N.C. App. 639, 643–44, 654 S.E.2d 514, 518 (2007) ("[A] trial court may combine the N.C.G.S. § 7B-1109 adjudicatory stage and the N.C.G.S. § 7B-1110 dispositional stage into one hearing, so long as the trial court applies the correct evidentiary standard at each stage and the trial court's orders associated with the termination action contain the appropriate standard-of-proof recitations."), *disc. review denied*, 362 N.C. 235, 659 S.E.2d 738 (2008).

[3] We next address respondent's challenges to the trial court's findings of fact regarding Sarah's likelihood of adoption and her argument that the trial court abused its discretion in assessing Sarah's best interests.

In determining whether termination of parental rights is in the best interests of a juvenile:

> The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2019). A trial court's best interests determination "is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. at 6, 832 S.E.2d at 700 (citing *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016)). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 6–7, 832 S.E.2d at 700–01 (modification omitted) (quoting *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015)). "[O]ur appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. 101, 110–11, 316 S.E.2d 246, 252–53 (1984).

On remand, the trial court amended its order terminating respondent's parental rights to include the following findings of fact regarding Sarah's likelihood of adoption:

> 4. There is a high likelihood of adoption once the juvenile can get stable, but she cannot be stable until she has closure regarding her relationship with her biological family. The juvenile needs permission to not feel guilty and to move forward and to allow herself to be loved by someone that can care for her appropriately.

5. Although the Juvenile struggles with transition, she is also in the process of stepping down from her current treatment program. When there are changes in her environment it causes the juvenile some stress and anxiety, which comes out in her behaviors.

6. The Juvenile has moderate mental health needs, based on a diagnosis of post-traumatic stress disorder and disruptive mood dysregulation disorder. The juvenile is extremely guarded. She is eleven years old and has endured years of injurious environment and neglect and exposure to substance abuse, domestic violence, and for her to be able to process that trauma that she has been through, she needs closure and as long as the biological family is in the picture, she feels split. Her loyalties are divided and she doesn't know how she should feel and she has expressed multiple times that it is her fault that she is in foster care.

7. The juvenile needs a little bit more stability before the conversation about adoption can occur. She has only been in this placement for a month and a half, and the juvenile and the foster parents need time to develop a bond before a discussion can be had. In addition, the Juvenile needs closure to allow for her to develop a bond because she is so guarded.

8. The plan to find the juvenile an adoptive home would be to start with the current placement and see if they are interested in keeping the juvenile. Once parents' rights are terminated, if there is not an identified adoptive home, CCDHS would complete adoption recruitment on behalf of the juvenile, including building a child profile, detailing the child's likes, dislikes, their needs, and it is submitted to NC Kids. NC Kids is a state website and also feeds into Adopt U.S. Kids, a national website to recruit for families. Pre-placement assessments for interested families would go to CCDHS and a team reviews them to determine which is the best placement for the child, and then the child would be placed in that home on a trial basis.

9. If an adoptive home is not located, the juvenile remains in CCDHS [custody] and they would continue to recruit to find an adoptive home for the juvenile. If the juvenile

> reaches the age of eighteen and is not adopted, the juvenile can transition into the LINKS program at CCDHS which helps teens transition into adulthood and develop necessary life skills.

Respondent first argues finding of fact four is erroneous. She contends the finding implies Sarah's only obstacle to stability was her relationship with her biological family, which is not supported by the evidence. She argues the evidence established that "closure" meant more than just severance from her biological family and included being able to process past trauma. She additionally contends the evidence regarding stability and closure for Sarah was only discussed in the context of whether termination of parental rights was in Sarah's best interests, and not specifically whether Sarah had a likelihood of adoption. Respondent further argues that without additional findings of fact as to what constitutes "stability" for Sarah and whether she would be able to obtain stability before reaching the age of majority, the likelihood of adoption is unknown.

Finding of fact four does not state that Sarah's relationship to her family was the *only* barrier to her ability to achieve stability in her life, but rather that severing the relationship was a necessary precondition to achieving it. The finding also does not suggest that "closure" for Sarah meant only the severance of parental rights. Finding of fact four is fully supported by testimony from the social worker, who testified, "the likelihood of adoption is high once we get [Sarah] stable, but she cannot be stable until she has closure." The social worker further testified:

> [Sarah] has endured years and years of an injurious environment and neglect and exposure to substance abuse, domestic violence, and for her to be able to process that trauma that she has been through, she needs closure. And as long as biological family are in the picture, . . . she's split and her loyalties are divided and she doesn't know how she should feel, and she's expressed to me multiple times that, "It is my fault that I'm in foster care. I should have never said anything." And so she needs that closure in order to . . . allow for her to develop a bond, because she's so guarded right now.

Furthermore, the trial court was not required to make findings of fact showing Sarah will attain the necessary stability to be adopted. *See*, *e.g.*, *In re Norris*, 65 N.C. App. 269, 275, 310 S.E.2d 25, 29 (1983) ("It suffices to say that . . . a finding [of adoptability] is not required in order

to terminate parental rights."), *cert. denied*, 310 N.C. 744, 315 S.E.2d 703 (1984). Section 7B-1110 does not require the trial court to set forth detailed findings establishing the benchmarks a traumatized child must meet to obtain the necessary stability to be adopted. The court had only to make findings of fact addressing Sarah's likelihood of adoption.

Respondent next contends finding of fact five minimizes Sarah's mental health and behavioral issues and creates an inaccurate perception that her conditions have improved enough to enable her to "step down" from her current therapeutic placement. Respondent argues there is no evidence Sarah was stepping down from her current treatment program, was only experiencing stress and anxiety, or was making progress toward her transition.

Respondent, however, ignores the social worker's testimony that Sarah was "in the process of stepping down from her current treatment program and I think that's causing some stress and anxiety, which is coming out in her behavior." The social worker testified a more permanent and stable environment would help Sarah, and Sarah's current foster parents, who are participating in her therapeutic care, were willing to keep fostering her as she is stepped down to a lower level of care so that she does not have to make another disruptive transition. Contrary to respondent's interpretation, this finding does not state Sarah is only experiencing stress or indicate her progress in making the transition. The finding also does not minimize Sarah's mental health and behavioral issues and acknowledges her struggles with transition as a result of her issues.

Respondent also argues finding of fact six implies that Sarah's mental health diagnoses caused her guarded and conflicted behavior and that her mental health and behavioral issues will go away if parental rights are terminated. The finding that Sarah is "extremely guarded" holds no such implication. The statement is supported by testimony from the social worker and carries no improper implication merely because the relevant testimony followed the social worker's identification of Sarah's specific mental health diagnoses.

Respondent appears to suggest the trial court should have made additional findings regarding the nature of Sarah's disruptive behaviors. However, a trial court is only required to make findings of fact necessary to resolve material issues. *See*, *e.g.*, *Carpenter v. Carpenter*, 225 N.C. App. 269, 271, 737 S.E.2d 783, 785 (2013) ("[T]he trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute." (citation omitted)). The nature of Sarah's mental health

and behavioral issues was not in dispute, and the trial court was not required to make findings on those issues.

Respondent further argues finding of fact seven takes the social worker's testimony out of context and creates an inaccurate impression that all Sarah needed to gain "stability" was termination of parental rights. We conclude the finding is fully supported by the social worker's testimony. The finding states that Sarah needs more stability before a "conversation about adoption can occur," not that stability will automatically cause Sarah to develop a bond with her potential adoptive parents. The trial court's finding merely indicates stability and closure will *assist* Sarah in attaining her permanent plan of adoption, not that adoption is guaranteed. We agree with respondent that there is no evidence the foster parents are open to adopting Sarah. The record instead establishes that Sarah needs more stability and closure before CCDHS initiates that conversation with Sarah and her foster parents.

Respondent also argues the trial court's finding of fact that it "accepted the [GAL's] court report into evidence, as it relates to the best interests of the child" is erroneous because it does no more than recite the evidence. Respondent takes issue with numerous statements in the report and the report's failure to discuss other aspects of the case. Respondent appears to believe the trial court's finding adopted the report's findings as its own, however, the finding simply acknowledges for the record that the report had been admitted into evidence for dispositional purposes. The court did not adopt the report's findings as its own, and we do not treat the report's findings as anything more than evidence in the case.

We hold the above challenged findings of fact are supported by competent record evidence and are binding on appeal. *See Montgomery*, 311 N.C. at 110–11, 316 S.E.2d at 252–53. Respondent does not challenge the remaining dispositional findings of fact, and they are thus binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.").

Next, respondent argues the trial court did not comply with the remand instructions from the Court of Appeals, because its findings do not resolve what respondent contends is a conflict between the testimony of the social worker and the GAL over whether there is a "high likelihood" that Sarah will be adopted. Respondent asserts that the amended findings ignore the GAL's report altogether and, as argued above, are erroneous.

However, nothing in the remand order actually states that the two slightly different assessments are irreconcilable or determinative of whether termination of respondent's parental rights is in Sarah's best interests. The Court of Appeals remanded this matter for the trial court to address Sarah's likelihood of adoption, *see* N.C.G.S. § 7B-1110(a)(2) (2019), which it held was placed at issue due to testimony from a social worker and from Sarah's GAL. *In re S.M.M.*, 2019 N.C. App. LEXIS at *13, 2019 WL 190200 at *5. The social worker's testimony that she thought "the likelihood of adoption is high once we get [Sarah] stable, but she cannot be stable until she has closure" and that "[Sarah] needs a little bit more stability before we can have that conversation [about adoption,]" is not contradicted by the GAL's written report, which stated "[t]he likelihood of adoption is good." *Id.* The amended findings set forth above find Sarah to have a high likelihood of adoption and, as discussed above, are supported by competent evidence. The findings therefore complied with the Court's remand instructions.

[4] Respondent lastly argues the trial court abused its discretion in concluding termination of her parental rights is in Sarah's best interests. Respondent contends the court's findings do not support its conclusion and its conclusion is not the result of a reasoned decision because the court failed to include an analysis of Sarah's actual likelihood of adoption and possibility that termination of respondent's parental rights will render Sarah a "legal orphan."

However, the trial court's dispositional findings of fact on remand address all the relevant criteria required by N.C.G.S. § 7B-1110(a). The findings establish that Sarah has a likelihood of adoption only if she obtains stability in her life and closure with the traumas of her past, which cannot be obtained absent the termination of respondent's parental rights. The findings make clear that the trial court recognized Sarah may never achieve the necessary stability and closure to be adopted, but it is well established that a likelihood of adoption is not necessary for a court to conclude termination of parental rights is in a juvenile's best interests. *See*, *e.g.*, *Norris*, 65 N.C. App. at 275, 310 S.E.2d at 29.

The trial court's order shows a well-reasoned weighing of Sarah's adoptability and the obstacles thereto, along with her age, lack of appropriate bond with respondent, and need for permanency. Accordingly, we hold the trial court did not abuse its discretion in concluding that termination of respondent's parental rights was in Sarah's best interests, and we affirm the trial court's order.

AFFIRMED.

IN RE W.I.M.

[374 N.C. 922 (2020)]

IN THE MATTER OF W.I.M.

No. 431A19

Filed 17 July 2020

Termination of Parental Rights—personal jurisdiction—amended petition—new summons

The trial court properly exercised personal jurisdiction over a father in a termination of parental rights (TPR) case where the Health and Human Services Agency (HHSA)—after discovering a jurisdictional defect in its original TPR petition—filed an amended petition and served the father with a new summons. The new summons and petition constituted new filings initiating a second TPR proceeding. Thus, although HHSA's failure to obtain the issuance of an alias and pluries summons or an endorsement of the original summons would have discontinued the first proceeding, it had no effect on jurisdiction in the second proceeding.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review orders entered on 31 May 2019 by Judge Monica H. Leslie in District Court, Haywood County. This matter was calendared for argument in the Supreme Court on 19 June 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Rachael J. Hawes, Agency Attorney, for petitioner-appellee Haywood County Health and Human Services Agency.

Matthew D. Wunsche, GAL Appellate Counsel, for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellant father.

MORGAN, Justice.

By virtue of orders entered on 28 February 2020, this Court dismissed respondent-father's pending appeal and allowed his petition for writ of certiorari to review two orders of the trial court terminating his parental rights to W.I.M. (Wesley),[1] a juvenile born in July 2010. Because

1. We use this pseudonym to protect the juvenile's identity and for ease of reading.

we find no merit in respondent's argument that the trial court lacked personal jurisdiction to proceed against him in this matter, we affirm the trial court's orders.

On 24 January 2017, the Haywood County Health and Human Services Agency (HHSA) removed Wesley and two of his half-siblings from their mother's care and took the juveniles into nonsecure custody due to their mother's ongoing substance abuse, her failure to provide proper care and supervision for the children, and her unsanitary and hazardous home environment to which she exposed them. HHSA also filed a juvenile petition alleging that Wesley was abused, neglected, and dependent. The juvenile petition identified respondent as Wesley's father and alleged that respondent was currently in custody serving a sentence for habitual impaired driving with a projected release date of 2 July 2017.

The trial court adjudicated Wesley to be a neglected juvenile on 14 March 2017 and ordered that HHSA maintain him in nonsecure custody. Since respondent had "expressed his desire to parent his son," the trial court directed HHSA to develop a case plan for respondent and to determine whether respondent had access to programs while incarcerated that would be appropriate for him. The trial court ordered respondent to comply with the case plan that was developed for him and to cooperate with HHSA. The trial court further ordered that upon respondent's release from custody, he must submit to random drug screens, undergo mental health and substance abuse assessments, comply with any related treatment recommendations, obtain and maintain stable housing and employment, and successfully complete parenting classes.

Respondent was released from incarceration on 2 July 2017 and was initially cooperative with HHSA. As a result, at the ninety-day review hearing, *see* N.C.G.S. § 7B-906.1(a) (2019), the trial court awarded respondent one hour per week of supervised visitation with Wesley and established a permanent plan of reunification with a concurrent plan of guardianship with a relative or court-approved caretaker. After visiting with Wesley on 20 September 2017, however, respondent absconded from his probation for another criminal conviction. HHSA was unable to contact respondent after 27 September 2017. Accordingly, following a permanency planning review hearing on 10 January 2018, the trial court ceased efforts at reunification with respondent and changed Wesley's permanent plan to reunification with his mother with a concurrent plan of guardianship.

On 23 July 2018, due to the mother's continued substance abuse issues and her overall lack of progress with her case plan, the trial court ceased all reunification efforts with the mother and changed the permanent plan for Wesley to adoption with a concurrent plan of guardianship. HHSA filed a petition to terminate the parental rights of both respondent and Wesley's mother on 21 September 2018. A summons was issued on 21 September 2018 and subsequently served on respondent by a deputy of the Caldwell County Sheriff's Office on 3 October 2018.

Respondent filed an answer to the petition for termination on 30 October 2018, accompanied by a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim for which relief may be granted under N.C.G.S. § 1A-1, Rule 12(b)(1), (6) (2019). In his motion to dismiss, respondent asserted that the petition for termination was not properly verified as required by N.C.G.S. § 7B-1104 because the verification was made on behalf of a *former* director of HHSA by his authorized agent. *See generally In re T.M.H.*, 186 N.C. App. 451, 454, 652 S.E.2d 1, 2 ("[A] violation of the verification requirement of N.C.G.S. § 7B-1104 has been held to be a jurisdictional defect *per se*."), *disc. review denied*, 362 N.C. 87, 657 S.E.2d 31 (2007).

On 9 November 2018, HHSA filed a "Motion to Amend Petition for Termination of Parental Rights" along with an amended petition for termination verified by the current HHSA director through his authorized agent. The trial court allowed the motion by order entered 19 November 2018. The trial court's order directed HHSA to file its amended petition for termination once it was "finalized for filing" and to serve it on respondent "by regular personal service, and/or through [his] Counsel of record." HHSA filed its amended petition for termination on 27 November 2018. A new summons was issued on 27 November 2018. Respondent was personally served with the new summons and amended petition for termination by a deputy of the Haywood County Sheriff's Office on 4 December 2018.

Respondent filed an answer to the amended petition for termination on 31 December 2018 along with a motion to quash the summons that was issued on 27 November 2018. In his motion to quash, respondent claimed that the 27 November 2018 summons was "null, void and of no effect" based on the following:

> 2. The [c]ourt allowed [HHSA] to amend the [p]etition, rather than file anew.
>
> 3. [HHSA] amended the [p]etition and served the same with a successive [s]ummons.

4. The successive summons is not marked an alias and pluries summons, nor does it contain information to support an alias and pluries summons.

Respondent's answer again denied the material allegations in the amended petition for termination.

The trial court addressed respondent's motion to quash at a hearing on 15 April 2019. Counsel for respondent explained the motion to quash as follows:

> [COUNSEL]: Your Honor, our motion is to quash a successive summons that was issued with the amended petition. We—*we were served with the original petition and original summons* and filed a motion to dismiss that. The underlying reason was the verification was bad. The court was—the court allowed the department to amend rather than filing a new—than telling them to start over in effect. That left the original summons outstanding. There can only be one original summons in a case and there was a summons attached to the amended petition which was not noted to be an alias and pluries summons and I won't try to remember which is the difference between alias and pluries but it doesn't contain the information necessary for that. We believe that that successive summons should be quashed if it's not valid under the theory that there can only be one original summons. The reason we're moving that is because we—we think that *if there's a need for an appeal that the appellate counsel will want to raise the subject matter jurisdiction and this is to protect that ground[ ] of appeal.*

(Emphases added.) The trial court denied respondent's motion to quash, finding that "the [a]mended [s]ummons and [p]etition[ ] were not a successive summons such that would require an alias and pluries summons . . . [but] were new filings, as allowed by the Order of the Court on November 19, 2018."

The trial court then proceeded with the hearing on HHSA's amended petition for termination on 15 and 16 April 2019. The trial court adjudicated the existence of three grounds for termination of respondent's parental rights: neglect, willful failure to make reasonable progress, and dependency. *See* N.C.G.S. § 7B-1111(a)(1), (2), (6) (2019). The trial court went on to consider the dispositional factors in N.C.G.S. § 7B-1110(a) and concluded that the termination of respondent's parental rights was

in Wesley's best interests. The adjudicatory order and dispositional order terminating respondent's parental rights to Wesley were entered by the trial court on 31 May 2019.

Respondent argues that the trial court had no personal jurisdiction over him for purposes of the termination-of-parental-rights proceeding. He contends that he was not served with a valid summons related to HHSA's amended petition for termination because (1) the summons issued on 27 November 2018 was not in the form of an alias or pluries summons as required by N.C.G.S. § 1A-1, Rule 4(d)(2) (2019), and (2) HHSA did not obtain either an endorsement of the original 21 September 2018 summons within ninety days pursuant to N.C.G.S. § 1A-1, Rule 4(d)(1), or an enlargement of the period for serving the original summons pursuant to N.C.G.S. § 1A-1, Rule 6(b) (2019).

As an initial matter, we note that the trial court characterized the new summons and amended petition which it directed HHSA to file pursuant to the trial court's 19 November 2018 order as "new filings." On 27 November 2018, the amended petition for termination was filed and the new summons was issued. While the essential purpose of the use of an endorsement or the issuance of an alias and pluries summons is to maintain an original action in order to toll the period of an applicable statute of limitations, no such consideration is invoked in this case. Even if HHSA had failed to obtain an endorsement upon either the original or new summons, or had failed to obtain the issuance of an alias and pluries summons, the only effect of any such failure would have been the resulting discontinuance of the original termination proceeding. *Lackey v. Cook*, 40 N.C. App. 522, 526, 253 S.E.2d 335, 337 (1979) (citing, *inter alia*, *Webb v. Seaboard Air Line R. Co.*, 268 N.C. 552, 151 S.E.2d 19 (1966)). Consequently, the result of HHSA's filing of the amended petition and the issuance of the new summons would have been the initiation on 27 November 2018 of a new termination proceeding. N.C.G.S. § 1A-1, Rule 4(e). However, due to the trial court's allowance of the filing of the amended petition and the issuance of the new summons, coupled with the lack of a contention by respondent that a termination petition filed on 27 November 2018 by HHSA involving his parental rights to Wesley would be time-barred, any failure of HHSA to preserve the operation of the original summons by endorsement or the issuance of the alias and pluries summons would not impact the trial court's authority to exercise personal jurisdiction over respondent. Respondent has not otherwise directed our attention to any alleged defect in the service of the 27 November 2018 summons upon him, or the content of it.

Upon careful review, we conclude that respondent waived any objection to the trial court's exercise of personal jurisdiction over him. The record before this Court shows that respondent filed an answer to HHSA's amended petition for termination and made a general appearance without raising the issue of personal jurisdiction either in his 30 October 2018 motion to dismiss or his 31 December 2018 motion to quash. *See* N.C.G.S. § 1A-1, Rule 12(b)(2), (h)(1) (2019); *In re K.J.L.*, 363 N.C. 343, 346, 677 S.E.2d 835, 837 (2009) ("Even without a summons, a court may properly obtain personal jurisdiction over a party who consents or makes a general appearance, for example, by filing an answer or appearing at a hearing without objecting to personal jurisdiction." (citing *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996)). Respondent asserts in his brief that "he meant personal jurisdiction" when he argued at the 15 April 2019 hearing that the trial court was without "subject matter jurisdiction." His assertion is belied by the written record, however, and is thus unavailing.[2] *See generally State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) ("This Court has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.' " (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)).

Respondent does not raise any claim of error with regard to the trial court's adjudication of grounds for the termination of his parental rights or its conclusion that terminating his parental rights is in Wesley's best interests. We therefore affirm the trial court's orders.

AFFIRMED.

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2. Respondent's 30 October 2018 motion to dismiss alleged as grounds for dismissal only that "the [c]ourt lacks subject matter jurisdiction for lack of a proper verification" and that HHSA's petition for termination "does not state a claim for which relief may be granted, because the factual allegations are not properly under oath." The motion to dismiss cited only Rule 12(b)(1) and (6) of the Rules of Civil Procedure as authority, making no mention of Rule 12(b)(2) regarding its reference to "[l]ack of jurisdiction over the person." N.C.G.S. § 1A-1, Rule 12(b)(2). While respondent's 31 December 2018 motion to quash averred that he had "previously moved the [c]ourt to dismiss based on lack of subject matter jurisdiction *and personal jurisdiction*," this averment's representation as to personal jurisdiction has no support in the record. (Emphasis added.)

APPENDIXES

PORTRAIT CEREMONY OF
CHRISTIE SPEIR CAMERON ROEDER,
CLERK OF COURT

COVID-19 ORDERS

BUSINESS COURT RULES

STATE BAR STANDING COMMITTEES
AND BOARDS

STATE BAR STANDING COMMITTEES
AND BOARDS

STATE BAR STANDING COMMITTEES
AND BOARDS

CERTIFICATION OF PARALEGALS

JUDICIAL STANDARDS FORMAL
ADVISORY OPINION, 2020-01

RULES OF THE JUDICIAL
STANDARDS COMMISSION

RULES OF MEDATION FOR MATTERS BEFORE
THE CLERK OF SUPERIOR COURT

RULES OF MEDIATION FOR MATTERS IN
DISTRICT CRIMINAL COURT

RULES FOR MEDIATED SETTLEMENT
CONFERENCES AND OTHER SETTLEMENT
PROCEDURES IN SUPERIOR COURT
CIVIL ACTIONS

RULES FOR SETTLEMENT PROCEDURES IN
DISTRICT COURT FAMILY FINANCIAL CASES

STANDARDS OF PROFESSIONAL CONDUCT
FOR MEDIATORS

ADVISORY COMMISSION ON PORTRAITS

PORTRAIT PRESENTATION
OF

Christie Speir Cameron Roeder

Clerk of Court
Supreme Court of North Carolina
1991 - 2016, 2017 - 2018

11:00 A.M.
MARCH 12, 2020

SUPREME COURT OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

Christie Speir Cameron Roeder
Supreme Court of North Carolina

Ms. Roeder was born in Bethel, North Carolina, to David and Betty Speir. She attended undergraduate and law school at the University of North Carolina at Chapel Hill. Ms. Roeder was the President of the Student Body at North Pitt High School and a member of the Phi Beta Kappa honorary society at Chapel Hill.

Upon graduation from law school, Ms. Roeder was employed as a research assistant to the Honorable John Webb at the North Carolina Court of Appeals from 1979-1981. In September of 1981, she was appointed as the Assistant Appellate Division Reporter for the Supreme Court of North Carolina. In 1984, Ms. Roeder was hired to head the Real Estate Department of Wyrick, Robbins, Yates and Ponton.

Ms. Roeder was appointed Clerk of the Supreme Court of North Carolina in April of 1991 where she served until May 31, 2016 and was asked to return from retirement for five months from October 2017 until March 2018. Ms. Roeder and her staff were credited with creating one of the first Case Management Systems for any court and with creating the first statewide appellate electronic filing system in the nation. Ms. Roeder was intent on seeking ways to make practicing before the Court and receiving information about the casework of the Court easier for anyone – whether they resided in Raleigh or in the far reaches of the State.

While Clerk of the Supreme Court, Ms. Roeder was President of the National Conference of Appellate Court Clerks (NCACC), recipient of the NCACC's J.O. Sentell Award, President of the Wake County and 10th Judicial District Bars, and a Counsel of State Governments' Toll Fellow. She received the Court's Amicus Curiae Award, the North Carolina State Bar's John B. McMillian Distinguished Service Award, and the Order of the Long Leaf Pine.

Other civic activities have included: Chair, North Carolina Child Advocacy Institute; Chair, Triangle Transit Authority; Vice Chair, North Carolina Railroad; Chair, Board of Directors of the North Carolina Museum of History Associates; Chair, Parent's Panel of the North Carolina Task Force on Excellence in Secondary Education, and member of the Board of Directors of the North Carolina Board of Corrections, the North Carolina Museum of Natural Sciences, Phi Beta Kappa Society of Wake County, and Kid's Voting of Wake County. Ms. Roeder has also been a member of several Legislative Study Commissions.

Ms. Roeder is married to Richard D. Roeder, and her children are David Price and his wife, Leah, and John Price, and his wife, Grace. Her step-children are Gabrielle Cameron, Lindsay Roeder and Kyle Roeder. She has two step-grandchildren, Owen and Jaysie.

Sounding of the Gavel
AMY FUNDERBURK
CLERK OF THE SUPREME COURT

Invocation
JOYCE MCFARLAND

Welcome
CHIEF JUSTICE CHERI BEASLEY

Presentation of the Portrait
FRANKLIN E. FREEMAN
RETIRED ASSOCIATE JUSTICE OF THE
SUPREME COURT OF NORTH CAROLINA

Thank You Remarks
CHRISTIE SPEIR CAMERON ROEDER

Unveiling of the Portrait
JOHN & DAVID PRICE

Adjournment
AMY FUNDERBURK
CLERK OF THE SUPREME COURT

A reception with light refreshments to follow
on the first floor of the Supreme Court

Portrait Artist
Rebecca Patman Chandler

Rebecca Patman Chandler studied at the Ringling School of Art, Pennsylvania School of Fine Arts and the Italian Academy of Fine Arts in Rome. She is represented by Portrait South and galleries in North Carolina. She has had 25 shows in her 40-year career, and her paintings and portraits are in private collections and institutions throughout the USA. Ms. Chandler has received numerous awards in both oils and watercolors. She has won awards in the Watercolor Society of North Carolina and the American Pastel Society at the National Arts Club Gallery in New York, and she has exhibited with the Oil Painters of America. Her work is represented in the Encyclopedia of Watercolor Techniques and Painting Beautiful Paintings from Photographs published in England.

An experienced teacher, Ms. Chandler has taught many workshops in figure painting, portraiture, landscape and still life. She returns periodically to teach at La Romita, an art school in Umbria, Italy.

Ms. Chandler previously painted the portrait of Chief Justice Joseph Branch.

★★★

Chief Justice

Cheri Beasley

Associate Justices

Paul M. Newby

Robin E. Hudson

Sam J. Ervin, IV

Michael R. Morgan

Anita Earls

Mark Davis

★★★

OPENING REMARKS
BY CHIEF JUSTICE CHERI BEASLEY

In a moment, I will invite Justice Franklin Freeman to give remarks. But first, I would like to take a few moments to express my personal gratitude and admiration for Christie. In her twenty-five years of service as Clerk, Christie made an indelible mark on this Court as an institution and on the lives of those of us who were privileged to work with her.

In her time here, Christie saw twenty Associate Justices begin their service on this bench, and six Chief Justices. Each of us came to the bench with our own priorities and our own ideas of how this Court should be run. We represented differing backgrounds, ideologies, and political affiliations, and Christie worked with each of us to make sure the Supreme Court of North Carolina was doing its work for the people of this State with the efficiency and fairness the people expect.

Christie was devoted in her service to the people of this State. She maintained a fantastic relationship with the State Bar, and she took on leadership roles in national Clerk's organizations. She had her finger on the pulse of trends in court practices nationwide, and she was able to think broadly about this Court and its needs. It was under Christie's steady guidance that we were able to begin e-filing in the Supreme Court, a practice that put our Court—for a time—at the forefront of technological innovation nationally. Christie's knowledge of Court practices and tradition was so vast, and her contributions so appreciated, that we often affectionately referred to her as "the eighth justice."

Christie's influence on our Court was not merely professional, however. She also frequently brought us together socially. After every ceremonial session of Court, Christie invited the entire Supreme Court staff to her home for a chili supper as a way to thank them for their participation in the event. We all cherished those opportunities to gather informally, and we all benefitted immensely from the collegiality and fellowship fostered by those events.

I am so pleased to have had the opportunity to work with and learn from Christie and so glad to have the opportunity to celebrate her today.

REMARKS BY JUSTICE (RET.) FRANKLIN E. FREEMAN

MAY IT PLEASE THE COURT

Christine (Christie) St. Clair Spier was born in Bethel, North Carolina on February 12, 1954 to Betty Smith Spier and David Ordway Spier, who had married on June 10, 1950 following their graduation from Duke University. She was the second of two daughters born to Betty and David, having been preceded by her sister, who is present here today, Caroline Grace, on December 30, 1951. Her mother's roots in North Carolina trace back to the late 1600s. Her father's roots in the United States trace back to the early 1700s. Each parent brought a rich history of public service and engagement in the affairs of government and community to their union, undoubtedly contributing markedly to Christie's lifelong interest in government, public, and community service.

Betty Maude Smith was born in Bethel, North Carolina on March 3, 1928 to Carolyn Pollock Smith and William Jasper Smith. Both of her parents were from prominent eastern North Carolina families who had been residents of the state for eight generations or more.

W. Jasper Smith was a leading manufacturer, public servant, and Methodist layman in Pitt County and eastern North Carolina. His family had lived in Martin and Pitt counties since the early 1700s. He was president of Bethel manufacturing, chairman of the Pitt county commissioners, one of the major founders of North Carolina Wesleyan College in Rocky Mount North Carolina, and the college's first business manager. Jasper's father, William Jordan Smith, moved to Bethel in 1909 to form and to establish a cotton gin and a lumber mill. Until his untimely death on September 3, 1930, when he was killed in automobile and train accident, he served as a Pitt county commissioner and earlier as Bethel town Councilman.

The family of Carolyn Pollock Smith is one of the oldest in North Carolina. The family progenitor, Thomas Pollock, came to the state on June 27, 1683 as deputy to Lord Carteret, one of the eight lords proprietors who oversaw the Carolinas for the King of England, Charles II. Between that day and his death on August 30, 1722, he amassed over 50,000 acres of property on the Chowan, Trent, and other rivers in northeastern North Carolina, served almost continuously as a member of the colonies executive Council, and was twice governor; first from September 12, 1712 to May 1714 and then again from March 30, 1722 until his death on August 30 of that year. His descendent, Carolyn's father, James Basil Pollock, was a banker during the Great Depression

in Trenton North Carolina and saw to it that every depositor of his bank who lost their money was made whole before he died.

These two families distinguished public service lead Betty Smith Spier, who is here with us today, to engage in a lifetime of active public and political service. For 30 years she taught in the public schools of Pitt County and thereafter continued her service and education by serving as the founder and Director of the Pitt County Educational Foundation. Early on she became engaged in the political affairs of the county and state, serving successively as president of the Pitt County Democratic Women in the mid -1960s, vice chair of the Pitt County Democratic executive committee, and then became the first woman to be elected chairperson of the Pitt County Democratic Party in 1973. She served in that role until 1976, followed by service as vice chair of the state Democratic Party and then Chairman of the state Democratic Party in 1980. She was a delegate to the 1980 Democratic national convention. She has served on numerous state boards and commissions including as a member of the Governors Crime Commission from 1978 to 1982, as a member thereafter of the State Board of Education for six years, and as a member of the East Carolina University board of trustees from July 1, 1995 to June 30, 2003.

David Ordway Spier was born in Summit, New Jersey on May 26, 1922 to Walter Snowdon Spear and Grace Dean Spear. He grew up in Madison, New Jersey where Walter was the mayor for a number of years, and Southern Pines, North Carolina. During World War II, he served in the 1885th Engineer Aviation Battalion of the United States Army and was stationed in Guam and Okinawa. Following the war, he attended Duke University, where he met Betty. After their graduations, they were married in 1950. Before his death on June 18, 2012, David served as president of Bethel Manufacturing Company, and on numerous boards and commissions in Pitt County including the county development commission, the Memorial hospital Board, and as president of the Pitt County United fund in 1968. He was an active and devout Methodist, serving as District Lay leader and chair of the Pensions Board of the North Carolina Conference of the United Methodist Church. He was a scoutmaster of the Boy Scouts of America in Bethel. An early ancestor, John Henry Spier, served as a colonel in the Revolutionary War and was honorably discharged by George Washington, returning thereafter to Boston to resume his law practice.

To know from whence someone has come helps us understand how they got to where they are and the stops made along the way. Such is the case with Christie. From an early age she showed that she was going

to follow in her family's footsteps of education, community and church service, and participation in public affairs. In 1970 at age 16 she was selected by then Governor Bob Scott to attend the White House conference on children and youth. In 1971 she was elected president of the North Pitt High School Student Body. While a student at North Pitt her academic achievements led her to be selected for membership in the National Honor Society. This academic achievement continued in her studies at the University of North Carolina at Chapel Hill from which she graduated Phi Beta Kappa with a bachelor of arts in 1976. Thereafter, she graduated from that University's School of Law in 1979 with a Juris Doctor's degree.

Following law school, she continued her interest in the academic pursuit of the law by serving from 1979 to 1981 as a research assistant to then Court of Appeals Judge John Webb, who later joined this court as an associate justice in 1986. That was followed by a three-year stent from 1981 to 1984 as the assistant appellate division reporter for North Carolina. Having been engaged in some form of academic and legal study for eight years, she changed the direction of her legal career in 1984 and joined one of Raleigh and North Carolina's finest law firms, Wyrick, Robbins, Yates, and Ponton. There, she was tasked with developing a real estate department for the law firm assuming this position when loan closing packages began to become the complex traded instruments they are today. Through working closely with mortgage companies and relocation services, she created a real estate section in the law firm which grew from infancy to handling the most loan closings of any firm in the area. During those years from 1979 to 1991, she followed in the footsteps of her parents and grandparents by becoming involved in the civic and government affairs of Wake county and North Carolina. From 1979 to 1984 she was a member of the North Carolina Board of Corrections. She was appointed in 1989 to the Triangle Transit Authority and continued service on this increasingly important Authority until 1998. She served as treasurer of that body from 1989 to 1991, secretary in 1992, vice chairperson in 1993, and chair in 1994. From 1989 to 1991 she served as a member of the North Carolina Legislative Study Commission on Neurologically Impaired Infants. She became a member of the North Carolina Museum of Natural Sciences Board of Directors in 1990 and continued service there until 1993. Also in 1990, and reflecting her grandfather Smith's commitment to the Methodist Church, she became a member of the board of trustees of Raleigh's largest Methodist church, Edenton Street, and served in that role until 1995. All of this legal experience and civic involvement caught the eye of the North Carolina Supreme Court in 1991, when the Court was looking for a new clerk.

Since the election of William Robards as the first Supreme Court Clerk on January 4, 1819, all 14 of the courts clerks, 13 in Raleigh and one in Morganton during the 14 years the court met there from 1847 to 1861, had been male. This 172 year domination was shattered in April of 1991 when Christie was elected by the Court as its first female clerk and sworn in on April 17, 1991, the 14th clerk located in Raleigh and the 15th overall. For the next 25 years that office was led by this learned, innovative, hardworking, diplomatic, and positive woman.

Courts, and particularly appellate courts, are often slow to change. There is nothing unusual about this because appellate courts are naturally imbued with and guided by the principles of stare decisis and tradition. In 1991, this court was no exception to those rules. Christie soon began to work collaboratively and collegially with the Court, the Bar of North Carolina and her staff to implement modern court management principles. In 1992 she directed the creation of a case management system for the court. In 1998 she initiated and supervised the implementation of the first statewide appellate court electronic filing site in the nation. The case management system she had directed in 1992 was then integrated with the electronic filing system. Through calendaring and process changes, she helped eliminate the backlog of cases brought to the Court through appeals of right. She initiated a team approach to handling the business of the Clerk's office. She assisted in the creation of a style manual, website changes, and phone procedures which helped pro se litigants and first time appellate attorneys. She streamlined the appellate Printing Department that serves both the Supreme Court and the Court of Appeals. In managing the technology department for both courts, Christie challenged and encouraged the staff to continuously work toward innovations that made the Court's technology more efficient and equitable in the processing of cases for the courts and the litigants. On a national basis, she conceived of and implemented the creation of the National Conference of Appellate Technology Officials in 2000 and served as a member of the national advisory board for the court services division of the National Center for State Courts from 1997 to 2006. On a state basis, she assisted in the development and funding of the North Carolina Supreme Court Historical Society. Her innovations and changes to the Court's business practices helped make North Carolina's Supreme Court one of the most efficient and effective in the United States. That work, coupled with her national leadership, lead in 2010 to Christie receiving the prestigious J. O. Sentell award from the National Conference of Appellate Court Clerks, a body she served as president of in 2002-03.

During her 25 years as the Clerk of this Court, Christie continued her commitment to her State and community. For 15 years, from 1999 to 2014, she served as a member of the Board of Directors of the North Carolina Railroad including serving as vice chair of the board from 2009 to 2014. She served as president of the Board of Directors of the North Carolina Museum of History Associates in 2014 and 2015 and on the North Carolina Child Advocacy Institute board from 1991 to 1998 including service as secretary and then chair of the board from 1992 to 1997. Importantly, Christie continued her family's long time commitment to the Methodist Church by serving on the Edenton Street United Methodist Church administrative board from 1999 to 2003. And in 2011, she was recognized for her leadership capabilities by her peers when she was elected president of the then 4500 member 10th Judicial District and Wake County Bar Association.

The many duties and responsibilities Christie held during her 25 years as clerk of the Supreme Court stand as a testament to her characteristics of innovation, hard work and versatility. Those characteristics admirable as they are, only partially describe Christy. People like her former employees who knew her well and intimately describe her caring, her compassion, and her outgoing, positive attitude. How many of us who know her can identify her entrance into an office or room, without even seeing who it is, by her trademark, cheerful greeting of "Yoohoo"? One of her employees describe her as a, "kind and giving boss who would bend over backwards to help you". This commitment to kindness and helping reflected the way she ran the office and expected everyone else in the office to do the same. One new employee once remarked to her that she could not believe how nice everyone in the office was. Christie's response speaks volumes about her. It was; "This is the Supreme Court, the last chance for people. It is hard for them to get here and therefore we need to be nice regardless."

Those who have worked with her or know her, know how convincing she can be. This ability was on full display when she worked with the Court in 2013 to help convince the Court to take the unprecedented action of allowing the partial filming of a Hollywood movie, Homeland, in this courtroom.

Christie is a modest person and rarely says anything about her work, service or achievements. The one thing, in addition to her family, that I have heard her state she was proud of was at the age of 16 she applied for and received a $10,000 grant from the federal government to build a park for the half of Bethel's children that did not have one. The living family she is so proud of includes her mother, Betty; her sister, Caroline

(Candy) Grace ; her two sons, David Craig Price, who is 38, and his wife, Leah; John Harvey Price, who is 37 and his wife, Grace; her husband, Rick Roeder, and three stepchildren: stepson, Kyle Roeder, who is 30; stepdaughter, Lindsay Roeder, who is 27; and 30 year old Gabrielle Cameron, daughter of her late husband and my great and dear friend of over 35 years, Dallas Cameron, who served this Court for over 25 years as Assistant Director and Director of the Administrative Office of the Courts. All are here today.

Of the sixteen former clerks of this Court, only four have been previously honored with the presentation of a portrait to the Court. The first portrait to be presented was that of the sixth clerk of the court, Thomas S. Kenan, who served as clerk from 1886 to 1911. His portrait was presented on December 15, 1914, following his death. That presentation was followed by a presentation of the portraits of the third clerk of the supreme Court, Edmond B. Freeman, who served from 1843 to 1868, the fifth clerk, William Henry Bagley, who served from 1869 to 1886, and that of the longest serving Clerk of the Supreme Court, Adrian Jefferson Newton, who served as the 11th clerk of the Court from 1941 to 1976. His was the most recent portrait to be presented in a court ceremony on March 4, 1977.

Twenty-five years ago, it was my honor to present to this Court the portrait of the late Chief Justice Susie Sharp. At that ceremony, I related one of Chief Justice Sharp's favorite stories. It regarded her first jury case, conducted in the 1920's before women were allowed to serve on juries or serve as court personnel. Thus, on that day, she was the only woman in the courtroom. The attorney on the opposite side was a famous Northwest North Carolina attorney and orator of the old school, Allen D. Ivie, Junior. As he commenced his presentation to the jury, Mr. Ivie said, "Gentleman of the jury, the presence of sweet womanhood in this courtroom today rarefies the atmosphere". Concluding my presentation of Chief Justice Sharp's portrait, I said, "This portrait of Chief Justice Sharp presented today will rarefy the atmosphere of this courtroom". Today, twenty five years later, as I now present to this Court the portrait of the first female Clerk of the Supreme Court, Christie Spier Cameron Roeder, I conclude by saying that this portrait will rarefy the atmosphere of the Supreme Court Clerk's office.

ORDER IN RESPONSE TO THE COVID-19 OUTBREAK

On 13 March 2020, the Chief Justice issued an order pursuant to N.C.G.S. § 7A-39(b) with two emergency directives deemed necessary to the continuing operation of essential trial court functions. On 19 March 2020, the Chief Justice issued an order extending time and periods of limitation for documents and papers due to be filed and acts due to be done in the trial courts. The Chief Justice's orders were in response to the public health threat posed by the COVID-19 outbreak and were intended to reduce the spread of infection in courthouses throughout the state.

Now, pursuant to Article IV, Section 13(2) of the Constitution of North Carolina, the Court grants relief to those with business before the appellate courts as follows:

1. **Extension of Time**. Deadlines imposed by the Rules of Appellate Procedure that fall between 27 March 2020 and 30 April 2020, inclusive of those endpoints, are hereby extended for 60 days.

2. **Electronic Filing Encouraged**. All parties are encouraged to file their documents and papers electronically at https://www.ncappellatecourts.org/. Until further notice, all document types may be filed electronically in the appellate courts, including the printed record on appeal in Court of Appeals cases.

3. **Credit for Secure-Leave Periods**. Attorneys with secure leave periods in the appellate courts during the months of April 2020 or May 2020 are hereby credited back those secure-leave periods. Attorneys who prefer to keep their secure-leave periods during those months must contact the Clerk of the Supreme Court for assistance.

Parties in need of other emergency relief in the appellate courts should make an appropriate application.

Additional orders in response to the COVID-19 outbreak will be entered as circumstances may warrant.

Ordered by the Court in Conference, this the 27th day of March, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of March, 2020.

s/Amy L. Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER IN RESPONSE TO THE COVID-19 OUTBREAK

Since 13 March 2020, the Chief Justice has issued a series of orders pursuant to N.C.G.S. § 7A-39(b) with extensions of time, extensions of periods of limitation, and other emergency directives that were deemed necessary to the continuing operation of essential trial court functions. The Chief Justice's orders were issued in response to the public health threat posed by the COVID-19 outbreak and were intended to reduce the spread of infection in courthouses throughout the state.

On 27 March 2020, this Court issued an order in response to the COVID 19 outbreak, which extended deadlines imposed by the Rules of Appellate Procedure, encouraged electronic filing in the appellate courts, and credited back secure-leave periods in the appellate courts during the months of April 2020 and May 2020. In that order, the Court emphasized that additional relief in response to the COVID-19 outbreak would be forthcoming if circumstances warranted it.

On 30 April 2020, the Chief Justice formed the COVID-19 Task Force for the Judicial Branch and directed the task force to submit recommendations for additional emergency directives and operational changes that would ensure the continued functioning of the North Carolina court system. The task force submitted its initial recommendations to the Chief Justice on 7 May 2020.

After considering the task force's initial recommendations and the current circumstances in our state, additional relief from this Court is now warranted. Accordingly, pursuant to Sections 7A-10.1 and 7A-34 of the General Statutes of North Carolina, the Court hereby orders the following:

1. **Temporary Modification of the Clerk of Superior Court's Duty Under Rule 2(b) of the General Rules of Practice**. Until the Chief Justice determines that catastrophic conditions no longer exist statewide, notwithstanding Rule 2(b) of the General Rules of Practice, the clerk of superior court's duty to publish and distribute the calendar is timely performed if the clerk publishes and distributes the calendar no later than two weeks prior to the first day of court.

2. **Temporary Modification to the Allowance of Secure-Leave Periods Under Rule 26(b) of the General Rules of Practice.** Notwithstanding Rule 26(b)(1) of the General Rules of Practice, between 1 July 2020 and 31 December 2020, an attorney may enjoy three different secure-leave periods for any purpose regardless of the number of secure-leave periods enjoyed by the attorney between 1 January 2020 and 30 June 2020.

3. **Temporary Modification to the Attendance Requirement in Rule 2 of the Rules of Continuing Judicial Education**. Notwithstanding Rule 2 of the Rules of Continuing Judicial Education, during the educational biennium beginning on 1 July 2019 and ending on 30 June 2021, a judge or justice may attend approved continuing legal or judicial education programs remotely.

Additional orders in response to the COVID-19 outbreak will be entered as circumstances may warrant.

Ordered by the Court in Conference, this the 14th day of May, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 14th day of May, 2020.

s/Amy L. Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER AMENDING THE NORTH CAROLINA BUSINESS COURT RULES

Pursuant to Section 7A-34 of the General Statutes of North Carolina, the Court hereby amends Rule 11 and Appendix 1 of the North Carolina Business Court Rules.

* * *

Rule 11. Mediation

11.1. Mandatory mediation. All mandatory complex business cases and cases assigned to a Business Court judge pursuant to Rule 2.1 of the General Rules of Practice are subject to the ~~Revised Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions~~Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions. Although these statewide mediation rules require participation in a mediation utilizing a certified mediator unless the Court orders otherwise on a showing of good cause, the parties may engage in multiple mediated settlement conferences before the same or different mediators.

11.2. Selection and appointment of mediator. The parties should attempt to select a mediator by agreement. The Case Management Report should contain either the parties' agreement or, in the absence of an agreement, each party's nominee of a certified mediator for appointment by the Court. If all parties cannot agree on a mediator, then the Court will appoint a mediator from the list of certified mediators maintained by the North Carolina Dispute Resolution Commission.

11.3. Report of mediator. Within ten days of the conclusion of the mediation, the mediator must mail or e-mail a copy of his or her report to the Court, in addition to filing the report with the Clerk of Superior Court in the county of venue.

11.4. Notification of settlement. The parties are encouraged to keep the Court apprised of the status of settlement negotiations and should notify the Court promptly when the parties have reached a settlement.

* * *

Appendix 1. Notice of Designation Template

STATE OF NORTH CAROLINA COUNTY OF _____ JOHN DOE, Plaintiff, v. ABC CORPORATION, Defendant.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION CIVIL ACTION NO.: **NOTICE OF DESIGNATION**

Pursuant to N.C.G.S. § 7A-45.4, [INSERT PARTY] seeks to designate the above-captioned action as a mandatory complex business case. In good faith and based on information reasonably available, [INSERT PARTY], through counsel, hereby certifies that this action meets the criteria for:

_____ Designation as a mandatory complex business case pursuant to N.C.G.S. § 7A-45.4(a), in that it involves a material issue related to:

_____ (1) Disputes involving the law governing corporations, except charitable and religious organizations qualified under N.C.G.S. § 55A-1-40(4) on the grounds of religious purpose, partnerships, and limited liability companies, including disputes arising under Chapters 55, 55A, 55B, 57D, and 59 of the General Statutes.

_____ (2) Disputes involving securities, including disputes arising under Chapter 78A of the General Statutes.

_____ (3) Disputes involving antitrust law, including disputes arising under Chapter 75 of the General Statutes that do not arise solely under N.C.G.S. § 75-1.1 or Article 2 of Chapter 75 of the General Statutes.

_____ (4) Disputes involving trademark law, including disputes arising under Chapter 80 of the General Statutes.

_____ (5) Disputes involving the ownership, use, licensing, lease, installation, or performance of intellectual property, including computer software, software applications, information technology and systems, data and data security, pharmaceuticals, biotechnology products, and bioscience technologies.

_____ ~~(6)~~(8) Disputes involving trade secrets, including disputes arising under Article 24 of Chapter 66 of the General Statutes.

_____ ~~(7)~~(9) Contract disputes in which all of the following conditions are met:

(a) At least on e plaintiff and at least one defendant is a corporation, partnership, or limited liabilitycompany, including any entity authorized to transact business in North Carolina under Chapter 55, 55A, 55B, 57D, or 59 of the General Statutes.

(b) The complaint asserts a claim for breach of contract or seeks a declaration of rights, status, or other legal relations under a contract.

(c) The amount in controversy computed in accordance with N.C.G.S. § 7A-243 is at least one million dollars ($1,000,000).

(d) All parties consent to the designation. [If all parties have not consented, indicate that the Notice of Designation is conditional pursuant to BCR 2.5.]

_____ Designation as a mandatory complex business case pursuant to N.C.G.S. § 7A-45.4(b), in that it is an action:

_____ (1) Involving a material issue related to tax law that has been the subject of a contested tax case for which judicial review is requested under N.C.G.S. § 105-241.16, or a civil action under N.C.G.S. § 105-241.17 containing a constitutional challenge to a tax statute.

_____ (2) Described in subsection (1), (2), (3), (4), (5), or (8) of N.C.G.S. § 7A-45.4(a) in which the amount in controversy computed in accordance with N.C.G.S. § 7A-243 is at least five million dollars ($5,000,000).

Briefly explain why the action falls within the specific categories checked above and provide information adequate to determine that the case has been timely designated (e.g., dates of filing or service of the complaint or other relevant pleading). If necessary, include additional information that may be helpful to the Court in determining whether this case is properly designated a mandatory complex business case.

Attach a copy of all significant pleadings filed to date in this action (e.g., the complaint and relevant pending motions).

[INSERT DATE AND SIGNATURE BLOCKS]

* * *

These amendments to the North Carolina Business Court Rules become effective on 1 March 2020.

These amendments shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 26th day of February, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 26th day of February, 2020.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING STANDING COMMITTEES AND BOARDS OF THE STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 25, 2019.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning standing committees and boards of the State Bar, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0900, Procedures for the Administrative Committee

.0903 Suspension for Failure to Fulfill Obligations of Membership

(a) Procedures for Enforcement of Obligations of Membership

. . .

(b) Notice

Whenever it appears that a member has failed to comply, in a timely fashion, with an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute, the secretary shall prepare a written notice directing the member to show cause, in writing, within 30 days of the date of service of the notice why he or she should not be suspended from the practice of law.

(c) Service of the Notice

The notice shall be served on the member by mailing a copy thereof by registered or certified mail or designated delivery service (such as Federal Express or UPS), return receipt requested, to the last known address of the member contained in the records of the North Carolina State Bar or such later address as may be known to the person attempting service. Service of the notice may also be accomplished by (i) personal service by a State Bar investigator or by any person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process, or (ii) email sent to the email address of the member contained in the records of the North Carolina State Bar if the member sends an email from that same email address to the State Bar acknowledging

such service. **A member who cannot, with reasonable diligence, be served by registered or certified mail, designated delivery service, personal service, or email shall be deemed served upon publication of the notice in the State Bar *Journal*.**

NORTH CAROLINA

WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 25, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of February, 2020.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 26th day of February, 2020.

s/Cheri L. Beasley
Cheri L. Beasley, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 26th day of February, 2020.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING STANDING COMMITTEES AND BOARDS OF THE STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 25, 2019.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning standing committees and boards of the State Bar, as particularly set forth in 27 N.C.A.C. 1D, Section .1700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1700, The Plan of Legal Specialization

.1720 Minimum Standards for Certification of Specialists

(a) To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the board for the particular area of specialty.

(1) The applicant must be licensed in a jurisdiction of the United States for at least five years immediately preceding his or her application and must be licensed in North Carolina for at least three years immediately preceding his or her application. The applicant must be currently in good standing to practice law in this state and the applicant's disciplinary record with the courts, the North Carolina State Bar, and any other government licensing agency must support qualification in the specialty.

(b) . . .

(d) Upon written request of the applicant and with the recommendation of the appropriate specialty committee, the board may for good cause shown waive strict compliance with the criteria relating to substantial involvement, continuing legal education, or peer review, as those requirements are set forth in the standards for certification for specialization. However, there shall be no waiver of the requirements that the applicant pass a written examination ~~and~~ **or of the minimum years of practice requirements set out in paragraph (a)(1) above** ~~be licensed to practice law in North Carolina for five years preceding the application~~.

NORTH CAROLINA

WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 25, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of February, 2020.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 26th day of February, 2020.

s/Cheri L. Beasley
Cheri L. Beasley, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 26th day of February, 2020.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING STANDING COMMITTEES AND BOARDS OF THE STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 25, 2019.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning standing committees and boards of the State Bar, as particularly set forth in 27 N.C.A.C. 1D, Section .2600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .2600, Certification Standards for the Immigration Law Specialty

.2605 Standards for Certification as a Specialist in Immigration Law

Each applicant for certification as a specialist in immigration law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in immigration law:

(a) Licensure and Practice . . .

. . .

(e) Examination - The applicant must pass a written examination designed to test the applicant's knowledge, skills, and proficiency in immigration law. The examination shall be in written form and shall be given **either** annually **or every other year as the Board deems appropriate**. The examination shall be administered and graded uniformly by the specialty committee.

NORTH CAROLINA

WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 25, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of February, 2020.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 26th day of February, 2020.

s/Cheri L. Beasley
Cheri L. Beasley, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 26th day of February, 2020.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CERTIFICATION OF PARALEGALS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 24, 2020.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

.0119 Standards for Certification of Paralegals

(a) To qualify for certification as a paralegal, an applicant must pay any required fee, and comply with the following standards:

(1) Education or Work Experience. The applicant must have earned one of the following requirements:

(A) an associate's, bachelor's, or master's degree from a qualified paralegal studies program;

(B) a certificate from a qualified paralegal studies program and an associate's or bachelor's degree in any discipline from any institution of post-secondary education that is accredited by an accrediting body recognized by the United States Department of Education (an accredited US institution) or an equivalent degree from a foreign educational institution if the degree is determined to be equivalent to a degree from an accredited US institution by an organization that is a member of the National Association of Credential Evaluation Services (NACES) or the Association of International Credentials Evaluators (AICE); ~~or~~

(C) a juris doctorate degree from a law school accredited by the American Bar Association; or

(D) a high school diploma or equivalent plus five years of experience (comprising 10,000 work hours) as a legal assistant/paralegal or paralegal educator and, within the

twelve months prior to the application, completed one hour of CLE on the topic of professional responsibility. Demonstration of work experience may be established by sworn affidavit(s) from the lawyer(s) or other supervisory personnel who has knowledge of the applicant's work as a legal assistant/paralegal during the entirety of the claimed work experience.

(2) National Certification. If an applicant has obtained and thereafter maintains in active status at all times prior to application (i) the designation Certified Legal Assistant (CLA)/Certified Paralegal (CP) from the National Association of Legal Assistants; (ii) the designation PACE-Registered Paralegal (RP)/Certified Registered Paralegal (CRP) from the National Federation of Paralegal Associations; or (iii) another national paralegal credential approved by the board, the applicant is not required to satisfy the educational or work experience standard in paragraph (a)(1).

(3) Examination. The applicant must achieve a satisfactory score on a written examination designed to test the applicant's knowledge and ability. The board shall assure that the contents and grading of the examinations are designed to produce a uniform minimum level of competence among the certified paralegals.

NORTH CAROLINA

WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 2020.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of February, 2020.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 26th day of February, 2020.

s/Cheri L. Beasley
Cheri L. Beasley, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 26th day of February, 2020.

s/Mark A. Davis
For the Court

JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2020-01

April 9, 2020

QUESTION:

Under what circumstances may a judge participate in truancy court programs created by local school districts?

CONCLUSION:

While judges may attend school programs to generally educate parents and students about truancy-related issues and court processes, judges should not participate as volunteer "judges" in school-sponsored truancy intervention programs in which the judge engages directly with specific at-risk families, appears to "preside" over dockets, or participates as a member of a "truancy team" to assist a particular family or review the details of truancy issues in specific cases. Judges also should avoid any participation that suggests that the judge is exercising any official judicial duties as part of the program or is compelling attendance in the program, such as by sending a "summons" or other notices to families directing them to appear in court or elsewhere for school-sponsored programs.

DISCUSSION:

Canon 4 provides generally that a judge may engage in outside quasi-judicial activities, including those relating to the educational system. Canon 4A through 4C describe generally the types of permissible quasi-judicial activities, including speaking, writing, lecturing and teaching (Canon 4A), appearing at public hearings or consulting with officials (Canon 4B), and serving on the boards of civic, charitable or governmental entities (Canon 4C). Because judges have a duty to hear and decide cases, however, they must avoid civic activities that would require frequent disqualification or would otherwise reasonably call into question the judge's ability to be fair and impartial. As such, Canon 4 places limits on a judge's quasi-judicial activities and requires that such activities may be undertaken "subject to the proper performance of the judge's judicial duties" and only if such activities "do not cast substantial doubt on the judge's capacity to decide impartially any issue that may come before the judge." On a more general level, Canon 2A also requires that judges conduct themselves "at all times in a manner the promotes public confidence in the integrity and impartiality of the judiciary." To further ensure that judges are perceived as impartial, Canon 3C requires judges to recuse themselves in cases in which their impartiality may

reasonably be questioned, including where the judge has "personal knowledge of disputed evidentiary facts concerning the proceedings" (Canon 3C(1)(a)) or where the judge "has been a material witness" concerning the matter in controversy (Canon 3C(1)(b)). Finally, under Canon 2B, judges are also prohibited from using the prestige of the judicial office to advance or promote the interests of non-judicial entities, which would include programs promoted by local school districts no matter how beneficial to the community.

In keeping with these rules, judges should not participate in truancy intervention programs in which the judge is expected to meet individually with parents, school counselors, prosecutors and others to evaluate the facts and develop strategies to address that specific family's truancy issues. This includes "presiding" over informal truancy dockets in schools or courtrooms or otherwise appearing as a "judge" when meeting with families outside of official court proceedings. Having such personal involvement with a particular case would require disqualification in that case if it eventually resulted in a juvenile, criminal or other proceeding involving those family members. In addition, judges should not create the appearance that they are acting with official authority in participating in truancy intervention programs established in local school districts. This includes not only "presiding" over school-sponsored truancy meetings while wearing a judicial robe, but also issuing a "summons" or other notice on behalf of the program to direct families to appear at truancy mediations, hearings or meetings. Nothing in this opinion is intended to suggest that truancy intervention programs do not serve beneficial community interests, nor does it preclude volunteer participation by judges to educate parents and students in group settings about court processes and procedures involved in truancy matters, nor does it preclude a judge from serving in an advisory capacity for such programs generally. Those activities are permissible under Canon 4A and Canon 4B.

References:
Canons 1, 2A, 2B, 3C, 4, 4A, 4B and 4C of the North Carolina Code of Judicial Conduct.

ORDER APPROVING THE RULES OF THE JUDICIAL STANDARDS COMMISSION

Pursuant to subsection 7A-375(g) of the General Statutes of North Carolina, the Court hereby approves the Rules of the Judicial Standards Commission, which appear on the following pages. These rules supersede the Rules of the Judicial Standards Commission published at 367 N.C. 936–53.

The Rules of the Judicial Standards Commission are effective immediately and apply to all matters pending before the Judicial Standards Commission on or after this date.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 3rd day of June, 2020.

s/Mark A. Davis
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of June, 2020.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

Rules of the Judicial Standards Commission

Rule 1. Authority and Definitions

(a) **Authority.** These rules are promulgated pursuant to the authority contained in N.C.G.S. § 7A-375(g) and § 97-78.1 and are effective as of the date of approval by the Supreme Court of North Carolina and apply to all matters pending before the Commission on or after that date.

(b) **Definitions**.

(1) The term "Code" refers to the North Carolina Code of Judicial Conduct.

(2) The term "Supreme Court" refers to the Supreme Court of North Carolina.

(3) The term "disability" refers to "incapacity" as defined in N.C.G.S. § 7A-374.2 to include any physical, mental, or emotional condition that seriously interferes with the ability of a judge to perform the duties of the judicial office.

(4) The term "disability proceeding" refers to a proceeding before a hearing panel of the Commission to determine whether to recommend suspension or removal of a judge by the Supreme Court for temporary or permanent incapacity pursuant to N.C.G.S. § 7A-376(c).

(5) The term "disciplinary proceeding" refers to a proceeding before a hearing panel of the Commission to determine whether to recommend public discipline of a judge by the Supreme Court pursuant to N.C.G.S. § 7A-376(b).

(6) The term "judge" refers to any justice or judge of the General Court of Justice of North Carolina, any retired justice or judge who is subject to recall to service, any emergency judge of any division of the General Court of Justice, and any commissioner or deputy commissioner of the North Carolina Industrial Commission.

(7) The term "Respondent" shall at all times refer to a judge who is the subject of a disciplinary or disability proceeding.

(8) Unless otherwise indicated, "writing" or "written" includes electronic communication.

Rule 2. Organization and Meetings

(a) **Officers.** The Commission shall have a Chairperson, who is the North Carolina Court of Appeals member of the Commission, and

two Vice-Chairpersons, who are the superior court judge members of the Commission. The Executive Director shall serve as the secretary to the Commission and to each panel and shall perform other duties as the Commission or a panel may assign.

(b) **Panels.** The Chairperson shall divide the Commission into 2 panels, designated Panel A and Panel B.

(1) The Chairperson shall be assigned to and serve as the Chairperson of Panel A and Panel B.

(2) The Chairperson shall assign the other members of the Commission to serve on Panel A or Panel B, each panel to include 1 superior court judge, 1 district court judge, 2 members appointed by the North Carolina State Bar, 1 citizen appointed by the Governor, and 1 citizen appointed by the General Assembly. Other than the Chairperson, no member shall be assigned to both Panel A and Panel B for consideration of the same matter.

(3) The superior court judge assigned to Panel A or Panel B shall serve as the Vice-Chairperson of the panel, and in the absence or disqualification of the Chairperson, shall preside over panel meetings, whether meeting as an investigative or hearing panel. In the absence or disqualification of both the Chairperson and Vice-Chairperson, the district court judge assigned to the panel shall preside.

(4) Each panel shall serve as an investigative panel at its regular business meetings for purposes of reviewing complaints, ordering investigations, or authorizing the initiation of disciplinary or disability proceedings. Each panel shall also serve as a hearing panel for any disciplinary or disability proceeding authorized by the other panel. No panel may function as both an investigative and hearing panel in the same matter.

(c) **Panel Meetings.** Panel meetings shall occur pursuant to the following requirements:

(1) Panel A and Panel B shall meet in alternating months, unless prevented by exigent circumstances, such as inclement weather, an emergency, or an unresolvable conflict with court calendars. Upon the call of the Chairperson, additional or special panel meetings may also be convened as needed to conduct or conclude the panel's business.

(2) Each panel member, including the Chairperson, Vice Chairperson, or other presiding member, shall be a voting

member of the panel unless disqualified from considering a particular matter pursuant to Rule 7.

(3) A quorum for the conduct of the business of a panel, whether sitting as an investigative or hearing panel, shall consist of 5 members present. The affirmative vote of at least 5 members present is required to authorize official action of the panel.

(4) The Chairperson may direct the reassignment of any matter for initial review to the other panel so long as no action has been taken by the original investigative panel scheduled to review and consider the matter.

(5) In the event that a hearing panel member will be absent for a hearing in a disciplinary or disability proceeding and the member's absence will prevent the formation of a quorum, the Chairperson or Executive Director shall request the appointing authority for the absent member to appoint an alternative member for the sole and exclusive purpose of participating as a member of the hearing panel for that disciplinary or disability proceeding.

(d) **Plenary Meetings.** Meetings of the full Commission shall occur pursuant to the following requirements:

(1) The full Commission shall meet on the call of the Chairperson or upon the written request of any 5 members.

(2) A quorum for the conduct of the business of the full Commission shall consist of 9 members present. The affirmative vote of at least 9 members is required to authorize any Commission action that requires a vote of the full membership.

(3) In the absence of the Chairperson at a plenary meeting, the Vice Chairperson with the longest tenure on the Commission shall preside.

(4) Upon the authorization of the Chairperson, the full Commission may conduct votes on specific matters by electronic means, with the votes to be recorded and maintained by the Executive Director.

(e) **Meeting Places.** Panel and plenary meetings of the Commission shall ordinarily meet at the North Carolina Court of Appeals, 1 West Morgan Street, Raleigh, North Carolina. The Chairperson may also direct that meetings be held anywhere in the state or through telephonic or electronic means.

Rule 3. Commission Staff

(a) **Executive Director.** The Executive Director shall have the duties and responsibilities prescribed by the Commission, including but not limited to:

(1) reviewing complaints and information as to alleged misconduct or disability, and making preliminary evaluations with respect thereof;

(2) providing training and developing educational resources relating to the Code and Commission procedures;

(3) issuing informal advisory opinions to judges and preparing formal advisory opinions as directed by the Commission, as provided in Rule 8;

(4) maintaining the Commission's records concerning the operation of the Commission;

(5) administering funds for the Commission's budget as prepared by the Administrative Office of the Courts;

(6) preparing an annual report and statistical information regarding the Commission's activities for presentation to the Commission, Supreme Court, and public;

(7) employing, with the approval of the Chairperson, the Commission Counsel, Commission Investigator, and other authorized Commission staff;

(8) supervising the Commission staff; and

(9) performing other duties at the direction of the Commission, the Chairperson, or as required by these rules.

(b) **Commission Counsel.** The Commission Counsel shall have the duties and responsibilities prescribed by the Commission, including but not limited to:

(1) reviewing complaints and information as to alleged misconduct or disability, and making preliminary evaluations thereof;

(2) conducting limited confidential inquiries with respect to complaints or information as to alleged misconduct or disability as necessary to verify information to be presented to an investigative panel for initial review;

(3) directing investigations as to alleged misconduct or disability and reporting to and advising the appropriate investigative panel as to the investigations;

(4) prosecuting disciplinary and disability proceedings before the Commission and appearing on behalf of the Commission in the Supreme Court in connection with any recommendation made by the Commission;

(5) providing training and developing educational resources relating to the Code and Commission procedures;

(6) issuing informal advisory opinions to judges as provided in Rule 8; and

(7) performing other duties at the direction of the Commission, Chairperson, or Executive Director, or as required by these rules.

(c) **Commission Investigator.** The Commission Investigator shall have the duties and responsibilities prescribed by the Commission, including but not limited to:

(1) conducting investigations initiated pursuant to these rules;

(2) assisting the Commission Counsel during disciplinary proceedings;

(3) maintaining records of Commission investigations; and

(4) performing other duties at the direction of the Commission, Chairperson, Executive Director, or Commission Counsel, or as required by these rules.

Rule 4. Contempt

(a) **Basis for Contempt.** A person may be held in contempt by the Commission through an order of the Chairperson issued in accordance with subsection (b) for refusal to obey a lawful order or process of the Commission and for any other conduct that would warrant punishment for contempt in a trial court of the General Court of Justice.

(b) **Procedure.** Procedures to hold a person in contempt and the appropriate punishment shall be in accordance with applicable provisions of Chapter 5A of the General Statutes of North Carolina.

Rule 5. Privilege and Immunity from Civil Action

(a) **Absolute Privilege.** In accordance with N.C.G.S. § 7A-377(a2), information or testimony provided to the Commission is absolutely privileged and shall not form the basis of a civil action against a complainant, witness, or their counsel.

(b) **Immunity of Members and Staff.** In accordance with N.C.G.S. § 7A 375(e), members of the Commission and its staff are immune from a

civil action that is based upon conduct undertaken in the course of their official duties.

Rule 6. Confidentiality

(a) **Confidentiality, Generally.** Except as expressly provided in subsection (b) of this rule, all complaints and related information received by the Commission, meeting materials and records, investigative files, documents and evidence relating to disciplinary and disability proceedings, private letters of caution, informal advisory opinions, and all documents and communications related to any of the foregoing are confidential. Commission meetings and deliberations, disciplinary and disability hearings, and work product of the Commission and its staff are also confidential and shall not be disclosed.

(b) **Exceptions to Confidentiality.**

(1) **Action by the Supreme Court.** Upon the public reprimand, censure, suspension, or removal of a judge by the Supreme Court in a disciplinary or disability proceeding, the pleadings, the Commission's recommendation, and the record filed in support of the recommendation are no longer confidential. All other documents and information relating to the complaint, investigation, and disciplinary or disability proceeding shall remain confidential.

(2) **Waiver.** Upon an express written waiver by a judge, the Commission may disclose documents or information specified by the judge in the written waiver. Waiver shall not be implied, and a partial waiver as to the specified documents or information shall not constitute a waiver as to other Commission documents and information.

(3) **Action by the Commission.** In a case in which a complaint filed with the Commission is made public by the complainant, the judge involved, independent sources, or by rule of law, the Commission may issue statements of clarification and correction as it deems appropriate in the interest of maintaining confidence in the administration of justice. The statements may address the status and procedural aspects of the proceeding, the judge's right to a fair hearing in accordance with due process requirements, and any official action or disposition by the Commission. The Commission may also disclose facts and documents as necessary to notify another person or agency of potential threats to public safety or the administration of justice, or

as otherwise authorized by these rules. A private letter of caution issued pursuant to Rule 11 may also become public if included in a record that becomes public pursuant to subsection (b)(1) of this rule.

(c) **Improper Disclosure of Confidential Information.**

(1) No person shall disclose confidential documents or information obtained from the Commission unless confidentiality has ceased in accordance with subsection (b) of this rule.

(2) A person violating the confidentiality requirements in these rules may be held in contempt pursuant to Rule 4.

Rule 7. Disqualification

(a) **Applicable Standard.** A member of the Commission is disqualified from considering a matter in which disqualification would be required of a judge by the Code or by law. A judge who is a member of the Commission is disqualified from acting in a matter in which the judge is the subject of a complaint, investigation, or disciplinary or disability proceeding, except in his or her own defense.

(b) **Procedure.** At the convening of each panel meeting, whether an investigative panel or a hearing panel, the Chairperson shall remind all members to voluntarily disqualify themselves from consideration of any matter wherein disqualification is required pursuant to subsection (a) of this rule. In the absence of a voluntary disqualification from the matter under consideration, or upon motion of a party to a disciplinary or disability proceeding, the Chairperson shall decide in his or her sole discretion whether disqualification is required in that instance.

Rule 8. Advisory Opinions

(a) **Formal Advisory Opinions.** A person may request that the Commission issue a formal advisory opinion as to whether actual or contemplated conduct on the part of a judge conforms to the requirements of the Code, subject to the following procedures:

(1) A request for a formal advisory opinion shall be submitted to the Executive Director in writing, who shall present the request to the Commission for consideration.

(2) Upon the affirmative vote of 9 members, the full Commission may issue a formal advisory opinion, which shall be written and shall state its conclusion with respect to the question asked and the reasons therefor.

(3) A formal advisory opinion shall be provided to the Appellate Reporter for publication, and the Reporter shall, from time to time, as directed by the Commission, publish an index of advisory opinions. The formal advisory opinion shall also be published on the Commission's website.

(4) A formal advisory opinion shall have precedential value in determining whether similar conduct conforms to the Code but shall not constitute controlling precedent or legal authority in the Supreme Court for the purpose of reviewing a disciplinary recommendation. To the extent the Supreme Court expressly nullifies an existing formal advisory opinion, the formal advisory opinion shall be deemed automatically withdrawn.

(5) Other than as provided in subsection (a)(4) of this rule, a formal advisory opinion may be modified or withdrawn by the Commission only upon the affirmative vote of 9 members of the full Commission. Until a formal advisory opinion is modified or withdrawn by the Commission or nullified by the Supreme Court, a judge shall be deemed to have acted in good faith if he or she acts in conformity with the advisory opinion.

(6) Except as published in the formal advisory opinion, information provided to the Commission and work product or communications associated with drafting and issuing the formal advisory opinion shall be confidential.

(b) **Informal Advisory Opinions**. A judge subject to the jurisdiction of the Commission may seek a confidential informal advisory opinion from the Chairperson, Executive Director, or Commission Counsel as to whether conduct, actual or contemplated, conforms to the requirements of the Code, subject to the following procedures:

(1) An informal advisory opinion may be requested orally or in writing.

(2) Any oral or written communications between the requesting judge and the Commission relating to an informal advisory opinion shall be confidential unless waived in writing by the judge.

(3) If a request for an informal advisory opinion discloses actual conduct that may be actionable as a violation of the Code, then the Chairperson, Executive Director, or Commission Counsel shall refer the matter to an investigative panel of the Commission for consideration.

(4) An informal advisory opinion may be issued orally but shall be confirmed in writing and shall approve or disapprove only the matter in issue, shall not otherwise serve as precedent, and shall be confidential.

(5) Informal advisory opinions shall be reviewed at regularly scheduled panel meetings. If upon review, a majority of the panel members present and voting decide that an informal advisory opinion should be withdrawn or modified, then the inquiring judge shall be notified in writing by the Executive Director. Until this notification takes place, the judge shall be deemed to have acted in good faith if he or she acts in conformity with the informal advisory opinion that is later withdrawn or modified.

(6) If an inquiring judge disagrees with the informal advisory opinion issued by the Chairperson, Executive Director, or Commission Counsel, then the judge may submit a written request in accordance with subsection (a) of this rule for consideration of the inquiry by the full Commission as a formal advisory opinion.

(c) **Protection of Privileged Information.** All inquiries, whether requesting a formal advisory opinion or an informal advisory opinion, shall present in detail all operative facts upon which the inquiry is based but should not disclose privileged information that is not necessary to the resolution of the question presented.

Rule 9. Procedure on Receipt of Complaint or Information

(a) **Summary Dismissal After Initial Review.** The Executive Director and the Commission Counsel shall review a written complaint received by the Commission to determine whether the complaint discloses facts that, if true, indicate that a judge has engaged in conduct in violation of the Code or suffers from a disability that seriously interferes with the judge's judicial duties. If the initial review does not disclose such facts, or if the allegations in the written complaint are obviously unfounded or frivolous, then the Chairperson shall summarily dismiss the complaint at the next investigative panel meeting, subject to the right of a member of the panel to review the complaint and request consideration of it pursuant to subsection (b) of this rule.

(b) **Action on Review by the Investigative Panel.** A written complaint not summarily dismissed pursuant to subsection (a) of this rule shall be considered by an investigative panel. The investigative panel shall also consider any complaint brought on the Commission's own motion that is based on credible information received by the

Commission disclosing facts that, if true, indicate that a judge has engaged in conduct in violation of the Code or suffers from a disability that seriously interferes with the judge's judicial duties. By the affirmative vote of at least 5 members, the investigative panel may dismiss the complaint or authorize an investigation pursuant to Rule 10.

(c) **Notice to Judge Regarding Complaint.** A judge who is the subject of a complaint pending before the Commission shall not be notified of the filing of the complaint, except:

(1) if notification to the judge is required pursuant to Rule 10, following the authorization of a formal investigation;

(2) if the investigative panel considering the complaint has authorized the Chairperson, Executive Director, Commission Counsel, or Commission Investigator to notify the judge of the complaint in the interests of the administration of justice; or

(3) if the judge has been notified by the complainant that the complaint was filed, or if the judge has been notified by another state agency of the receipt of a complaint that was received by that agency and forwarded to the Commission as required by law or other rules.

(d) **Notice to Complainant Regarding Commission Action.** A complainant who files a complaint with the Commission shall be notified in writing of:

(1) the Commission's receipt of the complaint;

(2) the initiation of a formal investigation into the complainant's allegations;

(3) a dismissal of the complaint by the investigative panel, if applicable;

(4) the investigative panel's decision with respect to an appropriate request for reconsideration after the dismissal of a complaint; and

(5) the issuance of an order of public discipline by the Supreme Court in the matter.

In cases in which a complaint is dismissed with a private letter of caution pursuant to Rule 11, the complainant shall be notified that the matter has concluded and that the Commission has taken appropriate action within its authority to address the complainant's concerns of judicial misconduct.

In cases in which disciplinary proceedings against the judge have been initiated, the complainant shall be notified of the proceedings only if the complainant is to be called as a witness, or if the Chairperson deems notice to be necessary in the interests of the administration of justice.

(e) **Requests for Reconsideration.** Upon dismissal of a complaint, a complainant may request reconsideration of the dismissal, provided that a request for reconsideration will only be considered by the investigative panel that dismissed the complaint if a request includes new or additional information not previously considered by the panel. Multiple requests for reconsideration without new or additional information will be considered an abuse of the Commission's complaint process and may result in a bar order pursuant to subsection (f) of this rule.

(f) **Abuse of the Complaint Process.** At any meeting of an investigative panel, the Commission Counsel may request that the Commission bar a complainant from filing further complaints or requests for reconsideration with the Commission for either a specified period of time or permanently as to allegations against the judge that have already been considered by the Commission. A bar shall be ordered only upon the affirmative vote of at least 5 members of the panel after a finding by clear and convincing evidence that the complainant has abused the complaint process by:

(1) using abusive or threatening language that is directed toward the Commission, Commission members, or Commission staff, or toward specific members of the judiciary;

(2) knowingly filing false information with the Commission;

(3) repeatedly demanding that the Commission rehear a complaint that has already been reviewed and dismissed without providing new or significantly different allegations or evidence, or repeatedly demanding that the Commission consider a complaint that has already been determined to be outside of the time period allowed for review of the alleged misconduct by the Commission or outside of the Commission's jurisdiction; or

(4) filing complaints that maintain the complainant is not subject to the authority of the State of North Carolina, or its laws, rules, or procedures, and that refuse to recognize the authority of the General Statutes of North Carolina over the Commission's operations and procedures.

Rule 10. Investigations

(a) **Generally.** An investigative panel may authorize either a preliminary or formal investigation based on a complaint considered pursuant to Rule 9(b) upon the affirmative vote of at least 5 members, or upon the granting of a motion for reconsideration pursuant to Rule 9(e).

(b) **Preliminary Investigations.** A preliminary investigation is made for the purpose of verifying the credibility of or ascertaining additional facts necessary to evaluate allegations in a complaint received by the Commission regarding potential judicial misconduct or disability. Notice of the preliminary investigation shall not be provided to the judge unless the notice is required by the investigative panel or is otherwise required by these rules.

(c) **Formal Investigations.** A formal investigation is made for the purpose of determining whether a judge has engaged in actual misconduct in violation of the Code or suffers from a disability that seriously interferes with the judge's judicial duties. In all formal investigations, the following procedures shall apply:

(1) The judge shall be notified in writing of the initiation of the formal investigation and shall be given a general description of the subject matter thereof, including, if available, the specific case caption and number if the investigation relates to the judge's conduct in a particular case. The notice letter shall not identify the name of the complainant unless necessary to allow the judge to determine whether the judge must be disqualified from continued involvement in cases involving the complainant, but shall state whether the investigation is initiated on written complaint or motion of the Commission.

(2) The notice of formal investigation shall be delivered by personal service or by Certified Mail, return receipt requested, to the judge's residence or business address, or in any manner otherwise agreed to by the judge.

(3) The judge shall be afforded a reasonable opportunity to respond to the notice letter and provide relevant information to the Commission relating to the subject matter of the investigation.

(d) **Subpoenas During Investigation.** After a formal investigation has been authorized, the Commission Counsel may issue subpoenas to the judge or witnesses to provide testimony and produce pertinent records, communications, and documents for purposes of concluding the formal investigation.

(e) **Retaliation by Judge.** A judge receiving notice under this rule, or otherwise becoming aware of a complaint, investigation, or disciplinary or disability proceeding, shall not retaliate against, intimidate, coerce, or otherwise attempt to influence a complaining party or a witness cooperating with the Commission's investigation or disciplinary or disability proceeding. A violation of this subsection may be charged as a separate and independent violation of the Code.

Rule 11. Private Letters of Caution

(a) **Grounds for Issuance.** An investigative or hearing panel of the Commission may issue a private letter of caution to a judge upon a determination that the judge engaged in conduct in violation of the Code that is not of such a nature as to warrant a recommendation of discipline by the Supreme Court. The issuance of a private letter of caution shall be in lieu of further proceedings in the matter, but in no instance may it be issued prior to the conclusion of a formal investigation. A private letter of caution issued by the Commission may advise the judge to engage in remedial action that is necessary to avoid a continuation or recurrence of the conduct in violation of the Code.

(b) **Response by the Judge**. A judge who receives a private letter of caution may provide a confidential written response, which will be maintained by the Commission with the private letter of caution.

(c) **Confidentiality and Use in Future Proceedings**. Unless waived in writing by the judge, a private letter of caution is confidential. Notwithstanding this provision, a private letter of caution may be used in future disciplinary proceedings against the same judge as an aggravating factor, as evidence of a pattern or practice of misconduct, or as evidence that the judge acted willfully or knew or should have known that the alleged conduct was contrary to the law or the requirements of the Code. In such circumstances, if included as part of the record of a disciplinary proceeding submitted to the Supreme Court, the private letter of caution may become public pursuant to Rule 6.

Rule 12. Initiation of Disciplinary or Disability Proceedings

(a) **Authorization of Disciplinary or Disability Proceedings**. After completion of a formal investigation authorized pursuant to Rule 10, and upon the affirmative vote of at least 5 members, the investigative panel considering the matter may authorize the initiation of a disciplinary or disability proceeding against the judge, who thereafter shall be referred to as the Respondent. The authorization to initiate a disciplinary or disability proceeding constitutes a finding that probable cause exists

to believe that the Respondent engaged in conduct that warrants public reprimand, censure, suspension, or removal by the Supreme Court or that the Respondent suffers from a disability that warrants suspension or removal by the Supreme Court pursuant to Article 30 of Chapter 7A of the General Statutes of North Carolina.

(b) **Filing of the Statement of Charges**. A disciplinary or disability proceeding is initiated through the filing of a Statement of Charges by the Commission Counsel at the Commission offices. The Statement of Charges shall contain:

(1) a caption entitled "BEFORE THE JUDICIAL STANDARDS COMMISSION, Inquiry Concerning a Judge No. ___.";

(2) a description of the charge or charges in plain and concise language and in sufficient detail to give fair and adequate notice of the nature of the alleged misconduct or disability;

(3) the name of the complainant;

(4) a statement about the Respondent's right to be represented by counsel at the Respondent's expense; and

(5) directions to the Respondent to file a Verified Answer as required pursuant to Rule 13.

(c) **Notice and Service of the Statement of Charges**.

(1) Service of the Statement of Charges shall constitute notice to the Respondent of the initiation of disciplinary or disability proceedings.

(2) Unless waived by the Respondent, a copy of the Statement of Charges shall be personally served upon the Respondent by a person of suitable age and discretion who has been designated by the Commission. If, after reasonable efforts to do so, personal service upon the Respondent cannot be effected, service may be made to the Respondent's home address by Registered Mail or Certified Mail, return receipt requested. Proof of service in accordance with N.C.G.S. § 1-75.10(a)(4) shall be filed with the Commission.

(d) **Withdrawal of the Statement of Charges**. Upon motion by the Commission Counsel and good cause shown, the investigative panel that authorized the initiation of disciplinary or disability proceedings may withdraw the Statement of Charges upon the affirmative vote of at least 5 members. Notice of withdrawal of the Statement of Charges shall be made in the same manner as service of the Statement of Charges.

(e) **Interim Suspension During Disciplinary or Disability Proceedings**. At any time following the conclusion of a formal investigation, if the investigative panel finds by clear and convincing evidence that a judge has (1) been charged with a felony under state or federal law, or (2) engaged in serious misconduct that poses an ongoing threat of substantial harm to public confidence in the judiciary or to the administration of justice, then the investigative panel may, upon the affirmative vote of at least 5 members, direct the Chairperson to recommend that the Chief Justice temporarily suspend the judge from the performance of his or her judicial duties with pay pending final disposition of the proceedings. A copy of the recommendation of interim suspension shall be provided to the judge by Certified Mail, return receipt requested, or as otherwise agreed to in writing by the judge. At any time after an interim suspension is issued, the judge shall have the right to submit written objections to the Commission. The Executive Director shall provide the judge's objections to the Chief Justice, along with the Commission's response. The Executive Director shall also provide a copy of the Commission's response to the judge.

Rule 13. Answer

(a) **Procedure for Filing**. Unless the time is extended by order of the Chairperson, the Respondent shall file a written original Verified Answer at the Commission offices within 30 days after service of the Statement of Charges.

(b) **Default**. Failure of the Respondent to answer the Statement of Charges shall constitute an admission of the allegations contained therein.

Rule 14. Pleadings and Amendments

(a) **Definition of Pleadings**. The Statement of Charges and Verified Answer shall constitute the pleadings. No further pleadings may be filed and no dispositive motions may be filed at any time in the proceedings, including at the close of evidence in a disciplinary or disability hearing held pursuant to Rule 19.

(b) **Amendments to Pleadings Prior to the Disciplinary or Disability Hearing**. At any time prior to the commencement of a disciplinary or disability hearing held pursuant to Rule 19, the investigative panel that authorized the Statement of Charges against the Respondent may authorize an amendment to the Statement of Charges in order to include new factual allegations and charges in accordance with Rule 12. The amended Statement of Charges shall be served on the Respondent

in the same manner as required under Rule 12, and the Respondent shall have the right to answer new or amended charges in accordance with Rule 13.

(c) **Amendments to Pleadings During the Disciplinary Hearing**. Once the disciplinary or disability hearing has commenced, and at any time prior to its conclusion, the hearing panel may allow amendments to the pleadings to conform to the proof or defenses offered at the disciplinary or disability hearing.

Rule 15. Ex Parte Communications

(a) **During Disciplinary or Disability Proceedings**. Except as provided in subsection (b) of this rule, upon the initiation of a disciplinary or disability proceeding, no member of the Commission shall engage in ex parte communications with the Respondent, Respondent's counsel, Commission Counsel, or witness regarding the facts or merits of the proceeding.

(b) **Administrative and Procedural Matters**. Commission members may communicate with the Executive Director, Commission Counsel, and Commission staff with respect to procedural and administrative matters involved in a disciplinary or disability proceeding as may be required in these rules. Upon consent of the Respondent, or the Respondent's counsel, if any, the Commission Counsel may also communicate with the Chairperson regarding administrative and procedural motions submitted on consent of the parties during the course of a disciplinary or disability proceeding.

Rule 16. Discovery

(a) **Required Disclosures**. Unless extended by order of the Chairperson, within 60 days of the filing of the Verified Answer, the Commission Counsel and the Respondent shall disclose to the other:

(1) the name, address, and contact information of each witness the party expects to offer at the disciplinary or disability hearing;

(2) a brief summary of the expected testimony of each witness;

(3) written statements provided by a witness to the Commission or the Respondent; and

(4) copies of documentary or other evidence that may be offered at the disciplinary or disability hearing.

(b) **Exculpatory Evidence**. At the same time the Commission Counsel provides the disclosures required under subsection (a) of

this rule, the Commission Counsel shall also provide the Respondent with exculpatory evidence that he or she is aware of and that is relevant to the allegations contained in the Statement of Charges or in a defense thereto.

(c) **Other Forms of Discovery**. The taking of depositions, serving of interrogatories, document requests, requests for admissions, and other discovery procedures authorized by the North Carolina Rules of Civil Procedure shall be permitted only by stipulation of the parties or by order of the Chairperson for good cause shown, and shall be completed in the manner and subject to any conditions as the Chairperson may prescribe.

(d) **Discovery Disputes**. Disputes concerning discovery shall be determined by the Chairperson, whose decision may not be appealed prior to the conclusion of the disciplinary or disability proceeding.

(e) **Failure to Disclose and Duty to Supplement**. Upon the failure of either party to disclose information or evidence as required under subsections (a) and (b) of this rule, the opposing party may move the Chairperson for an order compelling disclosure. A copy of the motion to compel shall be served on the opposing party and shall be heard before the Chairperson, who shall decide the motion in his or her sole discretion. A willful or continuing failure to provide required disclosures may result in the exclusion of the testimony of the witness or of the documentary evidence that was not provided. Both the Commission Counsel and the Respondent shall have a continuing duty to supplement information required to be exchanged under this rule.

Rule 17. Special Rules as to Disability Cases

(a) **Applicability of Rules Relating to Judicial Misconduct**. A proceeding shall be considered a disability proceeding if it is initiated by either a complaint or motion of the Commission alleging a disability of a judge that seriously interferes with the judge's judicial duties. If a disability proceeding is authorized by the investigative panel upon the completion of a formal investigation pursuant to Rule 10, then the disability proceeding shall be conducted in accordance with the procedures for disciplinary proceedings except as provided in this rule.

(b) **Waiver of Medical Privilege**. A judge waives the medical privilege and shall produce to the Commission Counsel the judge's medical records relating to an alleged disability, if the judge:

(1) provides a written waiver to the Commission;

(2) denies the existence of a disability in a proceeding in which the mental or physical condition or health of the judge is in issue; or

(3) asserts the existence of a disability as a defense to a Statement of Charges.

(c) **Physical or Mental Examination**. Upon the affirmative vote of 5 members, the investigative panel may order a judge who is subject to a formal investigation based on alleged disability to submit to a physical or mental examination by one or more qualified licensed physicians, psychologists, or mental health professionals appointed by the Chairperson to conduct the examination. The examination shall be at the Commission's expense and copies of the report of the examination shall be provided to the judge and the Commission Counsel. The examining physician or health professional shall be compensated by the Commission in the same manner as experts in civil cases in the General Court of Justice are compensated. If called to testify at a disciplinary proceeding, the Commission shall bear the witness costs of the examining physician or health professional as provided in Rule 20.

(d) **Failure or Refusal to Submit to Examination**. The failure or refusal of a judge to submit to a physical or mental examination ordered by the investigative panel shall preclude the judge from presenting evidence of the results of a physical or mental examination done at the judge's own expense. An investigative or hearing panel may consider a refusal or failure to submit to a physical or mental examination ordered pursuant to subsection (c) of this rule as evidence that the judge has a disability that seriously interferes with the ability of the judge to perform the duties of the judicial office.

Rule 18. Stipulated Facts and Agreed Disciplinary or Disability Dispositions

(a) **Factual Stipulations**.

(1) At any time prior to the conclusion of a disciplinary or disability hearing, the Respondent may stipulate to any of the factual allegations in the Statement of Charges and any other agreed upon facts. The factual stipulations shall be in writing and shall be signed by the Respondent, the Respondent's counsel, if any, and by the Commission Counsel. The factual stipulations may include an agreement as described in subsection (b) of this rule.

(2) The Chairperson of the hearing panel may accept the factual stipulations and any agreement made pursuant to

subsection (b) of this rule into the record at the disciplinary hearing upon the Chairperson's satisfaction that they were entered into freely and voluntarily.

(3) At the conclusion of the disciplinary hearing, the hearing panel shall deliberate and may adopt the factual stipulations upon the affirmative vote of at least 5 members present at the disciplinary hearing. Adoption of the factual stipulations constitutes a finding that the facts contained therein are established by clear and convincing evidence.

(4) If the factual stipulations are rejected by the hearing panel, then they shall be deemed withdrawn. In such circumstances, the Executive Director shall promptly notify the Respondent and the Commission Counsel of a date for a full evidentiary hearing.

(b) **Agreements as to Code Violations and Disciplinary Disposition**.

(1) Factual stipulations made pursuant to subsection (a) of this rule may, but are not required to, include an agreement as to specified violations of the Code in exchange for a requested disciplinary disposition. Upon its de novo review, the hearing panel may accept the agreement upon the affirmative vote of at least 5 members.

(2) In the absence of an agreement as to violations of the Code or a requested disciplinary disposition, or in the event the hearing panel rejects the agreement, the Executive Director shall promptly notify the Respondent and the Commission Counsel of a date for a hearing to consider the arguments of the parties with respect to the Code violations and the disciplinary disposition of the matter.

(c) **Consent Order Upon Resignation or Retirement of the Respondent**. At any time prior to the conclusion of a disciplinary or disability proceeding, the Respondent may enter into a consent order, signed by all parties and approved by the Chairperson, by which the Respondent resigns or retires from judicial office and agrees never to seek judicial office in North Carolina in the future in exchange for dismissal of the Statement of Charges without prejudice and upon any other terms and conditions as the parties may agree. A violation of the consent order shall be deemed a separate and independent violation of the Code.

Rule 19. Disciplinary and Disability Hearings

(a) **Notice of Hearing**. The Executive Director shall serve a notice of hearing upon the Respondent in the same manner as service of the

Statement of Charges under Rule 12, or in any manner otherwise agreed to by the Respondent. The Notice of Hearing shall set forth the date, time, and location of the disciplinary hearing. Unless otherwise agreed to in writing by the Commission Counsel and the Respondent, the disciplinary hearing shall be held no sooner than 60 days after filing of the Verified Answer or, if no response to the Statement of Charges is filed, 60 days after the expiration of time allowed for its filing.

(b) **Failure of the Respondent to Appear for Hearing**. The disciplinary hearing shall proceed whether or not the Respondent has filed a Verified Answer or appears for the hearing, either in person or through counsel.

(c) **Applicable Rules of Evidence**. The North Carolina Rules of Evidence set forth in Chapter 8C of the General Statutes of North Carolina shall apply in all disciplinary hearings except as otherwise indicated in these rules. Rulings on evidentiary matters shall be made by the Chairperson, or by the member presiding in the absence of the Chairperson.

(d) **Burden of Proof**. At the disciplinary hearing, the Commission Counsel shall have the burden of proving the existence of grounds for a recommendation of discipline, suspension, or removal based on disability by clear and convincing evidence, as that evidentiary standard is defined by the Supreme Court.

(e) **Additional Rights of the Respondent**. In addition to the rights specified in these rules, the Respondent shall have the right to defend against the charges by the introduction of evidence, by the examination and cross-examination of witnesses, and by the right to address the hearing panel in argument at the conclusion of the disciplinary hearing.

(f) **Record of Hearing**. The disciplinary or disability hearing shall be recorded verbatim by a court reporter. In the event that an evidentiary hearing is held, testimony of witnesses shall also be video recorded.

Rule 20. Witnesses; Oaths; Subpoenas

(a) **Witnesses**. The Commission Counsel and the Respondent shall have the right to call fact witnesses, expert witnesses, and character witnesses in accordance with the North Carolina Rules of Evidence, subject to the following limitations:

(1) **Fact and Expert Witnesses**. The Commission Counsel and the Respondent shall have the right to call witnesses to testify about a genuine dispute of material fact between the parties in the disciplinary hearing. The Commission

Counsel may call the Respondent as a witness. Expert witnesses may be called at the expense of the party calling the expert and only in accordance with the North Carolina Rules of Evidence.

(2) **Character Witnesses**. The Commission Counsel and the Respondent shall have the right to call witnesses to testify to the character of the Respondent, but neither the Commission Counsel nor the Respondent may call more than 4 character witnesses in a disciplinary proceeding. Additional character witnesses may submit affidavits or be identified and tendered for the record.

(3) **Witness Costs**. Witnesses shall be reimbursed in the manner provided in civil cases in the General Court of Justice, and their expenses shall be borne by the party calling them. Vouchers authorizing disbursements by the Commission for witnesses shall be signed by the Chairperson or Executive Director.

(b) **Oaths**. Every witness who testifies before the hearing panel at a disciplinary hearing shall be required to declare, by oath or affirmation, to testify truthfully. The oath or affirmation may be administered by any member of the Commission or by the Executive Director.

(c) **Subpoenas**. Both the Commission Counsel and the Respondent have the right to the issuance of subpoenas to compel the attendance of witnesses or the production of documents and other evidentiary material for the disciplinary or disability hearing. A subpoena to compel the attendance of a witness at a disciplinary or disability hearing before the Commission, or a subpoena for the production of evidence, shall be issued in the name of the State of North Carolina upon request of the Commission Counsel or the Respondent, and shall be signed by a member of the Commission, by the Executive Director, or by the Commission Counsel. A subpoena shall be served, without fee, by any officer authorized to serve a subpoena under Rule 45(b) of the North Carolina Rules of Civil Procedure.

Rule 21. Disposition of Disciplinary or Disability Proceeding

(a) **Recommendation to the Supreme Court**. At the conclusion of the disciplinary or disability hearing, the hearing panel shall deliberate and determine whether to file a recommendation with the Supreme Court pursuant to N.C.G.S. § 7A-376. The affirmative vote of at least 5 members of the hearing panel is required to make a recommendation to the Supreme Court that the Respondent either be publicly reprimanded,

censured, suspended, or removed from office for misconduct or suspended or removed for disability.

(b) **Dismissal of Charges**. If fewer than 5 members of the hearing panel vote to recommend action by the Supreme Court in accordance with subsection (a) of this rule, then the hearing panel shall dismiss the charges with prejudice. Upon the affirmative vote of at least 5 members of the hearing panel, the dismissal may be accompanied by a private letter of caution in accordance with Rule 11.

(c) **Severance of Charges or Counts**. If the hearing panel concludes that some, but not all, of the charges or counts alleged in the Statement of Charges warrant a recommendation to the Supreme Court under subsection (a) of this rule, then the hearing panel may sever and dismiss the remaining charges or counts in accordance with subsection (b) of this rule.

Rule 22. Recommendation to the Supreme Court; Record in Support of Recommendation

(a) **Recommendation to the Supreme Court**.

(1) Unless the time is extended by order of the Chair, within 60 days of the conclusion of the disciplinary hearing, the Executive Director shall serve upon the Respondent and the Commission Counsel the hearing panel's recommendation to the Supreme Court. Service of the recommendation upon the Respondent shall be in the same manner as service of the Statement of Charges, or in any manner otherwise agreed to by the parties.

(2) The recommendation shall be signed by the Chairperson, or Vice Chairperson in the absence of the Chairperson, and shall contain findings of fact supported by the record, conclusions of law, and a recommended disposition as to the Respondent. If the hearing panel's recommendation is based upon a stipulation and an agreement entered into pursuant to Rule 18, then the conclusions of law and recommendation for the disposition shall rely only upon the factual stipulations, facts that may be properly judicially noticed, and admissions in the Verified Answer.

(b) **Record in Support of Recommendation**.

(1) **Proposed Record**. At the same time and in the same manner that the recommendation is served upon the Respondent, the Executive Director shall also serve a

proposed record in support of the recommendation. The proposed record shall include the pleadings, a verbatim transcript of the hearing, a copy of the video recording of any witness testimony at the hearing, and any evidence entered into the record during the hearing and referenced in the recommendation.

(2) **Objections and Settling the Record**. Unless the Respondent files objections to the proposed record within 10 business days after service of the proposed record, the proposed record shall constitute the official record. If the Respondent files objections, any objections not resolved by the agreement of the parties shall be settled by the Chairperson upon notice and an opportunity of the Respondent and the Commission Counsel to be heard. In such cases, the record as settled by the Chairperson shall be the official record.

(c) **Filing of the Recommendation and Record**.

(1) Within 10 business days after the record has been settled, the Executive Director shall file with the Clerk of the Supreme Court the recommendation, the record in support of the recommendation, and a certification that the record has been settled and is the official record of the disciplinary or disability proceeding.

(2) The Executive Director shall concurrently serve upon the Respondent a Notice of Filing giving notice of the recommendation, record, and certification, and specifying the date upon which they were filed in the Supreme Court. The Executive Director shall also transmit to the Respondent copies of the certification along with any changes to the official record occurring as a result of the settlement of the record.

(3) The Executive Director shall serve copies of the filings upon the Respondent in the same manner as service of the Statement of Charges, or in any manner otherwise agreed to by the parties.

(d) **Proceedings in the Supreme Court**. Proceedings in the Supreme Court shall be governed by the Supreme Court's Rules for Review of Recommendations of the Judicial Standards Commission.

ORDER AMENDING THE RULES OF MEDIATION FOR MATTERS BEFORE THE CLERK OF SUPERIOR COURT

Pursuant to subsection 7A-38.3B(b) of the General Statutes of North Carolina, the Court hereby amends Rule 4 of the Rules of Mediation for Matters Before the Clerk of Superior Court.

* * *

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediations

(a) **Attendance**.

(1) All persons ordered by the clerk to attend a mediation conducted under these rules shall ~~physically attend the mediation until either~~attend the mediation using remote technology; for example, by telephone, videoconference, or other electronic means. The mediation shall conclude when an agreement is reduced to writing and signed, as provided in subsection (b) of this rule, or when an impasse ~~has been~~is declared. ~~Any person required to attend the mediation may have the attendance requirement excused or modified, including the allowance of that person's participation by telephone or teleconference, by~~Notwithstanding this remote attendance requirement, the mediation may be conducted in person if:

a. ~~agreement of all persons ordered to attend the mediation and the mediator; or~~the mediator and all persons required to attend the mediation agree to conduct the mediation in person and to comply with all federal, state, and local safety guidelines that have been issued; or

b. ~~order of~~ the clerk, upon ~~the~~ motion of a person ~~ordered~~required to attend the mediation and notice to the mediator and to all other persons ~~ordered~~ required to attend the mediation ~~and the mediator~~, so orders.

(2) Any nongovernmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an officer, employee, or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter.

(3) Any governmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an employee or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter; provided, however, that if proposed settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.

(4) An attorney ordered to attend a mediation under these rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.

(5) Other persons may participate in a mediation at the discretion of the mediator.

(6) Persons ordered to attend a mediation shall promptly notify the mediator, after selection or appointment, of any significant problems they have with the dates for mediation sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediation session is scheduled by the mediator.

(b) **Finalizing Agreement**.

(1) If an agreement is reached at the mediation, in matters that, as a matter of law, may be resolved by the parties by agreement, then the parties to the agreement shall reduce the terms of the agreement to writing and sign the writing along with their counsel. The parties shall designate a person who will file a consent judgment or a voluntary dismissal with the clerk, and that person shall sign the mediator's report. If an agreement is reached prior to or during a recess of the mediation, then the parties shall inform the mediator and the clerk that the matter has been settled and, within ten calendar days of the agreement, file a consent judgment or voluntary dismissal with the court.

(2) In all other matters, including guardianship and estate matters, if an agreement is reached upon some or all of the issues at the mediation, then the persons ordered to attend the mediation shall reduce the terms of the agreement to writing and sign the writing along with their counsel, if any. Such agreements are not binding upon the clerk, but may be offered into evidence at the hearing

of the matter and may be considered by the clerk for a just and fair resolution of the matter. Evidence of statements made and conduct occurring in a mediation where an agreement is reached is admissible under N.C.G.S. § 7A-38.3B(g)(3).

All written agreements reached in such matters shall include the following language in a prominent location in the document: "This agreement is not binding on the clerk but will be presented to the clerk as an aid to reaching a just resolution of the matter."

(c) **Payment of the Mediator's Fee**. The persons ordered to attend the mediation shall pay the mediator's fee as provided by Rule 7.

(d) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

* * *

These amendments to the Rules of Mediation for Matters Before the Clerk of Superior Court become effective on 10 June 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 3rd day of June, 2020.

s/Mark A. Davis
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of June, 2020.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER AMENDING THE RULES OF MEDIATION FOR MATTERS IN DISTRICT CRIMINAL COURT

Pursuant to subsection 7A-38.3D(d) of the General Statutes of North Carolina, the Court hereby amends Rule 5 of the Rules of Mediation for Matters in District Criminal Court.

* * *

Rule 5. Duties of the Parties

(a) **Attendance**.

(1) ~~**Physical** **Attendance Required** **Through the Use of Remote Technology**~~. A complainant or defendant who has agreed to attend mediation ~~must physically attend the proceeding until~~shall attend the mediation using remote technology; for example, by telephone, videoconference, or other electronic means. The mediation shall conclude when an agreement is reached or when the mediator ~~has declared~~declares an impasse.

(2) **Attendees**. The following persons may attend and participate in mediation:

a. **Parents or Guardians of a Minor Party**. A parent or guardian of a minor complainant or defendant who has been encouraged by the court to attend may attend and participate in mediation. However, the court shall encourage attendance by a parent or guardian only in consultation with the mediator, and the mediator may later excuse the participation of a parent or guardian if the mediator determines that the parent or guardian's presence is not helpful to the process.

b. **Attorneys**. Attorneys representing the parties may ~~physically~~ attend and participate in mediation. Attorneys may also participate by advising clients before, during, and after mediation sessions, including monitoring compliance with any agreement reached.

c. **Others**. In the mediator's discretion, others whose presence and participation is deemed helpful either to resolving the dispute or addressing an issue underlying it may be permitted to attend and participate, unless and until the mediator determines that their

presence is no longer helpful. Mediators may exclude anyone wishing to attend and participate, but whose presence and participation the mediator deems would likely be disruptive or counterproductive.

(3) **Exceptions to ~~Physical~~ the Remote Attendance Requirement**. ~~A party or other person may be excused from physically attending the mediation and may be allowed to participate either by telephone or through an attorney~~Notwithstanding the remote attendance requirement in subsection (a)(1) of this rule, the mediation may be conducted in person if:

a. ~~by agreement of the complainant, defendant, and mediator; or~~the mediator, complainant, and defendant agree to conduct the mediation in person and to comply with all federal, state, and local safety guidelines that have been issued; or

b. ~~by order of~~ the court so orders.

(4) **Scheduling**. The complainant and defendant, and any parent, guardian, or attorney who will be attending the mediation, will:

a. make a good faith effort to cooperate with the mediator or community mediation center to schedule the mediation at a time that is convenient to all participants;

b. promptly notify the mediator or community mediation center of any significant scheduling concerns that may impact that person's ability to be present for mediation; and

c. notify the mediator or the community mediation center about any other concern that may impact a person's ability to attend and meaningfully participate—for example, the need for wheelchair access or for a deaf or foreign language interpreter.

(b) **Finalizing Agreement**.

(1) **Written Agreement**. If an agreement is reached at the mediation, then the complainant and defendant are to ensure that the terms of the agreement are reduced to writing and signed by the parties. Agreements that are not reduced to writing and signed will not be enforceable. If

no agreement is reached in mediation, an impasse will be declared and the matter will be referred back to the court.

(2) **Dismissal Fee**. For charges to be dismissed by the district attorney, unless the parties agree to some other apportionment, the defendant shall pay a dismissal fee, as set out in N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m), to the clerk of superior court in the county where the case was filed and supply proof of payment to the community mediation center administering the program for the judicial district. Payment is to be made in accordance with the terms of the parties' agreement. The center shall, thereafter, provide the district attorney with a dismissal form, which may be a NCAOC form. In its discretion, the court may waive the dismissal fee under N.C.G.S. § 7A 38.3D(m) when the defendant is indigent, unemployed, a full-time college or high school student, a recipient of public assistance, or for any other appropriate reason. The mediator shall advise the parties where and how to pay the fee.

* * *

These amendments to the Rules of Mediation for Matters in District Criminal Court become effective on 10 June 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 3rd day of June, 2020.

s/Mark A. Davis
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of June, 2020.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER AMENDING THE RULES FOR MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

Pursuant to subsection 7A-38.1(c) of the General Statutes of North Carolina, the Court hereby amends Rules 1, 4, 7, and 8 of the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions.

* * *

Rule 1. Initiating Settlement Events

(a) **Purposes of Mandatory Settlement Procedures**. These rules are promulgated under N.C.G.S. § 7A-38.1 to implement a system of settlement events, which are designed to focus the parties' attention on settlement, rather than on trial preparation, and to provide a structured opportunity for settlement negotiations to take place. Nothing in these rules is intended to limit or prevent the parties from engaging in settlement procedures voluntarily, either prior to, or after, those ordered by the court under these rules.

(b) **Duty of Counsel to Consult with Clients and Opposing Counsel Concerning Settlement Procedures**. In furtherance of the purposes set out in subsection (a) of this rule, upon being retained to represent any party to a superior court civil action, counsel shall advise his or her client regarding the settlement procedures approved by these rules, and shall attempt to reach an agreement with opposing counsel on an appropriate settlement procedure for the action.

(c) **Initiating the Mediated Settlement Conference by Court Order**.

(1) **Order of the Senior Resident Superior Court Judge**. In all civil actions, except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license, the senior resident superior court judge of any judicial district shall, by written order, require all persons and entities identified in Rule 4 to attend a pretrial mediated settlement conference. The judge may withdraw his or her order upon motion of a party under subsection (c)(6) of this rule only for good cause shown.

(2) **Motion to Authorize the Use of Other Settlement Procedures**. The parties may move the senior resident

superior court judge to authorize the use of another settlement procedure allowed by these rules, or by local rule, in lieu of a mediated settlement conference, as provided in N.C.G.S. § 7A-38.1(i). The party requesting the authorization shall file a ~~Motion for an Order to Use Settlement Procedure Other Than Mediated Settlement Conference in Superior Court Civil Action, Form AOC-CV-829~~Motion to Use Settlement Procedure Other than Mediated Settlement Conference in Superior Court Civil Action and Order, Form AOC-CV-818, within twenty-one days of the senior resident superior court judge's order requiring a conference. The motion shall include:

a. the type of settlement procedure requested;

b. the name, address, and telephone number of the neutral evaluator (neutral) selected by the parties;

c. the rate of compensation of the neutral;

d. that the neutral and opposing counsel have agreed upon the selection and compensation of the neutral; and

e. that all parties consent to the motion.

If the parties are unable to agree to each of the above, then the senior resident superior court judge shall deny the motion and the parties shall attend the conference as originally ordered by the court. If the motion is granted, then the court may order the use of any agreed upon settlement procedure authorized by Rule 10, Rule 11, Rule 12, or Rule 13, or by local rule of the superior court in the county or judicial district where the action is pending.

(3) **Timing of the Order**. The senior resident superior court judge shall issue the order requiring a mediated settlement conference as soon as practicable after the time for the filing of answers has expired. Both Rule 3(b) and subsection (c)(4) of this rule shall govern the content of the order and the date for completion of the conference.

(4) **Content of the Order**. The court's order shall be on an Order for Mediated Settlement Conference in Superior Court and Trial Calendar Notice, Form AOC-CV-811, and shall:

a. require that a mediated settlement conference be held in the case;

b. establish a deadline for the completion of the mediated settlement conference;

c. state clearly that the parties have the right to select their own mediator as provided by Rule 2;

d. state the rate of compensation of the court-appointed mediator, if the parties do not exercise their right to select a mediator under Rule 2; and

e. state that the parties shall be required to pay the mediator's fee at the conclusion of the mediated settlement conference, unless otherwise ordered by the court.

(5) **Motion for Court-Ordered Mediated Settlement Conference.** In cases not ordered to participate in a mediated settlement conference, any party may file a written motion with the senior resident superior court judge requesting that the conference be ordered. The motion shall state the reasons why the order should be allowed and shall be served on the nonmovant. Any objections to the motion may be filed in writing with the senior resident superior court judge within ten days of the date of the service of the motion. The judge shall rule on the motion without a hearing and shall notify the parties or their attorneys of the ruling.

(6) **Motion to Dispense with the Mediated Settlement Conference**. A party may move the senior resident superior court judge to dispense with a mediated settlement conference ordered by the judge. The motion shall state the reasons the relief is sought. For good cause shown, the senior resident superior court judge may grant the motion.

Good cause may include, but is not limited to, the fact that the parties (i) have participated in a settlement procedure, such as nonbinding arbitration or early neutral evaluation, prior to the court's order to participate in a conference; or (ii) have elected to resolve their case through arbitration.

(d) **Initiating the Mediated Settlement Conference by Local Rule**.

(1) **Order by Local Rule**. In judicial districts in which a system of scheduling orders or scheduling conferences is utilized to aid in the administration of civil cases, the senior resident superior court judge of the district shall, by local rule, require all persons and entities identified in Rule 4 to attend a pretrial mediated settlement conference in all civil actions, except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his or her order upon motion of a party under subsection (c)(6) of this rule only for good cause shown.

(2) **Scheduling Orders or Notices**. In judicial districts in which scheduling orders or notices are utilized to manage civil cases and for all cases ordered to participate in a mediated settlement conference by local rule, the order or notice shall: (i) require that a conference be held in the case; (ii) establish a deadline for the completion of the conference; (iii) state clearly that the parties have the right to designate their own mediator and state the deadline by which that designation should be made; (iv) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to designate a mediator; and (v) state that the parties shall be required to pay the mediator's fee at the conclusion of the conference, unless otherwise ordered by the court.

(3) **Scheduling Conferences**. In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to participate in a mediated settlement conference by local rule, the notice for the scheduling conference shall: (i) require that a mediated settlement conference be held in the case; (ii) establish a deadline for the completion of the mediated settlement conference; (iii) state clearly that the parties have the right to designate their own mediator and state the deadline by which that designation should be made; (iv) state the rate of compensation of the court appointed mediator, in the event that the parties do not exercise their right to designate a mediator; and (v) state that the parties shall be required to pay the mediator's fee at the

conclusion of the mediated settlement conference, unless otherwise ordered by the court.

(4) **Application of Rule 1(c)**. The provisions in subsections (c)(2), (c)(5), and (c)(6) of this rule shall apply to mediated settlement conferences initiated by local rule under subsection (d) of this rule, except for the time limitations set out in those subsections.

(5) **Deadline for Completion**. The provisions of Rule 3(b), which state the deadline for completion of the mediated settlement conference, shall not apply to mediated settlement conferences conducted under subsection (d) of this rule. The deadline for completion of the mediated settlement conference shall be set by the senior resident superior court judge or the judge's designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline set by the court shall be well in advance of the trial date.

(6) **Selection of the Mediator**. The parties may designate, or the senior resident superior court judge may appoint, a mediator under Rule 2, except that the time limits for designation and appointment shall be set by local rule. All other provisions of Rule 2 shall apply to mediated settlement conferences that are conducted under subsection (d) of this rule.

(7) **Use of Other Settlement Procedures**. The parties may utilize other settlement procedures under the provisions of subsection (c)(2) of this rule and Rule 10. However, the time limits and the method of moving the court for approval to utilize another settlement procedure set out in these rules shall not apply and shall be governed by local rules.

Comment

Comment to Rule 1(c)(6). If a party is unable to pay the costs of the mediated settlement conference or lives a significant distance from the conference site, then the court should consider Rule 4 or Rule 7 prior to dispensing with mediation for good cause. Rule 4 permits a party to attend the conference electronically, and Rule 7 permits parties to attend the conference and obtain relief from the obligation to pay the mediator's fee.

* * *

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediated Settlement Conferences

(a) **Attendance.**

(1) **Persons Required to Attend**. The following persons shall attend a mediated settlement conference:

a. Parties to the action, to include the following:

1. All individual parties.

2. Any party that is a nongovernmental entity shall be represented at the mediated settlement conference by an officer, employee, or agent who is not the entity's outside counsel and who has been authorized to decide whether, and on what terms, to settle the action on behalf of the entity, or who has been authorized to negotiate on behalf of the entity and can promptly communicate during the conference with persons who have decision-making authority to settle the action; provided, however, that if a specific procedure is required by law (e.g., a statutory pre-audit certificate) or the entity's governing documents (e.g., articles of incorporation, bylaws, partnership agreement, articles of organization, or operating agreement) to approve the terms of the settlement, then the representative shall have the authority to negotiate and make recommendations to the applicable approval authority in accordance with that procedure.

3. Any party that is a governmental entity shall be represented at the mediated settlement conference by an employee or agent who is not the entity's outside counsel and who: (i) has authority to decide on behalf of the entity whether and on what terms to settle the action; (ii) has been authorized to negotiate on behalf of the entity and can promptly communicate during the conference with persons who have decision-making authority to settle the action;

or (iii) has authority to negotiate on behalf of the entity and to make a recommendation to the entity's governing board, if under applicable law the proposed settlement terms can be approved only by the entity's governing board.

Notwithstanding anything in these rules to the contrary, any agreement reached which involves a governmental entity may be subject to the provisions of N.C.G.S. § 159-28(a).

b. A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier, which may be obligated to pay all or part of any claim presented in the action. Each carrier shall be represented at the mediated settlement conference by an officer, employee, or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of the carrier, or who has been authorized to negotiate on behalf of the carrier, and can promptly communicate during the conference with persons who have decision-making authority.

c. At least one counsel of record for each party or other participant whose counsel has appeared in the action.

(2) **~~Physical~~ Attendance Required Through the Use of Remote Technology**. Any party or person required to attend a mediated settlement conference shall ~~physically attend until~~attend the conference using remote technology; for example, by telephone, videoconference, or other electronic means. The conference shall conclude when an agreement is reduced to writing and signed, as provided in subsection (c) of this rule, or when an impasse ~~has been~~is declared. ~~Any party or person may have the attendance requirement excused or modified, including the allowance of the party or person's participation without physical attendance by~~Notwithstanding this remote attendance requirement, the conference may be conducted in person if:

a. ~~agreement of all parties, persons required to attend, and the mediator; or~~the mediator and all parties and

persons required to attend the conference agree to conduct the conference in person and to comply with all federal, state, and local safety guidelines that have been issued; or

b. ~~order of~~ the senior resident superior court judge, upon motion of a party and notice to the mediator and to all parties and persons required to attend the conference, so orders.

(3) **Scheduling.** Participants required to attend the mediated settlement conference shall promptly notify the mediator after designation or appointment of any significant problems that they may have with the dates for conference sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediated settlement conference session is scheduled by the mediator. If a scheduling conflict in another court proceeding arises after a conference session has been scheduled by the mediator, then the participants shall promptly attempt to resolve the conflict under Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on 20 June 1985.

(b) **Notifying Lienholders**. Any party or attorney who has received notice of a lien, or other claim upon proceeds recovered in the action, shall notify the lienholder or claimant of the date, time, and location of the mediated settlement conference, and shall request that the lienholder or claimant attend the conference or make a representative available with whom to communicate during the conference.

(c) **Finalizing Agreement**.

(1) If an agreement is reached at the mediated settlement conference, then the parties shall reduce the terms of the agreement to writing and sign the writing, along with their counsel. By stipulation of the parties and at the parties' expense, the agreement may be electronically recorded. If the agreement resolves all issues in the dispute, then a consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

(2) If the agreement resolves all issues at the mediated settlement conference, then the parties shall give a copy of the signed agreement, consent judgment, or voluntary dismissal to the mediator and to all parties at the conference, and shall file the consent judgment or voluntary dismissal with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later. In all cases, a consent judgment or voluntary dismissal shall be filed prior to the scheduled trial.

(3) If an agreement that resolves all issues in the dispute is reached prior to the mediated settlement conference, or is finalized while the conference is in recess, then the parties shall reduce the terms of the agreement to writing and sign the writing, along with their counsel, and shall file a consent judgment or voluntary dismissal disposing of all issues with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later.

(4) When an agreement is reached upon all issues, all attorneys of record must notify the senior resident superior court judge within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal.

(d) **Payment of the Mediator's Fee**. The parties shall pay the mediator's fee as provided by Rule 7.

(e) **Related Cases**. Upon application of any party or person, the senior resident superior court judge may order that an attorney of record or a party in a pending superior court civil action, or a representative of an insurance carrier that may be liable for all or any part of a claim pending in superior court, shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered under this rule. Any attorney, party, or representative of an insurance carrier that properly attends a mediation conference under this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issue concerning an order entered under

this rule shall be determined by the senior resident superior court judge who entered the order.

(f) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Comment

Comment to Rule 4(a). Parties subject to Chapter 159 of the General Statutes of North Carolina—which provides, among other things, that if an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, then the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been pre-audited to assure compliance with N.C.G.S. § 159-28(a) and that an obligation incurred in violation of N.C.G.S. § 159 28(a) or (a1) is invalid and may not be enforced—should, as appropriate, inform all participants at the beginning of the mediation of the preaudit requirement and the consequences for failing to preaudit under N.C.G.S. § 159-28.

Comment to Rule 4(c). Consistent with N.C.G.S. § 7A-38.1(*l*), if a settlement is reached during a mediated settlement conference, then the mediator shall ensure that the terms of the settlement are reduced to writing and signed by the parties and their attorneys before ending the conference. No settlement shall be enforceable unless it has been reduced to writing and signed by the parties.

Cases in which an agreement upon all issues has been reached should be disposed of as expeditiously as possible. This assures that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep the terms of the settlement confidential, then they may timely file with the court closing documents that do not contain confidential terms (e.g., voluntary dismissal or a consent judgment resolving all claims). Mediators will not be required by local rules to submit agreements to the court.

Comment to Rule 4(e). Rule 4(e) clarifies a senior resident superior court judge's authority to order a party, attorney of record, or representative of an insurance carrier to attend proceedings in another forum that are related to the superior court civil action. For example, when there are workers' compensation claims being asserted in a case before North Carolina Industrial Commission, there are typically additional claims asserted in superior court against a third-party tortfeasor. Because of the related nature of the claims, it may be beneficial for a party, attorney of record, or representative of an insurance carrier in the superior court civil action to attend the North Carolina Industrial Commission mediation conference in order to resolve the pending claims. Rule 4(e) specifically authorizes a senior resident superior court judge to order a party, attorney of record, or representative of an insurance carrier to attend a proceeding in another

forum, provided that all parties in the related matter consent and the persons ordered to attend receive reasonable notice of the proceeding. The *North Carolina Industrial Commission Rules for Mediated Settlement and Neutral Evaluation Conferences* contain a similar provision, which provides that persons involved in a North Carolina Industrial Commission case may be ordered to attend a mediated settlement conference in a related matter.

* * *

Rule 7. Compensation of the Mediator and Sanctions

(a) **By Agreement**. When a mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator. Notwithstanding the terms of the parties' agreement with the mediator, subsection (d) of this rule shall apply to an issue involving compensation of the mediator. Subsections (e) and (f) of this rule shall apply unless the parties' agreement provides otherwise.

(b) **By Court Order**. When a mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay the mediator a one-time, per-case administrative fee of ~~$150~~$175, due upon appointment.

(c) **Change of Appointed Mediator**. Under Rule 2(a), the parties may select a certified mediator to conduct the mediated settlement conference. Parties who fail to select a certified mediator and then desire a substitution after the court has appointed a mediator shall obtain court approval for the substitution. The court may approve the substitution only upon proof of payment to the court's original appointee of the ~~$150~~$175 one-time, per-case administrative fee, any other amount owed for mediation services under subsection (b) of this rule, and any postponement fee owed under subsection (e) of this rule.

(d) **Indigent Cases**. ~~No~~Any party found to be indigent by the court for the purposes of these rules shall not be required to pay a mediator's fee. A mediator conducting a mediated settlement conference under these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigency and ask to be relieved of that party's obligation to pay a share of the mediator's fee using a Petition and Order for Relief from Obligation to Pay Mediator's Fee, Form AOC-CV-814.

The motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their dispute, subsequent to trial. In ruling upon the motion, the judge shall apply the criteria

enumerated in N.C.G.S. § 1-110(a), but shall consider the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's motion.

(e) **Postponements and Fees.**

(1) As used in subsection (e) of this rule, "postponement" means to reschedule or not proceed with a mediated settlement conference once a date for a session of the conference has been scheduled by the mediator. After a conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A mediated settlement conference session may be postponed by the mediator for good cause only after notice by the movant to all parties of the reason for the postponement and a finding of good cause by the mediator. Good cause exists when the reason for the postponement involves a situation over which the party seeking the postponement has no control, including, but not limited to: (i) the illness of a party or attorney, (ii) a death in the family of a party or attorney, (iii) a sudden and unexpected demand by a judge that a party or attorney for a party appear in court for a purpose not inconsistent with the guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts, or (iv) inclement weather exists, such that travel is prohibitive. Where good cause is found, the mediator shall not assess a postponement fee against a party.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause for postponement; provided, however, that the mediator was notified of the settlement immediately after it was reached and at least fourteen calendar days prior to the date scheduled for the mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled mediated settlement conference session with the consent of all parties. A fee of $150 shall be paid to the mediator if the postponement is allowed. However, if the request for a postponement is made within seven calendar days of the scheduled date for mediation, then the postponement fee shall be $300. The postponement fee shall be paid by the party requesting the postponement,

unless otherwise agreed to by the parties. Postponement fees are in addition to the one-time, per-case administrative fee provided for in subsection (b) of this rule.

(5) If the parties select a certified mediator and contract with the mediator as to compensation, then the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required under subsection (e) of this rule.

(f) **Payment of Compensation by Parties**. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the mediated settlement conference.

Comment

Comment to Rule 7(b). Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

It is not unusual for two or more related cases to be mediated collectively. A mediator shall use his or her business judgment in assessing the one-time, per-case administrative fee when two or more cases are mediated together, and set his or her fee according to the amount of time that he or she spent in an effort to schedule the matters for mediation. The mediator may charge a flat fee of ~~$150~~$175 if scheduling was relatively easy, or multiples of that amount if more effort was required.

Comment to Rule 7(e). Nonessential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. It is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to a postponement in instances where, in the mediator's judgment, the mediation could be held as scheduled.

Comment to Rule 7(f). If a party is found by a senior resident superior court judge to have failed to attend a mediated settlement conference without good cause, then the court may require that party to pay the mediator's fee and related expenses.

* * *

Rule 8. Mediator Certification and Decertification

(a) The Commission may receive and approve applications for certification of persons to be appointed as superior court mediators. In order to be certified, an applicant must satisfy the requirements of this subsection.

(1) The applicant must complete: (i) at least forty hours of Commission-certified trial court mediation training, or (ii) at least forty hours of Commission-certified family and divorce mediation training; and ~~(ii)~~ a sixteen-hour Commission-certified supplemental trial court mediation training.

(2) The applicant must have the following training, experience, and qualifications:

a. An attorney-applicant may be certified if he or she:

1. is a member in good standing of the North Carolina State Bar; or

2. is a member similarly in good standing of the bar of another state and eligible to apply for admission to the North Carolina State Bar under Chapter 1, Subchapter C, of the North Carolina State Bar Rules and the Rules Governing the Board of Law Examiners and the Training of Law Students, 27 N.C. Admin. Code 1C.0105; demonstrates familiarity with North Carolina court structure, legal terminology, and civil procedure; provides to the Commission three letters of reference about the applicant's good character, including at least one letter from a person with knowledge of the applicant's professional practice; and possesses the experience required by this subsection; and

3. has at least five years of experience after date of licensure as a judge, practicing attorney, law professor, or mediator, or has equivalent experience.

b. A nonattorney-applicant may be certified if he or she:

1. has completed a six-hour training provided by a Commission-certified trainer on North Carolina court organization, legal terminology, civil court procedure, the attorney–client privilege, the unauthorized practice of law, and the common legal issues arising in superior court civil actions;

2. has provided to the Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience qualifying the applicant under subsection (a)(2)(b)(3) of this rule; and

3. has completed either:

i. a minimum of twenty hours of basic mediation training provided by a trainer acceptable to the Commission and, after completing the twenty-hour training, has mediated at least thirty disputes over the course of at least three years, or has equivalent experience, and possesses a four year college degree from an accredited institution, ~~except that the four-year degree requirement shall not be applicable to mediators certified prior to 1 January 2005~~, and has four years of professional, management, or administrative experience in a professional, business, or governmental entity; or

ii. ten years of professional, management, or administrative experience in a professional, business, or governmental entity, and possesses a four-year college degree from an accredited institution~~, except that the four year degree requirement shall not be applicable to mediators certified prior to 1 January 2005~~.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be

ineligible for certification under subsections (a)(2)(a) and (a)(2)(b) of this rule.

~~c.~~(3) The applicant must complete the following observations:

~~1.~~a. **All Applicants**. All applicants for certification shall observe two mediated settlement conferences, at least one of which shall be of a superior court civil action.

~~2.~~b. **Nonattorney-Applicants**. Nonattorney-applicants for certification shall observe three mediated settlement conferences, in addition to those required under subsection ~~(a)(2)(c)(1)~~(a)(3)(a) of this rule, that are conducted by at least two different mediators. At least one of the additional observations shall be of a superior court civil action.

~~3.~~c. **Conferences Eligible for Observation**. Conferences eligible for observation under subsection ~~(a)(2)(c)~~(a)(3) of this rule shall be those in cases pending before the North Carolina superior courts, the North Carolina Court of Appeals, the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, or the federal district courts in North Carolina that are ordered to mediation or conducted by an agreement of the parties which incorporates the rules of mediation of one of those entities.

Conferences eligible for observation shall also include those conducted in disputes prior to litigation that are mediated by an agreement of the parties and incorporate the rules for mediation of one of the entities named above.

All conferences shall be conducted by a certified superior court mediator under rules adopted by one of the above entities and shall be observed from their beginning to settlement or when an impasse is declared. Observations shall be reported on a Certificate of Observation – Mediated Settlement Conference Program, Form AOC-DRC-07.

All observers shall conform their conduct to the Commission's policy on ~~*Requirements*~~*Guidelines for Observer Conduct*.

~~(3)~~(4) The applicant must demonstrate familiarity with the statutes, rules, and practices governing mediated settlement conferences in North Carolina.

~~(4)~~(5) The applicant must be of good moral character and adhere to the Standards of Professional Conduct for Mediators when acting under these rules. On his or her application(s) for certification or application(s) for certification renewal, an applicant shall disclose any:

a. pending criminal charges;

b. criminal convictions;

c. restraining orders issued against him or her;

d. failures to appear;

e. pending or closed grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country;

f. disciplinary action taken against him or her by a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country, including, but not limited to, disbarment, revocation, decertification, or suspension of any professional license or certification, including the suspension or revocation of any license, certification, registration, or qualification to serve as a mediator in another state or country, even if stayed;

g. judicial sanctions imposed against him or her in any jurisdiction; or

h. civil judgments, tax liens, or bankruptcy filings that occurred within the ten years preceding the date that the initial or renewal application was filed with the Commission.

A mediator shall report to the Commission any of the above-enumerated matters arising subsequent to the disclosures reported on the initial or renewal application for certification within thirty days of receiving notice of the matter.

As referenced in this subsection, criminal charges or convictions (excluding infractions) shall include felonies,

misdemeanors, or misdemeanor traffic violations (including driving while impaired) under the law of North Carolina or another state, or under the law of a federal, military, or foreign jurisdiction, regardless of whether the adjudication was withheld (prayer for judgment continued) or the imposition of a sentence was suspended.

~~(5)~~(6) The applicant must submit proof of qualifications set out in this rule on a form provided by the Commission.

~~(6)~~(7) The applicant must pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

~~(7)~~(8) The applicant must agree to accept the fee ordered by the court under Rule 7 as payment in full of a party's share of the mediator's fee.

~~(8)~~(9) The applicant must comply with the requirements of the Commission for completing and reporting continuing mediator education or training.

~~(9)~~(10) The applicant must agree, once certified, to make reasonable efforts to assist applicants for mediator certification in completing their observation requirements.

(b) No mediator who held a professional license and relied upon that license to qualify for certification under subsections (a)(2)(a) or (a)(2)(b) of this rule shall be decertified or denied recertification because that mediator's license lapses, is relinquished, or becomes inactive; provided, however, that this subsection shall not apply to any mediator whose professional license is revoked, suspended, lapsed, relinquished, or whose professional license becomes inactive due to disciplinary action or the threat of disciplinary action from his or her licensing authority. Any mediator whose professional license is revoked, suspended, lapsed, or relinquished, or whose professional license becomes inactive, shall report the matter to the Commission.

(c) A mediator's certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications set out in this rule or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible for certification under this rule. No application for certification renewal shall be denied on the grounds that the mediator's training and

experience does not meet the training and experience required under rules which were promulgated after the date of the applicant's original certification.

Comment

Comment to Rule 8(a)(2). Commission staff has discretion to waive the requirements set out in Rule 8(a)(2)(a)(2) and Rule 8(a)(2)(b)(1), if the applicant can demonstrate sufficient familiarity with North Carolina legal terminology, court structure, and procedure.

* * *

These amendments to the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions become effective on 10 June 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 3rd day of June, 2020.

s/Mark A. Davis
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of June, 2020.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER AMENDING THE RULES FOR SETTLEMENT PROCEDURES IN DISTRICT COURT FAMILY FINANCIAL CASES

Pursuant to subsection 7A-38.4A(k) and subsection 7A-38.4A(*o*) of the General Statutes of North Carolina, the Court hereby amends Rules 2, 4, 6, 7, and 8 of the Rules for Settlement Procedures in District Court Family Financial Cases.

* * *

Rule 2. Designation of the Mediator

(a) **Designation of a Mediator by Agreement of the Parties**. By agreement, the parties may designate a family financial mediator certified under these rules by filing a Designation of Mediator in Family Financial Case, Form AOC CV-825 (Designation Form), with the court at the scheduling and discovery conference. The Designation Form shall state: (i) the name, address, and telephone number of the designated mediator; (ii) the rate of compensation of the mediator; (iii) that the mediator and opposing counsel have agreed upon the designation and rate of compensation; and (iv) that the mediator is certified under these rules.

~~If the parties wish to designate a mediator who is not certified under these rules, the parties may nominate a noncertified mediator by filing a Designation Form with the court at the scheduling and discovery conference. If the parties choose to nominate a mediator, then the Designation Form shall state: (i) the name, address, and telephone number of the mediator; (ii) the training, experience, and other qualifications of the mediator; (iii) the rate of compensation of the mediator; (iv) that the mediator and opposing counsel have agreed upon the nomination; and (v) the rate of compensation, if any. The court shall approve the nomination if, in the court's opinion, the nominee is qualified to serve as the mediator and the parties and the nominee have agreed on the rate of compensation.~~

A copy of each form submitted to the court and the court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

(b) **Appointment of a Mediator by the Court**. If the parties cannot agree on the designation of a <u>certified</u> mediator, then the parties shall notify the court by filing a Designation Form requesting that the court appoint a <u>certified</u> mediator. The Designation Form shall be filed at the scheduling and discovery conference and state that the attorneys for the parties have discussed the designation of a mediator and have

been unable to agree on a mediator. Upon receipt of a Designation Form requesting the appointment of a mediator, or upon the parties' failure to file a Designation Form with the court, the court shall appoint a family financial mediator certified under these rules who has expressed a willingness to mediate disputes within the judicial district.

In appointing a mediator, the court shall rotate through a list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. The court shall retain discretion to depart from a strict rotation of mediators when, in the court's discretion, there is good cause in a case to do so.

As part of the application or certification renewal process, all mediators shall designate the judicial districts in which they are willing to accept court appointments. Each designation is a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated district and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a judicial district designated by the mediator may be grounds for the mediator's removal from the district's appointment list by the Dispute Resolution Commission (Commission) or the chief district court judge.

The Commission shall provide the district court judges in each judicial district a list of certified family financial mediators requesting appointments in that district. The list shall contain each mediator's name, address, and telephone number. The list shall be provided to the judges electronically through the Commission's website at https://www.ncdrc.gov.

The Commission shall promptly notify the district court of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

(c) **Mediator Information**. To assist the parties in designating a mediator, the Commission shall assemble, maintain, and post a list of certified family financial mediators on its website at https://www.ncdrc.gov, accompanied by each mediator's contact information and the judicial districts in which each mediator is available to serve. When a mediator has supplied it to the Commission, the list shall also provide the mediator's biographical information, including information about the mediator's education, professional experience, and mediation training and experience.

(d) **Withdrawal or Disqualification of the Mediator.**

(1) Any party may move the chief district court judge of the judicial district where the case is pending for an order disqualifying the mediator using a Notice of Withdrawal/ Disqualification of Mediator and Order for Substitution of Mediator, Form AOC DRC-20. For good cause, an order disqualifying the mediator shall be entered.

(2) A mediator who wishes to withdraw from a case may file a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20, with the chief district court judge of the judicial district where the case is pending.

(3) If a mediator withdraws or is disqualified, then a substitute mediator shall be designated or appointed under this rule. A mediator who has withdrawn or been disqualified shall not be entitled to receive an administrative fee, unless the mediation has been commenced.

* * *

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediated Settlement Conferences

(a) **Attendance**.

(1) The following persons shall attend a mediated settlement conference:

a. The parties.

b. At least one counsel of record for each party whose counsel has appeared in the case.

(2) Any party or ~~other~~ person required to attend a mediated settlement conference shall ~~physically attend the conference until~~attend the conference using remote technology; for example, by telephone, videoconference, or other electronic means. The conference shall conclude when an agreement is reduced to writing and signed, as provided in subsection (b) of this rule, or ~~until~~when an impasse ~~has been~~is declared. ~~Any such party or person may have the attendance requirement excused or modified, including permitting participation without physical attendance, by~~Notwithstanding this remote attendance requirement, the conference may be conducted in person if:

a. ~~agreement of all parties and persons required to attend the conference and the mediator; or~~the mediator and all parties and persons required to attend the conference agree to conduct the conference in person and to comply with all federal, state, and local safety guidelines that have been issued; or

b. ~~order of~~ the court, upon motion of a party and notice to the mediator and to all parties and persons required to attend the conference ~~and the mediator~~, so orders.

(b) **Scheduling**. Participants required to attend the mediated settlement conference shall promptly notify the mediator, after selection or appointment, of any significant problems that they may have with the dates for mediated settlement conference sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated conference session is scheduled by the mediator. If a scheduling conflict in another court proceeding arises after a conference session has been scheduled by the mediator, then participants shall promptly attempt to resolve the conflict under Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on 20 June 1985.

(c) **Finalizing Agreement**.

(1) If an agreement is reached at the mediated settlement conference, then the parties shall reduce the essential terms of the agreement to writing.

a. If the parties conclude the mediated settlement conference with a written document containing all of the terms of their agreement for property distribution and do not intend to submit their agreement to the court for approval, then the agreement shall be signed by all parties and formally acknowledged as required by N.C.G.S. § 50-20(d). If the parties conclude the conference with a written document containing all of the terms of their agreement and intend to submit their agreement to the court for approval, then the agreement shall be signed by all parties, but need not be formally acknowledged. In all cases, the mediator shall report a settlement to the court and include in the report the name of the person responsible for filing closing documents with the court.

b. If the parties reach an agreement at the mediated settlement conference regarding property distribution and do not intend to submit their agreement to the court for approval, but are unable to complete a final document reflecting their settlement or have it signed and acknowledged as required by N.C.G.S. § 50-20(d), then the parties shall produce a written summary of their understanding and use it to guide them in writing any agreements as may be required to give legal effect to their understanding. If the parties intend to submit their agreement to the court for approval, then the agreement must be in writing and signed by the parties, but need not be formally acknowledged. The mediator shall facilitate the production of the summary and shall either:

1. report to the court that the matter has been settled and include in the report the name of the person responsible for filing closing documents with the court; or

2. declare, in the mediator's discretion, a recess of the mediated settlement conference.

If a recess is declared, then the mediator may schedule another session of the conference if the mediator determines that it would assist the parties in finalizing a settlement.

(2) In all cases where an agreement is reached after being ordered to mediation, whether prior to, or during, the mediation, or during a recess, the parties shall file a consent judgment or voluntary dismissal with the court within thirty days of the agreement or before the expiration of the mediation deadline, whichever is later. The mediator shall report to the court that the matter has been settled and who reported the settlement.

(3) An agreement regarding the distribution of property, reached at a proceeding conducted under this section or during a recess of the mediated settlement conference, which has not been approved by a court, shall not be enforceable unless it has been reduced to writing, signed by the parties, and acknowledged as required under N.C.G.S. § 50-20(d).

(d) **Payment of the Mediator's Fee**. The parties shall pay the mediator's fee as provided by Rule 7.

(e) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Comment

Comment to Rule 4(c). Consistent with N.C.G.S. § 7A-38.4A(j), no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall ensure that the terms of the agreement are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which an agreement on all issues has been reached should be disposed of as expeditiously as possible. This assures that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep the terms of the settlement confidential, then they may timely file closing documents with the court, as long as those documents do not contain confidential terms (e.g., a voluntary dismissal or consent judgment resolving all claims). Mediators will not be required by local rules to submit agreements to the court.

* * *

Rule 6. Authority and Duties of the Mediator

(a) **Authority of the Mediator**.

(1) **Control of the Mediated Settlement Conference**. The mediator shall at all times be in control of the mediated settlement conference and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultation**. The mediator may communicate privately with any participant during the mediated settlement conference. However, there shall be no ex parte communication before or outside the conference between the mediator and any counsel or party regarding any aspect of the proceeding, except about scheduling matters. Nothing in this rule prevents the mediator from engaging in ex parte communications with the consent of the parties for the purpose of assisting settlement negotiations.

(b) **Duties of the Mediator**.

(1) **Informing the Parties**. At the beginning of the mediated settlement conference, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the differences between mediation and other forms of conflict resolution;

c. the costs of the mediated settlement conference;

d. the fact that the mediated settlement conference is not a trial, that the mediator is not a judge, and that the parties retain their right to a trial if they do not reach settlement;

e. the circumstances under which the mediator may meet and communicate privately with any of the parties, or with any other person;

f. whether, and under what conditions, communications with the mediator will be held in confidence during the mediated settlement conference;

g. the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.4A(j);

h. the duties and responsibilities of the mediator and the participants; and

i. the fact that any agreement reached will be reached by mutual consent.

(2) **Disclosure**. The mediator has a duty to be impartial and to disclose to all participants any circumstance bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse.** It is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediated settlement conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) R**eporting Results of the Mediated Settlement Conference**.

a. The mediator shall report the results of the mediated settlement conference and any settlement reached by the parties prior to, or during, a recess of the conference to the court. Mediators shall also report the

results of mediations held in other district court family financial cases in which a mediated settlement conference was not ordered by the court. The report shall be filed on a Report of Mediator in Family Financial Case, Form AOC-CV-827, within ten days of the conclusion of the conference or within ten days of being notified of the settlement, and shall include the names of the persons who attended the conference, if a conference was held. If a partial agreement was reached at the conference, then the report shall state the issues that remain for trial. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

b. If an agreement upon all issues was reached at the mediated settlement conference, then the mediator's report shall state whether the dispute will be resolved by a consent judgment or voluntary dismissal, and the name, address, and telephone number of the person designated by the parties to file the consent judgment or dismissal with the court, as required under Rule ~~4(b)(2)~~4(c)(2). The mediator shall advise the parties that, consistent with Rule ~~4(b)(2)~~4(c)(2), their consent judgment or voluntary dismissal is to be filed with the court within thirty days of the conference or before the expiration of the mediation deadline, whichever is later. The mediator's report shall indicate that the parties have been so advised.

c. The Commission or the North Carolina Administrative Office of the Courts (NCAOC) may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.

d. A mediator who fails to report as required by this rule shall be subject to sanctions by the court. The sanctions shall include, but are not limited to, fines or other monetary penalties, decertification as a mediator, and any other sanctions available through the court's contempt power. The court shall notify the Commission of any sanction imposed against a mediator under this section.

(5) **Scheduling and Holding the Mediated Settlement Conference.** The mediator shall schedule and conduct the mediated settlement conference prior to the conference

completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient to all participants. In the absence of agreement, the mediator shall select a date and time for the conference. The deadline for completion of the conference shall be strictly observed by the mediator, unless the deadline is changed by written order of the court.

A mediator selected by agreement of the parties shall not delay scheduling or conducting the conference because one or more of the parties has not paid an advance fee deposit as required by the agreement.

* * *

Rule 7. Compensation of the Mediator and Sanctions

(a) **By Agreement**. When a mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator. Notwithstanding the terms of the parties' agreement with the mediator, subsection (e) of this rule shall apply to an issue involving compensation of the mediator. Subsections (d) and (f) of this rule shall apply unless the parties' agreement provides otherwise.

(b) **By Court Order**. When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay the mediator a one-time, per-case administrative fee of ~~$150~~$175, which accrues upon appointment.

(c) **Change of Appointed Mediator**. Parties who fail to select a mediator and then desire a substitution after the court has appointed a mediator shall obtain court approval for the substitution. The court may approve the substitution only upon proof of payment to the court's original appointee of the ~~$150~~$175 one-time, per-case administrative fee, any other amount due for mediation services under subsection (b) of this rule, and any postponement fee owed under subsection (f) of this rule.

(d) **Payment of Compensation by the Parties**. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. Payment shall be due upon the completion of the mediated settlement conference.

(e) **Inability to Pay**. ~~No~~Any party found by the court to be unable to pay its full share of the mediator's fee shall not be required to do so. Any party required to pay a share of a mediator's fee under subsections (b) and (c) of this rule may move the court for relief using a Petition and Order for Relief from Obligation to Pay All or Part of Mediator's Fee in Family Financial Case, Form AOC-CV-828.

In ruling upon the motion, the court may consider the income and assets of the movant and the outcome of the dispute. The court shall enter an order granting or denying the party's motion. The court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a mediated settlement conference under these rules shall accept as payment in full of a party's share of the mediator's fee that portion paid by, or on behalf of, the party pursuant to a court order issued under this rule.

(f) **Postponements and Fees**.

(1) As used in subsection (f) of this rule, "postponement" means to reschedule or not proceed with a mediated settlement conference once a date for the conference has been scheduled by the mediator. After a conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A mediated settlement conference may be postponed by a mediator for good cause only after notice by the movant to all parties of the reason for the postponement and a finding of good cause by the mediator. Good cause exists when the reason for the postponement involves a situation over which the party seeking the postponement has no control, including, but not limited to: (i) the illness of a party or attorney, (ii) a death in the family of a party or attorney, (iii) a sudden and unexpected demand by the court that a party or attorney for a party appear in court for a purpose not inconsistent with the guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts, or (iv) inclement weather exists, such that travel is prohibitive. Where good cause is found, the mediator shall not assess a postponement fee.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause for postponement; provided, however, that the mediator was notified of the settlement immediately after it was reached and at least fourteen calendar days prior to the date scheduled for the mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled mediated settlement conference session with the consent of all parties. A fee of $150 shall be paid to the mediator if the postponement is allowed. However, if the request for a postponement is made within seven

calendar days of the scheduled date for mediation, then the postponement fee shall be $300. The postponement fee shall be paid by the party requesting the postponement, unless otherwise agreed to by the parties. Postponement fees are in addition to the one-time, per-case administrative fee provided for in subsection (b) of this rule.

(5) If the parties select a certified mediator and contract with the mediator as to compensation, then the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required under subsection (f) of this rule.

Comment

Comment to Rule 7(b). Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

Comment to Rule 7(d). If a party is found by the court to have failed to attend a mediated settlement conference without good cause, then the court may require that party to pay the mediator's fee and related expenses.

Comment to Rule 7(f). Nonessential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. It is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to a postponement in instances where, in the mediator's judgment, the mediation could be held as scheduled.

* * *

Rule 8. Mediator Certification and Decertification

(a) The Commission may receive and approve applications for certification of persons to be appointed as mediators for family financial matters in district court. In order to be certified, an applicant must satisfy the requirements of this subsection.

(1) The applicant for certification must have a basic understanding of North Carolina family law. Applicants should be able to demonstrate that they have completed at least twelve hours of basic family law education by:

a. attending workshops or programs on topics such as separation and divorce, alimony and postseparation support, equitable distribution, child custody and support, and domestic violence;

b. completing an independent study on these topics, such as viewing or listening to video or audio programs on family law topics; or

c. having equivalent North Carolina family law experience, including work experience that satisfies one of the categories set forth in the Commission's policy on interpreting Rule 8(a)(1) (e.g., the applicant is an experienced family law judge or board certified family law attorney).

(2) The applicant for certification must:

a. have an Advanced Practitioner Designation from the Association for Conflict Resolution (ACR) and have earned an undergraduate degree from an accredited four-year college or university; or

b. have completed either (i) forty hours of Commission certified family and divorce mediation training; or (ii) forty hours of Commission-certified trial court mediation training and sixteen hours of Commission certified supplemental family and divorce mediation training; and be

1. a member in good standing of the North Carolina State Bar or a member similarly in good standing of the bar of another state and eligible to apply for admission to the North Carolina State Bar under Chapter 1, Subchapter C, of the North Carolina State Bar Rules and the Rules Governing the Board of Law Examiners and the Training of Law Students, 27 N.C. Admin. Code 1C.0105, with at least five years of experience after the date of licensure as a judge, practicing attorney, law professor, or mediator, or must possess equivalent experience;

2. a licensed psychiatrist under N.C.G.S. § 90-9.1, with at least five years of experience in the field after the date of licensure;

3. a licensed psychologist under N.C.G.S. §§ 90-270.1 to -270.22, with at least five years of experience in the field after the date of licensure;

4. a licensed marriage and family therapist under N.C.G.S. §§ 90-270.45 to -270.63, with at least

five years of experience in the field after the date of licensure;

5. a licensed clinical social worker under N.C.G.S. § 90B-7, with at least five years of experience in the field after the date of licensure;

6. a licensed professional counselor under N.C.G.S. §§ 90-329 to -345, with at least five years of experience in the field after the date of licensure; or

7. an accountant certified in North Carolina, with at least five years of experience in the field after the date of certification.

c. Any person who has not been certified as a mediator pursuant to these rules may be certified without compliance with subsection (a)(2)(b) and subsection (a)(5) of this rule if

1. the applicant for certification is a member in good standing of the North Carolina State Bar or a member similarly in good standing of the bar of another state and eligible to apply for admission to the North Carolina State Bar under Chapter 1, Subchapter C, of the North Carolina State Bar Rules and the Rules Governing the Board of Law Examiners and the Training of Law Students, 27 N.C. Admin. Code 1C.0105, with at least five years of experience after the date of licensure as a judge, practicing attorney, law professor, or mediator, or must possess equivalent experience; and meets the following additional requirements:

i. the applicant applies for certification within one year from 10 June 2020;

ii. the applicant has, by selection of the parties, mediated at least ten family financial settlement cases in the North Carolina District Court within the last five years, as shown by proof satisfactory to the Commission staff; and

iii. the applicant has taken a sixteen-hour supplemental family and divorce

mediation training program approved by the Commission wherein the statutes, program rules, advisory opinions, and ethics, including the Standards of Professional Conduct for Mediators, are discussed;

or

2. the applicant for certification is a nonattorney who meets one of the required licensures set forth in subsection (a)(2)(b)(2) through subsection (a)(2)(b)(7) of this rule, and meets the following additional requirements:

i. the applicant applies for certification within one year from 10 June 2020;

ii. the applicant has, by selection of the parties, mediated at least fifteen family financial settlement cases in the North Carolina District Court within the last five years, as shown by proof satisfactory to the Commission staff; and

iii. the applicant has taken a forty-hour family and divorce mediation training course and the six-hour training on North Carolina legal terminology, court structure, and civil procedure course approved by the Commission.

(3) If the applicant is not licensed to practice law in one of the United States, then the applicant must have completed six hours of training on North Carolina legal terminology, court structure, and civil procedure, provided by a Commission-certified trainer. An attorney licensed to practice law in a state other than North Carolina shall satisfy this requirement by completing a self-study course, as directed by Commission staff.

(4) If the applicant is not licensed to practice law in North Carolina, then the applicant must provide three letters of reference to the Commission about the applicant's good character, including at least one letter from a person with knowledge of the applicant's professional practice and experience qualifying the applicant under subsection (a) of this rule.

(5) The applicant must have observed, as a neutral observer and with the permission of the parties, two mediations involving a custody or family financial issue conducted by a mediator who (i) is certified under these rules, (ii) has an Advanced Practitioner Designation from the ACR, or (iii) is a mediator certified by the NCAOC for custody matters. Mediations eligible for observation shall also include mediations conducted in matters prior to litigation of family financial disputes that are mediated by agreement of the parties and incorporate these rules.

If the applicant is not an attorney licensed to practice law in one of the United States, then the applicant must observe three additional mediations involving civil or family-related disputes, or disputes prior to litigation that are conducted by a Commission-certified mediator and are conducted pursuant to a court order or an agreement of the parties incorporating the mediation rules of a North Carolina state or federal court.

All mediations shall be observed from their beginning until settlement, or until the point that an impasse has been declared, and shall be reported by the applicant on a Certificate of Observation - Family Financial Settlement Conference Program, Form AOC-DRC-08. All observers shall conform their conduct to the Commission's policy on *Guidelines for Observer Conduct*.

(6) The applicant must demonstrate familiarity with the statutes, rules, standards of practice, and standards of conduct governing mediated settlement conferences conducted in North Carolina.

(7) The applicant must be of good moral character and adhere to the Standards of Professional Conduct for Mediators when acting under these rules. On his or her application(s) for certification or application(s) for certification renewal, an applicant shall disclose any:

a. pending criminal charges;

b. criminal convictions;

c. restraining orders issued against him or her;

d. failures to appear;

e. pending or closed grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country;

f. disciplinary action taken against him or her by a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country, including, but not limited to, disbarment, revocation, decertification, or suspension of any professional license or certification, including the suspension or revocation of any license, certification, registration, or qualification to serve as a mediator in another state or country, even if stayed;

g. judicial sanctions imposed against him or her in any jurisdiction; or

h. civil judgments, tax liens, or bankruptcy filings that occurred within the ten years preceding the date that the initial or renewal application was filed with the Commission.

A mediator shall report to the Commission any of the above-enumerated matters arising subsequent to the disclosures reported on the initial or renewal application for certification within thirty days of receiving notice of the matter.

As referenced in this subsection, criminal charges or convictions (excluding infractions) shall include felonies, misdemeanors, or misdemeanor traffic violations (including driving while impaired) under the law of North Carolina or another state, or under the law of a federal, military, or foreign jurisdiction, regardless of whether adjudication was withheld (prayer for judgment continued) or the imposition of a sentence was suspended.

(8) The applicant must submit proof of the qualifications set out in this rule on a form provided by the Commission.

(9) The applicant must pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

(10) The applicant must agree to accept the fee ordered by the court under Rule 7 as payment in full of a party's share of the mediator's fee.

(11) The applicant must comply with the requirements of the Commission for completing and reporting continuing mediator education or training.

(12) The applicant must agree, once certified, to make reasonable efforts to assist applicants for mediator certification in completing their observation requirements.

(b) No mediator who held a professional license and relied upon that license to qualify for certification under subsection (a)(2)(b) of this rule shall be decertified or denied recertification because the mediator's license lapses, is relinquished, or becomes inactive; provided, however, that this subsection shall not apply to a mediator whose professional license is revoked, suspended, lapsed, or relinquished, or whose professional license becomes inactive due to disciplinary action, or the threat of disciplinary action, from the mediator's licensing authority. Any mediator whose professional license is revoked, suspended, lapsed, relinquished, or whose professional license becomes inactive shall report the matter to the Commission.

(c) A mediator's certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications set out in this rule or has not faithfully observed these rules or those of any judicial district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible for certification under this rule. No application for certification renewal shall be denied on the ground that the mediator's training and experience does not satisfy a training and experience requirement promulgated after the date of the mediator's original certification.

Comment

Comment to Rule 8(a)(3). Commission staff has discretion to waive the requirements set out in Rule 8(a)(3) if an applicant can demonstrate sufficient familiarity with North Carolina legal terminology, court structure, and civil procedure.

* * *

These amendments to the Rules for Settlement Procedures in District Court Family Financial Cases become effective on 10 June 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 3rd day of June, 2020.

s/Mark A. Davis
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of June, 2020.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER AMENDING THE STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

Pursuant to subsection 7A-38.2(a) of the General Statutes of North Carolina, the Court hereby amends Standards 2, 3, 7, and 8 of the Standards of Professional Conduct for Mediators.

* * *

Standard 2. Impartiality

A mediator shall, in word and action, maintain impartiality toward the parties and on the issue in dispute.

(a) Impartiality means an absence of prejudice or bias, in word and action, and a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.

(b) As early as practical, and no later than the beginning of the first mediation session, the mediator shall fully disclose ~~of~~ any known relationship with a party or a party's counsel that may affect, or give the appearance of affecting, the mediator's impartiality.

(c) The mediator shall decline to serve, or shall withdraw from serving, if:

(1) a party objects to the mediator serving on grounds of lack of impartiality and, after discussion, the party continues to object; or

(2) the mediator determines that he or she cannot serve impartially.

* * *

Standard 3. Confidentiality

A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

(a) A mediator shall not disclose to any nonparticipant, directly or indirectly, any information communicated to the mediator by a participant within the mediation process, whether the information is obtained before, during, or after the mediated settlement conference. A mediator's filing of a copy of an agreement reached in mediation with the appropriate court, under a statute that mandates such filing, shall not be considered to be a violation of this subsection.

(b) A mediator shall not disclose to any participant, directly or indirectly, any information communicated to the mediator in confidence by any other participant in the mediation process, whether the information is obtained before, during, or after the mediated settlement conference, unless the other participant gives the mediator permission to do so. A mediator may encourage a participant to permit disclosure but, absent permission, the mediator shall not disclose the information.

(c) A mediator shall not disclose to court officials or staff any information communicated to the mediator by a participant within the mediation process, whether before, during, or after the mediated settlement conference, including correspondence or communications regarding scheduling or attendance, except as required to complete a report of mediator form; provided, however, that when seeking to collect a fee for services, the mediator may share correspondence or communications from a participant relating to the fees of the mediator. Report of mediator forms are available on the North Carolina Administrative Office of the Court's website at https://www.nccourts.gov.

(d) Notwithstanding the confidentiality provisions set forth in subsections (a), (b), and (c) of this standard, a mediator may report otherwise confidential conduct or statements made before, during, or after mediation in the following circumstances:

(1) If a mediator believes that communicating certain procedural matters to court officials or staff will aid the mediation, then, with the consent of the parties to the mediation, the mediator may do so. In making a permitted disclosure, a mediator shall refrain from expressing his or her personal opinion about a participant or any aspect of the case to court officials or staff.

(2) If a statute requires or permits a mediator to testify, give an affidavit, or tender a copy of an agreement reached in mediation to the official designated by the statute, then the mediator may do so.

If, under the Rules for Settlement Procedures in District Court Family Financial Cases or the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions, a hearing is held on a motion for sanctions for failure to attend a mediated settlement conference, or for failure to pay the mediator's fee, and the mediator who mediated the dispute testifies, either as the movant or under a subpoena, then the mediator shall limit his or her testimony to facts

relevant to a decision about the sanction sought and shall not testify about statements made by a participant that are not relevant to that decision.

(3) If a mediator is subpoenaed and ordered to testify or produce evidence in a criminal action or proceeding as provided in N.C.G.S. § 7A-38.1(1), N.C.G.S. § 7A-38.4A(j), and N.C.G.S. § 7A 38.3B(g), then the mediator may do so.

(4) If public safety is at issue, then a mediator may disclose otherwise confidential information to participants, nonparticipants, law enforcement personnel, or other persons potentially affected by the harm, if:

a. a party to, or a participant in, the mediation has communicated to the mediator a threat of serious bodily harm or death to any person, and the mediator has reason to believe the party has the intent and ability to act on the threat;

b. a party to, or a participant in, the mediation has communicated to the mediator a threat of significant damage to real or personal property, and the mediator has reason to believe the party has the intent and ability to act on the threat; or

c. a party or other participant's conduct during the mediation results in direct bodily injury or death to a person.

(5) If a party to, or a participant in, a mediation has filed a complaint with either the Commission or the North Carolina State Bar regarding a mediator's professional conduct, moral character, or fitness to practice as a mediator, then the mediator may reveal otherwise confidential information for the purpose of defending himself or herself against the complaint.

(6) If a party to, or a participant in, a mediation has filed a lawsuit against a mediator for damages or other relief regarding the mediator's professional conduct, moral character, or fitness to practice as a mediator, then the mediator may reveal otherwise confidential information for the purpose of defending himself or herself in the action.

(7) With the permission of all parties, a mediator may disclose otherwise confidential information to an attorney who now represents a party in a case previously mediated by

the mediator and in which no settlement was reached. The disclosure shall be intended to help the newly involved attorney understand any offers extended during the mediation process and any impediments to settlement. A mediator who discloses otherwise confidential information under this subsection shall take great care, especially if some time has passed, to ensure that their recall of the discussion is clear, that the information is presented in an unbiased manner, and that no confidential information is revealed.

(8) If a mediator is ~~an attorney~~a lawyer licensed by the North Carolina State Bar and another ~~attorney~~lawyer makes statements or engages in conduct that is reportable under subsection (d)(3)(4) of this standard, then the mediator shall report the statements or conduct to either the North Carolina State Bar or the court having jurisdiction over the matter, in accordance with Rule 8.3(e) of the North Carolina Rules of Professional Conduct.

(9) If a mediator concludes that, as a matter of safety, the mediated settlement conference should be held in a secure location, such as the courthouse, then the mediator may seek the assistance of court officials or staff in securing a location, so long as the specific circumstances of the parties' dispute are not identifiable.

(10) If a mediator or mediator-observer witnesses concerning behavior of an attorney during a mediation, then that behavior may be reported to the North Carolina Lawyer Assistance Program for the purpose of providing assistance to the attorney for alcohol or substance abuse.

In making a permitted disclosure under this standard, a mediator should make every effort to protect the confidentiality of noncomplaining parties or participants in the mediation, refrain from expressing his or her personal opinion about a participant, and avoid disclosing the identities of the participants or the specific circumstances of the parties' dispute.

(e) "Court officials or staff," as used in this standard, includes court officials or staff of North Carolina state and federal courts, state and federal administrative agencies, and community mediation centers.

(f) The duty of confidentiality as set forth in this standard encompasses information received by the mediator and then disseminated to a nonmediator employee or nonmediator associate who is acting as an agent of the mediator.

(1) A mediator who individually or together with other professionals employs and/or utilizes a nonmediator in the practice, firm, or organization shall make reasonable efforts to ensure that the practice, firm, or organization has provided reasonable assurance that the nonmediator's conduct is compatible with the professional obligations of the mediator.

a. A mediator having direct, or indirect, supervisory authority over the nonmediator shall make reasonable efforts to ensure that the nonmediator's conduct is compatible with the ethical obligations of the mediator.

b. A mediator may share confidential files with the nonmediator provided the mediator properly supervises the nonmediator to ensure the preservation of party confidences.

c. A mediator shall be responsible for the nonmediator's actions, or inactions, that would be a violation of these standards if:

1. the mediator orders or, with the knowledge of the specific conduct, ratifies the conduct; or

2. the mediator has managerial or direct supervisory authority over the nonmediator and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

(2) A mediator who individually or together with other professionals employs and/or utilizes a nonmediator in the practice, firm, or organization shall make reasonable efforts to ensure that the nonmediator's conduct is compatible with the provisions set forth in subsections (c) and (d) of this standard.

~~(f)~~(g) Nothing in this standard prohibits the use of information obtained in a mediation for instructional purposes or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identifiable.

Comment

Comment to Standard 3(f). Mediators may employ associates and/or assistants in their practice, including secretaries, law student interns, and paraprofessionals. The associates and assistants, whether employees or independent contractors, act for the mediator in rendition of the mediator's professional services. A mediator must give the associates and assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to a mediation case. The measures employed in supervising nonmediators should take account of the fact that nonmediators do not have mediation training and are not subject to professional discipline by the Commission.

* * *

Standard 7. Conflicts of Interest

A mediator shall not allow the mediator's personal interest to interfere with his or her primary obligation to impartially serve the parties to the dispute.

(a) A mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.

(b) If a party is represented or advised by a professional advocate or counselor, then a mediator shall place the interest of the party over the mediator's own interest in maintaining cordial relations with the professional advocate or counselor, if such interests are in conflict.

(c) A mediator who is ~~an attorney~~a lawyer, therapist, or other professional, and the mediator's professional partners or co-shareholders, shall not advise, counsel, or represent any of the parties in future matters concerning the subject of the dispute, an action closely related to the dispute, or an outgrowth of the dispute when the mediator or his or her staff has engaged in a substantive conversation with a party to the dispute. A substantive conversation is one that goes beyond a discussion of the general issue in dispute, the identity of parties or participants, and scheduling or administrative issues. Any disclosure that a party might expect the mediator to hold confidential under Standard 3 is a substantive conversation.

A mediator who is ~~an attorney~~a lawyer, therapist, or other professional may not mediate the dispute when the mediator, the mediator's professional partners, or the mediator's co-shareholders have advised, counseled, or represented any of the parties in any matter concerning the subject of the dispute, in any action closely related to the dispute, in any preceding issue in the dispute, or in any outgrowth of the dispute.

(d) A mediator shall not charge a contingent fee, or a fee based on the outcome of the mediation.

(e) A mediator shall not use information obtained, or relationships formed, during a mediation for personal gain or advantage.

(f) A mediator shall not knowingly contract for mediation services that cannot be delivered or completed in a timely manner or as directed by the court.

(g) A mediator shall not prolong a mediation for the purpose of charging a higher fee.

(h) A mediator shall not give any commission, rebate, or other monetary or non-monetary form of consideration to a party, or representative of a party, in return for a referral or due to an expectation of a referral of clients for mediation services.

A mediator should neither give nor accept any gift, favor, loan, or other item of value that raises a question as to the mediator's impartiality. However, a mediator may give or receive de minimis offerings such as sodas, cookies, snacks, or lunches served to those attending a mediation conducted by the mediator, that are intended to further the mediation or show respect for cultural norms.

* * *

Standard 8. Protecting the Integrity of the Mediation Process

A mediator shall encourage mutual respect between the parties and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

(a) A mediator shall make reasonable efforts to (i) ensure that a balanced discussion takes place during the mediation, (ii) prevent manipulation or intimidation by either party, and (iii) ensure that each party understands and respects the concerns and the position of the other party—even if they cannot agree.

(b) If a mediator believes that the statements or actions of a participant—including those of ~~an attorney~~a lawyer who the mediator believes is engaging in, or has engaged in, professional misconduct—jeopardize or will jeopardize the integrity of the mediation process, then the mediator shall attempt to persuade the participant to cease the participant's behavior and take remedial action. If the mediator is unsuccessful in this effort, then the mediator shall take appropriate steps including, but not limited to, postponing, withdrawing from, or terminating the mediation. If ~~an attorney's~~a lawyer's statements or conduct are reportable under

Standard 3(d)(8), then the mediator shall report the ~~attorney~~lawyer to either the North Carolina State Bar or the court having jurisdiction over the matter, in accordance with Rule 8.3(e) of the North Carolina Rules of Professional Conduct.

* * *

These amendments to the Standards of Professional Conduct for Mediators become effective on 10 June 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 3rd day of June, 2020.

s/Mark A. Davis
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of June, 2020.

s/Amy L. Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

THE FOLLOWING ORDER, SIGNED BY THE COURT ON 25 OCTOBER 2018, WAS INADVERTENTLY OMITTED FROM PUBLICATION IN THE NORTH CAROLINA REPORTS.

In the Matter of Establishing an	)
Advisory Commission on Portraits	)

ADMINISTRATIVE ORDER

The Court hereby establishes an Advisory Commission on Portraits to consider matters related to portraits of former justices of the Supreme Court of North Carolina. The advisory commission will promulgate a report and recommendation to the Court on or before 31 December 2019. It is envisioned that the advisory commission will receive public input and review the practices of other courts around the country before finalizing its recommendation.

By Order of the Court in Conference, this the 25th day of October, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 25th day of October, 2018.

AMYL. FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

CRIMINAL LAW—Continued

owner for the charges of misdemeanor larceny and injury to personal property (from "LOVES TRUCK STOP" to "Love's Travel Stops & Country Stores Inc."). The change was in substance an amendment to the arrest warrant, and it did not change the nature of the offense charged and was otherwise authorized by law. **State v. Capps, 621.**

Post-conviction relief—Racial Justice Act—evidentiary hearing—sufficiency of evidentiary forecast—The trial court erred by determining that defendant's Racial Justice Act claims lacked merit and could be denied on the pleadings without an evidentiary hearing, because defendant presented sufficient statistical and non-statistical evidence that race was a significant factor in the prosecutor's decision to seek the death sentence, in the use of peremptory challenges, and in the actual imposition of death sentences in defendant's murder trial. Defendant was entitled to not only an evidentiary hearing but also discovery pursuant to N.C.G.S. § 15A-1415(f). **State v. Ramseur, 658.**

Prosecutor's closing argument—reasonable fear and race—prejudice analysis—In a first-degree murder trial, the trial court did not err by overruling defendant's objections to the prosecutor's statements during closing argument regarding race and reasonable fear, where defendant asserted he shot the victim through a window in his house in self-defense. Assuming without deciding that the prosecutor's statements were improper, defendant did not demonstrate prejudice, given the totality of the prosecutor's closing argument (which focused extensively on defendant's lack of credibility as a witness) and in light of the overwhelming evidence presented of defendant's guilt of murder by premeditation and deliberation and/or by lying in wait. **State v. Copley, 224.**

Racial Justice Act—motion for appropriate relief—denial without evidentiary hearing—abuse of discretion—The trial court abused its discretion by denying defendant's request for relief from his conviction for murder, made pursuant to the Racial Justice Act, without holding an evidentiary hearing. Defendant presented extensive evidence supporting his argument that race was a significant factor at multiple points during his prosecution. **State v. Burke, 617.**

Withdrawal of a guilty plea—analysis of prejudice to the State—unnecessary—Once it determined that the factors stated in *State v. Handy*, 326 N.C. 532 (1990), weighed against allowing defendant to withdraw his guilty plea in a capital case, the Court of Appeals was not required to analyze any potential prejudice to the State in the event that the plea withdrawal had been allowed. **State v. Taylor, 710.**

Withdrawal of a guilty plea—effective assistance of counsel—dismissal without prejudice—In a capital case, where it was unnecessary to determine whether defense counsel's competency weighed in favor of defendant's motion to withdraw his guilty plea, defendant's ineffective assistance of counsel claim was dismissed without prejudice so he could raise it in a motion for appropriate relief. **State v. Taylor, 710.**

Withdrawal of a guilty plea—fair and just reason—consideration of factors—Defendant failed to demonstrate a fair and just reason for withdrawing his guilty plea to second-degree murder and two related robbery charges where the factors stated in *State v. Handy*, 326 N.C. 532 (1990), weighed against permitting the plea withdrawal. Defendant had not sufficiently asserted his legal innocence before attempting to withdraw his plea; the State's proffered evidence of defendant's guilt,

TERMINATION OF PARENTAL RIGHTS—Continued

Best interests of child—bond between children and parent—written findings—The trial court's written findings of fact were sufficient to demonstrate its consideration of the evidence regarding the bond between the children and their mother in determining the children's best interests where the trial court found that the mother had not created a bond with her children, the mother did not visit or maintain regular contact with the children after they were placed with a kinship provider, and the mother had made no effort on her Out of Home Family Services Agreements—findings which the mother did not challenge on appeal. Further, the trial court was not required to make written findings on the children's feelings toward their mother because no evidence was presented on the matter, except for evidence that the children desired to remain with their foster parents. **In re C.V.D.C., 525.**

Best interests of child—consideration of factors—When determining the best interests of a mother's three minor sons, the trial court properly considered each factor in N.C.G.S. § 7B-1110(a) and did not need to enter written factual findings as to those factors in the absence of conflicting evidence concerning any factor. Moreover, the trial court did not abuse its discretion in concluding that termination of the mother's parental rights was in the children's best interests where all three children were under the age of twelve; the youngest was with a potential adoptive placement and was "100 percent likely" to be adopted; the Department of Social Services had placed the other two in therapeutic foster homes and planned to move them into an adoptive home; and none of the children had a bond with the mother. **In re J.S., 811.**

Best interests of child—disposition—standard of review—abuse of discretion—The Supreme Court reaffirmed that a trial court's determination of a child's best interest in a termination proceeding (under N.C.G.S. § 7B-1110(a)) is reviewed under the abuse of discretion standard of review. **In re C.V.D.C., 525.**

Best interests of child—fact-finding requirements—statutory interpretation—standard of review—de novo—Whether the trial court complied with the fact-finding requirements of N.C.G.S. § 7B-1110(a) in determining a child's best interests was a question of statutory interpretation, which is reviewed de novo. **In re C.V.D.C., 525.**

Best interests of child—statutory factors—no written findings—no conflict in evidence—There was no reversible error in the trial court's failure to make written findings of fact as to several of the factors in N.C.G.S. § 7B-1110(a) where there was no conflict in the evidence as to those statutory factors. **In re C.V.D.C., 525.**

Best interests of the child—abuse of discretion standard—The standard for reviewing the best interests of the child determination in a termination of parental rights proceeding is abuse of discretion. The trial court, which is involved in the case from the beginning and hears the evidence, is in the best position to assess and weigh the evidence, find the facts, and reach conclusions. I**n re Z.A.M., 88.**

Best interests of the child—bond with parents—no abuse of discretion—The trial court did not err in a termination of parental rights proceeding by determining that the best interests of the children were served by termination despite the children's bond with the parents. The trial court considered the statutory factors and performed a reasoned analysis. The trial court's determination was not unsupported by reason or so arbitrary that it could not be the result of a reasoned decision. **In re Z.A.M., 88.**

TERMINATION OF PARENTAL RIGHTS—Continued

Best interests of the child—constitutionally protected status as parent—forfeiture—willful abandonment—A father lost his constitutionally protected paramount right to the custody, care, and control of his child when the trial court determined that he had willfully abandoned her under N.C.G.S. § 7B-1111(a)(7), and the trial court thereafter properly considered whether the child's best interests would be served by the termination of her father's parental rights—without regard for his constitutionally protected status. **In re K.N.K., 50.**

Best interests of the child—dispositional factors—competent evidence—The trial court did not abuse its discretion by deciding that termination of both parents' parental rights, rather than guardianship, was in the best interests of the children after considering and weighing the dispositional factors in N.C.G.S. § 7B-1110(a), including the bond the children had with their parents. The court's finding that the two children had a "very strong bond" with their foster parents, despite the children having lived with them for only three months, was supported by the evidence, and the court made an unchallenged finding that the children were highly adoptable. The trial judge's verbal statement suggesting that the foster parents "honor" the relationship the children had with their parents was neither part of the written order nor an acknowledgment that termination was not in the children's best interests. **In re J.J.B., 787.**

Best interests of the child—dispositional factors—private termination action—intention of mother's husband to adopt child—The trial court did not abuse its discretion in concluding that a child's best interests would be served by the termination of her father's parental rights in an action between her two parents, where the trial court demonstrated careful consideration of the dispositional factors of N.C.G.S. § 7B-1110(a), including the strong bond between the child and the mother's husband, his intention to adopt her, and the loving environment in the home of the mother and her husband. **In re K.N.K., 50.**

Best interests of the child—findings—bond with parent—The trial court did not abuse its discretion by determining that termination of a mother's parental rights was in the best interest of the child where it considered the dispositional factors in N.C.G.S. § 7B-1110 and its findings, including one that the mother-child bond was "similar to that of playmates," were supported by evidence—including testimony by the social worker who supervised visits. Moreover, in making findings regarding the child's relationship with his foster family, the trial court did not improperly relegate the decision of whether to terminate the mother's rights to a direct comparison or choice between the mother and the foster parent. **In re A.B.C., 752.**

Best interests of the child—likelihood of adoption—abuse of discretion analysis—The trial court did not abuse its discretion by concluding that termination of a mother's parental rights was in her daughter's best interests where the court's dispositional findings addressed all the relevant criteria required by N.C.G.S. § 7B-1110(a). As required by the Court of Appeals' mandate in a prior opinion in the matter, the trial court properly considered the daughter's likelihood of adoption—concluding that a necessary condition to adoptability was the stability and closure that could result only from termination of her mother's parental rights, and recognizing the possibility that the daughter may never achieve adoptability. **In re S.M.M., 911.**

Best interests of the child—private termination action—likelihood of adoption—dispositional factors—In a private termination of parental rights action

TERMINATION OF PARENTAL RIGHTS—Continued

between a child's two parents, the trial court did not abuse its discretion by concluding that the child's best interests would be served by termination of the father's parental rights. The mother's relationship with her boyfriend was not sufficiently relevant to require findings on the potential for future adoption, and the trial court properly balanced the factors in N.C.G.S. § 7B-1110(a), including the child's young age, lack of any bond with the father, and need for consistency. **In re C.J.C., 42.**

Best interests of the child—statutory factors—likelihood of adoption—The trial court did not abuse its discretion by concluding that termination of a mother's parental rights would be in the best interests of her children where the trial court made detailed findings of fact addressing each of the relevant criteria in N.C.G.S. § 7B-1110(a) and the findings were supported by competent evidence. Further, the children's strong bond with their parents and their desire to return to their parents' home did not preclude a finding that the children were likely to be adopted. **In re M.A., 865.**

Best interests of the child—statutory factors—parent not promoting child's well-being—foster family eager to adopt—The trial court did not abuse its discretion by determining that termination of a mother's parental rights was in her child's best interests where the trial court considered the statutory factors and found that the mother had demonstrated that she would not promote her child's well-being, there had been no progress toward returning the child home after 26 months in social services' care, and the child's foster family was meeting all her needs and eager to adopt her. **In re N.G., 891.**

Best interests of the child—weighing factors—evidentiary support—The trial court did not abuse its discretion in concluding that termination of a father's parental rights to his three-year-old son was in the child's best interests. First, the evidence supported the trial court's findings that the child was placed in a pre-adoptive home and had a high likelihood of adoption. Second, although the record contained some evidence weighing against terminating the father's parental rights, the trial court properly weighed the factors in determining the child's best interests (N.C.G.S. § 7B-1110), thereby reaching a decision that was neither arbitrary nor manifestly unsupported by reason. **In re J.C.L., 772.**

Disposition—best interests of child—no abuse of discretion—The trial court did not abuse its discretion by determining that termination of respondents' parental rights was in the juvenile's best interests. The trial court appropriately considered the factors stated in N.C.G.S. § 7B-1110(a), and the trial court's weighing of those factors was neither arbitrary nor manifestly unsupported by reason. Additionally, the findings of fact which respondents challenged on appeal were supported by competent evidence. **In re A.J.T., 504.**

Disposition—best interests of children—factors—The trial court did not abuse its discretion by determining that termination of respondents' parental rights was in the best interests of their two minor children. The trial court's factual findings regarding the likelihood of the children's adoption, as well as the nature and extent of the mother's bond with the children (N.C.G.S. § 7B-1110(a)(2), (4)), were supported by sufficient evidence. Moreover, the trial court properly weighed all relevant statutory factors from section 7B-1110(a) when determining the children's best interests. **In re I.N.C., 542.**

TERMINATION OF PARENTAL RIGHTS—Continued

Dispositional evidence—bifurcated hearings—not required—The trial court in a termination of parental rights case was not required to conduct a separate dispositional hearing where it heard dispositional evidence with adjudicatory evidence and applied the correct evidentiary standards to each. **In re S.M.M., 911.**

Findings of fact—evidentiary support—In a termination of parental rights case, a finding of fact that a mother did not complete a substance abuse treatment program was disregarded where it did not accurately reflect the evidence and contradicted another of the trial court's findings. Two other findings regarding the mother's housing conditions at the time of the termination hearing were not supported by evidence or were incomplete. **In re A.B.C., 752.**

Findings of fact—evidentiary support—Where a father challenged numerous findings of fact in the trial court's order terminating his parental rights to his child, several challenges were barred by collateral estoppel, many of the challenged findings were supported by the evidence, and several other challenged findings were disregarded because they were not supported by evidence. **In re J.M.J.-J., 553.**

Grounds for termination—dependency—conclusion of law—evidentiary support—The trial court erred in terminating a mother's parental rights on the ground of dependency where the trial court's conclusion that the mother was incapable of providing a safe, permanent home for the child was not supported by the record. Instead, evidence demonstrated that the mother adequately addressed her past history of abusive relationships, displayed appropriate parenting techniques, and obtained suitable housing. **In re K.L.T., 826.**

Grounds for termination—failure to make reasonable progress—dependency—The trial court properly terminated a mother's parental rights to her four children under N.C.G.S. § 7B-1111(a)(2) after finding that the mother made some progress on her family services plan but willfully failed to make reasonable progress in correcting the filthy, hazardous living conditions which led to the children's removal from her home. Furthermore, the trial court did not err in simultaneously finding the mother mentally incapable of parenting her children for purposes of N.C.G.S. § 7B-1111(a)(6) where, according to a psychologist's testimony, the mother's cognitive limitations affected her childrearing abilities but not her ability to clean her home. **In re J.S., 811.**

Grounds for termination—neglect—failure to make reasonable progress—sufficiency of findings—In a termination of parental rights case, the findings supported the conclusion that grounds existed to terminate for neglect and failure to make reasonable progress. The trial court found that defendant continued to use alcohol, and the father's three-month period of sobriety did not occur after the permanency planning hearing. Further, the trial court correctly determined that the father's three-month period of sobriety was outweighed by his continuous pattern of relapse. **In re Z.A.M., 88.**

Grounds for termination—neglect—findings—The trial court did not err by determining that grounds existed under N.C.G.S. § 7B-1111(a)(1) to terminate the parental rights of a father who had numerous convictions for sex offenses against a child. Despite the father's claims to the contrary, the district court expressly made a specific ultimate finding that there was a high probability that repetition of neglect would occur in the future if the child were placed with his father. The trial court's findings were supported by clear, cogent, and convincing evidence. **In re N.P., 61.**

TERMINATION OF PARENTAL RIGHTS—Continued

Grounds for termination—neglect—findings of fact—sufficiency of evidence—The trial court erred by determining that a mother's parental rights should be terminated on the ground of neglect, where its findings regarding the mother's compliance with her case plan, relationship issues, therapy participation, parenting skills, and home environment were not supported by clear, cogent, and convincing evidence and partially relied on speculation. Further, one of the court's ultimate findings linking the mother's history to the likelihood of future neglect failed to take into account the mother's positive steps to address domestic violence issues since the child was removed from her care, including obtaining a divorce from and taking out a protective order against the child's father with whom she had been in an abusive relationship, engaging in therapy, and writing a detailed safety plan in anticipation of regaining custody of her child. **In re K.L.T., 826.**

Grounds for termination—neglect—likelihood of future neglect—The trial court properly terminated a father's parental rights to his son on grounds of neglect, where the father's lack of progress in completing his case plan with the Department of Social Services indicated a reasonable likelihood of future neglect if his son were returned to his care. **In re J.C.L., 772.**

Grounds for termination—neglect—probability of repeated neglect—domestic violence—The trial court did not err by determining that a father's parental rights to his children were subject to termination on the grounds of neglect where the trial court found that a substantial probability existed that the children would be neglected if they were returned to the father's care, based on findings that included the father's lengthy history of domestic violence in the presence of the children, his failure to fully follow the trial court's order to participate in domestic violence treatment, and testimony regarding 911 calls relating to domestic disturbances at his residence. **In re M.A., 865.**

Grounds for termination—neglect—substance abuse—probability of future neglect—The trial court properly terminated a father's parental rights after concluding that there existed a high probability of future neglect of the child based on the father's persistent substance abuse issues and domestic discord in the home. The findings of fact in support of that conclusion were in turn supported by clear, cogent, and convincing evidence. **In re J.O.D., 797.**

Grounds for termination—neglect—sufficiency of findings—evidence of changed circumstances—The trial court's conclusion that grounds existed to terminate a mother's parental rights for neglect was supported by sufficient findings of fact, which were supported by clear, cogent, and convincing evidence, where the children were exposed numerous times to domestic violence between their parents and the mother repeatedly returned to her relationship with the abusive father. The trial court was not required to consider in its findings the mother's evidence of changed circumstances—that the father had received a long prison sentence and that she would not return to a relationship with him—in light of the history of the couple's relationship and the fact that the trial court did not have to believe the mother's testimony. **In re M.C., 882.**

Grounds for termination—neglect—support for conclusion—The trial court did not err by terminating a father's parental rights to his child where the findings of fact supported the conclusion that grounds for termination existed due to neglect. The father's failure to complete his case plan affected his fitness to parent his child because, even though he was not responsible for the mother's substance abuse and

TERMINATION OF PARENTAL RIGHTS—Continued

mental health problems, the prior adjudication of neglect resulted because the child could not be placed with the father. Further, the father failed to maintain any contact with the child even before he was incarcerated. **In re J.M.J.-J., 553.**

Grounds for termination—parental rights to another child terminated involuntarily—mental health issues—The trial court did not err by concluding that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(9) to terminate a father's parental rights where it was undisputed that his parental rights to another child had been terminated involuntarily and sufficient evidence supported the trial court's findings that the father suffered from antisocial personality disorder, he lied to the county department of social services to conceal his identity, and he made only minimal efforts toward treatment for his mental health issues. Even assuming the diagnosis of antisocial personality disorder was stale, the findings nonetheless supported the conclusion that the father was unable to provide a safe home for his child because the nature of the disorder made change unlikely, he lacked interest in and cancelled appointments for treatment, and he engaged in incidents of deception. **In re N.G., 891.**

Grounds for termination—willful abandonment—evidence—findings—The trial court's unchallenged findings of fact in a termination of parental rights proceeding were based on sufficient evidence and supported the court's conclusion of law that a mother willfully abandoned her child. The mother's complete failure to attempt any form of contact or communication with her daughter over several years was not excused by a prior custody order which did not grant her visitation rights. **In re A.L.S., 515.**

Grounds for termination—willful abandonment—incarceration—order prohibiting direct contact with children—The trial court's findings supported its conclusion that a father's parental rights in his children were subject to termination on the ground of abandonment (N.C.G.S. § 7B-1111(a)(7)). Even though the father was incarcerated and was prohibited by a custody and visitation order from directly contacting his children, he made no attempts during the determinative six-month period to contact the mother or anyone else to inquire about the children's welfare or to send along his best wishes to them. Further, the father would not even clearly tell his trial counsel whether he wanted to contest the termination of parental rights action. **In re A.G.D., 317.**

Grounds for termination—willful failure to make reasonable progress—addiction—The trial court's determination that grounds existed to terminate a mother's parental rights on the basis that she willfully failed to make reasonable progress to correct the conditions which led to her child's removal from the home was supported by the court's unchallenged findings of fact regarding mother's lack of progress on her substance abuse issues. **In re A.B.C., 752.**

Grounds—neglect—findings—conclusions—In a proceeding to terminate a father's parental rights based on neglect, the trial court made detailed findings of fact, supported by competent evidence, that the child was previously adjudicated neglected and that the father had not made sufficient progress toward completing the requirements of his case plan to enable reunification to occur. The findings were sufficient to support the trial court's conclusion that the child was neglected in the past and that there was a likelihood of repetition of neglect given the father's history of criminal activity and substance abuse, his lack of progress in correcting the barriers to reunification, and his inability to provide care for his child at the time of the termination hearing. **In re S.D., 67.**

TERMINATION OF PARENTAL RIGHTS—Continued

Grounds—willful abandonment—challenged findings—outside determinative time period—In an appeal from the trial court's order terminating a father's parental rights on the grounds of willful abandonment, any error in the trial court's findings challenged by the father were harmless where those challenged findings concerned his actions outside the six-month determinative time period preceding the filing of the petition. **In re K.N.K., 50.**

Grounds—willful abandonment—determinative time period—no contact or financial support—In a termination of parental rights action between a child's two parents, the trial court's findings supported its adjudication of willful abandonment where, during the determinative time period, the father had no contact with the child and provided no financial support for her. **In re K.N.K., 50.**

Grounds—willful abandonment—evidence and findings—The trial court appropriately found grounds to terminate a father's parental rights under N.C.G.S. § 7B-1111(a)(7) where the father argued that the evidence did not show willful abandonment. The trial court's findings demonstrated that respondent willfully withheld his love, care, and affection from his child during the determinative six-month period. **In re B.C.B., 32.**

Guardian ad litem—attorney advocate—failure to check box on AOC form—clerical error—On appeal from the termination of a father's parental rights to his child in a private termination action between the two parents, the Supreme Court rejected the father's argument that the trial court erred by failing to appoint a guardian ad litem (GAL) for the child. The attorney advocate was appointed to serve as both GAL and attorney advocate for the child, and the trial court's failure to check the box for "Attorney Advocate is also acting as [GAL]" on the appropriate form was a mere clerical error. Further, the attorney advocate competently fulfilled his role as GAL. **In re C.J.C., 42.**

Jurisdiction—UCCJEA—home state—record evidence—The trial court had jurisdiction to terminate a father's parental rights to his daughter, even though a prior custody order had been entered in Delaware, where the record reflected that the daughter had lived in North Carolina for more than six months prior to the filing of the juvenile petition, marking North Carolina as the minor's "home state" under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) when the proceedings commenced. **In re L.T., 567.**

Likelihood of adoption—findings—evidentiary support—In a termination of parental rights case, the trial court's findings of fact regarding the juvenile's likelihood of adoption—including her mental health, her behavioral issues, and her biological family being an obstacle to stability—were supported by competent evidence and properly complied with the Court of Appeals' remand instructions. **In re S.M.M., 911.**

Motion to continue—denied—abuse of discretion analysis—In a termination of parental rights (TPR) proceeding, the trial court did not abuse its discretion by denying a mother's motion to continue the hearing to allow her sixteen-year-old son (who was not the subject of the TPR hearing) to testify, where the court had already granted a month-long continuance on the same basis, the mother made no showing of extraordinary circumstances as required by N.C.G.S. § 7B-1109(d) to justify another continuance, and the mother's counsel did not tender an affidavit or other proof of the significance of the expected testimony. **In re A.L.S., 515.**