# NORTH CAROLINA REPORTS

VOLUME 375

SUPREME COURT OF NORTH CAROLINA

14 AUGUST 2020

11 DECEMBER 2020

RALEIGH
2021

CITE THIS VOLUME

375 N.C.

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# TABLE OF CONTENTS

**THE SUPREME COURT**
**OF**
**NORTH CAROLINA**

*Chief Justice*

CHERI BEASLEY

*Associate Justices*

PAUL MARTIN NEWBY
ROBIN E. HUDSON
SAMUEL J. ERVIN, IV
MICHAEL R. MORGAN
ANITA EARLS
MARK A. DAVIS

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JAMES G. EXUM, JR.
BURLEY B. MITCHELL, JR.
HENRY E. FRYE
SARAH PARKER
MARK D. MARTIN

*Former Justices*

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J. PHIL CARLTON
WILLIS P. WHICHARD
JAMES A. WYNN, JR.
FRANKLIN E. FREEMAN, JR.
G. K. BUTTERFIELD, JR.
ROBERT F. ORR
GEORGE L. WAINWRIGHT, JR.
EDWARD THOMAS BRADY
PATRICIA TIMMONS-GOODSON
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ROBERT H. EDMUNDS, JR.
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Alyssa M. Chen
Jennifer C. Peterson
Niccolle C. Hernandez

# TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

## SUPERIOR COURT DIVISION

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| | *First Division* | |
| 1 | Jerry R. Tillett | Manteo |
| | J. Carlton Cole | Hertford |
| 2 | Wayland Sermons | Washington |
| 3A | Marvin K. Blount, III | Greenville |
| | Jeffery B. Foster | Greenville |
| 6A | Alma L. Hinton | Roanoke Rapids |
| 6B | Cy A. Grant, Sr. | Ahoskie |
| 7A | Quentin T. Sumner | Rocky Mount |
| 7BC | Walter H. Godwin, Jr.[1] | Tarboro |
| | Lamont Wiggins[2] | Rocky Mount |
| | William D. Wolfe[3] | Wilson |
| 9 | John Dunlow | Oxford |
| | Cindy Sturges | Louisburg |
| 14 | Orlando F. Hudson, Jr. | Durham |
| | James E. Hardin, Jr. | Hillsborough |
| | Michael O'Foghludha | Durham |
| | Josephine Kerr Davis | Durham |
| | *Second Division* | |
| 3B | Joshua W. Wiley | New Bern |
| | Paul M. Quinn[4] | Atlantic Beach |
| | Clinton D. Rowe[5] | New Bern |
| 4 | Charles H. Henry | Jacksonville |
| | Henry L. Stevens | Wallace |
| 5 | Phyllis M. Gorham | Wilmington |
| | R. Kent Harrell | Burgaw |
| | 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.[6] | Fairmont |
| | James Gregory Bell[7] | Lumberton |
| | Tifany Pequise-Powers[8] | Lumberton |
| | *Third Division* | |
| 10 | Paul C. Ridgeway | Raleigh |
| | G. Bryan Collins, Jr. | Raleigh |
| | A. Graham Shirley | Raleigh |
| | Rebecca W. Holt | Raleigh |

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| | Vinston M. Rozier | Raleigh |
| | Keith O. Gregory | Raleigh |
| 11A | C. Winston Gilchrist | Lillington |
| 11B | Thomas H. Lock | Smithfield |
| 12 | James F. Ammons, Jr. | Fayetteville |
| | 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 |
| | Patrick Nadolski[9] | Mount Gilead |
| 20B | Jeffery K. Carpenter[10] | Wadesboro |
| | N. Hunt Gwyn[11] | Monroe |
| | Jonathan Perry[12] | Monroe |
| | *Fourth Division* | |
| 15B | R. Allen Baddour | Chapel Hill |
| | Alyson A. Grine[13] | Chapel Hill |
| 17A | Edwin Graves Wilson, Jr. | Eden |
| | Stanley L. Allen | Sandy Ridge |
| 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 |
| 22A | Joseph Crosswhite | Statesville |
| | Julia Lynn Gullett[14] | Statesville |
| | William Long[15] | Statesville |
| 22B | Mark E. Klass | Lexington |
| | Lori Hamilton | Mocksville |
| 23 | Michael Duncan | Wilkesboro |
| | *Fifth Division* | |
| 24 | Gary Gavenus | Burnsville |
| | R. Gregory Horne | Boone |

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| 25A | Robert C. Ervin | Morganton |
| | Daniel A. Kuehnert | Morganton |
| 25B | Nathaniel J. Poovey | Newton |
| | Gregory R. Hayes | Hickory |
| 26 | W. Robert Bell | Charlotte |
| | Lisa C. Bell | Charlotte |
| | Carla Archie | Charlotte |
| | Karen Eady-Williams | Charlotte |
| | Donnie Hoover | Charlotte |
| | Louis A. Trosch | Charlotte |
| | George Bell | Charlotte |
| | Casey Viser[16] | 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[17] | Asheville |
| 29A | J. Thomas Davis | Forest City |
| 29B | Peter B. Knight | Hendersonville |
| 30A | William H. Coward | Highlands |
| 30B | Bradley B. Letts | Hazelwood |

## SPECIAL JUDGES

| | |
|---|---|
| Louis A. Bledsoe, III | Charlotte |
| Athena Brooks | Fletcher |
| J. Stanley Carmical | Lumberton |
| Adam M. Conrad | Charlotte |
| Craig Croom | Raleigh |
| Andrew Heath | Raleigh |
| Gregory P. McGuire | Raleigh |
| Michael L. Robinson | Winston-Salem |
| Casey M. Viser[18] | Charlotte |
| Steven R. Warren | Asheville |

## EMERGENCY JUDGES

| | |
|---|---|
| Benjamin G. Alford | New Bern |
| Sharon T. Barrett | Asheville |
| Michael E. Beale | Rockingham |
| Christopher W. Bragg | Monroe |
| Allen Cobb | Wilmington |
| Yvonne M. Evans[19] | Charlotte |
| Henry W. Hight, Jr. | Henderson |
| Jack Hooks | Whiteville |
| Jeffrey P. Hunt | Brevard |
| Robert F. Johnson | Burlington |
| Paul L. Jones | Kinston |

| JUDGES | ADDRESS |
|---|---|
| Timothy S. Kincaid | Newton |
| W. David Lee | Monroe |
| Eric L. Levinson | Charlotte |
| Hugh Lewis | Charlotte |
| A. Moses Massey | Mount Airy |
| Jerry Cash Martin | Pilot Mountain |
| J. Douglas McCullough | Raleigh |
| James W. Morgan | Shelby |
| Calvin Murphy | Charlotte |
| J. Richard Parker | Manteo |
| William R. Pittman | Raleigh |
| Mark Powell | Hendersonville |
| Ronald E. Spivey | Winston-Salem |
| Joseph E. Turner | Greensboro |
| Tanya T. Wallace | Rockingham |

## RETIRED/RECALLED JUDGES

| | |
|---|---|
| W. Douglas Albright | Greensboro |
| Anthony M. Brannon | Durham |
| Stafford G. Bullock | Raleigh |
| H. William Constangy | Charlotte |
| C. Preston Cornelius | Mooresville |
| Lindsay R. Davis | Greensboro |
| Richard L. Doughton | Sparta |
| B. Craig Ellis | Laurinburg |
| Larry G. Ford | Salisbury |
| James L. Gale | Greensboro |
| Beecher R. Gray | Durham |
| Zoro J. Guice, Jr. | Hendersonville |
| Thomas D. Haigwood | Greenville |
| Robert H. Hobgood | Louisburg |
| Howard E. Manning, Jr. | Raleigh |
| John E. Nobles, Jr. | Morehead City |
| Thomas W. Seay | Spencer |
| John W. Smith | Raleigh |
| James C. Spencer | Burlington |
| Ronald L. Stephens[20] | Belville |
| Ralph A. Walker, Jr. | Raleigh |
| William Z. Wood, Jr. | Lewisville |

[1]Retired 31 October 2020. [2]Became Senior Resident Superior Court Judge 1 November 2020. [3]Sworn in 5 February 2021. [4]Retired 31 January 2021. [5]Sworn in 1 January 2021. [6]Retired 31 December 2020. [7]Became Senior Resident Superior Court Judge 1 January 2021. [8]Sworn in 1 January 2021. [9]Sworn in 1 January 2021. [10]Resigned 31 December 2020. [11]Resigned 31 December 2020. Sworn in 5 March 2021. [12]Sworn in and became Senior Resident Superior Court Judge 1 January 2021. [13]Sworn in 22 January 2021. [14]Retired 31 December 2020. [15]Sworn in 1 January 2021. [16]Sworn in 1 January 2021. [17]Retired 31 January 2021. [18]Resigned 31 December 2020. [19]Resigned 31 January 2021. [20]Resigned 10 February 2021.

## DISTRICT COURT DIVISION

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| 1 | Edgar L. Barnes (Chief) | Manteo |
| | Amber Davis | Wanchese |
| | Eula E. Reid | Elizabeth City |
| | Robert P. Trivette | Kitty Hawk |
| | Meader W. Harris, III | Edenton |
| 2 | Regina Rogers Parker (Chief) | Williamston |
| | Christopher B. McLendon | Williamston |
| | Darrell B. Cayton, Jr. | Washington |
| | Keith B. Mason | Washington |
| 3A | G. Galen Braddy (Chief) | Grimesland |
| | Brian DeSoto | Greenville |
| | Lee F. Teague | Greenville |
| | Wendy S. Hazelton | Greenville |
| | Daniel H. Entzminger | Greenville |
| 3B | L. Walter Mills (Chief) | New Bern |
| | Karen A. Alexander[1] | New Bern |
| | Peter Mack, Jr.[2] | New Bern |
| | W. David McFadyen, III | New Bern |
| | Clinton D. Rowe[3] | New Bern |
| | Bob R. Cherry | Beaufort |
| | Paul J. Delamar[4] | Bayboro |
| | Andrew Wigmore[5] | Beaufort |
| 4 | Sarah Cowen Seaton (Chief) | Jacksonville |
| | Carol Jones Wilson[6] | Kenansville |
| | James L. Moore | Jacksonville |
| | William B. Sutton | Clinton |
| | Michael C. Surles | Jacksonville |
| | Timothy W. Smith | Kenansville |
| | Christopher J. Welch | Jacksonville |
| | Mario M. White | Clinton |
| | James Walter Bateman, III[7] | Jacksonville |
| | Robert H. Gilmore[8] | Clinton |
| | William Shanahan[9] | Jacksonville |
| 5 | J. H. Corpening, II (Chief) | Wilmington |
| | James H. Faison, III | Wilmington |
| | Sandra A. Ray | Wilmington |
| | Richard Russell Davis | Wilmington |
| | Melinda Haynie Crouch | Wrightsville Beach |
| | Jeffrey Evan Noecker | Wilmington |
| | Chad Hogston | Wilmington |
| | Robin W. Robinson | Wilmington |
| | Lindsey L. McKee | Wilmington |
| 6 | Brenda G. Branch (Chief) | Roanoke Rapids |
| | W. Turner Stephenson, III | Roanoke Rapids |
| | Teresa R. Freeman | Roanoke Rapids |
| | Vershenia B. Moody | Windsor |
| 7 | William Charles Farris (Chief) | Wilson |
| | John M. Britt[10] | Tarboro |
| | Pell C. Cooper | Rocky Mount |

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| | Anthony W. Brown | Spring Hope |
| | Wayne S. Boyette | Tarboro |
| | Elizabeth Freshwater Smith | Wilson |
| | Joseph E. Brown, III | Wilson |
| | William R. Solomon[11] | Rocky Mount |
| 8 | Elizabeth A. Heath (Chief) | Kinston |
| | Charles P. Gaylor, III | Goldsboro |
| | Ericka Y. James | Goldsboro |
| | Curtis Stackhouse | Goldsboro |
| | Annette W. Turik | Kinston |
| | Jonathon Sergeant | Kinston |
| 9 | John W. Davis (Chief) | Louisburg |
| | Amanda Stevenson | Oxford |
| | John H. Stultz, III | Roxboro |
| | Adam S. Keith | Louisburg |
| | Caroline S. Burnette | Henderson |
| | Benjamin S. Hunter | Louisburg |
| | Sarah K. Burnette | Oxford |
| 10 | Debra Ann Smith Sasser (Chief) | Raleigh |
| | Monica M. Bousman[12] | 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 |
| | Louis B. Meyer, III | Raleigh |
| | Daniel J. Nagle | Raleigh |
| | Vartan A. Davidian | Raleigh |
| | Jefferson G. Griffin[13] | Raleigh |
| | Sam S. Hamadani | Raleigh |
| | Ashleigh P. Dunston | Raleigh |
| | J. Brian Ratledge | Raleigh |
| | David K. Baker, Sr. | Raleigh |
| | Julie L. Bell[14] | Knightdale |
| | James R. Black[15] | Raleigh |
| | Mark L. Stevens[16] | Raleigh |
| 11 | Jacquelyn L. Lee (Chief)[17] | Smithfield |
| | Paul A. Holcombe (Chief)[18] | Smithfield |
| | Jimmy L. Love, Jr. | Sanford |
| | O Henry Willis, Jr. | Dunn |
| | Addie M. Harris-Rawls | Clayton |
| | Resson O. Faircloth, II | Erwin |
| | Caron H. Stewart | Smithfield |
| | Mary H. Wells | Smithfield |
| | Joy A. Jones | Smithfield |
| | Jerry F. Wood | Selma |
| | Jason H. Coats | Smithfield |
| | Terry F. Rose[19] | Smithfield |

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| 12 | Edward A. Pone (Chief)[20] | Parkton |
| | Toni S. King (Chief)[21] | Fayetteville |
| | David H. Hasty | Fayetteville |
| | Francis M. McDuffie | Fayetteville |
| | Lou Oliveria | Fayetteville |
| | Cheri Siler-Mack | Fayetteville |
| | Stephen C. Stokes | Fayetteville |
| | April M. Smith | Fayetteville |
| | Tiffany M. Whitfield | Fayetteville |
| | Caitlin Evans | Fayetteville |
| 13 | Scott Ussery (Chief) | Elizabethtown |
| | Pauline Hankins | Tabor City |
| | Willie Fred Gore[22] | Whiteville |
| | C. Ashley Gore | Whiteville |
| | J. Calvin Chandler | Shallotte |
| | Quintin M. McGee[23] | Leland |
| 14 | Patricia D. Evans (Chief) | Durham |
| | Brian C. Wilks | Durham |
| | Doretta Walker | Durham |
| | Shamieka L. Rhinehart | Durham |
| | Amanda L. Maris | Durham |
| | Clayton Jones | Durham |
| | Dave Hall | Durham |
| 15A | Bradley Reid Allen, Sr. (Chief) | Burlington |
| | Kathryn W. Overby | Burlington |
| | Steven H. Messick[24] | Burlington |
| | Larry D. Brown | Graham |
| | Rick Champion[25] | Burlington |
| 15B | Samantha Cabe (Chief) | Chapel Hill |
| | Beverly A. Scarlett | Durham |
| | Sherri T. Murrell | Chapel Hill |
| | Hathaway S. Pendergrass | Chapel Hill |
| | Christopher T. Roper[26] | Siler City |
| 16A | Amanda L. Wilson (Chief) | Rockingham |
| | Regina M. Joe | Raeford |
| | Christopher W. Rhue | Laurinburg |
| | Sophie G. Crawford | Wadesboro |
| | Chevonne R. Wallace | Rockingham |
| 16B | Judith Milsap Daniels (Chief)[27] | Lumberton |
| | Angelica C. McIntyre (Chief)[28] | Lumberton |
| | William J. Moore | Maxton |
| | Dale G. Desse | Maxton |
| | Brooke L. Clark | Lumberton |
| | Vanessa E. Burton | Lumberton |
| | Greg Bullard[29] | Lumberton |
| 17A | James A. Grogan (Chief) | Reidsville |
| | Chris Freeman | Wentworth |
| | Christine F. Strader | Reidsville |
| | Erica S. Brandon | Wentworth |
| 17B | William F. Southern III (Chief) | King |
| | Spencer Gray Key, Jr. | Elkin |
| | Marion M. Boone | Dobson |

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| | Gretchen H. Kirkman | Mt. Airy |
| | Thomas B. Langan | King |
| 18 | Theresa H. Vincent (Chief) | Summerfield |
| | Susan R. Burch[30] | High Point |
| | Kimberly Michelle Fletcher | Greensboro |
| | Angela C. Foster | Greensboro |
| | Angela B. Fox | Greensboro |
| | Tabatha Holliday | Greensboro |
| | David Sherrill | Greensboro |
| | Jonathan G. Kreider | Greensboro |
| | Tonia A. Cutchin | Greensboro |
| | William B. Davis | Greensboro |
| | Marcus Shields | Greensboro |
| | Larry L. Archie | Greensboro |
| | Brian K. Tomlin | Greensboro |
| | Marc R. Tyrey | High Point |
| | Kevin D. Smith | Greensboro |
| | Ashley L. Watlington-Simms | Greensboro |
| | Caroline Tomlinson-Pemberton[31] | Greensboro |
| 19A | Christy E. Wilhelm (Chief) | Concord |
| | Brent Cloninger | Mount Pleasant |
| | Nathaniel E. Knust | Concord |
| | Juanita Boger-Allen | Concord |
| | Steve Grossman | Concord |
| | Michael G. Knox[32] | Concord |
| 19B | Lee W. Gavin (Chief) | Asheboro |
| | Scott C. Etheridge | Asheboro |
| | Robert M. Wilkins | Asheboro |
| | Sarah N. Lanier | Asheboro |
| | J. Brooke Schmidly[33] | Asheboro |
| | Barron Thompson[34] | Asheboro |
| 19C | Charles E. Brown (Chief) | Salisbury |
| | Beth Spencer Dixon | Salisbury |
| | Kevin G. Eddinger | Salisbury |
| | Roy Marshall Bickett, Jr. | Salisbury |
| | James Randolph | Salisbury |
| 19D | Donald W. Creed, Jr. (Chief) | Asheboro |
| | Regina M. Joe | Raeford |
| | Warren McSweeney | Carthage |
| | Tiffany Bartholomew[35] | Raeford |
| | Steve Bibey[36] | Carthage |
| 20A | John R. Nance (Chief) | Albemarle |
| | Thai Vang | Montgomery |
| | Phillip Cornett[37] | Norwood |
| 20B | William F. Helms, III (Chief) | Matthews |
| | Joseph J. Williams | Monroe |
| | Stephen V. Higdon | Monroe |
| | Erin S. Hucks | Monroe |
| | Matthew B. Smith[38] | Monroe |
| 21 | Lisa V. L. Menefee (Chief) | Winston-Salem |
| | Victoria Lane Roemer | Winston-Salem |
| | Laurie L. Hutchins[39] | Winston-Salem |
| | Lawrence J. Fine | Clemmons |

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| | Denise S. Hartsfield | Winston Salem |
| | Camille D. Banks-Payne | Winston-Salem |
| | David Sipprell | Winston-Salem |
| | Gordon A. Miller | Winston-Salem |
| | Theodore Kazakos | Winston-Salem |
| | Carrie F. Vickery | Winston-Salem |
| | Whit Davis[40] | Winston-Salem |
| 22A | L. Dale Graham (Chief) | Taylorsville |
| | Deborah P. Brown[41] | Mooresville |
| | Edward L. Hendrick, IV | Taylorsville |
| | Christine Underwood | Olin |
| | Carole A. Hicks | Statesville |
| | Bryan A. Corbett[42] | Statesville |
| | Thomas R. Young[43] | Statesville |
| 22B | Wayne L. Michael (Chief)[44] | Lexington |
| | Jimmy L. Myers (Chief)[45] | Advance |
| | April C. Wood[46] | Lexington |
| | Mary C. Paul | Thomasville |
| | Carlton Terry | Advance |
| | Carlos Jané | Lexington |
| 23 | David V. Byrd (Chief) | Wilkesboro |
| | Jeanie Reavis Houston[47] | Yadkinville |
| | William Finley Brooks | Wilkesboro |
| | Robert Crumpton | Wilkesboro |
| | Donna L. Shumate[48] | Sparta |
| 24 | Theodore Wright McEntire (Chief) | Spruce Pine |
| | Hal Gene Harrison | Spruce Pine |
| | Rebecca E. Eggers-Gryder | Boone |
| | Larry B. Leake | Marshall |
| 25 | Buford A. Cherry (Chief) | Hickory |
| | Sherrie Wilson Elliott | Newton |
| | Amy Sigmon Walker | Newton |
| | Robert A. Mullinax, Jr. | Newton |
| | Mark L. Killian | Hickory |
| | Clifton H. Smith | Hickory |
| | David W. Aycock | Hickory |
| | Wesley W. Barkley | Newton |
| | Richard S. Holloway | Lenoir |
| | Andrea C. Plyler[49] | Hudson |
| 26 | Elizabeth Thornton Trosch (Chief) | Charlotte |
| | Rickye McKoy Mitchell | Charlotte |
| | Christy Townley Mann | Charlotte |
| | Paige B. McThenia | Charlotte |
| | Kimberly Y. Best-Staton | Charlotte |
| | Jena P. Culler | Charlotte |
| | Tyyawdi M. Hands | Charlotte |
| | Sean Smith | Charlotte |
| | Matt Osman | Charlotte |
| | Gary Henderson | Charlotte |
| | David Strickland[50] | Charlotte |
| | Aretha V. Blake | Charlotte |
| | Tracy H. Hewett | Charlotte |
| | Faith Fickling | Charlotte |

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| | Roy H. Wiggins | Charlotte |
| | Karen D. McCallum | Charlotte |
| | Michael J. Standing | Charlotte |
| | Paulina N. Havelka | Charlotte |
| | Jonathon R. Marvel | Charlotte |
| | Reggie McKnight | Charlotte |
| | C. Renee Little[51] | Charlotte |
| 27A | John K. Greenlee (Chief) | Gastonia |
| | Angela G. Hoyle | Belmont |
| | James A. Jackson | Gastonia |
| | Michael K. Lands | Gastonia |
| | Richard Abernethy[52] | Gastonia |
| | Pennie M. Thrower | Gastonia |
| | Craig R. Collins | Gastonia |
| | Donald Rice[53] | Cramerton |
| 27B | Jeanette R. Reeves (Chief) | Shelby |
| | K. Dean Black | Denver |
| | Meredith A. Shuford[54] | Lincolnton |
| | Justin K. Brackett | Shelby |
| | Micah J. Sanderson | Denver |
| | Brad Champion[55] | Lincolnton |
| | Jamie Hodges[56] | Lincolnton |
| 28 | J. Calvin Hill (Chief) | Asheville |
| | Patricia Kaufmann Young | Asheville |
| | Julie M. Kepple | Asheville |
| | Andrea Dray | Asheville |
| | Ward D. Scott | Asheville |
| | Edwin D. Clontz | Candler |
| | Susan Marie Dotson-Smith | Asheville |
| 29A | Robert K. Martelle (Chief) | Rutherfordton |
| | Laura Anne Powell | Rutherfordton |
| | Ellen Shelley | Marion |
| | Michelle McEntire | Graham |
| | Corey J. MacKinnon[57] | Marion |
| 29B | Thomas M. Brittain, Jr. (Chief) | Mills River |
| | Emily Cowan | Hendersonville |
| | Charles W. McKeller[58] | Brevard |
| | Kimberly Gasperson-Justice | Hendersonville |
| | Gene B. Johnson[59] | Hendersonville |
| 30 | Richard K. Walker (Chief)[60] | Hayesville |
| | Roy T. Wijewickrama (Chief)[61] | Waynesville |
| | Monica Hayes Leslie | Waynesville |
| | Donna Forga | Clyde |
| | Kristina L. Earwood | Waynesville |
| | Tessa S. Sellers | Murphy |
| | Kaleb Wingate[62] | Waynesville |

## EMERGENCY JUDGES

| | |
|---|---|
| Sherry Fowler Alloway[63] | Greensboro |
| C. Christopher Bean | Edenton |

| JUDGES | ADDRESS |
|---|---|
| Rebecca W. Blackmore | Wilmington |
| Joseph A. Blick | Greenville |
| Robert M. Brady | Lenoir |
| David B. Brantley | Goldsboro |
| Jacqueline L. Brewer | Apex |
| Deborah P. Brown[64] | Mooresville |
| Joseph M. Buckner[65] | Chapel Hill |
| William M. Cameron | Richlands |
| H. Thomas Church | Statesville |
| Thomas G. Foster, Jr. | Pleasant Green |
| Nancy E. Gordon | Durham |
| Joyce A. Hamilton | Raleigh |
| Paul A. Hardison | Jacksonville |
| P. Gwynnett Hilburn | Greenville |
| James T. Hill | Durham |
| Richlyn D. Holt | Waynesville |
| Shelly S. Holt | Wilmington |
| F. Warren Hughes | Burnsville |
| A. Elizabeth Keever | Fayetteville |
| David A. Leech | Greenville |
| Harold Paul McCoy, Jr. | Halifax |
| Lawrence McSwain | Greensboro |
| Regan A. Miller[66] | Charlotte |
| Charles M. Neaves | Elkin |
| Thomas R.J. Newbern | Aulander |
| Ali B. Paksoy | Shelby |
| Dennis J. Redwing | Gastonia |
| Anne B. Salisbury | Cary |
| Joseph E. Setzer, Jr. | Franklinton |
| William G. Stewart | Wilson |
| Robert D. Stubbs[67] | Clayton |
| Jerry Waddell | Bryson City |
| Fredrick B. Wilkins, Jr. | Reidsville |

## RETIRED/RECALLED JUDGES

| | |
|---|---|
| Claude W. Allen, Jr. | Oxford |
| Sarah P. Bailey | Rocky Mount |
| J. Henry Banks | Henderson |
| George A. Bedsworth | Winston-Salem |
| Jacqueline L. Brewer | Apex |
| Samuel Cathey | Charlotte |
| Ronald L. Chapman | Charlotte |
| Albert A. Corbett, Jr. | Smithfield |
| Linda Falls | Durham |
| Daniel Fredrick Finch | Oxford |
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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 December 2020. [2]Resigned 31 December 2020. [3]Resigned 31 December 2020. [4]Sworn in 1 January 2021. [5]Sworn in 1 January 2021. [6]Resigned 31 December 2020. [7]Sworn in 1 January 2021. [8]Sworn in 1 January 2021. [9]Sworn in 1 January 2021. [10]Retired 31 December 2020. [11]Sworn in 1 January 2021. [12]Retired 31 December 2020. [13]Resigned 31 December 2020. [14]Sworn in 1 January 2021. [15]Sworn in 1 January 2021. [16]Sworn in 1 January 2021. [17]Retired 31 December 2020. [18]Became Chief District Court Judge 1 January 2021. [19]Sworn in 1 January 2021. [20]Retired 31 March 2021. [21]Became Chief District Court Judge 1 April 2021. [22]Resigned 31 December 2020. [23]Sworn in 1 January 2021. [24]Retired 31 December 2020. [25]Sworn in 1 January 2021. [26]Sworn in 1 January 2021. [27]Retired 31 January 2021. [28]Became Chief District Court Judge 1 February 2021. [29]Sworn in 1 January 2021. [30]Resigned 31 December 2020. [31]Sworn in 1 January 2021. [32]Sworn in 1 January 2021. [33]Resigned 31 December 2020. [34]Sworn in 1 January 2021. [35]Resigned 31 December 2020. [36]Sworn in 1 January 2021. [37]Sworn in 19 November 2020. [38]Sworn in 1 January 2021. [39]Retired 31 December 2020. [40]Sworn in 1 January 2021. [41]Retired 31 December 2020. [42]Sworn in 1 January 2021. [43]Sworn in 1 January 2021. [44]Retired 31 January 2021. [45]Became Chief District Court Judge 1 February 2021. [46]Resigned 31 December 2020. [47]Retired 31 December 2020. [48]Sworn in 1 January 2021. [49]Sworn in 1 January 2021. [50]Resigned 31 December 2020. [51]Sworn in 1 January 2021. [52]Resigned 31 December 2020. [53]Sworn in 1 January 2021. [54]Resigned 31 December 2020. [55]Sworn in 1 January 2021. [56]Sworn in 1 January 2021. [57]Sworn in 1 January 2021. [58]Resigned 31 December 2020. [59]Sworn in 1 January 2021. [60]Resigned 31 December 2020. [61]Became Chief District Court Judge 1 January 2021. [62]Sworn in 1 January 2021. [63]Resigned 31 December 2020. [64]Sworn in 11 January 2021. [65]Sworn in 3 December 2020. [66]Sworn in 17 December 2020. [67]Resigned 26 January 2021.

# ATTORNEY GENERAL OF NORTH CAROLINA

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Seth Dearmin

*Deputy Chief of Staff*
David Elliott

*Chief Deputy Attorney General*
Alexander McC. Peters

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*Civil Bureau Chief*
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*Criminal Bureau Chief*
Leslie Dismukes

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Stuart Saunders
Wes Saunders
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James Wilson
Dorian Woolaston
Kyla Wonder
Narcisa Woods
Donna B. Wojcik
Christine Wright
Nicholas Yates
Elly Young
Sarah Zambon
Ryan Zellar

# DISTRICT ATTORNEYS

| District | District Attorney | Address |
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| 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 |
| 24 | Avery Crump | Greensboro |
| 25 | Roxann Vaneekhoven | Concord |
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| 28 | Lynn Clodfelter | Albemarle |
| 29 | Maureen Krueger | Carthage |
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| 31 | Jim O'Neill | Winston-Salem |
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| 37 | Andy Gregson | Asheboro |
| 38 | Locke Bell | Gastonia |
| 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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| 2 | Thomas P. Routten | Washington |
| 3A | Robert C. Kemp, III | Greenville |
| 3B | Peter Mack | New Bern |
| 5 | Jennifer Harjo | Wilmington |
| 10 | Deonte L. Thomas | Raleigh |
| 12 | Cynthia Page Black | Fayetteville |
| 14 | Dawn Y. Baxton | Durham |
| 15B | Woodrena Baker-Harrell | Hillsborough |
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| 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 | Hendersonville |

# CASES REPORTED

## ORDERS



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

The following persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners in 2020 and have been issued a certificate by the Board.

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Andrew Vincent Adams ..... Winston-Salem
Justin George Sydney Adams ..... Raleigh
Sarah Alberta Adams ..... Zebulon
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Matthew Nheer Amrit ..... Chapel Hill
Evan Dean Anderson ..... Atlanta, GA
William Michael Apple ..... Lakeview
Nicole Margaret Arcodia ..... Fallston, MD
Nakia Lynn Arrington ..... Arlington, VA
Jonathan Atkinson ..... Pageland, SC
Mark Evan Atkinson ..... Durham
Stephen Atkinson ..... Pageland, SC
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Marianna Mendel Baggett ..... Raleigh
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Angela Christiana Baldwin ..... Raleigh
Milton Enrique Barba ..... Cary
Marissa Lynne Barbalato ..... Charlotte
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Graham Ross Billings ..... Charlotte
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Nicholas Kenan Blackwood ..... Greensboro
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Mackenzie Bluedorn ..... Winston-Salem
James Lilton Bobbitt III ..... Raleigh

Jennifer Elaina Bobbitt ..... Raleigh
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Nicholas Bogdash ..... Bellefonte, PA
William Donald Bomar ..... Greensboro
Tyana Nadine Bond ..... Whitsett
Andrea Carolina Bonvecchio ..... Raleigh
Kathleen Thayer Booras ..... Mount Holly
Katherine Elizabeth Bordwine ..... Morganton
Maergrethe C. Box ..... Orlando, FL
Karen Turnage Boyd ..... Farmville
Marissa Kathryn Branson ..... Greensboro
Colin Richard Brennan ..... Birmingham, AL
Alondra Margarita Bribiesca ..... Cary
Rachel Emily Brinson ..... Charlotte
Harrison Lee Broadbent ..... Wilmington
Xavier Montez Bromell ..... Durham
Davidson Nance Brooks ..... Waxhaw
Shelby Morgan Brooks ..... Charlotte
Jolie Alexa Brown ..... Goldsboro
Kelly Renee Brown ..... Goldsboro
Meghan Brown ..... Durham
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Hannah Fry Burgin ..... Tryon
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Jonah Aaron Garson ..... Chapel Hill
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Rachel Maura Geissler ..... Chapel Hill
Tharesa C. Gelwicks ..... Denver
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Haviland Macy Marie Kebler ..... Saint Petersburg, FL

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Jonathan Samuel Kidd ..... Rutherfordton
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Christian Lee Kiechel ..... Charlotte
Jami Michelle King ..... Sand Springs, OK
Jacquelyn Diane Kinni ..... Charlotte
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Hailey Kirby ..... Pikeville
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Rakia M. Kirby ..... Durham
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Brittany Debra Levine ..... Raleigh
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Matthew Cullen Lewis ..... Lexington
Ira Eliot Lifland ..... Greensboro
Eric Joseph Limbert ..... Raleigh
Joshua Michael Lingerfelt ..... Greensboro
Madeline Clark Lipe ..... Cary
Paul Scott Lipof ..... Hayesville
Alexa Noelle Litt ..... Charlotte

Jasmine Radeejah Little ..... Winston-Salem
Kevin Lanier Littlejohn II ..... Rolesville
Hetali Mayur Lodaya ..... Detroit, MI
John M. Logan ..... Rocky Mount
Haley Marie Lohr ..... Graham
Richard Gwynn Long III ..... Monroe
Ashley Nicole Longman ..... Durham
Kristen Nicole Longmire ..... Knightdale
Mary Isabel MacGuire ..... Savannah, GA
Kathryn Alaine Magoon ..... Efland
Georgia Hezain Malik ..... Raleigh
Megan Lee Mallamas ..... Raleigh
Melissa Lee Malone ..... Charlotte
Mikayla Kathryn Mann ..... Hillsborough
Donna Marie Mansfield ..... Holly Springs
Clarke Sheldon Martin ..... Winston-Salem
Frank Righeimer Martin ..... Charlotte
Jasmin Petty Martin ..... Sanford
Kelsey Lane Martin ..... Winston-Salem
Lauren Alexandra Martin ..... Danville, VA
Agustin Martinez Martinez ..... Greensboro
Hannah Crater Mashburn ..... Bermuda Run
Alexis Ora Massengill ..... Four Oaks
Bret Matera ..... Chapel Hill
Natalie Kay McCann ..... Wake Forest
Chanda Latise McClain ..... Greenville, SC
Skylar Adeline McClain ..... Charleston, SC
Andre' Demond McCoy ..... Charlotte
Elizabeth Blythe McCoy ..... Richmond, VA
Jared McDaniel ..... Rainbow City, AL
Robert Aaron McGlothlin ..... Carrboro
Trenton Isaiah McGuirt ..... Raleigh
Sarah Katherine McIntosh ..... Cornelius
Melissa Li Hua McKinney ..... Winston-Salem
Scarlett Shaunte McKinney ..... Leicester
Elizabeth Harrington McLellan ..... Greenwood, SC
Holden K. McLemore ..... Raleigh
Cody McPherson ..... Statesville
Morgan Nancy McPherson ..... District of Columbia
Alfred Percell McQueen Jr. ..... Winston-Salem
Laura Hope Medlin ..... Cary
Rebekah Louise Meier ..... Cary
Roecker Smith Melick ..... Winston-Salem
Alec Thomas Mercolino ..... Chapel Hill
Deborah Mergner ..... High Point
Chelsea Lauren Merritt ..... Raleigh
Justin Joseph Merritt ..... Morrisville
Megan June Mers ..... Burlington
Michael Sterling Mestre ..... Charlotte
Morgan Concetta Miano ..... Greensboro

Diane Catherine Mickelson ..... Apex
Jaelyn Denise Miller ..... Raleigh
Alexandra Elizabeth Milliard ..... Melbourne, FL
Timothy Misner ..... Charlotte
Ashley Monae' Mitchell ..... Elizabeth City
Kasey Mochel ..... Raleigh
Ahmed Mostafa Mohamed ..... Port Matilda, PA
Andrew Wellington Monthey ..... Charlotte
Lucas A. Moomaw ..... Asheville
Casey Moore ..... Havelock
Ciara Dominique Moore ..... Charlotte
Peyton Hannah Moore ..... Rock Hill, SC
Samuel Allen Moore ..... Pfafftown
Cristina Marie Morales ..... Fort George Meade, MD
Patrick M. Mordue ..... Excelsior Springs, MO
Benjamin Morrell ..... Charlotte
Alice Nicole Moscicki ..... Charlotte
Rachel Elizabeth Mosser ..... Greer, SC
Bryson Cole Mosteller ..... Newton
Laken Thompson Moxley ..... Boonville
Madison H. Mumma ..... Durham
Michael Munn ..... Chapel Hill
Edward Nappi ..... Sanford
Ivory Lazard Narcisse ..... Fayetteville
Alexandria Jean Neal ..... Belmont
John Anthony Nedley ..... Durham
Isaac Killian Neill ..... Charlotte
Alexander Eric Newkirk ..... Knightdale
Allison Janine Newton ..... Durham
Devon A. Newton ..... Durham
Leonidas Jacob Newton ..... Charlotte
Vanden Gregory Nibert ..... Clinton, SC
Rebecca L .Nicolella ..... Mebane
Samuel Anthony Nicosia ..... Tampa, FL
Frederick Matthew Norchi ..... Charlotte
Evan Kylie Norman ..... Charlotte
Cooper Talmage Norris ..... Durham
Michael Aaron Nozick ..... Atlanta, GA
Ashley Michelle Nunes ..... Rolesville
Robert James Yancey Nunnery ..... West End
Jessica L. O'Brien ..... Chapel Hill
Taylor Obzud ..... Raleigh
Sean Odom ..... Matthews
Joshua William Ohaus ..... Charlotte
Rolie Brozas Ohl ..... Sanford
Ashley Oldfield ..... Cornelius
David Ransom Ortiz ..... Raleigh
Dianna Sinclaire Owen ..... Raleigh
Myles Christian Owens IV ..... Emerald Isle
Robert Melvin Padget III ..... Charlotte

Ashle Mills Page ..... Cary
Chester Palumbo ..... Waynesville
Sophia Pappalardo ..... Charlotte
Nicholas Theodore Pappayliou ..... Charlotte
Ayana Parker ..... Durham
Bethany Megan Parlier ..... Winston-Salem
Kenya Rae Parrish ..... Winston-Salem
Alexander Riley William Paschal ..... Asheville
Heather Pasek-Delaney ..... Villa Hills, KY
Ami Pankaj Patel ..... Fort Mill, SC
Kisha Patel ..... Chapel Hill
Roshan Jagdish Patel ..... Matthews
Michael Paul ..... Rolesville
Lissette Courtney Payne ..... Charlotte
Kevin Douglas Peach ..... Cary
Abbey Caroline Peavy ..... Griffin, GA
Elizabeth Pellegrini ..... Raleigh
Rachel Phelps Pender ..... Winston-Salem
Michael Cameron Peretz ..... Charlotte
Daniel Thaddeus Perry IV ..... Greensboro
Margaret Wicker Perry ..... Chapel Hill
Olivia Leigh Perry ..... Raleigh
Sakeinah Perry ..... Durham
Steven Thomas Peruski ..... DeWitt, MI
Hannah Michenzie Petersen ..... Durham
Thomas K. Petersen ..... District of Columbia
Carl Henry Petkoff ..... Columbia, SC
Jacob Oliver Pickett ..... State Road
Jessica Danielle Pierce ..... Durham
Sarah Elizabeth Gabehart Pilon ..... Durham
Natalie Marie Pita ..... Edenton
Sean Thomas Placey ..... New Bern
Ashley Nicole Pollard ..... La Grange
Kelsey Lynn Poorman ..... Charlotte
Brittany Porter ..... Durham
Rachel Gail Posey ..... Raleigh
Tyler James Potts ..... Glendale, NY
Erik Stefan Pozek ..... Charlotte
Catherine Ruffin Prater ..... Birmingham, AL
Francis Christopher Pray III ..... Matthews
Jasmine Pressa ..... Greensboro
Anastasia Marie Pressel ..... Raleigh
Alaina Taylor Prevatte ..... Charlotte
Kyle Lee Putnam ..... Morganton
Ismaail Abu Hanifa Qaiyim ..... Charlotte
Jasmyne Taylar Quinn ..... LaVergne, TN
Shane Paul Raley ..... Raleigh
Walter Thomas Ramsey Jr. ..... Hillsborough
Quinn McEwen Randell ..... Wellborn, FL
Sonye' N. Randolph ..... Greensboro

Caleb Rash ..... Kannapolis
Kelli Patrice Rawlinson ..... Mooresville
Dylan Ray ..... Charlotte
Cameron Bradley Redd ..... Garner
Aishaah R. Reed ..... Waxhaw
Jennifer Ruth Reed ..... Charlotte
Lindsey June Reedy ..... Thomasville
Dylan Ray Reel ..... Clayton
Jessica Rhaven Reep ..... Moyock
Katlyn Ashley Reh ..... Charlotte
Arielle Rose Lyon Reid ..... District of Columbia
Stacy Michelle Reid Monroe ..... Charlotte
Nathaniel Isaac Reiff ..... Winston-Salem
Daniel James Reis ..... Charlotte
Machaella Reisman ..... Raleigh
Maria Juliana Rengifo ..... Raleigh
Adam Renkiewicz ..... Clayton
Charlotte Isabella Ressler ..... Raleigh
Andrew F. Rhoden ..... Raleigh
Joshua Lamar Richardson ..... Cary
Katherine Crook Richardson ..... Durham
Cally Michelle Richter ..... Charlotte
Alexandra Lee Riddle ..... Goldsboro
Keith Manning Rivenbark ..... Kannapolis
Kiana Faye Rivers ..... Durham
Michael Thomas Roberson ..... Durham
Tiffany Nicole Walters Roberson ..... Greensboro
Ashley Robinson ..... Cary
Maryam J. Robinson ..... Charlotte
Michael MacRae Robinson ..... Winston-Salem
Steffi Rodriguez ..... Saint Cloud, FL
Rachel Elizabeth Rogers ..... Fayetteville
Tess Savannah Rogers ..... Raleigh
Shameka Carolynn Rolla ..... Raleigh
Jazzmin Marie Romero ..... Charlotte
McKenna Ronan ..... Raleigh
Daniel John Root ..... Holly Springs
Alison Janelle Rossi ..... Chapel Hill
Mark Montgomery Rothrock ..... Raleigh
Kimberly Ann Rotzell ..... Harrisburg
Caroline Elizabeth Rowell ..... Dillon, SC
Sara Caraway Royster ..... Pinnacle
Courtney Nelson Rudolph ..... Wilmington
Autumn Rushton ..... Rocky Mount
Matthew Scott Russell ..... Cary
Alexander James Rutgers ..... Fayetteville
John Edward Ryan III ..... Mount Olive
Madelaine Elizabeth Ryan ..... Loveland, OH
Rivca R. SaNogueira ..... Durham
Noel Santorelli ..... Leland

Adrienne Satchell ..... Huntersville
Benjamin Marcus Satterthwaite ..... Columbia, SC
James Harris Sattin ..... Charlotte
Elizabeth Barrett Savage ..... Raleigh
Jana Newcomer Schaal ..... High Point
Michelle Schalliol ..... Durham
Morgan Olivia Schick ..... Chapel Hill
Jeffrey Schlemmer ..... Agawam, MA
Nicholas Phillip Schloss ..... Raleigh
Catherine Schluter ..... Charlotte
Michelle Janae Scott ..... Greensboro
Ethan Michael Sealy ..... New HIll
Belinda See ..... Statesville
April Seggerman ..... Weaverville
Albert Richard Sementa ..... Raleigh
Jennifer Serrano ..... Newton Grove
Roderick Kelvin Setzer II ..... Newton
Jesse Sharp ..... Greensboro
Michael Lawrence Sheehan ..... Concord
Laura Leigh Sheridan ..... Raleigh
Autumn Brianna Nate Shipman ..... Durham
Charles Richard Shoop III ..... Greensboro
Andrew Shortt ..... Kernersville
Casey Renee Simmons ..... Charlotte
Dana Marie Stanley Sisk ..... Reno, NV
Mary Celeste Skinner ..... Zebulon
John A. Skubina Jr. ..... Omaha, NE
Jane Alexandra Small ..... Raleigh
Andrea Helene Smaxwell ..... Greensboro
Bradley Benjamin Smith ..... Marshville
Camille Madison Smith ..... Durham
Claire Smith ..... Raleigh
Gregory Scott Smith ..... Cameron
Haley Elizabeth Smith ..... Kernersville
Hannah Kathryn Smith ..... Bostic
Ian B. Smith ..... Hendersonville
Joshua E. Smith ..... Chapel Hill
Samantha Lee Smith ..... Greensboro
Samuel Smotherman ..... Durham
Wade Tyler Sockman ..... Mars Hill
Paola Milagros Soler ..... High Point
Timothy Sookram ..... Chapel Hill
Nicholas Brent Sorensen ..... Wake Forest
Faranak Soubouti ..... Charlotte
Carlie Allison Spencer ..... Raleigh
Sarah Elizabeth Sponaugle ..... Advance
Megan Roman Srnik ..... Raleigh
Mary Catherine Stamato ..... Charlotte
Carley Rachel Starnes ..... Huntersville
John Carlton Stathis ..... Durham

Susan Elisabeth Stedman ..... Waxhaw
Killian Kelly Steer ..... Raleigh
Mary Elizabeth Stillwell ..... Raleigh
Nickolas Lee Stockton ..... Raleigh
Lauren McKenzie Stokes ..... Raleigh
Christina Stone ..... Cary
Joshua Samuel Stone ..... Charlotte
Matthew Earl Stone ..... Sanford
Lydia Cassady Stoney ..... Charlotte
Kelley Marie Storey ..... District of Columbia
Jessica Sara Stout ..... Raleigh
Hannah Strickland ..... Richmond, VA
Bradlee Katherine Suggs ..... Darlington, SC
Laurie Marcelette Suitt ..... Harrisburg
Colleen Breana Sullivan ..... Catawba
Lanie Kathryne Summerlin ..... Stanley
Bryan Michael Sumner ..... Raleigh
Chastan Taylor Swain ..... Durham
Christian James Swope ..... Weddington
Veneta L. Sydnor ..... Durham
Heather Nicole Tabor ..... Durham
Brian Reynolds Taylor ..... Raleigh
Brian Zachary Taylor Jr. ..... Raleigh
John Robert Taylor ..... Ahoskie
Samantha Beth Taylor ..... Charlotte
Jordan Alexander Tehrani ..... Morrisville
Jake Warren Terrell ..... Raleigh
Nicholas Gold Tessener ..... Raleigh
Kevin David Thayer ..... Trent Woods
Kendall Kilborne Thielemann ..... Chapel Hill
Joshua L. Thomas ..... Greenwood, SC
Michael William Thomas ..... Arlington, VA
William Hardy Thomas ..... Raleigh
Adam Patrick Thomason ..... Charlotte
Destiney Thompson ..... Raleigh
Sarah Kathryn Thompson ..... Charlotte
Trevor Nute Thompson ..... Lillington
Andres Tomey ..... Raleigh
Sable Leigh Toney ..... Miami, FL
Hlekani Nonqeba Totten ..... Greensboro
Anastasia Frances Tramontozzi ..... Melrose, MA
Michael Smoak Traynham ..... Irmo, SC
Shannon Catherine Traynor ..... Chapel Hill
Alexis Tremble ..... Charlotte
Tara Tiffany Danielle Trull ..... Fayetteville
Devon Reeves Tucker ..... Asheville
Lisa Renée Tucker ..... Columbia, MD
Olivia Lee Turner ..... Zebulon
Roberta Lynn Turner ..... York, SC
Matthew Alan Turpin ..... Sylva

James Matthew Twiddy ..... Raleigh
James Patrick Andrew Twisdale ..... Carrboro
Thomas Graves Upchurch Jr. ..... Ann Arbor, MI
Elizabeth Marie Usery ..... Jacksonville
Scott Gary VanHatten ..... Charlotte
Shawna Diane Vasilko ..... Youngsville
Kirsten Ruth von Wahl ..... Charlotte
Kelsey E. Walker ..... Greenville
David Blair Wall ..... Chapel Hill
Victoria Hannah Wannall ..... Charlotte
Reagan Elizabeth Warren ..... Dunn
Daniel Holder Washburn ..... Creedmoor
Michael Adam Way ..... Durham
Adam Sterling Webb ..... Raleigh
Cassidy Paige Webb ..... Advance
Austin Taylor Webber ..... Charlotte
Brooke E. Webber ..... Raleigh
Michaela Weber ..... Cary
Ashley Wayne Weeks ..... Greenville, SC
Maya Hart Weinstein ..... Chapel Hill
Morgan Alexandra Welge ..... Chapel Hill
Baxter Hunter Wells III ..... Durham
Norvell Winston West IV ..... Wilmington
Eimile Stokes Whelan ..... Charlotte
Leah Whetten-Goldstein ..... Chapel Hill
Jared Nelson Elvis White ..... Virginia Beach, VA
Brian Wick ..... Charlotte
Harrison Lee Wicker ..... Raleigh
Michael John Wilber ..... Raleigh
Michael Anthony Wilcox ..... Raleigh
Brittany LaDawn Williams ..... Durham
Christopher Steven Williams ..... Wilmington
Jamika Williams ..... Mooresville
Jesse Benjamin Williams ..... Durham
Kristin Diane Williams ..... Apex
Erin Lee Wilson ..... Shelby
Steven Craig Wilson Jr. ..... Chapel Hill
Hannelore Brooke Witt ..... Raleigh
Tylin Natalie Woodstock ..... Hyattsville, MD
Travis Edward Woolen ..... Kernersville
Alyssa Nicole Wright ..... Wake Forest
Daniel Joseph Wright ..... Wake Forest
Jacob Denny Wright ..... Louisville, TN
Matthew Bennett Wright ..... District of Columbia
Karah Frances Yager ..... Greensboro
Evelyn Scott Yarborough ..... Asheville
Matthew Whitney Yelverton ..... Chapel Hill
Christopher Haden Yon ..... Haw River
Cayley Marie Young ..... Syracuse, NY
Jessica Leigh Young ..... Winston-Salem

Julio Mario Zaconet Valentin ..... Atlanta, GA
Bassel Samir Zeitouni ..... Charlotte
Lauren Nicole Zickert ..... Greensboro
Danielle Zucker ..... Waban, MA

The following persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners in 2020 and have been issued a certificate by the Board.

Marianne Abely ..... Applied from the District of Columbia
Kimberly E. Alston ..... Applied from the State of Georgia
Ismail Amin ..... Applied from the State of Texas
Michael William Anderson ..... Applied from the State of New York
Kendra Kasik Bader ..... Applied from the State of Minnesota
Steven Andrew Bader ..... Applied from the State of Minnesota
William Henry Barfield ..... Applied from the State of Texas
Deborah Marie Barone ..... Applied from the State of New York
Kenneth Wayne Bart Jr. ..... Applied from the State of Colorado
Tammara Bauer ..... Applied from the State of Colorado
Ryan Gary Beadle ..... Applied from the State of Texas
Paul Fitszimmons Beck ..... Applied from the State of Missouri
Harold Edwards Bell ..... Applied from the State of Virginia
Edward Franklin Berry ..... Applied from the State of Georgia
Matthew Chandler Berthold ..... Applied from the State of West Virginia
Douglas Richard Blecki ..... Applied from the State of Virginia
Bryant Allen Boohar ..... Applied from the State of New Jersey
Whitney Allison Bowling ..... Applied from the State of Texas
Gregory Caleb Bowman ..... Applied from the District of Columbia
Sarah Boyce ..... Applied from the State of Maryland
Daniel Vincent Bradley ..... Applied from the State of Illinois
James Albert Breckenridge ..... Applied from the State of Missouri
Dennis Arthur John Breen ..... Applied from the State of New York
Tara McKenzie Bright ..... Applied from the State of New York
Kevin Brooks ..... Applied from the State of Texas
Amanda Brumfield ..... Applied from the State of New York and the District of Columbia
SuAnne Hardee Bryant ..... Applied from the State of Virginia
Waylon Memphis Bryson ..... Applied from the State of New York
Micah Bucy ..... Applied from the State of Pennsylvania
Stephen M. Buhr ..... Applied from the State of New York
Louis Clayton Burgess ..... Applied from the State of Texas
Paul P. Burghardt ..... Applied from the State of Utah
Alison Casey Burke ..... Applied from the State of New York
Gennaro Dominick Calabrese ..... Applied from the State of New York
Kelly Alfred Cameron ..... Applied from the State of Idaho
Leah Mary Campbell ..... Applied from the State of New York
Darl Hilton Champion Jr. ..... Applied from the State of Georgia
Douglas Blake Chanco ..... Applied from the State of Georgia
Christopher Edward Chapman ..... Applied from the State of Georgia
Jason Chimon ..... Applied from the State of New York

Kunal Janak Choksi ..... Applied from the District of Columbia
Jeffrey C. Clark ..... Applied from the State of Illinois
James Carroll Coghlan ..... Applied from the State of Illinois
Samuel Charles Cohen ..... Applied from the District of Columbia
Rania Saidi Combs ..... Applied from the State of Texas
Addi Karan Cook ..... Applied from the State of Georgia
Thomas Roland Cook IV ..... Applied from the State of Georgia
Frank Joseph Corigliano ..... Applied from the State of New York
Yvonne Marie Costelloe ..... Applied from the State of Ohio
Brandon J. Crainer ..... Applied from the State of Nebraska
Thomas Crist ..... Applied from the State of Ohio
Frank J. Cuccio ..... Applied from the State of New Jersey
Kimberly Willwerth Daniel ..... Applied from the State of Virginia
James Murrell Daniel Jr. ..... Applied from the State of Virginia
William Daniel Davis ..... Applied from the State of Georgia
Natalie Mayo Deak ..... Applied from the District of Columbia
Stephen James DeBoer ..... Applied from the State of Virginia
Nathan Troy Ewing ..... Applied from the State of Illinois
Jordan Leigh Fieldstein ..... Applied from the State of Connecticut
Eric Michael Fish ..... Applied from the State of Illinois
Nathan Joseph Forb ..... Applied from the State of Ohio
Nicole Joy Galinsky ..... Applied from the State of Massachusetts
James Francis Gallagher ..... Applied from the State of New York
Jason Adam Gang ..... Applied from the State of New York
Eric Gayan ..... Applied from the State of Ohio
Carly Erin Ginley ..... Applied from the State of New York
Israel Wondimu Gobena ..... Applied from the State of Minnesota
Robert A. Goetz ..... Applied from the State of Wisconsin
Lauren Genvert Goetzl ..... Applied from the State of Maryland
Reuben Goetzl..... Applied from the State of Maryland and the District of Columbia
Arren Scott Goldman ..... Applied from the State of New York
Robert Aaron Greenberg ..... Applied from the State of New Jersey
Billie Jo Guthrie ..... Applied from the State of Massachusetts
Sangwan Ha ..... Applied from the State of New York
Jessica Anne Golembiewski Halling ..... Applied from the State of Minnesota
Ryan Damon Hamady ..... Applied from the State of West Virginia
James Alan Harvey ..... Applied from the State of New York
Stephenson F. Harvey Jr. ..... Applied from the District of Columbia
Michele Hayes ..... Applied from the State of Maryland
Jamie Stephens Hiles ..... Applied from the State of Virginia
Richard Bryan Holbrook ..... Applied from the State of Virginia
Dana Michael Hollywood ..... Applied from the State of Massachusetts
Mary August Huffman ..... Applied from the State of Virginia
Kerry O'Neill Irwin ..... Applied from the State of Kentucky
Edward Henderson Ivey ..... Applied from the State of West Virginia
Daniel L. Jacobs ..... Applied from the State of Ohio
Carey Michael Johnson ..... Applied from the State of Georgia
Lance Johnson ..... Applied from the State of Illinois
Cynthia Jon-Ubabuco ..... Applied from the State of Texas
Samantha Maxwell Kagan ..... Applied from the State of New York

John Kicinski ..... Applied from the State of New York
Joseph A. Kimmet ..... Applied from the State of Tennessee
Apostolis Anthony Kolovos ..... Applied from the State of Massachusetts
Luciano J. Lama ..... Applied from the State of New York
Emily Lauren Langhenry ..... Applied from the State of Illinois
Maria Elena Lapetina ..... Applied from the State of New York
Twila C. Leigh ..... Applied from the States of Michigan and Georgia
Ashley Leonard ..... Applied from the States of Utah and Tennessee
Hilary Rennee Levine ..... Applied from the State of New York
Andrew David Ligon ..... Applied from the State of New York
John James Lisy IV ..... Applied from the State of Ohio
Jeffery Charles Lowe ..... Applied from the District of Columbia
Casaundra Marie Maimone ..... Applied from the State of Virginia
Erik Alexander Martin ..... Applied from the State of Illinois
Lillian Claire Martin-Mashburn ..... Applied from the State of Georgia
John Nowlin McClain III ..... Applied from the State of New York
Christine Michelle McDevitt ..... Applied from the State of Illinois
James Edward McLean Jr. ..... Applied from the State of Ohio
William Fletcher McMurry ..... Applied from the State of Kentucky
Kimberly Irene McWhorter ..... Applied from the State of Georgia
Carey Brian Meadors ..... Applied from the District of Columbia
Amanda Marie Meglemre ..... Applied from the State of Kansas
Jean Christian Michel ..... Applied from the State of Tennessee
Edward Hopkins Miller ..... Applied from the State of Virginia
Renae Alderman Mitchell ..... Applied from the State of Virginia
Lindsey Teal Mittelstadt ..... Applied from the State of Montana
Mitchell Dial Monsour Jr. ..... Applied from the State of Mississippi
Joseph Cade Morgan ..... Applied from the State of Tennessee
Francis Henry Morrison ..... Applied from the District of Columbia
John Becker Mumford Jr. ..... Applied from the State of Virginia
Charles Andrew Munn ..... Applied from the State of New York
Drew G. Murphy ..... Applied from the State of Illinois
Lucky Narain ..... Applied from the State of New Jersey
Jed Robert Nolan ..... Applied from the State of West Virginia
Ashley Ann Norton ..... Applied from the State of Pennsylvania
Charles Walter Olminsky Jr. ..... Applied from the State of Ohio
Danielle Marie Orait ..... Applied from the State of Pennsylvania
Thomas Achille Ozbolt ..... Applied from the State of Massachusetts
Mary Frances Parker ..... Applied from the State of Tennessee
Nicholas Parr ..... Applied from the State of New York
Devan Robert Patrick ..... Applied from the State of Texas
Peter Joseph Paukstelis ..... Applied from the State of Kansas
Marc R. Paul ..... Applied from the State of Pennsylvania
Jason Edwin Payne ..... Applied from the State of Texas
David Peet ..... Applied from the District of Columbia
Laura Nicole Pierro ..... Applied from the State of New Jersey
Gregory D. Podolak ..... Applied from the State of Connecticut
Lee Mathew Pollack ..... Applied from the State of New York
Wendy Powell ..... Applied from the State of New York
Carri Lee Preble ..... Applied from the State of New Hampshire

Stefanie Caroline Pupkiewicz ..... Applied from the State of Colorado
Michael Robert Rasor ..... Applied from the State of Ohio
Richard W. Reinthaler ..... Applied from the State of New York
Mary Margaret Rhodes ..... Applied from the State of New York
Louis Robert Richman ..... Applied from the State of Virginia
Michelle L. Risavi ..... Applied from the State of New York
Kimberly Yvonne Smith Rivera ..... Applied from the State of Ohio
Julie Rizzo ..... Applied from the District of Columbia
Cristal Dawn Robinson ..... Applied from the State of Texas
Brent Rowlands ..... Applied from the State of Virginia
Abraham Rubert-Schewel ..... Applied from the State of New York
John S. Rudd ..... Applied from the State of New York
Rachel Ryan ..... Applied from the State of New York
Scott Edward Schang ..... Applied from the District of Columbia
Nicole Erica Schiavo ..... Applied from the State of New York
Cory D. Schug ..... Applied from the State of New York
Lynn Allison Scull ..... Applied from the State of Connecticut
Jennifer Lynn Shephard ..... Applied from the State of New York
Jonathan Mackenzie Short ..... Applied from the State of New Jersey
Kevin M. Simpson ..... Applied from the State of Pennsylvania
Kevin S. Smith ..... Applied from the State of New Jersey
Reagan Lacee Burrow Smith ..... Applied from the States of Louisiana and California
Valerie Barnes Speakman ..... Applied from the State of Tennessee
David Todd Spruill ..... Applied from the State of Virginia
Shane Thomas Stansbury ..... Applied from the State of New York
Aaron Joseph Steventon ..... Applied from the State of Kansas
Joseph Lee Stiles ..... Applied from the State of Virginia
Jeffery Stoddard ..... Applied from the State of Virginia
Matthew Christopher Stone ..... Applied from the State of Illinois
Melanie A. Stratton ..... Applied from the State of Washington
Leslie Brook Stuntebeck ..... Applied from the State of Texas
Jennifer Lee Swearingen ..... Applied from the State of New York
Robert M. Talley ..... Applied from the State of Pennsylvania
Amber Johanna Thiel ..... Applied from the State of New York
Lauren Lynne Refinetti Timmons ..... Applied from the State of Texas
Erik John Tomberg ..... Applied from the State of Massachusetts
Edward F. Treat ..... Applied from the State of New York
Kyle Thomas Turnbull ..... Applied from the State of West Virginia
Louis Gerald Visco ..... Applied from the State of New York
Jeffrey Mark Wagner ..... Applied from the State of Illinois
Shirley Kohsin Wang ..... Applied from the State of Tennessee
Gregory Todd Wasylak ..... Applied from the State of Maryland
Marjorie Sara White ..... Applied from the State of New York
Walter Aden Wilkie ..... Applied from the District of Columbia
Christopher Alan Williams ..... Applied from the District of Columbia
Matthew Alexander Winer ..... Applied from the State of Virginia
Erica Marie Womer ..... Applied from the State of New York
Elizabeth Louise Yingling ..... Applied from the State of Texas
Jared David Zajac ..... Applied from the State of New York
Jacob Ziemowit Zambrzycki ..... Applied from the State of New York

Lindsay Alexandra Zelek-Thompson ..... Applied from the State of Massachusetts
Rebecca Zimmer ..... Applied from the State of New York

The following persons were admitted to the North Carolina Bar by transfer by the Board of Law Examiners in 2020 and have been issued a certificate by the Board.

Chip Devin Adkins ..... Applied from the State of Alabama
Tara Elizabeth Adkins Hart ..... Applied from the State of New York
Alyssa Louise Agostino ..... Applied from the State of South Carolina
Jenna Elise Roark Alexander ..... Applied from the State of Tennessee
Margaret Elizabeth Anderson ..... Applied from the State of New York
Courtney Michelle Bachman ..... Applied from the State of New York
Paulo Cesar Balcazar Martinez ..... Applied from the District of Columbia
John Vincent Barraco ..... Applied from the State of Washington
William Spencer Barrow ..... Applied from the State of South Carolina
Kathryn Rose Barry ..... Applied from the State of New York
Robert Francis Baumann Jr. ..... Applied from the State of New York
Jared Michael Becker ..... Applied from the State of Missouri
Christopher Michael Beeco ..... Applied from the State of South Carolina
Alexandria Maria Beto ..... Applied from the State of West Virginia
Maisha M. Blakeney ..... Applied from the State of New Jersey
Joanna Christina Boardman ..... Applied from the State of Alabama
Shambree Nashell Bonner ..... Applied from the State of New Jersey
Robert Botkin ..... Applied from the State of New York
Britton Howard Bouchard ..... Applied from the State of New York
Benjamin Scott Boyles ..... Applied from the State of New Jersey
James Michael Bracken ..... Applied from the State of South Carolina
Joshua Jeremiah Brasch ..... Applied from the State of Missouri
Robert Allen Breitweiser III ..... Applied from the District of Columbia
Robin Rene Bronson ..... Applied from the District of Columbia
John Gray Brotherton ..... Applied from the State of Massachusetts
Mitchell Douglas Brown ..... Applied from the State of New York
Megan Kathleen Gabbard Bruyns ..... Applied from the State of Missouri
George Waller Bryan III ..... Applied from the State of South Carolina
James Keith Bryson ..... Applied from the State of South Carolina
Charles Baxter Burnette IV ..... Applied from the State of South Carolina
Raford Wainwright Bussey Jr. ..... Applied from the State of South Carolina
Rhett Nicholas Jerry John Scallion Kilpatrick Butler ..... Applied from the State of New York
Edgar J. Cabra ..... Applied from the State of South Carolina
Benjamin Earl Calhoun ..... Applied from the State of South Carolina
Kayla Nicole Campbell ..... Applied from the District of Columbia
Angela Joyce Casa ..... Applied from the State of New York
Molly Hubbard Cash ..... Applied from the State of South Carolina
Rosemary Chandler ..... Applied from the State of New York
Zeola Charles ..... Applied from the State of Alabama
Atiya Simone' Clark ..... Applied from the District of Columbia
Frederick Darrell Clarke III ..... Applied from the State of Alabama

Janelle Lilley Cline ..... Applied from the State of Arkansas
Jason D. Cline ..... Applied from the State of Arkansas
Tatiana Marie Cody ..... Applied from the District of Columbia
Phylicia Yvette Christine Coleman ..... Applied from the State of South Carolina
Breanna Compitello ..... Applied from the District of Columbia
David Fleming Cook..... Applied from the State of New York
Tyler Johnson Cook ..... Applied from the State of New York
Andrea Lee Coraci ..... Applied from the State of New York
Kayla M. Culver ..... Applied from the State of South Carolina
Meghan Kathleen Daly ..... Applied from the State of New York
Reed Stevenson deMent ..... Applied from the State of South Carolina
Tyler Andrew Diekhaus ..... Applied from the State of New Jersey
Rucha Dixit ..... Applied from the State of Tennessee
Dwana Dixon ..... Applied from the State of New York
Christopher Paul Doerring ..... Applied from the State of Alabama
Shadari De'Asha Douglas ..... Applied from the District of Columbia
Ethan Bell DuBois ..... Applied from the State of South Carolina
Ryan Paul Duffy ..... Applied from the State of New Jersey
John Elliott Dugger Jr. ..... Applied from the State of Montana
Natalie Ecker ..... Applied from the State of South Carolina
Tyler Anita Ellis ..... Applied from the District of Columbia
Eboni Monique Elm ..... Applied from the State of New Jersey
Joshua James Emmett ..... Applied from the State of New York
John John Feliciano Acosta .....Applied from the State of Illinois
Naiyma Yasmine Ferguson ..... Applied from the State of New York
Megan Laura Foy ..... Applied from the State of South Carolina
Jared Ross Franzblau ..... Applied from the State of New York
McKenna Freese ..... Applied from the District of Columbia
Rebecca Abigail Friedman .....Applied from the State of Maine
Kathryn T. Gathy ..... Applied from the State of Connecticut
John William Gibson ..... Applied from the State of South Carolina
Christopher Gillespie ..... Applied from the District of Columbia
Alexandra Giordanella ..... Applied from the District of Columbia
Jesse Glenn ..... Applied from the State of South Carolina
Chelsea Alexandra Glover ..... Applied from the State of South Carolina
Thomas Joseph Godfrey..... Applied from the State of South Carolina
Jordan Scott Goewey..... Applied from the State of South Carolina
Ashton R. Gottschall ..... Applied from the State of South Carolina
John Garrett Grafton.....Applied from the State of West Virginia
Christian Haverstrom..... Applied from the District of Columbia
Christopher Brandon Henry..... Applied from the State of South Carolina
Mary Elizabeth Reagan Hinton ..... Applied from the District of Columbia
Luke R. Hoopes..... Applied from the State of South Carolina
Thomas Erskine Ice..... Applied from the District of Columbia
Federico Iwan ..... Applied from the District of Columbia
William S. Jackson IV..... Applied from the State of South Carolina
Jamaal Jaynes..... Applied from the District of Columbia
Rebecca Jennings ..... Applied from the State of South Carolina
James Steven Jennings-Gresham..... Applied from the State of Wyoming
Edgar Jimenez..... Applied from the District of Columbia

Madeline Nancy Joerg ..... Applied from the State of New York
Ethan Andrew Johnson ..... Applied from the State of New York
Kevin Christopher Johnson ..... Applied from the State of South Carolina
Daniel E. Jouppi ..... Applied from the State of New York
Afzal Karim .....Applied from the State of West Virginia
Steven Mark Keithley ..... Applied from the State of New York
Lindsey Kell ..... Applied from the State of New York
Emily Jeanne Kim .....Applied from the State of Massachusetts
Emily Rebecca Kirkpatrick ..... Applied from the State of Alabama
Symone D. Knox ..... Applied from the District of Columbia
William Greyson Land ..... Applied from the State of South Carolina
Ellen Anne Larson ..... Applied from the State of Alabama
Brett L. Lawrence ..... Applied from the State of New York
Tiffany N. Lawson..... Applied from the District of Columbia
Erryonna Leonard .....Applied from the State of West Virginia
Jasana Alexandria Levy ..... Applied from the State of Connecticut
Dylan Douglas Lingerfelt ..... Applied from the State of South Carolina
Susan Lloyd ..... Applied from the State of Colorado
Lydia Locklear ..... Applied from the District of Columbia
Erin Long ..... Applied from the State of Colorado
Maureen Patricia Long ..... Applied from the District of Columbia
William Vincent Lucas ..... Applied from the District of Columbia
Jody Clinton Lyles ..... Applied from the State of South Carolina
Gail Elizabeth Malone ..... Applied from the State of New York
Hannah Grace Manning Carroll ..... Applied from the State of Tennessee
Latasha Ann May ..... Applied from the District of Columbia
Stubley Mark McClellan Jr. ..... Applied from the State of Alabama
Wallis Faith McElroy ..... Applied from the State of Missouri
Christopher Roberts McKeown ..... Applied from the State of South Carolina
Jon Michael Tyler McNew ..... Applied from the District of Columbia
Brianna Nikai McRae ..... Applied from the State of New York
Araca Landis Miller ..... Applied from the State of Tennessee
Sherika Miller ..... Applied from the State of New York
Endri Mince ..... Applied from the State of South Carolina
Claire Elise Mispagel ..... Applied from the State of Missouri
Tyler Jackson Mitchell ..... Applied from the District of Columbia
Catherine Smith Montezuma ..... Applied from the District of Columbia
Brittany Taylor Morrison .....Applied from the State of Nebraska
Deanna Mosher ..... Applied from the State of Minnesota
Keisha Twanna Murray ..... Applied from the State of South Carolina
Roland Heath Myers ..... Applied from the State of South Carolina
Joe'Terrious Keon Neal ..... Applied from the State of South Carolina
Yawara Ng ..... Applied from the State of New York
Kara Raelan Nipper ..... Applied from the State of Montana
Danielle Nicole Nix ..... Applied from the District of Columbia
Edward Michael Nogay .....Applied from the State of West Virginia
Nicholas Adam Norris ..... Applied from the State of South Carolina
Sara Elizabeth Ohlman ..... Applied from the State of Missouri
Ian Patrick O'Keefe ..... Applied from the District of Columbia
Lisa Dawn Owings.....Applied from the State of North Dakota

# LICENSED ATTORNEYS

Kaitlyn Adams Parker ..... Applied from the State of Missouri
Kushal Patel ..... Applied from the State of Washington
Hirak Pati ..... Applied from the State of South Carolina
Adrian Renata Peguese ..... Applied from the State of South Carolina
Leslie Walker Peters ..... Applied from the State of South Carolina
Mara Bovard Peterson ..... Applied from the State of Colorado
Irvin Henry Philpot IV ..... Applied from the State of South Carolina
Julien Donald Polk ..... Applied from the District of Columbia
Marcus Odell Pollard ..... Applied from the District of Columbia
Alicia Raft ..... Applied from the District of Columbia
Elizabeth Rita Rasheed ..... Applied from the State of New York
Kelly Michelle Reid ..... Applied from the State of South Carolina
Anna Claire Reilly ..... Applied from the State of Alabama
Rachel Marie Rice ..... Applied from the State of New York
Shiekel Deandre' Richardson ..... Applied from the District of Columbia
Pierce Rigney ..... Applied from the State of Alabama
Enid Felicia Robinson ..... Applied from the State of New York
Paris Robinson ..... Applied from the State of New York
Aaron Saul Rogoff ..... Applied from the State of New York
Gheisha-Ly Rosario Diaz ..... Applied from the District of Columbia
Michael James Rosenthal ..... Applied from the District of Columbia
Jarel Lamar Rosser ..... Applied from the State of New York
Maxwell Christian Ruocco ..... Applied from the State of New Jersey
Rupa Vickers Russe ..... Applied from the District of Columbia
John David Sallenger ..... Applied from the State of South Carolina
Cecilia Maria Santostefano ..... Applied from the State of New York
David Robert Sayers ..... Applied from the District of Columbia
David Ross Schambach ..... Applied from the State of Colorado
Katherine Segall ..... Applied from the State of New York
William Cole Shannon ..... Applied from the State of South Carolina
Stephen Matthew Shell ..... Applied from the State of New York
Peter Donovan Singh ..... Applied from the State of New York
Ryon David Smalls ..... Applied from the State of Georgia
Bonnie Lee Smith ..... Applied from the State of New York
Carlie Anne Smith ..... Applied from the State of Utah
Riley William Maxwell Smith ..... Applied from the State of Colorado
John M. Spencer ..... Applied from the State of Alabama
Chelsie LeeAnn Spurling ..... Applied from the State of South Carolina
Corey Stanton ..... Applied from the State of South Carolina
Meaghan Nicole Stjernholm ..... Applied from the State of Colorado
Tomi Malia Suzuki ..... Applied from the District of Columbia
Madhuri Swarna ..... Applied from the State of New York
Derek Devere Tarver ..... Applied from the State of South Carolina
William Beverly Taylor ..... Applied from the State of New York
Ford Hamby Thrift ..... Applied from the State of South Carolina
Jonathan Todd ..... Applied from the State of South Carolina
Chavonne Neema Trevillion ..... Applied from the State of New Hampshire
Josh K. Unice ..... Applied from the State of Illinois
Christopher A. Vernick ..... Applied from the State of Maryland
James Allen Villanueva ..... Applied from the State of South Carolina

## LICENSED ATTORNEYS

Ashley Nicole Walker ..... Applied from the State of New Jersey
Megan Walker .....Applied from the State of New Mexico
Kyrstin McKenzie Wallach ..... Applied from the District of Columbia
Harris McRae Watkins ..... Applied from the State of South Carolina
Brooke Raylynn Watson ..... Applied from the State of Alabama
Tamikiyo Cartwright Watters ..... Applied from the District of Columbia
Ashley Brittany Weathers ..... Applied from the State of New York
Jessica Lucia Wemes ..... Applied from the State of New York
Joseph Robert Lee Wideman Jr. ..... Applied from the State of South Carolina
Nicole Shanette Wilkes ..... Applied from the State of New York
Howard Cleo Williams III .....Applied from the State of Arizona
Phyniques Tarnisha Williams ..... Applied from the District of Columbia
Jennifer Williams Winkler .....Applied from the State of West Virginia
Kelsey Rio Wolff .....Applied from the State of Washington
Phillips Stone Workman ..... Applied from the State of South Carolina
Jennifer Ashley Wright ..... Applied from the State of South Carolina
Roni Yashaev ..... Applied from the State of New York
Ashley Rene Zatloukal ..... Applied from the District of Columbia

CASES

ARGUED AND DETERMINED IN THE

# SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

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RAYMOND A. DA SILVA, EXECUTOR OF THE ESTATE OF DOLORES J. PIERCE
v.
WAKEMED, WAKEMED D/B/A WAKEMED CARY HOSPITAL, AND
WAKEMED FACULTY PRACTICE PLAN

No. 326PA18

Filed 14 August 2020

**1. Medical Malpractice—Rule 702—specialist expert—qualifications—similar specialty to defendants—active clinical practice**

The trial court erred as a matter of law by disqualifying plaintiff's expert from testifying as to the standard of care in a suit against three hospitalists (for prescribing an antibiotic in conjunction with a corticosteroid) where sufficient evidence was presented as to each requirement in Evidence Rule 702 for qualifying a specialist expert. The proffered expert was board certified in internal medicine and therefore had a similar specialty as the defendant-hospitalists, and his specialty included the performance of the procedure that was the subject of the lawsuit. Further, during the year immediately preceding plaintiff's hospitalization, the proffered expert devoted the majority of his professional time to clinical practice as an internist, including two months full time in a hospital.

**2. Medical Malpractice—proximate cause—forecast of evidence—sufficiency**

The trial court erred by granting summary judgment to defendants (three hospitalists) where plaintiff presented sufficient evidence, through a proffered expert who was erroneously disqualified

from testifying about the standard of care, that the actions of defendants in continuing to prescribe a particular antibiotic to treat decedent's infection—even though she was also taking a corticosteroid—proximately caused decedent to suffer a ruptured tendon.

Justice DAVIS concurring in part and dissenting in part.

Justice NEWBY dissenting.

Justice MORGAN joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 817 S.E.2d 628, 2018 WL 3978021 (N.C. Ct. App. 2018), reversing an order entered on 13 February 2017 and an order entered on 20 February 2017 and vacating an order entered on 13 February 2017 by Judge Robert H. Hobgood in Superior Court, Wake County. Heard in the Supreme Court on 15 June 2020.

*Law Offices of Gregory M. Kash, by Gregory M. Kash, for plaintiff-appellee.*

*Fox Rothschild LLP, by Matthew Nis Leerberg; and Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by John D. Madden and Robert E. Desmond, for defendant-appellants.*

*Stephen J. Gugenheim and Anna Kalarites for North Carolina Advocates for Justice, amicus curiae.*

HUDSON, Justice.

Here, we must determine whether an internist proffered by plaintiff to provide standard of care expert testimony against three hospitalists is properly qualified under Rule 702(b) of the North Carolina Rules of Evidence. We conclude that plaintiff's expert is qualified and affirm the decision of the Court of Appeals. We also must decide whether there is sufficient evidence in the record to raise a genuine issue of material fact that the hospitalists proximately caused plaintiff's injury. We conclude that the record evidence here was sufficient and thus also affirm the decision of the Court of Appeals as to this issue.

## I. Factual & Procedural History

This case began when a 76-year-old woman, Dolores Pierce, was hospitalized at WakeMed Cary Hospital from 30 October 2012 to 5 November 2012. Mrs. Pierce had been taking a daily dose of prednisone—a corticosteroid used to treat an inflammatory disorder—for years before being hospitalized. At the WakeMed Cary emergency room, she presented with fever, altered mental status, and weakness; she was presumed to have a urinary tract infection. Concerned that an infection had induced sepsis, emergency room personnel collected urine and blood cultures and a physician ordered the antibiotic Levaquin to be administered intravenously.

Levaquin is an antibiotic commonly used to treat infection. Levaquin has a "black box" warning,[1] the strongest warning required by the Food and Drug Administration (FDA). The "black box" on Levaquin warns of an increased risk of tendon ruptures in patients over sixty years old and in patients who are concomitantly taking a corticosteroid. The most prevalent tendon rupture attributable to Levaquin use is the rupture of the Achilles tendon.

Within hours of arriving at the emergency room, Mrs. Pierce was admitted to a telemetry-intermediate care floor and came under the care of physicians at WakeMed Cary Hospital, three of whom are relevant here: Dr. Jenkins, Dr. Daud, and Dr. Afridi (the hospitalists). All three of these doctors are board certified in internal medicine, and they all identify themselves as hospitalists—physicians who specialize in internal medicine in a hospital setting and care for hospitalized patients.

During Mrs. Pierce's stay, each of these hospitalists prescribed her Levaquin and continued her on a daily dose of prednisone. All three doctors testified that they were familiar with Levaquin and its "black box" warning at the time they prescribed the medication. They also testified that they were aware Mrs. Pierce was over the age of sixty and was taking a corticosteroid.

When Mrs. Pierce was ultimately discharged to a rehabilitation facility, Dr. Afridi's discharge orders included orders to continue Mrs. Pierce on Levaquin and prednisone. Per those orders, both drugs were administered through 9 November 2012 at the rehabilitation facility. Mrs. Pierce was discharged within the next few days. Roughly a week after her discharge, Mrs. Pierce's Achilles tendon ruptured, and she had to undergo

1. 21 C.F.R. § 201.57(c)(1) (2015).

tendon repair surgery. She never fully recovered and ultimately died from pneumonia and debility on 7 September 2013.

Raymond Da Silva, the executor of Mrs. Pierce's estate, brought this medical malpractice action seeking recovery for the tendon rupture and Mrs. Pierce's resulting injury and death. The only claims remaining arise from the hospitalists' alleged medical negligence. Mr. Da Silva is thus the plaintiff in this capacity.

During discovery, plaintiff identified experts and provided the deposition of Dr. Paul Genecin as expert testimony on the standard of care in compliance with Rule 26(b)(4) of the North Carolina Rules of Civil Procedure. Defendant moved to disqualify Dr. Genecin and moved for summary judgment on the issue of proximate cause. The trial court concluded that Dr. Genecin did not qualify as an expert. Because Dr. Genecin was plaintiff's only "standard of care" expert, the trial court granted summary judgment for defendant based on plaintiff's failure to provide any evidence proving a violation of the standard of care. The trial court also granted summary judgment for defendant on the issue of proximate cause.

Plaintiff appealed. The Court of Appeals unanimously concluded that Dr. Genecin was competent to testify as to the standard of care and that his testimony sufficiently forecasted proximate cause. *Da Silva v. WakeMed*, 817 S.E.2d 628, 2018 WL 3978021, at *9, *11 (N.C. Ct. App. 2018). As a result, the Court of Appeals reversed the trial court's order disqualifying Dr. Genecin as an expert witness, vacated the trial court's order granting summary judgment due to lack of expert testimony, and reversed the trial court's order granting summary judgment due to lack of evidence of proximate cause. *Id.* at *11. Defendant filed a petition for discretionary review, which we allowed. We now affirm the decision of the Court of Appeals.

## II. Rule 702(b)

### A. Standard of Review

**[1]** Generally, the trial court's decision to allow or disqualify an expert "will not be reversed on appeal absent a showing of abuse of discretion." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004)). "The standard of review remains the same whether the trial court has admitted or excluded the testimony—even when the exclusion of expert testimony results in summary judgment and thereby becomes

'outcome determinative.' " *Id.* at 893, 787 S.E.2d at 11 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142–43 (1997)).

However, when the pertinent inquiry on appeal is based on a question of law—such as whether the trial court properly interpreted and applied the language of a statute—we conduct de novo review.[2] Here, plaintiff argues that the trial court erred as a matter of law by misinterpreting and misapplying Rule 702 and disqualifying Dr. Genecin as an expert. Consequently, we review this issue de novo. *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 155, 712 S.E.2d 868, 871 (2011) ("Reviewing courts apply de novo review to alleged errors of law[.]").

**B. Rule 702(b)**

Rule 702(b) of the North Carolina Rules of Evidence provides:

> (b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:
>
> > (1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
> >
> > > a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or
> > >
> > > b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.
> >
> > (2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority

2. Additionally, an error of law is an abuse of discretion. *See Koon v. United States*, 518 U.S. 81, 100 (1996) ("A [trial] court by definition abuses its discretion when it makes an error of law."); *see also Matter of A.U.D.*, 373 N.C. 3, 13, 832 S.E.2d 698, 704 (2019) (Newby, J., dissenting) ("A trial court's misapplication of the law is an abuse of discretion.").

> of his or her professional time to either or both of the following:
>
> > a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or
> >
> > b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

N.C. R. Evid. 702(b) (2019). From the language of this rule, we discern the following three requirements that Dr. Genecin must fulfill in order to provide expert testimony against the hospitalists, who hold themselves out as specialists[3]:

(1) Dr. Genecin must be a licensed health care provider in North Carolina or another state;

(2) Dr. Genecin must have the same specialty as the hospitalists or have a similar specialty; if Dr. Genecin has a similar specialty, his specialty must include the performance of the procedure that is the subject of the complaint and he must have prior experience treating patients similar to plaintiff; and

(3) Dr. Genecin must have devoted the majority of his professional time to either the active clinical practice of the same or similar specialty as the hospitalists and/or the instruction of students in the same specialty during the year immediately preceding plaintiff's hospitalization.

---

3. *See FormyDuval v. Bunn*, 138 N.C. App. 381, 388, 530 S.E.2d 96, 101 (2000) ("We thus hold that a doctor who is either board certified in a specialty or who holds himself out to be a specialist or limits his practice to a specific field of medicine is properly deemed a "specialist" for purposes of Rule 702.").

We examine the record for evidence of each of these three requirements.

**C. Dr. Genecin's Qualifications**

First, we note that Dr. Genecin testified in his video deposition that he is a licensed health care provider in Connecticut. Defendant lodged no objection to this testimony.

Second, we must determine whether Dr. Genecin has the same or similar specialty as the hospitalists. The record shows that Dr. Genecin is board certified in internal medicine, meaning that he specializes in and is known as an internist. As noted above, defendant's physicians hold themselves out as hospitalists, meaning that they specialize in internal medicine in a hospital setting and care for hospitalized patients. Like, Dr. Genecin, the hospitalists are all board certified in internal medicine. The hospitalists and Dr. Genecin also have similar education, training, and experience. Though Dr. Genecin's practice is broader in scope, it includes the scope of the hospitalists' practice. Dr. Genecin testified that "[a] hospitalist is a job title that an internal medicine doctor can assume by going to work full time for a hospital. The work that a hospitalist does is the same work as any internist who cares for hospitalized patients." The record reveals no evidence to the contrary. Based on the evidence here that Dr. Genecin and the hospitalists all practice within the same scope of internal medicine, we conclude that the evidence shows that here, internist and hospitalist are similar specialties.[4]

Next, we examine the record to see whether Dr. Genecin's work as an internist includes the performance of the procedure that was the subject of the complaint. The complaint provides a description of the procedures at issue here and alleges the following ways in which the hospitalists deviated from the standard of care: (1) they administered Levaquin even when contraindicated by boxed warnings and when other antibiotics were available; (2) they administered a corticosteroid while plaintiff was also taking Levaquin; (3) they failed to properly identify and assess whether plaintiff was a proper candidate for the medications administered; (4) they failed to ensure proper medication reconciliation; (5) they ordered incorrect medications in excessive dosages; and (6) they discharged and transferred plaintiff with orders to continue Levaquin. These allegations all pertain to the selection and

4. We express no opinion here as to whether internist and hospitalist are the *same* specialty.

prescription of medication and a physician's responsibility to recognize potential drug interactions.

In the complaint, plaintiff also alleged other deviations from the standard of care by the hospitalists: (1) they failed to assess, obtain, and document accurate information in the medical records regarding plaintiff's medical record and medication history, (2) they discharged plaintiff without appropriately reviewing her medical chart, and (3) they failed to communicate with one another. These allegations all involve the overall care and management of a patient.

Thus, for purposes of our decision, the procedure that is the subject of the complaint includes the selection, prescription, and management of medication in the overall care of a patient. This includes, of course, a physician's responsibility to recognize drug warnings and interactions.

Defendant argues that this characterization of the procedure is too broad because "just about every physician prescribes medications and makes referrals." However, if the physician is a specialist, Rule 702(b) also requires that the procedure be part of a similar specialty. Thus, not every physician who selects, prescribes, and reconciles medications in the overall care and management of a patient would be qualified to testify here. Pursuant to Rule 702(b), the physician must do these things within the context of a similar specialty *and* have experience treating patients similar to the plaintiff.

It is clear from Dr. Genecin's testimony that his practice as an internist includes the procedures alleged here. He testified that he has experience reading and understanding the labeling of drugs, selecting and prescribing drugs, and recognizing potential reactions between drugs. He has also prescribed Levaquin to patients in the past. When working at the Yale Health Center, he does "all of the direct patient-care activities involved in internal medicine practice." This includes making referrals, reading results, and writing prescriptions. Dr. Genecin also works as an attending physician in a hospital two months out of the year, where his primary duty is patient care. This includes admitting patients, assessing patient history and clinical findings, reading test results, assessing patient problems, recommending treatment appropriate to patient needs, and planning for the discharge and appropriate transition of patients. Dr. Genecin also testified that as an internist in the hospital his "role is identical [to that of the hospitalists] with respect to the care provided to the patients." Again, the record contains no evidence to the contrary. We conclude that this testimony is sufficient to satisfy the requirement that Dr. Genecin's practice as an internist includes the procedures alleged in the complaint.

Next, we review the record to determine whether Dr. Genecin has prior experience treating patients similar to Mrs. Pierce. When asked about this in his deposition, he responded with the following:

> I see patients of Mrs. Pierce's demographic, elderly female patients in their 70s, many dozen per year in the hospital setting, admitted through the hospital with serious infections of one sort or another including, frequently, with infection arising in the urinary tract including the kidney. . . .

Later in the same deposition, he explained Mrs. Pierce's condition: "[S]he was an elderly patient with sepsis, urosepsis, needing I.V. antibiotics and inpatient care." Dr. Genecin was then asked if he had seen patients like her in the emergency room when he was acting as an attending physician and he responded, "yes, all the time." This evidence showed without equivocation that Dr. Genecin had prior experience with patients similar to Mrs. Pierce.

Third and finally, in order to qualify to testify against the hospitalists, Dr. Genecin must have spent the majority of his professional time the year prior to Mrs. Pierce's hospitalization in active clinical practice as an internist or hospitalist or instructing students in the hospitalist specialty. Clinical practice is the active practice of seeing patients in a clinical setting. *See FormyDuval v. Bunn*, 138 N.C. App. 381, 391, 530 S.E.2d 96, 103 (2000) ("Clinical is defined as 'based on or pertaining to actual experience in the observation and treatment of patients.' " (citation omitted)).

Dr. Genecin testified without objection that in the year prior to Mrs. Pierce's hospitalization he spent 55%–60% of his overall professional time in clinical practice as an internist, including two months of the year in which he practiced internal medicine in a hospital full time. As explained above, there is evidence in the record that Dr. Genecin's clinical practice included the performance of the procedure that is the subject of the complaint and that he had experience treating patients similar to plaintiff. Thus, we conclude that the evidence shows without contradiction that Dr. Genecin spent the majority of his professional time the year prior to Mrs. Pierce's hospitalization in the active clinical practice of a qualifying specialty similar to the hospitalists.

The record contains undisputed evidence that Dr. Genecin meets each of the applicable requirements of Rule 702(b). Therefore, we conclude that Dr. Genecin may properly offer expert testimony on the standard of care against the hospitalists. We conclude that the trial court

erred as a matter of law and affirm the decision of the Court of Appeals on this issue.

## III. Proximate Cause

**[2]** We review de novo a trial court's order granting summary judgment. *Sykes v. Health Network Solutions, Inc.*, 372 N.C. 326, 332, 828 S.E.2d 467, 471 (2019). Summary judgment is appropriate "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). We review the evidence in the light most favorable to the non-moving party. *McCutchen v. McCutchen*, 360 N.C. 280, 286, 624 S.E.2d 620, 625 (2006).

"Proximate cause is ordinarily a jury question." *Turner v. Duke Univ.*, 325 N.C. 152, 162, 381 S.E.2d 706, 712 (1989) (citing *Conley v. Pearce-Young-Angel Co.*, 224 N.C. 211, 29 S.E.2d 740 (1944)). In a case like this one where the allegations in the complaint and the evidence in the record indicate that there may be multiple proximate causes of the plaintiff's injury, a genuine issue of material fact remains, and summary judgment is not proper. *See King v. Allred*, 309 N.C. 113, 118, 305 S.E.2d 554, 558 (1983) (holding that where the facts did not preclude a finding by the jury that defendant's negligence "was *a* proximate cause or *the* proximate cause" of the injury, the court could not conclude as a matter of law that the negligence of the defendant was the sole proximate cause of plaintiff's injury and summary judgment was not proper).

During his deposition, Dr. Genecin stated repeatedly that the prescription of Levaquin caused plaintiff's injury. He testified that:

> Levaquin was the cause of the tendon rupture that Mrs. Pierce had within the classic time frame, less than 30 days of therapy; in the classic location, the Achilles tendon; under the circumstances that are described in the black box warning, an elderly woman treated with Levaquin while on prednisone.

He went on to reiterate:

> Q: . . . In addition to your opinions on standard of care, . . . do you have an opinion, Doctor, to a reasonable degree of medical certainty . . . as to whether or not Ms. Pierce suffered any injury that was proximately caused by being prescribed Levaquin when she's over the age of 60 and concomitantly taking a corticosteroid?

. . .

A: I do have an opinion.

Q: And that is?

. . .

A: That she suffered a tendon rupture as a consequence of unsafe use of Levaquin because of her age and corticosteroid use.

In the light most favorable to the plaintiff, a jury could reasonably find that "unsafe use of Levaquin" refers to the unsafe prescription of Levaquin by *any* of the doctors treating Mrs. Pierce, including the hospitalists.

Defendant asks us to find that the following exchange during cross-examination negates these affirmative statements of causation:

> Q: . . . Would you agree with me that all you can say, with respect to any connection between the Levaquin and the resulting injury to Ms. Pierce, is that if the Levaquin had been stopped by [any of the hospitalists] that all that would have done would have been to reduce the risk or, say it another way, improve her chances of avoiding an Achilles tendon rupture?
>
> A: That's true. . . . the shorter the duration, the less the risk. . . . It's best not to start it if you can avoid it in a situation like this. But the shorter course is safer than the long course.

This exchange during cross examination does not negate Dr. Genecin's consistently expressed opinion that Levaquin caused the injury. Though the evidence shows that Mrs. Pierce had already been prescribed Levaquin by the emergency room physician when she was formally admitted into the care of the hospitalists, plaintiff is not required to prove that the hospitalists' prescription of Levaquin was the sole or exclusive cause of her injury, only that it was a proximate cause. *See Turner*, 325 N.C. at 162, 381 S.E.2d at 712 ("When a defendant moves for a directed verdict in a medical malpractice case, the question raised is whether the plaintiff has offered evidence of each of the following elements of his claim for relief: (1) the standard of care, (2) breach of the standard of care, (3) *proximate causation*, and (4) damages." (emphasis added)).

Here, Dr. Genecin's testimony during direct examination is not negated by, and is not even necessarily inconsistent with, the quoted

excerpt from the cross-examination. Taken in the light most favorable to plaintiff, a jury could find that the prescription of Levaquin was a cause of Mrs. Pierce's injuries and that the hospitalists' continued prescription of Levaquin was or was not a contributing cause. That is for the jury to decide.[5]

We conclude that plaintiff presented sufficient evidence of proximate cause such that summary judgment is inappropriate. We affirm the decision of the Court of Appeals as to this issue.

## IV. Conclusion

We conclude that Dr. Genecin was qualified to testify to the standard of care and that his testimony sufficiently forecasted proximate cause. As a result, we affirm the decision of the Court of Appeals to reverse the trial court's order disqualifying Dr. Genecin as an expert witness, and we affirm the decision of the Court of Appeals to vacate the trial court's order allowing summary judgment due to lack of expert testimony. We also affirm the decision of the Court of Appeals to reverse the trial court's order granting summary judgment due to lack of evidence of proximate cause.

AFFIRMED.

Justice DAVIS concurring in part and dissenting in part.

I concur with the portion of the majority's opinion holding that Dr. Genecin was qualified to testify as an expert witness and offer an opinion at trial. However, for the reasons stated in Justice Newby's dissent, I respectfully dissent from the portion of the majority's opinion holding that plaintiff presented sufficient evidence on the issue of proximate cause through Dr. Genecin's testimony to overcome defendants' motion for summary judgment. Accordingly, I would hold that the Court of Appeals erred in reversing the trial court's entry of summary judgment in favor of defendants.

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5. We note that, to the extent that the parties argued it, we do not rely on *Gower v. Davidian*, 212 N.C. 172, 193 S.E. 28 (1937), or the loss of chance doctrine in support of our holding.

Justice NEWBY dissenting.

To succeed in this medical malpractice case, plaintiff must show that defendants violated the applicable standard of care by continuing the administration of Levaquin in a hospital setting to a patient who is suffering from a life-threatening infection. Further, plaintiff must demonstrate that a violation of the standard of care proximately caused Pierce's injury. Plaintiff has only one expert witness to establish the standard of care, breach of that standard by defendants, and whether the breach proximately caused the injury: Doctor Genecin. Dr. Genecin testified via a trial deposition. In properly applying the statutory and case law, the trial court determined Dr. Genecin did not meet the statutory requirements to render an expert opinion critical of defendants. In addition, after carefully evaluating Dr. Genecin's testimony, the only evidence of proximate causation, the trial court found the evidence inadequate to establish proximate causation. The trial court was correct. Dr. Genecin, an internal medicine physician, does not qualify to testify about the standard of care of hospitalists. Similarly, Dr. Genecin's testimony does not establish that the actions of the hospitalists caused plaintiff's injuries.

In its decision reversing the trial court, the majority undermines the General Assembly's carefully crafted statutory scheme designed to ensure that only colorable medical malpractice claims are presented to juries. The majority asks the wrong questions and therefore gets the wrong answers. First, considering whether Dr. Genecin is qualified to testify against defendants, the majority asks the broad question of whether the general medical work involved in this case is the sort of work that Dr. Genecin often performs. It instead should have asked whether Dr. Genecin's specialty often requires him to perform the actual care at issue; whether he frequently must decide whether to continue a patient with a life-threatening condition on a medication that had been prescribed by someone else and that appears to be helping the patient recover. To reach its result, the majority undermines the longstanding deferential standard of review, which recognizes the factual nature of the inquiry into an expert witness's qualifications. It now designates this inquiry to be a legal issue. Second, the majority asks whether Dr. Genecin testified that the relevant medication, Levaquin, proximately caused the tendon rupture. It instead should have asked whether Dr. Genecin testified that the *procedure at issue*, the hospitalists' continued administration of Levaquin that had already been prescribed, proximately caused the rupture. Regardless, Dr. Genecin's testimony was only that Levaquin increased the risk of the injury. Because the trial court correctly answered the right questions, I respectfully dissent.

Seventy-six-year-old Dolores Pierce arrived at WakeMed Cary Hospital on 30 October 2012, with severe confusion, a fever, and weakness. Upon initial examination, the emergency room physician[1] thought that Pierce had a serious infection that was inducing sepsis, and prescribed her Levaquin, a common antibiotic, to be administered intravenously. Levaquin is associated with an increased risk of tendon injury, but, for those with risk factors similar to those of Pierce, the antibiotic only presents about a three percent chance of such an injury.[2] The emergency room physician admitted Pierce to the hospital, and she was transferred to the hospitalists' care. The hospitalists diagnosed her with sepsis and identified her as "critically ill." But they noticed that the Levaquin appeared to be helping fight her infection. They continued the Levaquin prescription to treat Pierce's infection. Pierce remained in the hospital until 5 November 2012 when she had substantially recovered from her infection and was ready to be discharged. At that time, she was transferred to a rehabilitation facility and was instructed to continue Levaquin, along with her daily Prednisone, for four more days. On 19 November 2012, ten days after Pierce stopped taking Levaquin, she experienced a left Achilles tendon rupture.

Plaintiff sued the hospital and the hospitalists for negligence. Plaintiff identified Dr. Genecin as an expert witness. Dr. Genecin specializes in internal medicine, but, by his own admission, is not a hospitalist. For only two months of the year, less than seventeen percent of his professional time, Dr. Genecin treats hospitalized patients as an attending physician. Most of his professional time he oversees outpatient care at a clinic. Dr. Genecin testified that working in such an office practice is different than caring for patients in a hospital setting as an attending physician. Nevertheless, plaintiff sought to introduce Dr. Genecin's testimony that in his professional opinion the hospitalists' continued administration of Levaquin to Pierce represented conduct that fell below the applicable standard of medical care.

Dr. Genecin also offered plaintiff's only evidence on the issue of whether the hospitalists' administering of Levaquin proximately

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1. The emergency room physician who originally prescribed Levaquin is not a defendant in this case.

2. Dr. Genecin testified that around three out of every one thousand Levaquin takers suffers a tendon rupture, and that for those with certain risk factors like Pierce, the risk of such an injury is between three and ten times greater than that of the general population of Levaquin takers. Thus, even interpreting these numbers to indicate the greatest risk, Levaquin only poses about a thirty in one thousand, or three percent, risk of tendon rupture for those with risk factors like Pierce's.

caused Pierce's tendon rupture. He testified that many different factors can increase the risk of a tendon rupture, including a patient's age, a patient's taking of corticosteroids, a patient's history of having a kidney transplant, and a patient's taking of Levaquin. Focusing on the Levaquin risk factor, Dr. Genecin's testimony indicated that, for someone who possesses all the risk factors Pierce had, the chance of suffering a tendon injury from the Levaquin is only around three percent. Dr. Genecin nevertheless named Levaquin as the cause of Pierce's injury. But, on cross examination, he admitted that other factors likely contributed to the rupture, and that all he could say was that her chances of avoiding injury would have been better had the hospitalists not continued her Levaquin treatment as they did. He also admitted that he himself prescribed Levaquin to his patients and agreed that "the Levaquin effectively treated [Pierce's] infection and she survived that potentially life-threatening disease." Dr. Genecin's deposition testimony was the only evidence presented by plaintiff on the issues of defendants' standard of care and whether defendants' conduct proximately caused Pierce's tendon rupture.

Defendants moved to disqualify Dr. Genecin as an expert witness, and moved for summary judgment. The trial court reviewed the record evidence and granted both motions. The Court of Appeals reversed.

An appellate court should reverse a decision of the trial court that a witness does not qualify to testify as an expert under Rule 702 only if the trial court abused its discretion. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). A trial court abuses its discretion if "its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986). In recognition of the fact-intensive nature of the inquiry, trial courts are granted "wide latitude" in determining if an expert is qualified to testify under Rule 702. *Moore v. Proper*, 366 N.C. 25, 30, 726 S.E.2d 812, 817 (2012) (quoting *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984)). As this Court said in *McGrady*, "[t]he standard of review [of a trial court's decision under Rule 702] remains the same . . . even when the exclusion of expert testimony results in summary judgment and thereby becomes 'outcome determinative.' " 368 N.C. at 893, 787 S.E.2d at 11 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142–43, 118 S. Ct. 512, 517 (1997)). However, a trial court's decision to grant summary judgment is reviewed de novo. *Sykes v. Health Network Sols., Inc.* 372 N.C. 326, 332, 828 S.E.2d 467, 471. (2019).

Here, while citing the correct deferential standard of review of the trial court's determination of the expert's qualifications, the majority

conducts a de novo review, stating that questions about the meaning of statutes like Rule 702 are questions of law to be reviewed de novo. Certainly a bona fide question of statutory interpretation should be reviewed de novo, but such a question is not at issue in this case. The question here simply concerns the rule's *application to the facts*, in other words, whether plaintiff's purported expert witness in fact has the requisite specialized training and experience qualifying him to testify against the hospitalists under Rule 702. How the nature of a witness's work and the length of time the witness spends performing that work is a question of law instead of fact, the majority does not say. As evidenced by its analysis, the majority simply reweighs the evidence to reach its result. It ignores the differing nature of the work of hospitalists and clinicians and decides, contrary to the trial court's decision, that Dr. Genecin's work is similar enough to the defendants' work to qualify him to testify. This approach contradicts our case law. In *McGrady*, we plainly said that a trial court's decision that a witness does not qualify to testify as an expert under Rule 702 is reviewed for an *abuse of discretion*. 368 N.C. at 893, 787 S.E.2d at 11.

Through Rule 702(b), the General Assembly has established strict criteria that must be met for someone to qualify as an expert witness competent to testify against a medical professional. Under the rule's first requirement, the proffered witness must either specialize in the same specialty as the party against whom the testimony is offered, or be of a similar specialty that includes the medical care at issue and have experience treating the same sort of patients. N.C.G.S. § 8C-1, Rule 702(b)(1) (2019). Under the rule's second requirement, the witness, in the year leading up to the occurrence that is the basis for the action, must

> have devoted a majority of his or her professional time to either . . . [t]he active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty *which includes within its specialty the performance of the procedure that is the subject of the complaint* and have prior experience treating similar patients; or [t]he instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

N.C.G.S. § 8C-1, Rule 702(b)(2) (emphasis added). The trial court reasonably found that Dr. Genecin does not satisfy these requirements.

Neither the trial court, nor the Court of Appeals, nor the majority of this Court assert that Dr. Genecin is of the same specialty as the hospitalists.[3] The majority instead holds that Dr. Genecin's practice is of a similar specialty to that of the hospitalists. Though all these doctors are trained in and practice internal medicine, the nature of a hospital practice and that of an outpatient clinic are vastly different. Yet, as the majority notes, it is not enough for the witness to work in a similar specialty. His specialty must also include the procedure at issue in the lawsuit, and he must have spent the majority of his professional time working in that similar specialty that includes the procedure at issue (or teaching in such a specialty). N.C.G.S. § 8C-1, Rule 702(b)(1)–(2).

Dr. Genecin's specialty as an internist at an outpatient clinic does not include the procedure at issue here. The majority states that the medical care at issue in this case is "the selection, prescription, and management of medication in the overall care of a patient." But that characterization is too broad.[4] The majority asks a general question about whether both Dr. Genecin and the hospitalists prescribe medications, when it should ask a more specific question tailored to the medical care actually at issue in this case. The procedure at issue is the hospitalists' overseeing of the *continued* administration of Levaquin to Pierce after an emergency room physician had already started her on the medication and after it appeared to be helping her recover from a potentially life-threatening infection. Defendants thus were called to provide patient care for Pierce in the midst of an ongoing medical emergency.

Dr. Genecin's clinical work does not, however, involve such emergency decisions and the precise cost-benefit analyses which they entail. Indeed, Dr. Genecin agreed that the administering of Levaquin appears to have helped Ms. Pierce recover from a potentially life-threatening infection. Patients at Dr. Genecin's clinic who appear to be in serious condition are referred from the clinic to the hospital for the hospital to administer emergency care. Dr. Genecin may be an expert in internal

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3. Though the majority does not do so, I would hold that Dr. Genecin and the hospitalists are not of the same specialty because of the hospitalists' unique form of care, which is administered in a hospital under more emergency circumstances than in a clinic.

4. Moreover, the majority's statement that the relevant care includes "selection" of medication is misleading. The hospitalists had no role in the original selection of Levaquin (or Prednisone). Instead, their role was to *continue* Pierce on Levaquin that was already being administered at the direction of a doctor who is not a party to this case.

medicine, and his clinical practice may call on him to understand how medications like Levaquin affect people with various risk factors. But his clinical practice does not call on him to exercise medical judgment about whether a person who is suffering from a life-threatening infection should continue taking a medication that has already been administered and which appears to be fighting the infection effectively, but may marginally inflate other risks. In his day-to-day work Dr. Genecin does not make such judgment calls, which require specialized medical training and expertise. Because the practice in which he spends the majority of his professional time does not include the medical care at issue in this case, the trial court properly disqualified him as an expert witness and did not allow him to testify regarding the hospitalists' medical care.

Dr. Genecin does have limited experience treating similar patients in a hospital setting, as he spends some time working at Yale New Haven Hospital as a hospital attending physician. But he does not spend the majority of his professional time in such a setting as required by the statute. Instead, by his own testimony, he spends only about two months out of the year at the hospital, roughly seventeen percent of his professional time.

The trial court did not abuse its discretion when it disqualified Dr. Genecin from testifying as an expert witness regarding whether the hospitalists' continued administration of Levaquin fell below the applicable standard of medical care. The majority's decision to the contrary inserts this Court into what is ultimately a factfinding role assigned to the trial court.[5]

The trial court's grant of summary judgment to defendants should be affirmed as well on the ground that plaintiff did not put forth sufficient evidence that defendants' actions were the proximate cause of Pierce's injury. In a medical malpractice case, "the plaintiff must establish proof of a causal connection between the negligence of the physician and the injury complained of by the testimony of medical experts." *McGill v. French*, 333 N.C. 209, 217, 424 S.E.2d 108, 113 (1993). Thus, to survive summary judgment, plaintiffs had to present evidence that it was probable, in other words, more likely than not, that defendants' purported negligence caused the injury. This Court has long held that it

5. The majority also notes that defendants raised "no objection to [Dr. Genecin's] testimony" in his video deposition. If the majority means to say Dr. Genecin's qualifications to testify as an expert are uncontested, it is obviously incorrect. From the beginning defendants have contested Dr. Genecin's qualifications to testify as an expert against them, and the trial court decided in defendants' favor on that point.

is not sufficient for a plaintiff to simply show that a different course of treatment by the defendant physician would have increased the plaintiff's chances of avoiding the injury. *See Gower v. Davidian*, 212 N.C. 172, 175–76, 193 S.E. 28, 30–31 (1937). So, unless the evidence, viewed in plaintiff's favor, shows that the hospitalists' conduct of continuing Pierce on Levaquin at the dosage and length of time they did probably caused her tendon rupture, the trial court's grant of summary judgment in defendants' favor should be affirmed.

The majority again frames the question too broadly. Instead of asking whether Dr. Genecin testified that the actual medical care of the hospitalists proximately caused the tendon rupture, the majority is content to fixate on his testimony that Levaquin in general was the cause, even though Dr. Genecin vacillated on even that statement.

Dr. Genecin never offered any testimony to the specific and central point that defendants' failure to discontinue Levaquin caused Pierce's Achilles tendon rupture. Rather, he testified that "*Levaquin* was the cause of the tendon rupture." (emphasis added). The Levaquin was not, however, prescribed only by the hospitalists. An emergency department physician originally began intravenous administration of the medication, and the hospitalists continued Pierce on that medication after diagnosing her with a dangerous infection and noting that Levaquin appeared to be effectively treating her infection. It is the conduct of the hospitalists that is at issue. But the relevant testimony from Dr. Genecin on proximate cause does not target that conduct.

Moreover, Dr. Genecin later clarified and qualified his statement regarding Levaquin as the cause of injury by agreeing that "all [he could] say" was that the hospitalists discontinuing the Levaquin would have "reduce[d] the risk or . . . improve[d] [Pierce's] chances of avoiding an Achilles tendon rupture." This assertion is not enough to show proximate causation. Again, this Court's decision in *Gower* illustrates that a plaintiff cannot survive dismissal on the issue of causation simply by showing that another course of treatment would have reduced the risk of the injury. By qualifying his statements as he did, Dr. Genecin demonstrated that he was unable to say whether the administration of Levaquin was a substantial cause of the tendon rupture at all, not to mention whether the specific continuance decisions of the hospitalists proximately caused the injury. Instead, Dr. Genecin testified regarding a study that showed the risk of a tendon injury from taking Levaquin is only around three in one thousand, and that this risk is likely three to ten times higher for people with various risk factors. Thus, his testimony indicates at most around a thirty in one thousand, or *three percent*,

risk of a tendon injury for those with risk factors like Pierce who take Levaquin. This Court has held that when an expert testifies merely to a possible cause of the injury, that testimony is insufficient to create a material issue of fact about whether the subject of the testimony proximately caused the plaintiff's injury. *See Gillikin v. Burbage*, 263 N.C. 317, 324–25, 139 S.E.2d 753, 759–60 (1965). By holding otherwise, the majority quietly applies the "loss of chance" doctrine, nonexistent under North Carolina law, which changes the traditional requirement of proximate cause and allows a plaintiff to prevail if she demonstrates that the medical care affected her *chance* of good health, no matter how small the effect may be. Under existing North Carolina law regarding proximate cause, Dr. Genecin's testimony did not establish a material issue of fact regarding, or amount to sufficient evidence of, proximate cause, and the trial court's grant of summary judgment was appropriate.

Rule 702 helps ensure that reliable evidence is presented to support a plaintiff's medical malpractice claim. A jury may be substantially swayed by anyone with the title of "doctor," even if that doctor lacks the specialization and experience necessary to provide reliable testimony on the proper standard of professional medical care. Rule 702 thus limits expert testimony to those doctors who, through relevant training and experience, have significant information to contribute to the factfinder. Dr. Genecin undoubtedly possesses substantial knowledge and skill in internal medicine generally; but his practice does not require him to regularly make emergency decisions about a hospitalized patient's care, which hospitalists must routinely make. The majority, by framing the question of Dr. Genecin's specialization so broadly, misses this critical distinction. Moreover, the majority reweighs the evidence to reach its conclusion. The trial court did not abuse its discretion by disqualifying Dr. Genecin as an expert as to the hospitalists' medical care at issue in this case. Further, because Dr. Genecin did not, and could not, testify that the hospitalists' care caused Pierce's tendon rupture, plaintiff did not present sufficient evidence of proximate causation, and the trial court appropriately granted summary judgment in defendants' favor. The trial court's decision was correct, and the decision of the Court of Appeals should be reversed.

I respectfully dissent.

Justice MORGAN joins in this dissenting opinion.

BETH DESMOND
v.
THE NEWS AND OBSERVER PUBLISHING COMPANY,
McCLATCHY NEWSPAPERS, INC., AND MANDY LOCKE

No. 132PA18-2

Filed 14 August 2020

**1. Libel and Slander—defamation—newspaper articles—public official—actual malice—forensic firearms examiner**

In an action by a State Bureau of Investigation forensic firearms examiner (plaintiff) alleging that a newspaper publishing company and one of its reporters (defendants) defamed her in a series of news articles concerning her work in two related murder cases, plaintiff (who stipulated she was a public official and that the alleged defamation related to her official conduct) presented clear and convincing evidence that defendants acted with actual malice—that is, with knowledge that the alleged defamatory statements were false or with reckless disregard of whether they were false. Defendants published several statements claiming that independent firearms experts had asserted that plaintiff—either through extreme incompetence or deliberate fraud—had erred in her laboratory analysis and possibly caused the conviction of an innocent man; however, among other things, the purported expert sources testified that they did not make the statements attributed to them; the reporter made significant mischaracterizations and omissions in the articles; and defendants were aware that an independent examination of the ballistics evidence was planned, but they proceeded with publication without waiting for the results.

**2. Libel and Slander—defamation—jury instructions—material falsity—attribution—opinion**

In a defamation action, the trial court did not err by instructing the jury that a materially false attribution may constitute libel where defendant-newspaper reported that several firearms experts had expressed opinions that they did not actually express regarding the work of a State Bureau of Investigation forensic firearms examiner (plaintiff) in two related murder cases.

**3. Libel and Slander—defamation—jury instructions—punitive damages—statutory aggravating factors**

In a defamation action, the trial court erred by failing to instruct the jury that it was required to find one of the statutory aggravating

factors before awarding punitive damages pursuant to N.C.G.S. § 1D-15(a). Contrary to an incorrect statement of law in the pattern jury instructions, a finding of actual malice in the liability stage did not obviate the need for the jury to find one of the statutory aggravating factors.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 263 N.C. App. 26, 823 S.E.2d 412 (2018), affirming the order and judgment entered 18 November 2016 and the order entered 30 January 2017 by Judge A. Graham Shirley in Superior Court, Wake County. Heard in the Supreme Court on 4 November 2019.

*Dement Askew & Johnson, by James T. Johnson and Chymna T. Smith, for plaintiff-appellee Beth Desmond.*

*The Bussian Law Firm, PLLC, by John A. Bussian, McGuire Woods, by Bradley R. Kutrow, and Brooks, Pierce, Mclendon, Humphrey & Leonard, L.L.P., by Mark J. Prak, Julia C. Ambrose, and Timothy G. Nelson, for defendant-appellant The News and Observer Publishing Company, Tharrington Smith L.L.P., by Wade M. Smith, for Mandy Locke.*

*Essex Richards, P.A., by Jonathan E. Buchan, for The Reporters Committee for Freedom of the Press, et al., amici curiae.*

*Wyche, PA, by William M. Wilson, III, for Professor William Van Alstyne, amicus curiae.*

EARLS, Justice.

Plaintiff, Beth Desmond, filed a complaint alleging defamation on the part of defendants, the News and Observer Publishing Company (the N&O) and reporter Mandy Locke, arising out of a series of articles published by defendants in 2010. Following a trial, in which the jury found defendants liable for defamation and awarded plaintiff compensatory and punitive damages, defendants appealed. On appeal, the Court of Appeals affirmed the trial court's order and judgment, concluding that plaintiff presented clear and convincing evidence of actual malice and that there was no error in the jury instructions. *Desmond v. News & Observer Pub. Co.*, 263 N.C. App. 26, 67, 823 S.E.2d 412, 438–39 (2018) (*Desmond II*). We affirm in part and reverse in part.

Background

Plaintiff's defamation claim arises out of a series of articles published by defendants in 2010 entitled "Agents' Secrets," which reported on alleged problems within the North Carolina State Bureau of Investigation (the SBI) that purportedly led to wrongful convictions. Plaintiff was at that time a Special Agent with the SBI serving as a forensic firearms examiner, which is a "discipline in forensic science" mainly concerned with "comparing cartridge cases and bullets and other ammunition components." In the final article of the four-part "Agents' Secrets" series, defendants reported on and were critical of plaintiff's work in two related criminal cases in Pitt County. *See generally State v. Green*, 187 N.C. App. 510, 653 S.E.2d 256, 2007 WL 4234300 (2007) (unpublished); *State v. Adams*, 212 N.C. App. 235, 713 S.E.2d 251, 2011 WL 1938270 (2011) (unpublished).

Charges in both cases originated from a confrontation that occurred on 19 April 2005 in Pitt County. Two groups of women engaged in a series of verbal altercations over the course of an afternoon that ultimately culminated with multiple gun shots and one bullet striking a ten-year-old child, Christopher Foggs, in the chest. Foggs died from the gunshot wound at the hospital later that evening. *Desmond II*, 263 N.C. App. at 31–33, 823 S.E.2d at 418–19.

Jemaul Green, who drove his girlfriend, Vonzeil Adams, to the scene of the incident, was indicted for multiple offenses, including first-degree murder. His trial took place in 2006. In support of its case, the State presented testimony from twelve eyewitnesses to the shooting. Green testified on his own behalf and asserted that when he drove to the Haddock house he had in his possession a 9mm handgun that he had illegally purchased and that he took it with him that day out of concern for his own safety.[1] Green testified that during the incident he saw an unknown black male in between the Haddock house and a neighboring house standing closely behind a car—a "black Neon"—and that this man fired a handgun in Green's direction, prompting Green to return fire in self-defense. According to Green, Adams then snatched the gun from him and fired additional shots at the Haddock house before they both got back in the car and left the scene. None of the State's twelve eyewitnesses observed anyone at the scene with a gun other than Green. Green's own witness Victoria Gardner testified that she was standing in between the houses, that she did not see anyone near the black Neon, that she did not hear

1. Green testified that one of the women riding in the car with him and Adams to the Haddock house had a Taser and that another of the women had a sword.

any shots other than those coming from Green, and that she did not see anyone with a gun other than Green.

The State also presented evidence concerning eight fired cartridge casings and six bullet fragments recovered from the scene. The casings were found "in a fairly small circle" next to a tree where Green had been standing when he fired his 9mm handgun, and the bullet fragments were found "in a very tight pattern" leading from Green's location. The State also presented testimony from plaintiff, who had been assigned by the SBI to the case and who performed microscopic comparison analysis of the cartridge casings and bullet fragments. The prosecutors in the case originally sent only the cartridge casings to the SBI's crime lab for analysis, mistakenly assuming that the bullet fragments had no forensic value. When plaintiff arrived in Pitt County to testify and learned that bullet fragments had also been recovered from the scene, she discussed with the prosecutors whether they wanted the bullets examined as well. The prosecutors decided that they did want the bullets examined, and the trial judge rescheduled plaintiff's testimony for the following day so that plaintiff could perform an examination of the bullets. Accordingly, plaintiff returned to the crime lab that day, performed an examination of the six bullet fragments, and compiled a report of her examination. Plaintiff's work was reviewed by her senior supervisor, Neal Morin, who examined the bullets under a comparison microscope and arrived at the same conclusions as plaintiff.

On the following day, plaintiff returned to Pitt County to give her testimony. Plaintiff opined that the eight cartridge casings had been fired from the same gun and that the gun was a Hi-Point 9 millimeter semiautomatic pistol. Regarding the bullet fragments, plaintiff opined that while four of the bullets were too damaged to have any forensic value, two of the bullets were fired from the same *type of gun*, a Hi-Point 9 millimeter semiautomatic pistol, but she could not conclusively determine whether the bullets were fired from the same gun. Plaintiff's analysis involved examining the "class characteristics," or "rifling impressions," which are the "lands and grooves" (i.e. ridges and impressions) that are left on a bullet as it travels through the barrel of a gun.[2] Plaintiff determined

2. Firearms examiners also analyze "individual characteristics," which "come[ ] from the markings that are inside the gun" and "that are actually imparted to the firearm during the manufacture." Plaintiff explained that "when the manufacturer makes the gun the tools that are used to make the gun are harder than the metals of the gun itself and so those tools would leave unique markings, irregularities, random markings on the internal part of the gun, so every place that that cartridge, the soft metals of that ammunition comes in contact would be a potential for us to look at it as a firearms examiner for this unique individual detail." Plaintiff's determination regarding the individual characteristics was "inconclusive."

that the class characteristics of the two bullets were the same—"nine lands and grooves with a left hand direction of twist down the barrel." Because only one manufacturer makes their guns "9-left," plaintiff was able to determine that the type of gun was a Hi-Point Model C.

After plaintiff had testified regarding her forensic examination of the cartridge casings and the bullet fragments, the prosecutor sought to have plaintiff hold a semiautomatic handgun (unloaded) and explain to the jury where the "ejection port" is and how it operates to eject the cartridge casing each time the gun is fired. During a brief *voir dire* examination by defense counsel while the jury was in recess, plaintiff stated with "absolute certainty" that the two bullets came from a 9mm Hi-Point firearm. Following a court recess, the prosecutor had plaintiff hold a 9mm Hi-Point model C handgun to explain how the ejection port in a semiautomatic handgun works.

Green was ultimately convicted of second-degree murder, as well as multiple counts of discharging a weapon into occupied property and assault with a deadly weapon. Green appealed on grounds unrelated to the ballistics evidence, and on appeal the Court of Appeals upheld his convictions. *Green*, 2007 WL 4234300, at *2, *6–*7.

Vonzeil Adams was also indicted for first-degree murder and other offenses in connection with the shooting; her trial took place in 2010.[3] Before trial, Adams's defense attorney, David Sutton, filed a motion seeking to preclude the State presenting plaintiff's expert testimony at trial. The motion was affixed with an extensive affidavit from Adina Schwartz, a professor at the John Jay College of Criminal Justice, in which Schwartz challenged the scientific reliability of firearms examination, as well as the SBI's firearms examination protocols and plaintiff's documentation. The trial court denied this motion and plaintiff again testified regarding her opinions concerning the cartridge casings and bullet fragments.

Near the end of the *Adams* trial, Sutton, with permission of the trial court, asked another local attorney, Fred Whitehurst, to take photographs of the two bullet fragments about which plaintiff had testified. Whitehurst, a former FBI chemist, had no training in firearms examination, but he owned a microscope with the capacity to take photographs. Whitehurst and Sutton emailed the resultant photographs (the Whitehurst Photographs) to other attorneys, including one attorney

3. A mistrial was declared in Adams' initial trial in 2009, and the second trial took place in April of 2010.

representing an as of-yet untried co-defendant of Vonzeil Adams, and other individuals interested in firearms examination, including Schwartz. The Whitehurst Photographs, including one photograph in particular (the Comparison Photograph) in which the bullets are posed back-to-back, or "base-to-base," raised questions among those circulating the photographs because they could not perceive any matching class characteristics in the two bullets. Based largely on these photographs, Sutton filed a motion for mistrial.

In the motion, Sutton alleged that the photographs "clearly show that the 'lands and grooves' in Q-9 and Q-10[, the two bullet fragments,] are distinctly dissimilar." Additionally, Sutton asserted that "[t]he photographs have been sent to William Tobin, formerly of the FBI laboratory for analysis," and that Tobin had stated that " 'preliminary' [sic] based upon a photograph sent by Dr. Whitehurst there is ample reason to question whether the class characteristics in Q-9 and Q-10 are the same."[4] The trial court denied the motion for mistrial. Adams was convicted—under an aiding-and-abetting theory—of one count of voluntary manslaughter, three counts of discharging a firearm into occupied property, and one count of assault with a deadly weapon. *Adams*, 2011 WL 1938270, at *3. On appeal, the Court of Appeals concluded there was no error in her convictions. *Id.* at *7.

Around this time, Locke, who was a staff writer for the N&O, became interested in the *Green* and *Adams* cases and obtained copies of the photographs from Whitehurst. After speaking with Sutton, Locke began working on a story about plaintiff's work in the *Green* and *Adams* cases. As part of her research, Locke reviewed the court filings and evidence from the *Green* and *Adams* cases, interviewed Jemaul Green in prison, and researched the discipline of firearms examination. In an early draft for her story, Locke included a direct quote from Sutton: "[Plaintiff] just made it up. She made it up because she could, and prosecutors needed her to. It's that simple." Locke began looking for experts in firearms examination or related fields willing to comment on the Whitehurst Photographs. To that end, Locke communicated by email and phone with Bill Tobin and Adina Schwartz, both mentioned above, as well as Liam Hendrikse, a firearms forensic scientist from Canada, and Dr. Stephen Bunch, a firearms forensic scientist and former FBI scientist from Virginia. Locke and the N&O ultimately published statements which were attributed to these four individuals as purported firearms experts and which in effect confirmed Sutton's allegation—that

4. Tobin later testified that this statement attributed to him in the motion was accurate except for the use of the word "ample," which he did not recall using.

is, defendants published statements asserting that firearms experts had examined the Whitehurst Photographs, determined that plaintiff's analysis was false, and questioned whether plaintiff was extremely incompetent or had falsified her report in order to help the prosecution convict a potentially innocent man. As will be discussed more in-depth below, these four individuals strongly disputed making the statements attributed to them by defendants.

Defendants planned to publish Locke's story as part of its "Agents' Secrets" series in August of 2010. John Drescher, the executive editor and senior vice president of the N&O, described the series in an email to the N&O's vice president in charge of marketing, stating: "In August, we'll publish a four-part series, 'Agents' Secrets,' showing how practices by the [SBI] have led to wrongful convictions. The series, by reporters Joseph Neff and Mandy Locke, reveals that the agency teaches its laboratory analysts and agents to line up with prosecutors' theories, sometimes with devastating results." Locke testified that she and Neff, as well as Steve Riley, the senior editor directly responsible for editing the "Agents' Secrets" series, "were constantly in communication" when preparing the series for publication. According to Locke, "we do double-check each other's work," and "there wasn't a day that passed that we weren't comparing notes and collaborating in some form or fashion."

In one of these email communications in May of 2010, Locke stated that they were "rocking and rolling on the SBI project" and included plaintiff in a list of "a few agents/analyst[s] who we are bearing down on." Locke requested "reports (absolutely everything we know)" on these agents. Upon learning that plaintiff had a degree from Julliard, Locke wrote that she was "curious to know of her discipline" and asked for a "search or anything else . . . that would register someone who was an artistic genius." When she received in response an article discussing plaintiff's previous career as a ballerina; Locke wrote: "Yes. Bingo! How in the world this woman went from ballet to firearms identification work is beyond me. But, what a lovely tidbit." Locke passed this information along to Neff, who responded, "lovely. [T]hat's even better than a bassoonist." In an email Riley sent to Drescher, Locke, and Neff, he discussed the progress of the "Agents' Secrets" series, stating that "this all adds up to some pretty serious allegations against individual agents, and we've got to be properly loaded if this is to be written with an edge, as it should be." An internal story folder circulated to N&O staff summarized the upcoming article, stating that "Beth Desmond, the SBI analyst charged with studying the cartridges and bullet fragments . . . said she's dead certain there was a single gun used that day" and that "Desmond

had no idea how to evaluate firearm evidence or, worse, she ignored all rules of the trade and fabricated the results to help police secure their victory."

Near the end of July 2010, defendants decided to move up their planned publication date of the "Agents' Secrets" series. John Drescher explained in an email: "News breaking here. In advance of our SBI series, Roy Cooper [the Attorney General] is replacing the SBI director. We likely will move series to start Sunday, Aug. 7." In an email later that day, Steve Riley confirmed the decision to move up the publication date, stating: "I know this makes things harder for everyone, but this will make us much more timely," and "[e]verything won't be perfect, but it'll be good." Locke later emailed Shawn Rocco, one of defendants' photojournalists involved in the series, apologizing for the "strain" of the new publication date and stating "[b]elieve me, I'm feeling it too. Especially with Joe [Neff] gone and out till Friday." Rocco responded:

> [H]mmm, how to say this nicely . . . shut up. [Smiley Icon] we're all in this together.
>
> [C]oncentrate on writing the best damn piece you've ever done. [I] want you to compel our readers to gather pitchforks and torches. [B]ecause shit like this has got to change.
>
> [I]'m infuriated that robin [Pendergraff] still keeps a job. t'aint nothing new in state gov, I know, but I'm pissed nonetheless.

When the SBI and plaintiff first became aware of the Whitehurst Photographs in July 2010, they immediately had concerns that the photographs were misleading due to a variety of issues. Jerry Richardson, then the assistant director of the SBI Crime Laboratory, emailed Whitehurst to discuss the misleading nature of the photographs, stating:

> [W]e have noted a number of issues associated with the photos. These issues include: photographs are not properly oriented, improper side lighting, unknown microscope magnification; focus; and, the use of what appears to be tweezers or other metal objects to handle evidence during photography which could alter the evidence.

When plaintiff learned that the N&O and Locke were planning a story about firearms examination involving the Whitehurst photographs, plaintiff contacted Locke to arrange a meeting.

During the resulting interview at the SBI's crime lab on 3 August 2010, plaintiff explained to Locke that for numerous reasons the Whitehurst Photographs did not depict the matching class characteristics that plaintiff had observed in her laboratory analysis. Plaintiff explained that firearms examination is "three-dimensional" and that "it's very difficult to show in just one picture what we do. It's not truly representative of what we do in firearms."[5] Further, plaintiff noted that while she "ha[s] great respect for [Whitehurst]," "he's not a firearms expert, and he knows that." One of the problems with the Whitehurst Photographs, plaintiff explained, was the lighting. Plaintiff stated that "[i]t takes hours under the microscope to get the right lighting, to get them lined up the right way to be able to measure those. It's very careful and patient examination." Plaintiff stated that another issue on a more fundamental level was that the bullets in the Comparison Photograph were improperly positioned. Plaintiff explained:

> MS. DESMOND: And so that's the end of the base right here and that's it. This bullet here, this is the base but the—
>
> MS. LOCKE: Uh-huh.
>
> MS. DESMOND: –the nose is up here.
>
> MS. LOCKE: So it's base to base.
>
> MS. DESMOND: Correct.
>
> MS. LOCKE: Okay.
>
> MS. DESMOND: In firearms, we don't do that. We never do that. Every bullet we look at would be similar in casings. The nose is to the left the nose is to the left, or if the nose is to the right and the nose to the right. [sic] Okay. So we would never compare anything base to base. That's wrong. That's just not right. Everyone who is a firearms examiner 101 knows not to do that.
>
> But this is basically what this picture is showing. If you do that base to base – this is the base and there's the base here. Put these together and you try to line them up. They're going to be off. Right? They're going to look like they're not in alignment.

5. The transcript of Locke's interview with plaintiff contains formatting issues that are omitted here for clarity.

> MS. LOCKE: Uh-huh.
>
> MS. DESMOND: They're not going to look right. They're – it's a mis-perception. You can't – it doesn't look like the other base, not even close.

Plaintiff repeatedly stressed that the Comparison Photograph "is not depicting what I saw in the microscope and what I measured." Plaintiff explained, "[t]hat's why you need to put it on the microscope. You cannot do it from a picture." Plaintiff and Locke discussed the fact that plaintiff's work had been checked by Neal Morin, who examined the bullets under a microscope and reached the same conclusions as plaintiff. Moreover, plaintiff stated: "I guarantee that if you ask another qualified examiner, a qualified firearms examiner, what they – to go ahead and examine it under the microscope, that they will come to the same conclusion I have." In that regard, Locke asked plaintiff about the fact that the bullets were going to be sent for an independent examination. Plaintiff responded, "[t]his is what we've been asking them to do. . . . Of course, we would like for it to be sent to any other qualified firearms examiner. We have been asking for it."

At no point in the interview did Locke mention anything about firearms experts asserting based on the Whitehurst Photographs that plaintiff's analysis had been false and questioning whether plaintiff was incompetent or corrupt. According to plaintiff, Locke simply told her that "it's a firearms piece in a much larger article." Towards the end of the interview, plaintiff attempted to make sure Locke understood what she was saying, asking "[d]id I make things clear for you?" and "[d]o you understand what I'm saying." Locke said that she did. Plaintiff would later testify that:

> I thought she understood. I thought that – I thought I set the record straight. You know, I thought I had – I went in there and told her how I had testified in the Pitt County case, I told her the facts of the case, and then I explained to her why this picture – she shouldn't rely on the picture and how we in turn don't rely on pictures to – you don't form an opinion on a picture.

Plaintiff testified that she "felt relieved that [she] had done the interview with" Locke. Before Locke left, she asked if she could take plaintiff's picture, stating "I would love to take a picture of you because we've asked for your photo to be provided." Plaintiff stated:

MS. DESMOND: It's – it's fine. You can. I would prefer, though, if – if you don't mind, if you – how can I say this? I absolutely don't mind you taking my picture. If you were going to print the picture, please take great care because I work a lot of cases.

MS. LOCKE: Uh-huh.

MS. DESMOND: And I do work on sometimes cases that are very sensitive and I don't want my name and picture out there for safety reasons. And that's the only thing.

MS. LOCKE: Okay.

MS. DESMOND: So just be aware of that, if you don't mind.

Eleven days later, in accordance with their advanced publication schedule, defendants published on the front page of the N&O the following story (the 14 August Article) featuring plaintiff's picture, as well as an even more prominent picture of the Comparison Photograph coupled with a caption inquiring of the audience, "WHAT CAN YOU SEE?":

- Doc Ex 900 -

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ETHAN HYMAN - ehyman@newsobserver.com

High school football season begins Friday. See analyses of the Triangle's toughest teams and players.

ONE GUILTY PLEA IN DEATH OF APEX TEEN

One of four teens accused of taking part in the 2008 death of Matthew Stillman pleads guilty to second-degree murder and will testify against another suspect. 1B

911 ADAPTS TO THE SMART PHONE

Durham is among a few 911 emergency centers in the state that could soon be receiving emergency texts and videos, but AT&T objects. 4B

FDA GIVES OK TO NEW CONTRACEPTIVE

Family planning advocates praised the FDA's approval of a pill that can prevent pregnancy for up to five days after sex, but anti-abortion groups disagreed. 3A

S.C. CANDIDATE FOR SENATE INDICTED

Alvin Greene, the unemployed veteran who unexpectedly won the Democratic nomination, is indicted on obscenity charges. 6A

WEATHER

Today: A slight chance for thunderstorms. High 90, low 72

Sunday: Pretty much the same as

AGENTS' SECRETS: JUNK SCIENCE, TAINTED TESTIMONY AT THE SBI

# SBI relies on bullet analysis critics deride as unreliable

**'This is as bad as it can be,' a former FBI analyst says of work in Pitt County case.**

*Last of four parts*

By Mandy Locke and Joseph Neff
STAFF WRITERS

Beth Desmond looked through a microscope at two mangled bullets.

It was the start of a 2006 murder trial in Pitt County, and prosecutors needed her help to fix a potentially crippling weakness in their case. They asked Desmond, an SBI firearms analyst, to determine whether the two bullet fragments had passed through the same gun, a Hi-Point 9 mm she had already linked to a cluster of casings at the crime scene.

SBI agent Beth Desmond

Desmond's answer was quick, sure and pleasing to the prosecution. But her work in the case has threatened the integrity of yet another unit of the State Bureau of Investigation.

A News & Observer investigation of the SBI has revealed more than a dozen instances in which agents cheated or bent the rules to secure an answer prosecutors sought. At the crime lab, examiners have bypassed accepted techniques, despite pushback in the wider scientific community. Even when their bosses learn of missteps, they often do nothing.

Attorney General Roy Cooper has asked his new director, Greg McLeod, to review the work of the firearms identification unit, citing concerns raised by The N&O this summer. Cooper, a Democrat, removed previous director Robin Pendergraft, who in an N&O interview struggled to explain flawed lab work.

With Desmond's Pitt County assignment, the stakes were high. A 10-year-old boy had caught a bullet during a street fight between two groups of rival teens. His death rocked the small town of Ayden. Her analysis would make or break the case against Jemaul Green, the man they believed accidentally killed Christopher Poggs.

Jemaul Green is in prison.

Desmond would turn to firearms and toolmark identification, one of the oldest and most controversial disciplines of forensic science, to harness these clues into proof that Green was the only gunman. Green had insisted from the start that another man had fired first and that he shot back in self defense. The gun – or guns – had vanished, leaving only a smattering of casings and bullet fragments.

Desmond examined a bullet found in the eaves of a nearby house; the other was collected from the yard near where Christopher collapsed.

SEE BULLETS, PAGE 8A

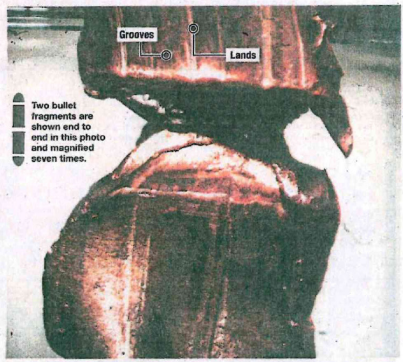


Photo courtesy of Fred Whitehurst — The News & Observer

**WHAT CAN YOU SEE?**

SBI firearms analyst Beth Desmond compared these two bullet fragments (photo, left) in 2006 for a murder case in Pitt County. She testified they came from the same model handgun, helping prosecutors win a conviction.

Firearms analysts compare the markings made on bullets as the projectiles travel through the barrel of a gun.

Lands are depressions on a bullet. Grooves are the raised areas between the lands. The number of lands and grooves are the same on each bullet that passes through the barrel of an individual firearm; they are also consistent for all guns of a particular type.

To find that number for a deformed bullet, analysts measure a single land and a single groove and plug the results into a formula. Desmond plugged in virtually identical measurements for the land and groove on each bullet.

Other firearms analysts say that even with the poor photo lighting and deformed bullets, it's obvious that the width of the lands and grooves are different.

Desmond took no photos. The photo was taken by a former FBI crime lab analyst in the presence of a prosecutor. Desmond said the photos don't match what she saw under the microscope. She said that bullets can be manipulated in photos "to make them look like they don't match."

Sunday: A confession doesn't add up | Tuesday: Bloodstain analysis: 'A bunch of malarkey' | Thursday: Lab's policies pump up prosecution | TODAY: Alarm bells about ballistics work | ONLINE: See videos and catch up on the series at newsobserver.com.

## Soldiers wonder if their work is enough

By Dion Nissenbaum
McClatchy Newspapers

ARGHANDAB, Afghanistan – Setting out on one of their final patrols in Afghanistan, the U.S. Army and Afghan soldiers waded through waist-deep streams, scampered over crumbling mud walls and were closing in on a suspected bomb-making factory when their mission came to an unexpected halt.

Fifty yards short of their target, an Afghan soldier had

Sophomore Ashley Matthews, left, helps senior Mary Woessner move into The Oaks, apartment-style housing at Meredith College.

ETHAN HYMAN - ehyman@newsobserver.com

## Meredith hopes to leave

## Alcoa foe paid worker on TV story

By Lynn Bonner
STAFF WRITER

A researcher who worked on UNC-TV news stories critical of the aluminum

Defendant's 14 August Article is highly critical of plaintiff and her work in the *Green* case and includes numerous assertions and opinions concerning plaintiff that Locke later attributed to the four purported firearms experts mentioned above, including, *inter alia*, the following five statements:

> 1. "Independent firearms experts who have studied the photographs question whether Desmond knows anything about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted."
>
> 2. " 'This is a big red flag for the whole unit,' said William Tobin, former chief metallurgist for the FBI who has testified about potential problems in firearms analysis. 'This is as bad as it can be. It raises the question of whether she did an analysis at all.' "
>
> 3. "The independent analysts say the widths of the lands and the grooves on the two bullets are starkly different, which would make it impossible to have the same number."
>
> 4. " 'You don't even need to measure to see this doesn't add up,' said Hendrikse, the firearms analyst from Toronto. 'It's so basic to our work. The only benefit I can extend is that she accidentally measured the same bullet twice.' "
>
> 5. "Other firearms analysts say that even with the poor photo lighting and deformed bullets, it's obvious that the width of the lands and grooves are different."

In a section alleging that "[a]t the SBI lab, training is often minimal," the article claims that plaintiff "was a novice examiner" who "came to the field through a peculiar route" and discusses plaintiff's prior career as a ballerina. According to the article, the prosecutors in the *Green* case "needed [plaintiff's] help to fix a potentially crippling weakness in their case" and that her analysis of the two bullet fragments pictured in the Comparison Photograph[6] "would make or break the case against Jemaul

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6. The 14 August Article notes that the Comparison Photograph was taken by Whitehurst, whom the article describes as a "former FBI crime lab analyst" and an attorney "who formerly worked at the SBI's crime lab." The article includes a quote from Whitehurst, stating that "[i]t didn't take a lot of analysis to see there was something really off here." The article does not explain, as Locke discussed in her trial testimony, that firearms "was not [Whitehurst's] discipline; he was a chemist" and that Whitehurst "just so happen[ed] to own a microscope that had the capacity to take a photograph."

Green." The article does not mention that thirteen eyewitnesses to the shooting testified that they saw no one other than Green with a firearm. The article also asserts that when plaintiff examined the two bullets in the Comparison Photograph she "scribbled down the measurements of the lands and grooves" and that "[h]er report eliminated doubt about another shooter." The article does not mention that four additional bullets were recovered from the scene and that plaintiff, as reflected both in her typed report and her trial testimony, concluded that no determinations could be made as to these four bullets.

Additionally, the article mentions plaintiff's use of the "absolute certainty" language and states that plaintiff "said this month that she meant to say she was absolutely certain that the bullets were consistent with a Hi-Point 9mm." According to the article, "[t]o make either determination, [plaintiff] had to conclude that the bullets had the same number of lands and grooves," and that, in any event, "[i]t is [plaintiff's] measurements that befuddle independent analysts asked to evaluate the photographs of the two bullets."

Shortly after the 14 August article was published, Bill Tobin called Jerry Richardson to apologize for the way his statement had been portrayed, to explain that the statement explicitly attributed to him in the article was a version of a statement he made only in response to hypothetical "what-if" questions from Locke, and to make clear that he was not one of the "independent" experts referenced in the other statements in the article. Liam Hendrikse, who was also unaware that he was supposed to be one of the "independent" experts referenced in the article, contacted the N&O to request a retraction for statements that were explicitly attributed to him.

Plaintiff was in Pennsylvania visiting her father in the hospital when she heard about the 14 August Article. Plaintiff testified that when she was able to get to a computer and pull up the article, she was stunned:

> I was surprised at how the size of this, the picture was just right there, and this picture just popped up on the screen, and all I could see was like what can you see in asking the reader what they can see looking at this photograph after I had just finished telling her all the reasons, everything I thought was wrong with why you shouldn't use this photograph.
>
> And so I immediately felt like the blood just ran out of my body. I didn't know if I was angry or if I was upset. I didn't know how to feel when I looked at this and so I

> started trying to read it and I couldn't get through the first paragraph. I had to walk away. I had to keep coming back and reading the article in little bits and pieces and there were things that just kind of stuck out with me like they needed her to fix, you know, fix the case, and falsify the evidence and ballerina. It was almost implying that someone like me, a ballerina, had no business doing firearms examinations and that I was incompetent. I mean, this is – it was insane. It's reporting that these experts in my field are saying – are saying that I falsified evidence and saying that I didn't even do the analysis and that these can't possibly be what I said they were, that they're starkly different, and so I was stunned.
>
> I was stunned at how large the article was. I thought it was just going to be a little blurb. I thought it was just going to be a little piece in a larger article, and the fact that it was me and my picture and these bullets are there on the front page as soon as you look, I was stunned.

An August newsletter for John Jay College of Criminal Justice reported that "a forensic analyst from the [SBI] in North Carolina and John Jay College of Criminal Justice alumna, Beth Desmond, has been accused of making a mistake in matching two bullets that sent an innocent man to prison for murder, according to the *News and Observer*, Raleigh, NC."

After the 14 August Article was published, Stephen Bunch performed an independent examination of the ballistics evidence from the *Green* case. The results of Bunch's report corroborated plaintiff's examination. Bunch testified that plaintiff "basically got the same answers [he] did." Regarding the class characteristics in the two bullets depicted in the Whitehurst Photographs, Bunch stated that "[t]hey're spot on."

On 31 December 2010, the N&O published a follow-up article (the 31 December Article), also written by Locke and Neff and entitled "[r]eport backs SBI ballistics."[7] Compared to the 14 August Article, the 31 December Article devotes considerably more attention to plaintiff's use of the "absolute certainty" language and includes a subheading stating, "[h]owever, agent's courtroom certainty that bullets came from one gun in question."[8] The article, which repeats much of the factual recitation

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7. The article, published on the front page of the N&O, again features plaintiff's picture.

8. Plaintiff never testified that the bullets came from one gun.

from the 14 August Article, briefly discusses the results of Bunch's independent examination of the ballistics evidence that had been the focus of the previous article, but alleges that Bunch's "findings undermined the certainty of [plaintiff's] testimony." In the same vein as the five statements from the 14 August Article quoted above, the 31 December Article includes an additional allegation that is attributed explicitly, in part, to Bunch:

> 6. "Ballistics experts who viewed the photographs, including a second FBI scientist who wrote the report released Thursday, said the bullets could not have been fired from the same firearm."

In one of her first cases following the publication of the 14 August Article plaintiff was told "to be prepared, they're coming after you," and thereafter she began facing aggressive cross-examination from defense attorneys on the basis of the article's allegations. Plaintiff testified that in an Alamance County case a respected defense attorney "came after [her] really hard," holding up the 14 August Article in front of the jury and vigorously interrogating plaintiff about the various things of which she'd been accused. The same attorney was quoted at that time in an article in the Charlotte Observer, also written by Locke and Neff, as stating that plaintiff "is putting false information in the courts" and "lacks the credentials and training to do her job."[9] Plaintiff testified that when she realized this attorney was representing a defendant in one of her subsequent cases, "she became very pale knowing that it was him" and "was so afraid of what [he] might have done when [she] went to testify in front of him again."[10] Plaintiff stated that her "credibility and [her] character had been attacked and that [she] was always constantly having to defend [her]self from that point on."

Plaintiff's difficulties continued following the publication of the 31 December Article. Plaintiff stated that she "felt like [the 31 December Article] didn't really do anything to clear [her] name" and that "[i]t seemed like it was just following me around and there was nothing I

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9. This Charlotte Observer article, which repeats statement 2 from the 14 August Article, was admitted into evidence only on the issue of damages.

10. Plaintiff testified that this attorney apologized to her at a subsequent trial, stating:

> I remember when I got off the stand, I went down and as I crossed by his table, I remember him reaching up, grabbing my hand and pulling me down and saying, "Hey, listen. I'm so sorry for what I did to you." He said, "I hope you can forgive me," and I shouldn't have listened to them or something to that effect.

could do to get rid of what was in that first article." At an Association of Firearms and Tool Mark conference that plaintiff attended in Buffalo, New York, after putting on her nametag, plaintiff was asked, "[y]ou know you're a little famous, don't you?" Plaintiff stated she became embarrassed to wear her name tag because everyone seemed to be discussing the 14 August article, with one prominent firearms expert asking, "aren't you the girl that's caused all the trouble down in North Carolina?"

Plaintiff testified that she realized that her "life as a firearms examiner or in the forensic science field had changed and . . . [she] had continued to struggle ever since then." Plaintiff found "it was difficult to work cases," and she began "having trouble concentrating on anything." When the SBI's crime lab was evacuated due to a bomb threat, she felt responsible. Following an incident in which plaintiff returned home from work and saw "a car in front of [her] house and there were two men, and one guy was outside of his car with the door open and taking pictures of [her] house and [her] son was playing in the driveway," plaintiff became "obsessed with safety" and "would GPS [her] son everywhere that he went." Eventually, plaintiff requested a transfer and ultimately was transferred out of the crime lab in September 2013.

Procedural History

Plaintiff filed this defamation action against defendants on 29 November 2012.[11] Plaintiff originally alleged that sixteen statements contained in the 14 August and 31 December articles were defamatory. Defendants moved for summary judgment, which was denied on 14 March 2014. Defendants appealed.

On appeal, the Court of Appeals determined that defendants' interlocutory appeal was appropriate because the case involved application of the "actual malice" standard, the misapplication of which could "have a chilling effect on a defendant's right to free speech." *Desmond v. News & Observer Pub. Co.*, 241 N.C. App. 10, 16, 772 S.E.2d 128, 134 (2015) (*Desmond I)* (quoting *Boyce & Isley, PLLC v. Cooper*, 211 N.C. App. 469, 474, 710 S.E.2d 309, 314 (2011)). The court explained that "[i]n order to recover for defamation, a plaintiff generally must show that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Id.* at 16, 772 S.E.2d at 135 (citing *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 897 (2002)). Significantly

11. Plaintiff's original complaint included additional defendants, including McClatchy Newspapers, Inc., the "corporate parent" of N&O, that were subsequently dismissed from the case.

however, First Amendment principles mandate that "[w]here the plaintiff is a public official and the allegedly defamatory statement concerns his official conduct, he must prove that the statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[12] *Id.* at 17, 772 S.E.2d at 135 (alteration in original) (quoting *Lewis v. Rapp*, 220 N.C. App. 299, 302–03, 725 S.E.2d 597, 601 (2012)). Having concluded that defendants' interlocutory appeal was properly before the court, the Court of Appeals proceeded to address whether genuine issues of material fact existed as to sixteen allegedly defamatory statements contained in defendants' 14 August and 31 December articles.

In evaluating each of these statements, the court noted that while in order to be actionable as defamation a statement must be one of fact, not merely opinion, the United States Supreme Court has cautioned against "an artificial dichotomy between 'opinion' and fact" and has stated that "expressions of 'opinion' may often imply an assertion of objective fact." *Id.* at 20, 772 S.E.2d at 137 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18–19 (1990)); *see also Milkovich*, 497 U.S. at 18–19 ("Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.' As Judge Friendly aptly stated: 'It would be destructive of the law of libel if a writer could escape liability for accusations of defamatory conduct simply by using, explicitly or implicitly, the words "I think." ' "). The Court of Appeals noted that fact and opinion can be particularly difficult to separate in a case like this one, "which involves mostly Locke's reports of opinions of experts regarding Desmond's work." *Id.* at 21, 772 S.E.2d at 137. As the court stated:

> Some of the allegedly defamatory statements, though stated as expressions of opinion from experts, may be factually false because Locke reported that the experts expressed opinions regarding Desmond's work that they actually did not express. In some instances, the evidence indicates that Locke asked the experts a hypothetical question, and they answered on the assumption that the facts of the hypothetical question were true, while the facts were actually false and Locke either knew the facts were false or she asked the question with reckless disregard for the actual facts. The experts' opinions were then stated in the article as opinions which the experts

12. Plaintiff stipulated that she was a public official.

> gave about Desmond's actual work, instead of in response to a hypothetical question. Thus, the statements, even as opinions, "imply a false assertion of fact" and may be actionable under *Milkovich*.

*Id.* at 21, 772 S.E.2d at 137; *see Milkovich*, 497 U.S. at 20 (stating that "where a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth"). Ultimately, the court held that ten of the statements were not actionable as defamation, but that the six statements—five published in the 14 August Article and one published in the 31 December Article—were actionable and that genuine issues of material fact existed as to whether those six statements were false and defamatory and whether defendants published these six statements with actual malice. *Id.* at 30–31, 772 S.E.2d at 143. Accordingly, the court affirmed in part and reversed in part the trial court's denial of defendants' motion for summary judgment and remanded the case for trial.

Defendants filed a petition for discretionary review of the interlocutory appeal, which this Court denied.

At trial, plaintiff called approximately twenty-three witnesses and presented over one hundred exhibits. Plaintiff's evidence in support of her defamation claim included extensive evidence relating to the *Green* and *Adams* cases, Locke's research and preparation of the articles, Locke's interviews and communications with various individuals, and communications between employees of the N&O. Plaintiff also presented evidence concerning the issue of damages focusing heavily on the mental and emotional impact plaintiff suffered as a result of defendants' articles, including testimony from her psychiatrist and counselor stating that plaintiff suffered from post-traumatic stress disorder. Defendants called two witnesses, including Locke, and presented fewer than twenty exhibits. At the close of plaintiff's evidence, and again at the close of all evidence, defendants moved for directed verdict under Rule 50 of the Rules of Civil Procedure. The trial court denied these motions. The jury found both the defendants liable for defamation for the first five statements and awarded plaintiff $1,500,000 in damages; as to statement six, the jury found the N&O liable for defamation and awarded plaintiff $11,500 in actual damages.

The punitive damages phase of the trial began on 19 October 2016. The jury awarded plaintiff $7.5 million in punitive damages against the

N&O and $75,000 against Locke. The trial court reduced the punitive damages award against the N&O to $4,534,500.00 pursuant to N.C.G.S. § 1D-25(b).[13] Defendants moved for Judgment Notwithstanding the Verdict (JNOV), or, in the alternative, for a new trial. The trial court denied this motion on 30 January 2017. Defendants appealed.

On appeal, defendants argued that the trial court erred in denying its motion for directed verdict and motion for JNOV because plaintiff failed to present sufficient evidence of actual malice and that there were several errors in the jury instructions. The Court of Appeals disagreed, first determining after a careful review of the record that plaintiff presented clear and convincing evidence that defendants published the six statements with actual malice. *Desmond II*, 263 N.C. App. at 55, 823 S.E.2d at 431. The court then addressed defendants' arguments concerning the jury instructions, concluding that: the trial court did not err in denying defendants' proposed instruction concerning the element of falsity; the trial court did not err in instructing the jury to evaluate falsity using the preponderance of the evidence standard, as opposed to the clear and convincing evidence standard applicable to the issue of actual malice; and the trial court did not err by failing to instruct the jury on the statutory aggravating factors required to support an award of punitive damages. *Id.* at 60–67, 823 S.E.2d at 435–38. Accordingly, the Court of Appeals affirmed the trial court's order and judgment. *Id.* at 67, 823 S.E.2d at 439.

Defendants filed a petition for discretionary review, which this Court allowed on 27 March 2019.[14]

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13. This statute limits punitive damages to the greater of three times the amount of compensatory damages or $25,000.

14. After the Court heard arguments in this case, the N&O filed a "NOTICE OF BANKRUPTCY PROCEEDING" advising the Court that The McClatchy Company had filed a chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Southern District of New York and that the N&O was included as an affiliated entity and debtor in the filing. The N&O stated that as a result of the bankruptcy filing, its position was that "further proceedings in this matter are subject to the automatic stay provisions of 11 U.S.C. § 362 pending further order of the Bankruptcy Court." In an order filed 2 April 2020, this Court directed the parties "to inform this Court if and when the bankruptcy court grants relief from the automatic stay provisions or when the automatic stay lapses." On 30 June 2020, the parties jointly filed a "NOTICE OF BANKRUPTCY COURT'S ORDER MODIFYING THE AUTOMATIC STAY," informing the Court that the United States Bankruptcy Court for the Southern District of New York entered an order modifying the automatic stay "Solely to the Extent Necessary to Permit the North Carolina Supreme Court to Issue an Appeal Opinion" in this case.

Analysis

I. Actual Malice

**[1]** Defendants argue that the defamation verdict here cannot be squared with the First Amendment because plaintiff failed to present clear and convincing evidence of actual malice. According to defendants, plaintiff's evidence reveals only a post-publication dispute between an investigative reporter and her quoted experts centered on subjective intent and unspoken context. These "misunderstandings," defendants contend, do not establish constitutional actual malice under the First Amendment. Accordingly, defendants argue that they were entitled to judgment as a matter of law on plaintiff's defamation claim because the evidence was insufficient to create a triable issue of actual malice. After careful review, we conclude that plaintiff presented clear and convincing evidence of actual malice and that the trial court did not err in denying defendant's motions for directed verdict and JNOV.

The standard of review for the denial of a directed verdict or JNOV is the same and inquires "whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Green v. Freeman*, 367 N.C. 136, 140, 749 S.E.2d 262, 267 (2013) (quoting *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 SE.2d 133, 138 (1991)). "If 'there is evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for [JNOV] should be denied.' " *Id.* at 140–41, 749 S.E.2d at 267 (quoting *Abels v. Renfro Corp.*, 335 N.C. 209, 215, 436 S.E.2d 822, 825 (1993)). Whether a party is entitled to a directed verdict or JNOV is a question of law that we review de novo. *Id.* at 141, 749 S.E.2d at 267 (first citing *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 720, 693 S.E.2d 640, 643 (2009); then citing *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)). Further, "[w]e review decisions of the Court of Appeals for errors of law." *Pine v. Wal-Mart Assocs., Inc.*, 371 N.C. 707, 715, 821 S.E.2d 155, 160 (2018) (quoting *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016)).

As the Court of Appeals noted, "[i]n order to recover for defamation, a plaintiff generally must show that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Desmond I*, 241 N.C. App. at 16, 772 S.E.2d at 135 (citing *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 897 (2002)). Moreover, as the United States Supreme Court first explained in *New York Times Co. v. Sullivan*,

the First Amendment[15] places an additional burden on a plaintiff who is a public official seeking damages for defamation relating to his or her official conduct by requiring the plaintiff to "prove[ ] that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. 254, 279–80 (1964); *see also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 499 (1991) ("The First Amendment protects authors and journalists who write about public figures by requiring a plaintiff to prove that the defamatory statements were made with what we have called 'actual malice,' a term of art denoting deliberate or reckless falsification.").

Notably, "[m]ere negligence does not suffice. Rather, the plaintiff must demonstrate that the author 'in fact entertained serious doubts as to the truth of his publication,' or acted with a 'high degree of awareness of . . . probable falsity.' " *Id.* at 510 (alteration in original) (first quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); then quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)); *see also Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989) ("Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category." (citing *St. Amant*, 390 U.S. at 733)). Further, "[a]ctual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." *Masson*, 501 U.S. at 510–11 (citing *Greenbelt Cooperative Publ'g Assn., Inc. v. Bresler*, 398 U.S. 6 (1970)).

Following *New York Times Co. v. Sullivan*, the Supreme Court has further elaborated on the actual malice standard and the role of the courts in enforcing this constitutional safeguard:

> [t]he question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law. This rule is not simply premised on common-law tradition, but on the unique character of the interest protected by the actual malice standard. Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of breathing space so that protected speech is not discouraged. The meaning of terms such as "actual malice"—and, more particularly, "reckless disregard"—however, is not readily captured in

15. The First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *New York Times*, 376 U.S. at 277 (citations omitted).

one infallible definition. Rather, only through the course of case-by-case adjudication can we give content to these otherwise elusive constitutional standards. Moreover, such elucidation is particularly important in the area of free speech for precisely the same reason that the actual malice standard is itself necessary. Uncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords. Most fundamentally, the rule is premised on the recognition that judges, as expositors of the Constitution, have a duty to independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'

. . . .

We have not gone so far, however, as to accord the press absolute immunity in its coverage of public figures or elections. If a false and defamatory statement is published with knowledge of falsity or a reckless disregard for the truth, the public figure may prevail. A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. The standard is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a high degree of awareness of probable falsity. As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. . . .

In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the opportunity to observe the demeanor of the witnesses, the reviewing court must examine for itself the statements in issue and the circumstances under which they were made to see

> whether they are of a character which the principles of the First Amendment protect.

*Harte-Hanks*, 491 U.S. at 685–89 (cleaned up); *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) ("[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " (quoting *New York Times*, 376 U.S. at 284–86)).[16]

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16. Amici, The Reporters Committee for Freedom of the Press, citing *Bose Corp. v. Consumers Union of the United States, Inc.*, contend that the Court of Appeals below erred by viewing the evidence of actual malice in the light most favorable to plaintiff and, in doing so, failed to conduct an "independent examination of the whole record" required by United States Supreme Court precedent. 466 U.S. at 499. In *Bose Corp.*, the Supreme Court held that a federal trial judge's ultimate "finding" of actual malice was not insulated from an appellate court's independent examination of the record by virtue of the "clearly erroneous" standard applicable to findings of fact in a federal bench trial. *Id.* at 514 ("[T]he clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times*."). Notably, however, the Court did not suggest that an appellate court, in reviewing whether the record in a defamation case is sufficient to support a finding of actual malice, should make its own findings of fact and credibility determinations, or overrule those of the trier of fact. For example, the petitioner there alleged that the respondent, in a critical magazine review of the petitioner's loudspeaker system, falsely asserted with actual malice that musical instruments heard through the speakers tended to wander "about the room," as opposed to the truthful description of wandering "along the wall." *Id.* at 488–91. The district court found as fact a lack of credibility in the respondent's employee's assertion in his trial testimony that he interpreted these descriptions as synonymous and, based only on that finding and its finding that "about the room" was not an accurate description, determined that the petitioner had proven actual malice. *Id.* at 511–12. The Supreme Court did not disturb the district court's credibility finding, or any of the district court's "purely factual findings," but simply held that the lack of credibility stemming from the respondent's employee's unconvincing and "vain attempt to defend his statement as a precise description of the nature of the sound movement" did not, by itself constitute clear and convincing evidence that respondent possessed actual malice at the time of the publication. *Id.* at 512–13. This is factually distinguishable from the situation here, in which, as discussed below, plaintiff presented ample evidence tending to show defendants' awareness of falsity and doubts regarding the truth of the six statements at the time of the publication. More to the point, the principle of viewing the evidence in the light most favorable to the nonmoving party on a motion for JNOV, while it must be applied in conjunction with the heightened clear and convincing evidentiary standard and with the appellate court's "independent examination of the whole record," is necessary—where findings of fact and credibility determinations must ultimately be made by the jury—in order to ascertain whether the record can permissibly and constitutionally support a finding of actual malice. Were we to, as amici seemingly urge, make our own factual determinations on the evidence and on the ultimate question of actual malice itself, we would impermissibly invade the province of the jury and conflict with Supreme Court precedent to the contrary. *See, e.g.*, *Time, Inc. v. Hill*, 385 U.S. 374, 394 n.11 (1967) (stating that where a result of either negligence or actual malice "finds reasonable support in the

Here, because plaintiff stipulated that she was a public official and because the allegedly defamatory statements concerned her official conduct, she was required to present sufficient evidence for the jury to find by clear and convincing evidence that defendants published the statements at issue with actual malice. The trial court, in denying defendants' motions for directed verdict and JNOV, determined that plaintiff had met this evidentiary burden, and the Court of Appeals affirmed this ruling. Consistent with our "duty to independently decide whether the evidence in the record is sufficient to cross th[is] constitutional threshold," we "must consider the factual record in full" and "examine . . . the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment protect." *Harte-Hanks*, 491 U.S. at 686, 688. In addition to the evidence as summarized in the factual background provided above, we will summarize additional portions of the evidence relevant to plaintiff's claim[17]

The crux of plaintiff's defamation claim is that in the six statements defendants falsely claimed that independent firearms experts were asserting based on the Whitehurst Photographs that plaintiff, either through extreme incompetence or deliberate fraud, had botched her laboratory analysis in the *Green* case with the added consequence of securing the conviction of a potentially innocent man. Plaintiff contended that this false narrative began when Locke first learned of the Whitehurst Photographs and the motion for mistrial filed in the *Adams* case, in which Adams' attorney, David Sutton, stated that "William Tobin says preliminary [sic], based upon a photograph sent by Dr. Whitehurst, there is ample reason to question whether the class characteristics in Q-9 and Q-10 are the same." When Locke discussed the *Green* and *Adams* cases

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record it is for the jury, not for this Court, to determine whether there was knowing or reckless falsehood" (citing *New York Times*, 376 U.S. at 284–285)). As such, we do not view an appellate court's "duty to independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice,' " *Harte-Hanks*, 491 U.S. at 685–89, as inherently inconsistent with the principle that a court, on a motion for directed verdict or JNOV, must determine "whether the evidence, taken in the light most favorable to the non-moving party, *is sufficient as a matter of law* to be submitted to the jury," *Green*, 367 N.C. at 140, 749 S.E.2d at 267 (emphasis added) (citation omitted).

17. We emphasize that our discussion of the evidence in this case is a reflection of the record as viewed in the light most favorable to plaintiff and summarizes what the jury could permissibly have found as fact under a clear and convincing evidentiary standard. It was for the jury, not this Court, to determine whether defendants in fact acted with actual malice, and we note that we give due regard here to the principle that credibility determinations are within the province of the jury.

with Sutton in April 2010 and decided to write the story, she included a quote from Sutton in an early draft that was later removed, stating that "[plaintiff] just made it up. She made it up because she could, and prosecutors needed her to. It's that simple." According to plaintiff's theory of the case, defendants decided early on that this was the story and that it would constitute the last of their four-part "Agents' Secrets" series, which reported on alleged errors or wrongdoing by SBI agents and "how practices by the [SBI] have led to wrongful convictions." An internal story folder circulated to N&O staff summarized the planned article, stating that "Desmond had no idea how to evaluate firearm evidence or, worse, she ignored all rules of the trade and fabricated the results to help police secure their victory."

However, all that existed to support such a story, apart from a rather sensational allegation by a zealous defense attorney, was Tobin's statement that the Whitehurst Photographs raised a preliminary "question" over the class characteristics. As plaintiff's counsel stated in closing arguments, Locke "needed [the story] to be what David Sutton had said. . . . That was what she needed the story to be, but she didn't have it. This is what she had, a question." Accordingly, Locke set out to procure independent experts who would substantiate the story suggested by Sutton. Defendants' articles reported that Locke did indeed obtain such "independent firearms experts" who, having "studied the photographs," not only stated, *inter alia*, that "the widths of the lands and grooves on the two bullets are starkly different, which would make it impossible to have the same number," and that "the bullets could not have been fired from the same firearm," but also "question[ed] whether Desmond knows anything about the discipline" and "suspect[ed] she falsified evidence to offer the prosecutors the answer they wanted." Yet, plaintiff's evidence tends to show no one, not least of which the four individuals to whom the statements were attributed, was willing to make such statements—that is, experts were *not* asserting based on the Whitehurst Photographs that plaintiff's analysis was false and questioning whether plaintiff was incompetent or corrupt. As plaintiff's counsel stated at the end of her closing argument:

> This was the story on April 6th. "William Tobin says preliminary [sic], based upon a photograph sent by Dr. Whitehurst, there is ample reason to question whether the class characteristics in Q-9 and Q-10 are the same."
>
> Well, guess what? This is exactly what [Locke] had on August 14, 2010, the story was the same. After all of the attempts to scramble, to try to talk to everybody,

> . . . everybody is saying the same thing. That was still all she had.

Moreover, plaintiff's evidence tends to show defendants' publication of the false statements was not a result of mere negligence or failure to investigate, but stemmed rather from a "purposeful avoidance of the truth." *Harte-Hanks*, 491 U.S. at 692.

One of Locke's purported sources for the six statements was Bill Tobin, a "former chief metallurgist for the FBI." Plaintiff presented evidence tending to show that Tobin did not make some of the statements attributed to him and that he only made other statements when asked as a hypothetical to assume that a serious mistake had been made in the analysis. For example, in his deposition testimony, Tobin was asked about several of the statements attributed to him:

> Q If I understand your answer correctly, your comment, This is as bad as it can be, or It doesn't get any worse than this, was assuming that it was determined that a mistake or an error had been made; is that fair to say?
>
> A Yes, I would also remind, should remind somebody, that that was out of context. In context I was also implying that what I just said is true with regard to the practice of firearms identification, but one needs to put that also in a systemic context because what I believe we had already discussed, if in fact an error had been made, how it crept through the system through what should have been some systemic peer reviews, supervisory reviews of the crime lab, itself, as well.
>
> So in other words, even if an error existed, it should have been detected somewhere along the normal system of reviews before it's admitted or before it's released from the agency. So that was in the context in which I said it doesn't get any worse than that, if in fact an error was made. Again, that's the subjunctive, the caveat or disclaimer, then, comma, then this is it doesn't get any worse than the easiest of the three types of an error creeping all the way through the system. That what I was meaning by it doesn't get any worse than this.
>
> Again, I was not referring to a specific examiner or a specific case. I was just discussing general errors as Type 1, Type 2, and Type 3 errors and the presumed system of

checks and balances and error quality control process that should exist in the system. Does that make any sense?

Q It does. So is it fair to say that your comment of either, This is as bad as it could be or It doesn't get any worse than this, that you may have made to Mandy Locke was not referring to Beth Desmond's work in this case?

A Correct.

Q In any of your conversations with Ms. Locke, did you state to Ms. Locke that you questioned whether Beth Desmond knew anything at all about the discipline of firearms examination?

*A First of all, I continue to advise Fred and Mandy that I have no basis to make any claims of this particular examiner's work. I have none. I have no, I didn't know who she or he was. I had no experience with her work product, so I have no basis to make any statements regarding a specific examiner's proficiency.*

*It's not even a field in which I normally will deal anyway. So on numerous levels I had no basis to make any claim about someone's proficiency. So I don't recall making any statement that she doesn't know anything about firearms or whatever you, firearms identification. I don't recall making that statement.*

If I did, it would have been included in the universe or the entire same pool, it's known as, entire possible events leading up to an error if one occurred, if one had occurred, but I don't recall making that statement.

Q So is it fair to summarize your answer by saying you don't recall making any statement like that, but if you had made a statement like that, the only way you could have possibly made a statement like that is if in response to the assumption that a mistake had, in fact, been made and you were laying that out as one possibility along with a lot of other possibilities as the cause of the mistake.

*A Yes, but that is such a foreign statement. I would not be in a basis to claim that somebody doesn't know anything about an area in which I don't even deal, in which I don't even perform, that I don't even operate.*

So again, I continually admonish—well, not, *I continually reminded Fred and Mandy that I can only present generic assessments of errors, what types of errors and systematic issues from my experiences, both as a scientists and also as a[ ] forensic examiner inside, behind the blue wall. I can only address these areas generically.*

So I would not have any basis at all to make any statement about someone's proficiency in an area outside of metallurgy material science and possibly legally, in the legal community. *But I would not make such a statement. That's not, I have no basis to make that statement.*

Q In any of your conversations with Ms. Locke, did you ever tell Ms. Locke that you suspected that Beth Desmond falsified evidence to offer prosecutors the answer they wanted?

A *No. Again, I have no basis. There is not, that is so inconsistent on numerous levels for me to make that statement, so I did not make that statement.*

Q In any of your conversations with Ms. Locke did you ever tell Ms. Locke that you questioned whether Beth Desmond had done an analysis at all?

A I'll say if you take out the two words Beth and Desmond, yes. I do recall including that in the—that's called drylabbing—take the name out and I concluded that, included that in the possible universe of explanations as to what could have occurred if an error had, in fact, been made.

*But I did not specifically indicate that Beth Desmond committed an error. Again, over and over I told anyone with whom I was interacting, I have no basis to judge her work product or her proficiency.*

(Emphases added.) While there were no recordings of Locke's interviews or conversations with the expert sources, Locke wrote in her notes from a conversation with Tobin that Tobin stated that "[p]hotographs are not data upon which I rely to make my decision." Following this passage, Locke's notes include a variation of the Tobin quote later reported in the article as statement 2 ("This is a big red flag for the whole unit," said William Tobin, former chief metallurgist for the FBI, who has testified about potential problems in firearms analysis. "This is

as bad as it can be. It raises the question of whether she did an analysis at all."). Yet, immediately preceding this quote, Locke noted Tobin as stating: "Preface this by saying photographs present accurate picture." Locke admitted in her testimony that Tobin was qualifying his statement on the assumption that it was later determined that the Whitehurst Photographs were in fact accurate depictions of the class characteristics of the bullets. Yet, Locke did not include Tobin's prefatory qualifying statement in the article.

Tobin's testimony is bolstered by email communications between Locke and Tobin prior to the publication of the articles. In a 3 August 2010 email from Tobin to Locke, he stated:

> *I don't do F/TM [firearms/toolmark] examinations, and most particularly don't render opinions from photographs in an area in which I don't function.* I only testify as a scientist objecting to the lack of a scientific foundation for testimonies of individualization (specific source attribution), and report on the opinion of my [rather distinguished] colleagues who also strenuously disagree with the conclusions rendered by F/TM examiners. The science doesn't support such conclusions.
>
> I never testify as to the possible fact of a match, only as to the lack of scientific (and statistical) foundation for inferences of individualization.

(Emphasis added.) Thus, despite Tobin's explicit statement that he did not "render opinions from photographs in an area in which I don't function," defendants attributed statements to Tobin representing that Tobin had specifically analyzed plaintiff work in the *Green* and *Adams* cases. Statement 2 was explicitly reported as a quote from Tobin, and Locke asserted that Tobin was one of the "independent" expert sources for the other statements.

Shortly after the 14 August article was published, Tobin called Jerry Richardson, then the assistant director of the SBI Crime Laboratory, to apologize for the way Tobin's statements had been portrayed and make clear that he was not one of the "independent" experts referenced in the article. According to Richardson:

> [T]he first morning after I was back in the office after the articles were published I did receive a phone call from a Mr. Tobin. Mr. Tobin immediately apologized to me . . . . He wanted me to share his apologies also with the crime

> laboratory, with Ms. Desmond, and with our director at the time because of the things that were printed in the article. He made it clear he was not one of the I guess external experts that had made comments. He made it clear to me that his comments were in very general terms. He did say he was answering those questions in a form of "what-ifs," what if this happened and those were how his responses were based, and again he apologized, and he stated at that point he would not have any further contact with the reporter.

This conversation is reflected in an email that Richardson sent later that day to other individuals in the SBI, in which Richardson stated:

> FYI
>
> Bill Tobin, FBI Chief Metallurgist, who is quoted from Saturday's article contact[ed] me earlier today. He wanted to apologize to Beth Desmond, the SBI Firearms Section and me for the manner in which his comments were portrayed in Firearms article. He advises that he only answered questions from the reporter in general terms and actually was not aware of the circumstances of any of the cases and has no knowledge of Desmond's work. Tobin advises that his quotes are from three different questions and appears to have been combined from a series of "What ifs." He further wanted us to know that he is *not* one of the independent experts that is mentioned in the article.

In his deposition testimony, Tobin confirmed that this email accurately described his conversation with Richardson.

Another of Locke's purported expert sources was Liam Hendrikse, a consulting forensic scientist in the field of firearms and ballistics living in Canada. Hendrikse was among those included in the emails circulating the Whitehurst Photographs following the *Adams* trial. When Locke contacted Hendrikse asking if he would be willing to discuss the case, Hendrikse was hesitant to speak with her in part because of the possibility that he could be retained to perform an independent examination of the ballistics evidence from the *Green* case. In an email to Whitehurst and Schwartz, Hendrikse asked if he should speak with Locke and noted that he had not "examined and compared the samples Q9 and Q10 'first hand' " and that "anything that [he] would say would of course be a qualified opinion." Hendrikse wrote that he "suppose[d] he should discuss [Locke's] intentions with her, and then go from there." Schwartz

advised Hendrikse to "do whatever's comfortable" and that if he spoke with Locke, "make sure you qualify your opinions as much as you think they should be qualified." Hendrikse also discussed his concerns in an email with another local attorney, stating that he intended to speak with Locke "just to get an idea of her intentions with respect to this article" and that "[i]f the article seems to be more general, than specific, then [he] would see no reason why [he] couldn't comment." After Hendrikse spoke with Locke, he wrote that his concerns were alleviated "given the nature of the article" and that he had "had a very general conversation with the reporter, in my mind perfectly harmless."

At trial, Hendrikse testified that when he spoke with Locke they largely discussed firearms examination generally, and he told her that the class characteristics of the bullets looked different in the Whitehurst Photographs but repeatedly stressed the limitations of photographs and the fact that a physical examination would be necessary to make any determinations about the bullets. With respect to statement 1 ("Independent firearms experts who have studied the photographs question whether Desmond knows anything about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted."), Hendrikse denied making any such comments and assumed when the article was published that Locke must have been referring to other sources. Similarly, Hendrikse denied making statements 3 and 4 as written, testifying that he never stated that "the widths of the lands and the grooves on the two bullets are starkly different, which would make it impossible to have the same number" or that "You don't even need to measure to see this doesn't add up." With respect to the last portion of statement 4 ("It's so basic to our work. The only benefit I can extend is that she accidentally measured the same bullet twice."), which was specifically attributed to Hendrikse in the article, Hendrikse testified that he did state something similar, but only by way of explanation in response to a question in which he was asked to assume that a serious mistake had in fact been made. According to Hendrikse, this comment

> was an explanation that I gave to Ms. Locke in our conversation. Based on assuming somebody went in there looked at these two samples and determined that they actually were different, then how would that mistake have been made, and that was the explanation that I gave her, but that wasn't the only benefit that I came up with because that was prefaced as "I can't tell you whether she's right or wrong because I haven't looked at the exhibits."

After the 14 August article was published, Hendrikse wrote to the N&O with his concerns about the inaccuracies in the article and to request a retraction for the statements that were explicitly attributed to him, stating:

> I've been having trouble with the context of the quotes that are attributed to me, and I was wondering if a retraction was possible.
>
> The two quotes that I have real issues with are the following:
>
> 1. "The chances of a gun not matching a bullet recovered from the crime scene when it involves an American gun is highly likely. Our days of speaking with such certainty should be over."
>
> The first part of that was misinterpreted. We were speaking on the phone, about Class Characteristics, not Individual Characteristics. When we spoke about how Agent Desmond arrived at determining that the bullet was fired from a Hi-Point, I mentioned that it is usually very difficult to narrow down the possible makes of gun, to just one when analyzing the Class Characteristics of a bullet. The quote makes it seem like I'm saying it's unlikely that you can link a bullet to the individual gun that fired it. This is wrong, and in a nutshell makes me appear to be a lunatic. The existence of such a quote could have longer-term ramifications with respect to my career and credentials.
>
> The latter part of that quote doesn't really say anything without that first part.
>
> 2. The only benefit I can extend is that she accidentally measured the same bullet twice.
>
> I feel that this is unfair to both agent Desmond, and to myself. Both verbally, and in writing, I stated that I couldn't tell you if she was right or wrong unless I examined the items.

(Emphasis added.) As previously stated, Hendrikse was unaware at the time that he was purportedly a source for the other statements attributed to the "independent" experts.

Another of Locke's expert sources for the six statements was Dr. Stephen Bunch, a firearms examiner and a supervisor of the firearms

and tool mark section at the Virginia Department of Forensic Science laboratory. In his testimony, Bunch stated that in his one phone conversation and follow-up emails with Locke he answered general questions about firearms examination and denied that he made any of the statements as reported in defendants' articles. In his first email following their phone conversation, Bunch asked that any of his comments be kept off the record, stating: "Thank you for being understanding of my refusal to comment about this case. Frankly, I know nothing factual about it at all." In subsequent emails, after Bunch had seen the Whitehurst Photographs, Bunch wrote to Locke that "it appears" in the photographs that the class characteristics are different, but that he "would have to look at the actual specimens to really offer a firm opinion." In a separate email, Bunch wrote to Locke: "I wish I could see the actual specimens and then I could render a real opinion"; and "[s]trange things can happen though when one observes photos, so I hate to state anything with firmness." Bunch testified that he never told Locke that the class characteristics of the bullets were actually different (or that it was obvious they were different), that he questioned whether plaintiff knew anything about the discipline of firearms examination, or that he questioned whether plaintiff had done an analysis at all:

> Q. . . . [D]id you ever tell Ms. Locke that it was obvious that the widths of the lands and grooves on the two bullets at issue were different?
>
> A. I may have suggested that they appeared different in the photographs but I wouldn't have said definitively they were different, no.
>
> Q. And similar question: Did you ever tell Ms. Locke that the widths of the lands and grooves on the two bullets were starkly different?
>
> A. Only I may have used that word in referring to their appearance in the key photograph possibly. I don't recall. But I wouldn't have said as a fact that they were starkly different, no, not without examining them.
>
> Q. Okay. And in any of your conversations with Ms. Locke did you ever tell Ms. Locke that you questioned whether Beth Desmond knew anything at all about the discipline of firearms examination?
>
> A. I really don't think so. I don't think that came up at all in our one telephone conversation so at least not to my

> recollection. I can't conceive of – I've had dealings with that and when the FBI questions one examination over another. That can be a dicey topic. I've thought about that a lot over the years, so no, I can't conceive of saying something like that just based on a potential single mistake.
>
> Q. And I believe I've already asked you this but I'm going to ask you again: In any of your conversations with Ms. Locke, did you ever tell Ms. Locke that you suspected that Ms. Desmond falsified the evidence to offer the prosecutors the answer they wanted?
>
> A. No, I wouldn't have done that. I didn't even think of that myself, as mentioned.
>
> Q. Did you ever tell Ms. Locke that you questioned whether or not Beth Desmond had done an analysis at all?
>
> A. No, I don't think so. I don't even know for sure whether her name came up in an initial conversation, I don't know. It may have, it may not have. I'm not sure, but it was a general conversation I think about where she could find other examiners to do this or comment on it, and it was the general – maybe a little bit of a general discussion on the science and, you know, the good and the bad or whatever.

Locke originally asserted in a sworn deposition that Tobin, Hendrikse, and Bunch were her expert sources for the six statements. The following day, however, Locke asserted that she had inadvertently omitted Schwartz as an additional expert source for the statements. Locke had one conversation with Schwartz, who is not a firearms expert. In Locke's notes from this conversation, Locke quotes Schwartz as stating "Hi-Point Model C. I don't know enough to dispute that." In her deposition, Schwartz testified that she did not recall Locke asking for her opinion as to whether the bullets in the Whitehurst photograph had been fired from the same gun. Had she been asked, Schwartz stated that she would have explained she was not "qualified to judge" and "would have referred her to Liam [Hendrikse]." Schwartz further testified in this respect:

> Q. Did you or would you have ever told Mandy Locke that the widths of the land and groove impressions on the bullets that Beth Desmond examined are starkly different,

> and therefore it's impossible for the bullets to have the same number of land and groove impressions?
>
> A. I could only have said I might have said that Liam had that opinion or that Fred had that opinion, or possibly if Bill Tobin had that opinion, or possibly if Bill Tobin got involved that they had that opinion. I'm not competent to have such an opinion. I was not then and I am not now. I have never been competent to have such an opinion.
>
> Q. And would you have ever told Mandy Locke that the bullets in question could not have been fired from the same firearm?
>
> A. Again, I am not competent to have such an opinion.

Regarding statement 1 ("Independent firearms experts who have studied the photographs question whether Desmond knows anything about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted"), Schwartz testified:

> Q. Would you have ever told Mandy Locke that you questioned whether or not Beth Desmond knew anything about the discipline of firearms examination?
>
> A. I don't recall saying such a thing, I don't. I'd say that this isn't the kind of thing I would have said.
>
> . . . .
>
> Q. Would you have ever told Mandy Locke that you suspected that Beth Desmond had falsified her report?
>
> A. No, that is not something I would have said, chiefly because I don't have access to Ms. Desmond's mind. To say falsified would have been that she did something deliberately lied. How could I know without having access to her mind.

Schwartz's testimony that she would not have made such statements is consistent with her affidavit and testimony in the *Adams* case, as well as an email she sent to individuals interested in the Whitehurst Photographs on 10 April 2010, in which she stated: "[A] definitive statement that the bullets came from two different guns can't be made on the basis of Fred's photographs or, indeed, any photos. To reach a definite conclusion as to the class characteristics on the two bullets, the bullets themselves will need to be examined."

Locke's communications with her purported expert sources tend to show not only that Locke frequently sought to obtain their statements on the hypothetical assumption that plaintiff's analysis had already been determined to be false, which is not the manner in which any of the resulting statements that were actually made were reported in the articles, but also that Locke tended to misrepresent to her sources the SBI's response to any questions that had been raised by the Whitehurst Photographs. For example, when the SBI first received the Whitehurst Photographs on 24 July 2010, Richardson emailed Whitehurst to discuss the misleading nature of the photographs. Richardson wrote:

> [W]e have noted a number of issues associated with the photos. These issues include: photographs are not properly oriented, improper side lighting, unknown microscope magnification; focus; and, the use of what appears to be tweezers or other metal objects to handle evidence during photography which could alter the evidence.

This email was forwarded to Locke, who then emailed Bunch and Hendrikse stating:

> Not surprisingly instead of addressing a grave mistake the SBI leadership is trying to discredit the photos you and the others saw of those bullet fragments in the case in North Carolina that we discussed. The photographer had the fragments propped up on metal tweezers, but he said he didn't handle the bullets with them. The SBI leadership is saying that the metal-to-metal contact likely corrupted the evidence. Liam, could tweezers, particularly if they are not used to pick up the bullets affect the number of lands and grooves visible? Could it make a new land or groove?

Locke's email, which again opened with the false premise that it was already established that plaintiff's analysis was unsound (i.e. "a grave mistake"), omitted the SBI's legitimate concerns with the photographs and falsely suggested the SBI was asserting that the use of tweezers had "*likely* corrupted the evidence" or even had created new lands and grooves on the bullets. Bunch responded that the fictitious latter proposition was "laughable," and Hendrikse stated that "you'd have to be some sort of ham-handed strong man to accidentally create what looks like equidistant rifling impressions on either of the fragments, or obliterate rifling that was originally there."

Notably, in Hendrikse's response, he again stressed the necessity of an independent examination in order to resolve any questions

concerning the bullets, stating "[t]he fact remains that unless I physically examine them I won't know if ultimately SBI NC are correct or not. Did they ever employ an independent examiner to give a second opinion?" In her responding email,[18] Locke acknowledged that an independent examination was planned, but again misrepresented the position of the SBI:

> Liam, thanks for that; it's what I suspected. They've hired the guy and run through a million hoops to physically get the bullets sent. The DA has dragged his feet per pressure from the SBI. They're avoiding scrutiny.

As Locke admitted in her trial testimony, the latter statements were false, as both the Pitt County DA and the SBI wanted to have an independent examination performed on the bullets.[19]

Locke similarly mispresented what plaintiff had said about the photographs when Locke spoke to her purported sources. In their interview, plaintiff repeatedly stressed to Locke that firearms examination requires physical examination under a microscope by a qualified examiner and cautioned against attempting to draw any conclusions from a photograph, particularly one taken by someone who, like Whitehurst, is not a firearms expert. On the subject of the use of tweezers, plaintiff pointed to this as one example of Whitehurst's noticeable inexperience in firearms examination, stating that this could have "potentially, potentially" impaired the bullets for future examination. Plaintiff explained, "I'm just saying that a firearms person would never use tweezers on any type[,] I don't even care if you['re] only holding them up for a picture. You don't do that. If I had done that, I would have been chased out of here." Plaintiff further stressed that she and the SBI were eager for the bullets to be reexamined, stating, "[t]his is what we've been asking them to do" and that "[o]f course, we would like for it to be sent to any other qualified firearms examiner. We have been asking for it. . . . I am – I have – I'm wanting someone to look at them. That's fine with me." Yet, in an email to Hendrikse later that day, Locke stated that plaintiff was "sure that the tweezers as we discussed last week had ruined the evidence and that no one would be able to make any good conclusions now."

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18. This email evidently was not provided to plaintiff by defendants along with the other emails produced during discovery and was instead provided to plaintiff by Hendrikse.

19. Locke asserted that the false accusations in her email originated with Sutton, stating that "Sutton has a very strong personality, and he had some very strong thoughts, and I think that he had made the issues sound bigger than it was to me, and I erroneously repeated it," and that "Sutton was very frustrated. He felt that Mr. Everett's office was standing in the way of these bullets being tested. I now know and think he was wrong[.]"

While misrepresenting these portions of the interview to her sources, plaintiff's evidence also shows that Locke ignored other critical aspects of her interview with plaintiff. In the interview, plaintiff not only reiterated what Locke's experts had stated—that no conclusions can, or should, be drawn from mere photographs—but also repeatedly stressed that due to conspicuous issues with the photographs, including the poor lighting and improper positioning of the bullets, the class characteristics she and Morin had observed *are not visible in the Whitehurst Photographs*, particularly in the Comparison Photograph. As previously noted, plaintiff explained at length how firearms examiners "never compare anything base to base," that "[e]veryone who is a Firearms examiner 101 knows not to do that," and that if "you try to line them up[,] [t]hey're going to be off. Right? They're going to look like they're not in alignment." In this respect, plaintiff also presented evidence that, prior to publication, a photographer for defendants' "Agents' Secrets" series tried to raise this same concern in a team meeting by drawing lines diagonally across a piece of paper, tearing the paper in two down the middle of the lines, and then turning one of the pieces around to show that the lines no longer lined up with each other. Additionally, Locke testified that as part of her research she "read every operating procedure manual for every section of the state crime laboratory as far back as they had retained those materials" and was aware that the bullets were improperly positioned in the comparison photograph. Thus, plaintiff's evidence tends to show that in spite of Locke's awareness of the myriad problems with the Whitehurst Photographs, particularly the "base-to-base" Comparison Photograph, and the fact that no one, most especially plaintiff, was asserting that the relevant class characteristics were visible in the Comparison Photograph, defendants featured the Comparison Photograph prominently on the front page of their newspaper along with the caption "WHAT CAN YOU SEE?" inviting the average reader to look for something that could not be seen and to do what independent firearms experts would not—form an opinion based merely on a photograph.

Plaintiff's evidence also demonstrated that, despite Locke's sources' repeated statements that any substantive analysis of the bullets in question would require physical examination under a microscope, Locke never sought to interview or otherwise contact Neal Morin. Morin, plaintiff's supervisor at that time, was the only other qualified firearms examiner who had examined the bullets under a microscope, and he had agreed with plaintiff's conclusions regarding the matching class characteristics and had signed off on her work. Plaintiff presented evidence

that Locke was aware of Morin and his role in reviewing plaintiff's analysis. In Locke's interview with plaintiff, plaintiff explained:

> MS. DESMOND: . . . All of my work is checked by a senior examiner, someone that is more senior to me. And so that person takes it back through all the evidence, looks at it and has to come to the same conclusion I did before they sign up – off on it."
>
> MS. LOCKE: And that would be Neal Morin.
>
> MS. DESMOND: Yes, it was.

Locke even wrote in her research notes "Check on Neal Morin, approved peer review of Desmond," yet never attempted to contact Morin.

When asked why she had interviewed plaintiff but not Morin, Locke first testified that she did not interview Morin because "the chain of custody log indicated that Mr. Morin had access to specimen for ten minutes," and because "one of the primary concerns was how [plaintiff's] testimony differed from her laboratory report," and Morin did not testify. Locke acknowledged that plaintiff's "determinations on the class characteristics w[ere] the central question" but asserted that she did not understand how interviewing Morin would "have changed or made this story any different for Ms. Desmond." In her testimony on the following day, when asked why she had not sought to interview Morin when she was already at the SBI crime lab interviewing plaintiff, Locke suggested an additional reason why she had not interviewed Morin:

> "[t]he protocol for talking to anybody employed with the SBI is to reach out to the public information officer. . . . A public information officer was not present in that interview, and so I would not have stormed over to the firearms unit at that moment to try to interview anybody else without looping in the public information officer."

Yet, plaintiff had testified that when she contacted Locke to discuss her concerns with the Whitehurst Photographs, a public information officer's presence was a prerequisite to the interview:

> A. . . . I went to the director and I told him that I wanted to talk to her and at least give the facts of the case that I testified on, only to give the facts of a case that I testified on and to explain, you know, these pictures, if this is what she was looking at, and he had agreed and he had said that the only way he would let me do that is

> if he would have – he would have the public information officer come in with me to make sure, you know, sit in the room – the interview room, and I said that would be fine.
>
> And so then I called Mandy Locke, and I set up an interview to talk about the Pitt County case.
>
> Q. And did you in fact have an interview with Mandy Locke?
>
> A. I did.
>
> . . . .
>
> Q. And it was you and Mandy Locke and who else was there?
>
> A. Her name was Jennifer Canada, and she was the public information officer with the Department of Justice.

Morin testified that he was at the lab during Locke's interview with plaintiff, he anticipated being asked questions by Locke, and he was surprised that he was not.

Also relevant to the question of defendants' regard for the truth or falsity of their publications is plaintiff's evidence concerning various mischaracterizations and omissions in the articles. Consistent with the theme of the "Agents' Secrets" series—to show "how practices by the [SBI] have led to wrongful convictions"—the 14 August article asserted that Pitt County prosecutors needed plaintiff's bullet analysis to "fix a potentially crippling weakness in their case" and that plaintiff's "analysis would make or break the case against Jemaul Green." Yet, despite Locke's insistence in her trial testimony that "we try to tell our readers as much as we know and provide to them as much information as we can," the article omits key information about the case against Green, perhaps most pertinently the fact that thirteen eyewitnesses testified at the trial and none of them observed anyone other than Green with a firearm. Further, Locke acknowledged she was aware of credibility issues with Green and his claim of self-defense which were omitted from the 14 August and 31 December articles. According to Locke, "I think any intelligent reader understanding that a man opened fire in a populated street who had been convicted of murder and sent to prison might have some credibility issues. I didn't need to say that."

The 14 August Article mischaracterizes not only the strength of the State's case, but also the impact of plaintiff's testimony upon the case. For example, the article asserts that when plaintiff examined the two

bullets in the Comparison Photograph she "scribbled down the measurements of the lands and grooves"[20] and that "her report eliminated doubt about another shooter." The article mentions neither the four additional bullets recovered from the scene nor the fact that plaintiff, as reflected both in her typed report and her trial testimony, concluded that no determinations could be made as to these four bullets. The 14 August Article also discusses the fact that Green wanted to introduce evidence tending to show that, not long after the shooting, the victim's brother was seen at Vonzeil Adams' house threatening Adams with a gun. According to the article, this "evidence that [the victim's brother] could have been a second shooter" was excluded because "Desmond had convinced the judge: Nothing but bullets and casings from a Hi-Point 9mm Model C had been recovered there." This is false, as the judge's primary ruling was that the proffered evidence was inadmissible hearsay and, as previously stated, plaintiff made no determinations as to four additional bullets recovered from the scene.

The 14 August Article also discusses plaintiff's use of the "absolute certainty" language in her trial testimony, noting that plaintiff at one point "concluded with 'absolute certainty' that they were fired from the same kind of gun." The article states that plaintiff "said this month that she meant to say she was absolutely certain that the bullets were consistent with a Hi-Point 9 mm." What the article does not state and what Locke, having read the trial transcripts and specifically discussed this issue with plaintiff, was aware of is that plaintiff's "absolute certainty" comment was made during *voir dire* outside of the presence of the jury, that it occurred after plaintiff had already testified regarding her analysis of the cartridge casings and bullet fragments, and that the *voir dire* examination concerned the prosecution's proposed demonstration of how a semiautomatic handgun's ejection port works.[21] Thus, it is unlikely that any purported issue with plaintiff's "absolute certainty" language (as opposed to "scientific certainty" or "consistent with") had

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20. In her trial testimony, Locke denied that the word "scribbled" conveyed any negative connotation, stating, "[n]o, I do not agree with that. My doctor scribbles." Locke also asserted that the 14 August Article's discussion of plaintiff's prior career in ballet was intended to be complimentary and denied that it was in any way derogatory, explaining that "it was really interesting that she had this background." The discussion is included in the article as part of a section alleging that "[a]t the SBI lab, training is often minimal" and claiming that plaintiff "was a novice examiner" who "came to the field through a peculiar route." By contrast, in discussing with Hendrikse his prior work as a model, Locke told him she would not have reported it because it would not have been relevant.

21. Thus, the *voir dire* examination was not conducted in order for the trial court to rule on the admissibility of plaintiff's expert testimony.

any effect on the trial or the jury's verdict, contrary to the suggestion of the 14 August Article. This information is similarly omitted in the 31 December Article, despite the fact that this article focuses far more heavily on the purported "absolute certainty" issue rather than on plaintiff's substantive analysis of the bullets.[22] Additionally, the subheading of the 31 December Article erroneously refers to plaintiff's "certainty that bullets came from *one gun*," rather than one type of gun.

Finally, plaintiff's evidence demonstrates that defendants were aware not only of the necessity of an independent examination of the bullets in order for any determinations to be made concerning plaintiff's analysis, but also of the fact that the bullets were indeed going to be independently examined—but not before the planned publication date of defendants' "Agents' Secrets" series, in which the 14 August Article was set to be the final article in the four-part series. Defendants did not wait for the results of the independent examination, which ultimately confirmed plaintiff's analysis. Instead, shortly before publication, defendants decided to move the "Agents' Secrets" series up a week in order to be "more timely"—that is, to piggyback on the breaking news that the Attorney General had replaced the SBI director.

Overall, following "an independent examination of the whole record," *Bose Corp.*, 466 U.S. at 499, we conclude that the evidence is sufficient to support a finding by clear and convincing evidence that Locke and the N&O published the six statements with serious doubts as to the truth of the statements or a high degree of awareness of probable falsity, *Masson*, 501 U.S. at 510. If the evidence reflected, as defendants urge, a simple "misunderstanding" or a "he-said/she-said dispute" between a reporter and her sources, then it may very well have been insufficient to meet the *New York Times* standard. Here, however, the evidence concerning Locke's purported expert sources, including, *inter alia*, the numerous confirmations that no conclusions should be drawn from photographs, not only tends to support those four individuals' testimony that they did not make the six statements attributed to them, but also tends to show, particularly in light of the expert subject matter at issue, that those individuals would never have made such statements—that, indeed, it would have made little to no sense for them

22. The evidence, including the 31 December Article and the trial testimony, tends to show an effort by defendants to deflect from what was reported in the 14 August Article about plaintiff's substantive analysis and to portray their story all along as one largely concerned with plaintiff's "testimonial overstatement" in using the "absolute certainty" language.

to have made such statements. Meanwhile, the evidence of numerous statements made by Locke in her communications with her purported expert sources and in her deposition and trial testimony would support a finding by the jury of a lack of credibility on her part with respect to the statements attributed to those purported sources and, more generally, to decisions made at each step of the publication process leading up to the 14 August Article. This evidence concerning Locke, including the myriad ways in which she was aware, and repeatedly made aware, of the false aspects of the six statements and various other portions of the 14 August and 31 December Articles, yet evidently disregarded this information, is highly pertinent to the question of Locke's state of mind with respect to the truth or falsity of the six statements at the time of publication. Moreover, the contrasting evidence between Locke and the purported expert sources must be also considered in the context of the additional evidence concerning the internal communications of defendants' employees, the significant mischaracterizations and omissions in the 14 August and 31 December Articles tending to portray a narrative of events divorced from reality, the attempts by defendants in their 31 December Article and in their testimony and representations in the trial court to shift the focus away from the Whitehurst Photographs and plaintiff's substantive analysis in the *Green* case to the purported issue of plaintiff's "testimonial overstatement," and the fact that defendants did not wait for the independent examination of the ballistics evidence but rather advanced their publication date in order to capitalize on the latest headlines—all of which tends to show, as the Court of Appeals below described it, "that the primary objective of defendants was sensationalism rather than truth." *Desmond II*, 263 N.C. App. at 54, 823 S.E.2d at 431. When viewed as a whole, the evidence is sufficient for the jury to find by clear and convincing evidence that defendants published the statements with actual malice—that is, "knowledge of falsity or a reckless disregard for the truth." *Harte-Hanks*, 491 U.S. at 688.

Certainly, the jury could have found that false and defamatory statements published in the 14 August and 31 December Articles were the result of a significant pattern of negligence on the part of defendants that fell short of actual malice.[23] Where, however, the record would support

23. Defendant argues that the law protects a reporter's "rational interpretation" of an ambiguous source, even if the interpretation is wrong. *Time, Inc. v. Pap*e, 401 U.S. 279, 289–90 (1971). While the jury, which was instructed on rational interpretation, could have found that defendants' statements were within the realm of rational interpretation, plaintiff presented sufficient evidence to support the jury's finding that the reported statements transcended any rational interpretation and resulted instead from a deliberate falsification or a reckless disregard for the truth. Additionally, defendants note that a plaintiff must

either finding, the question must be submitted to the jury. *See Time, Inc. v. Hill*, 385 U.S. 374, 394 n.11 (1967) (stating that where a result of either negligence or actual malice "finds reasonable support in the record it is for the jury, not for this Court, to determine whether there was knowing or reckless falsehood" (citing *New York Times*, 376 U.S. at 284–285)).

We recognize the significant societal interests implicated by the issue here and discussed at length in amici curiae briefs filed by several organizations on behalf of defendants. The First Amendment "demands that the law of libel carve out an area of breathing space so that protected speech is not discouraged," *Harte-Hanks*, 491 U.S. at 686 (cleaned up), and this breathing space is particularly vital in the context of the discussion of issues affecting our criminal justice system and our system of government. The Supreme Court, however, "ha[s] not gone so far . . . as to accord the press absolute immunity in its coverage of public figures" and public officials. *Id.* at 688; *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation."). An individual still maintains a "right to the protection of his own good name." *Gertz*, 418 U.S. at 341. Moreover, while the clear and convincing evidentiary standard is more stringent than the preponderance of the evidence standard, it is not an insurmountable burden. *See, e.g.*, *California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 93 (1981) (per curiam) (footnote omitted) ("Three standards of proof are generally recognized, ranging from the 'preponderance of the evidence' standard employed in most civil cases, to the 'clear and convincing' standard reserved to protect particularly important interests in a limited number of civil cases, to the requirement that guilt be proved 'beyond a reasonable doubt' in a criminal prosecution." (citing *Addington v. Texas*, 441 U.S. 418, 423–44 (1979))); *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 721, 693 S.E.2d 640, 643 (2009) (stating that the clear and convincing standard "is more exacting than the 'preponderance of the evidence' standard generally applied in civil cases, but less than the 'beyond a reasonable doubt' standard applied in criminal matters" (citing *Williams v. Blue Ridge Bldg. & Loan Ass'n*, 207 N.C. 362, 363–64, 177 S.E. 176, 177 (1934))). Where

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establish that a challenged statement is not "substantially true." The issue of the sufficiency of the evidence regarding the issue of falsity is not properly before the Court; in any event, plaintiff presented ample evidence that the six statements were not substantially true.

plaintiff presented sufficient evidence to meet this evidentiary burden, the issue was properly submitted for a jury determination.

As such, the trial court did not err in denying defendants' motions for directed verdict and JNOV. Accordingly, we affirm the decision of the Court of Appeals with respect to this issue.

II. Jury Instructions

**[2]** Defendants next argue that the trial court erred in its jury instructions regarding the issue of material falsity by instructing the jury as follows:

> The attribution of statements, opinions or beliefs to a person or persons may constitute libel if the attribution is materially false, or put another way, if it is not substantially true. The question is whether the statements, opinions or beliefs of the individuals that were reported as being held or expressed by the individuals were actually expressed by those individuals.

According to defendants, when a publication attributes a statement to a speaker, the defamatory "sting" is not in the attribution to the source but instead is in "the underlying statement of fact attributed to the speaker." Defendants contend that the trial court instructed the jury to consider only the material falsity of the attribution, standing alone, and never instructed the jury to consider the material falsity of the underlying statement of fact attributed to the speaker. Defendants argue that the trial court should have adopted their proposed instruction, stating:

> If you find that the underlying facts reported by a challenged Statement are substantially true, separate and apart from the attribution to a cited or quoted source or sources, you should find that Plaintiff has not carried her burden of proving material falsity.

We disagree.

"It is a well-established principle in this jurisdiction that in reviewing jury instructions for error, they must be considered and reviewed in their entirety." *Murrow v. Daniels*, 321 N.C. 494, 497, 364 S.E.2d 392, 395 (1988) (citing *Gregory v. Lynch*, 271 N.C. 198, 203, 155 S.E.2d 488, 492 (1967)). Further, "[w]here the trial court adequately instructs the jury as to the law on every material aspect of the case arising from the evidence and applies the law fairly to variant factual situations presented by the evidence, the charge is sufficient. *Id.* at 497, 364 S.E.2d at 395 (citing *King v. Powell*, 252 N.C. 506, 114 S.E.2d 265 (1960)).

With respect to the issue of falsity, "[t]he common law of libel" "overlooks minor inaccuracies and focuses on *substantial truth*." *Masson*, 501 U.S. at 516 (emphasis added). As such, "[m]inor inaccuracies do not amount to falsity so long as 'the substance, the gist, *the sting*, of the libelous charge be justified.' " *Id.* at 517 (emphasis added) (citation omitted). Thus, a plaintiff must establish that "the sting," the aspect causing injury to the plaintiff's reputation, is materially false. Stated differently, "the issue of falsity relates to the *defamatory* facts implied by a statement." *Milkovich*, 497 U.S. at 20 n.7. Here, however, what constitutes the actionable defamatory facts has been difficult at times to parse due to the unique factual posture, which involves statements that attribute other statements to third parties as experts opining about plaintiff's work as an expert in the same specialized field. As the Court of Appeals stated in *Desmond I*, "[i]n this case, which involves mostly Locke's reports of opinions of experts regarding Desmond's work, fact and opinion are difficult to separate." *Desmond I*, 241 N.C. App. at 21, 772 S.E.2d at 137.

In that appeal, the court rejected defendants' argument that " '[m]any of the statements identified in [plaintiff's] Complaint are simply expressions of opinion' by various experts whom Locke interviewed, not assertions of fact, and thus not actionable." *Desmond I*, 241 N.C. App. at 20, 772 S.E.2d at 136–37. The court explained, as noted above, that "[s]ome of the allegedly defamatory statements, though stated as expressions of opinion from experts, may be factually false because Locke reported that the experts expressed opinions regarding Desmond's work that they actually did not express." *Id.* at 21, 772 S.E.2d at 137. Thus, in these instances, an expert's opinion that by itself would not have been actionable is actionable here because defendants published *an assertion of fact* that the expert made a *statement of opinion* that they did not state. For example, if Bill Tobin had published an article on his personal blog in which he opined that the Comparison Photograph is "a big red flag" and "*raises the question* of whether [plaintiff] did an analysis at all," plaintiff would have been hard pressed to establish that his indeterminate statement, though critical, was sufficiently an assertion of fact to be actionable as defamation against Tobin himself. Where, however, defendants publish a statement claiming that Tobin expressed that same statement of opinion, this statement attributing an opinion critical of plaintiff to an expert in her field is an actionable assertion of fact. In such an instance, "the sting" is in the attribution alone—the false *assertion of fact* that an expert in plaintiff's field holds an *opinion* critical of plaintiff. Thus, the trial court correctly instructed the jury that an "attribution . . . *may constitute libel* if the attribution is *materially false*." (Emphases added.)

On the other hand, other statements published by defendants attribute to experts statements that contain an assertion of fact in their own right. For example, statement six provides that "[b]allistics experts who viewed the photographs . . . said the bullets could not have been fired from the same firearm." This statement asserts as fact not only that experts made statements concerning plaintiff, but also, in turn, that those experts' statements are assertions of fact that plaintiff's analysis was conclusively wrong. The sting in such a statement is not only in the attribution,[24] but also in the underlying assertion of fact.[25] As such, in order to establish the falsity of such a statement plaintiff was required to show that both the attribution and the underlying assertion were materially false.

In this respect, we think the trial court's instruction on material falsity provided a correct statement of the law:

> Plaintiff must prove by the greater weight of the evidence that the statement was materially false. If a statement is substantially true it is not materially false. It is not required that the statement was literally true in every respect. Slight inaccuracies of expression are immaterial provided that the statement was substantially true. This means that the gist or sting of the statement must be true even if minor details are not. The gist of a statement is the main point or heart of the matter in question. *The sting of a statement is the hurtful effect or the element of the statement that wounds, pains or irritates. The gist or sting of a statement is true if it produces the same effect*

24. We do not agree with defendants' assertion that "when a publication attributes a statement to a speaker, it is not the truthfulness of the attribution that matters." Part of the sting in the allegedly defamatory statements here necessarily lies in the fact that they are attributed to an expert in plaintiff's specialized field. As the Court of Appeals stated, "[w]ithout attribution to experts in the relevant field, the statements have 'a different effect on the mind of the reader.' " *Desmond II*, 263 N.C. App. at 63, 823 S.E.2d at 436 (citation omitted); *see also id.* at 63, 823 S.E.2d at 436 ("The statements are close to nonsense if they are attributed to people with no expertise: '[Several people at Starbucks] who have studied the photographs question whether Desmond knows anything about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted.' ").

25. As a hypothetical, had Bunch's report, rather than confirming plaintiff's analysis, revealed that the bullets could not have been fired from the same gun, we do not believe that plaintiff would have been able to establish material falsity of this statement in such a scenario. We recognize that in such a scenario a statement attributing only an opinion, rather than an assertion of fact, would necessarily be affected as well; however, we believe that the effect on such a statement would properly be considered not with the issue of falsity, but rather with the issue of damages, *i.e.* the extent to which plaintiff suffered, for example, any harm to her reputation or loss of standing in the community.

> *on the mind of the recipient which the precise truth would have produced.*

(Emphasis added.) On the issue of material falsity the trial court instructed the jury to evaluate whether "the sting" of each statement was substantially true. We do not view the fact that the trial court elsewhere instructed the jury that an attribution may constitute libel, which as discussed above is a correct statement of the law, as an invitation to the jury to disregard its earlier directive to evaluate "the heart of the matter in question" and determine whether "the sting" of each statement was substantially true. Absent such an attribution instruction, the jury may have questioned whether it could properly find an attribution of a mere opinion to be a defamatory statement. By contrast, defendants' proposed instruction could potentially have misled the jury by inviting the jury to attempt to evaluate "underlying facts"—which the instruction does not define or explain in relation to an assertion of fact actionable as defamation—when there was only an underlying opinion.

Viewing the jury instructions in their entirety, we conclude that the trial court properly instructed the jury regarding the issue of falsity and that there was no error in the instructions.

III. Punitive Damages Jury Instructions

**[3]** Finally, defendants argue the trial court erred in instructing the jury on punitive damages because the instructions did not require the jury to find the existence of one of the statutorily required aggravating factors. We agree.

N.C.G.S. § 1D-15 provides:

> (a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
>
> (1) Fraud.
> (2) Malice.
> (3) Willful or wanton conduct.
>
> (b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.

N.C.G.S. § 1D-15(a)-(b) (2019). "Malice" and "willful or wanton conduct" are defined under this chapter as follows:

> (5) "Malice" means a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant.
>
> . . . .
>
> (7) "Willful or wanton conduct" means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. "Willful or wanton conduct" means more than gross negligence.

N.C.G.S. § 1D-5.

Here, over defendants' objection, the trial court did not instruct the jury that it was required to find one of the statutory aggravating factors under N.C.G.S. § 1D-15 before awarding punitive damages. The trial court, in reliance on the pattern jury instructions, reasoned that a finding of actual malice in the liability stage automatically allowed for an award of punitive damages and obviated any need for the jury to find one of the statutory aggravating factors. The Court of Appeals affirmed, stating that "the trial court instructed in accord with the pattern jury instructions," which are "the preferred method of jury instruction[.]" *Desmond II*, 263 N.C. App. at 66, 823 S.E.2d at 438 (citing *In re Will of Leonard*, 71 N.C. App. 714, 717, 323 S.E.2d 377, 379 (1984)).

We conclude that the pattern jury instructions utilized in this case do not accurately reflect the law regarding punitive damages and that the trial court erred in failing to instruct the jury that it was required to find one of the statutory aggravating factors before awarding punitive damages. The preface to the relevant pattern jury instructions provide:

> Under current U.S. Supreme Court jurisprudence, however, in the case of a public figure or public official, the element of publication with actual malice must be proven, not only to establish liability, but also to recover presumed and punitive damages. *Thus, in a defamation case actionable per se, once a public figure plaintiff proves liability under the actual malice standard, that plaintiff will be able to seek presumed and punitive damages without proving an additional damages fault standard[.]*

N.C.P.I.—Civil 806.40 (2017) (emphasis added) (footnote omitted). While the first quoted sentence is correct, the following sentence reflects a misapprehension of the law in this context.

As noted above, the Supreme Court has held that a public official plaintiff seeking damages for defamation relating to his or her official conduct must prove actual malice. *New York Times*, 376 U.S. at 279–80. Additionally, the Supreme Court has held that states may not permit an award of punitive damages in a defamation case absent a showing of actual malice, even where the plaintiff is a private figure. *Gertz*, 418 U.S. at 349. The Supreme Court, however, has not held that a showing of actual malice automatically obviates any state law prerequisites to an award of punitive damages. Thus, plaintiff's successful showing of actual malice in the liability stage *permits* an award of punitive damages under Supreme Court precedent, but it does not eliminate the necessity of a jury finding one of the statutory aggravating factors under N.C.G.S. § 1D-15(a), which does not include actual malice.

In that regard, based on the plain language of the statutory definitions of "malice" and "willful or wanton conduct," we do not view either of these aggravating factors as synonymous with actual malice. As previously noted, unlike "malice" as defined by N.C.G.S. § 1D-5(5), "[a]ctual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." *Masson*, 501 U.S. at 510–11 (citing *Greenbelt Coop. Publ'g Assn., Inc. v. Bresler*, 398 U.S. 6 (1970)). Moreover, while actual malice refers solely to a defendant's subjective concern for the truth or falsity of a publication (*i.e.*, knowledge of falsity or reckless disregard for the truth), "willful or wanton conduct" focuses on a defendant's "conscious and intentional disregard of and indifference to *the rights and safety of others*." N.C.G.S. § 1D-5(7) (emphasis added). On top of that, "willful or wanton conduct" requires an additional finding unnecessary for a showing of actual malice—specifically, that "the defendant knows or should know" that the conduct "is reasonably likely to result in injury, damage, or other harm." *Id.*

Certainly, much of the evidence presented in support of plaintiff's showing of actual malice would also be relevant to the jury's determination regarding the existence of the statutory aggravating factors. However, the jury must in fact make such a determination upon proper instructions from the trial court before an award of punitive damages can be awarded. Accordingly, the trial court erred in failing to instruct the jury that it was required to find one of the statutory aggravating

factors before awarding punitive damages. As such, we reverse the Court of Appeals on this issue.

Conclusion

In summary, we conclude that plaintiff presented sufficient evidence to support a finding of actual malice by clear and convincing evidence and that the trial court did not err in denying defendants' motions for directed verdict and JNOV. Further, the trial court did not err in instructing the jury on the issue of falsity. We affirm the decision of the Court of Appeals with respect to these issues. However, the trial court erred in failing to instruct the jury that it was required to find one of the statutory aggravating factors before awarding punitive damages pursuant to N.C.G.S. § 1D-15(a). As such, we reverse the decision of the Court of Appeals on this issue and remand to that court for further remand to the trial court for a new trial on punitive damages only.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

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GLOBAL TEXTILE ALLIANCE, INC., PLAINTIFF
v.
TDI WORLDWIDE, LLC, DOLVEN ENTERPRISES, INC., TIMOTHY DOLAN, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER, SHAREHOLDER AND DIRECTOR OF DOLVEN ENTERPRISES, INC. AND AN OFFICER AND OWNER OF TDI WORLDWIDE, LLC; JAMES DOLAN, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER, SHAREHOLDER AND DIRECTOR OF DOLVEN ENTERPRISES, INC., STEVEN GRAVEN, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER, SHAREHOLDER AND DIRECTOR OF DOLVEN ENTERPRISES, INC., RYAN GRAVEN, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER, SHAREHOLDER AND DIRECTOR OF DOLVEN ENTERPRISES, INC., GARRETT GRAVEN, INDIVIDUALLY, GFY INDUSTRIES LIMITED, GFY, LIMITADA DE CAPITAL VARIABLE, GFY COOPERATIVE, U.A., 上海冠沣源贸易有限公司 A/K/A GFY SH, AND FRESH INDUSTRIES, LTD., DEFENDANTS

No. 279A19

Filed 14 August 2020

**1. Discovery—attorney-client privilege—communications by agent of sole shareholder—not agent of corporation—not protected**

The Business Court did not abuse its discretion by compelling the production of communications involving the agent of a corporation's sole shareholder because that person was not also the agent of the corporation—a properly formed corporation is a distinct entity and not the alter ego of shareholders, even one who owns all

of the corporation's stock. The communications at issue were not protected by the attorney-client privilege, nor would they be under specialized applications of the privilege—the functional-equivalent test or the *Kovel* doctrine—even if those applications were recognized by North Carolina law.

**2. Discovery—work-product doctrine—corporate litigation—communications with agent of shareholder**

The Business Court did not abuse its discretion by determining that communications involving an agent of a corporation's sole shareholder were not protected from discovery under the work-product doctrine where the communications were not prepared in anticipation of litigation—the agent had no role at the corporation, was not retained by the corporation to work on the current litigation, and did not advise the corporation about the litigation in any capacity.

**3. Discovery—compelling production—in-camera review—limited in scope—abuse of discretion analysis**

The Business Court did not abuse its discretion by limiting its in camera review of contested communications to a "reasonable sampling" where the corporation seeking protection from a discovery request failed to promptly provide all documents necessary for an exhaustive review and welcomed the accommodation of a limited review.

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from the order compelling discovery entered on 26 February 2019 by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases, in Superior Court, Guilford County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 16 June 2020.

*Hagan Barrett PLLC, by J. Alexander S. Barrett, Charles T. Hagan III, and Kurt. A. Seeber, and Akin Gump Strauss Hauer & Feld LLP, by Stanley E. Woodward, Jr., for plaintiff-appellant.*

*Ellis & Winters LLP, by Jon Berkelhammer, Steven A. Scoggan, and Scottie Forbes Lee, for defendant-appellee Steven Graven, K&L Gates LLP, by A. Lee Hogewood III, John R. Gardner, and Matthew T. Houston, for defendant-appellees Dolven Enterprises, Inc., Ryan Graven, and GFY Cooperative, U.A., James McElroy & Diehl, P.A., by Fred B. Monroe and Jennifer M. Houti, for defendant-appellees*

*TDI Worldwide, LLC and Timothy Dolan, Morningstar Law Group, by Shannon R. Joseph and Jeffrey L. Roether, for defendant-appellee Garrett Graven, and Brooks, Pierce, McLendon, Humphrey & Leonard LLP, by Eric M. David and Shepard D. O'Connell, for defendant-appellee James Dolan.*

NEWBY, Justice.

This case is about whether a one-hundred percent shareholder of a corporation is that corporation's alter ego for the purposes of privilege against discovery. Specifically, we must decide whether communications with someone who is an agent of the sole shareholder, but not of the corporation, fall under the corporation's attorney-client privilege or the work-product doctrine. They do not. Once a corporate form of ownership is properly established, the corporation is an entity distinct from the shareholder, even a shareholder owning one-hundred percent of the stock. An agent of the shareholder is not automatically an agent of the corporation. We also must decide whether the Business Court should have conducted an exhaustive in camera review of all relevant communications, even though plaintiff invited the court to conduct a more limited review of a sample of documents. The Business Court's limited review in this case was appropriate. Because the Business Court did not abuse its discretion either by ordering production of the relevant communications or by conducting a limited review of those communications, that court's decision is affirmed.

Global Textile Alliance, Inc. (GTA), the sole plaintiff, is a North Carolina corporation with its principal place of business in Reidsville, North Carolina. Luc Tack is GTA's only shareholder. Remy Tack, Luc Tack's son, is GTA's Chief Executive Officer. As a corporation, GTA is governed by a board of directors. GTA filed this lawsuit in the Business Court against defendants, alleging that defendants engaged in several improper acts during the formation and operation of Dolven Enterprises, Inc.

During discovery, defendants asked GTA to identify Stefaan Haspeslagh as a custodian required to provide electronically stored information (ESI). Haspeslagh is Luc Tack's longtime friend, financial advisor, and advisor to some of Luc Tack's businesses. GTA did not comply with defendants' request, asserting that Haspeslagh is not an employee, officer, or director of GTA. Both Luc Tack and Remy Tack testified that Haspeslagh has no role with GTA and that Haspeslagh has not advised GTA about this lawsuit.

On 24 July 2018 the Business Court heard oral argument on the custodial issue. GTA's counsel argued that Haspeslagh was "a third-party consultant not retained by GTA, [but] retained by the Tacks." Based on this assertion, the Business Court determined that Haspeslagh was not a custodian of GTA documents. Thus, it did not require GTA to name Haspeslagh as a custodian required to provide defendants with ESI during discovery.

Months later, GTA produced a privilege log that identified categories of documents that GTA had withheld from defendants during discovery. One category of documents was described as "[c]onfidential correspondence between GTA and/or its outside counsel and Stefaan Haspeslagh conveying and/or summarizing legal advice regarding the matters giving rise to the instant litigation." GTA claimed that these communications were protected on the grounds of the attorney-client privilege and the work-product doctrine. GTA's attorneys instructed witnesses not to answer questions about their discussions with Haspeslagh.

Defendant Steven Graven filed a motion with the Business Court to compel GTA to produce the communications involving Haspeslagh and to instruct the witnesses to answer questions about their discussions with Haspeslagh. Defendant argued that GTA waived the attorney-client privilege by including Haspeslagh on communications with GTA's counsel.

GTA responded that its attorney-client privilege extends to communications involving Haspeslagh. It argued that Haspeslagh is GTA's agent because Luc Tack is GTA's sole shareholder and because Haspeslagh works for some of Luc Tack's businesses. GTA also asserted privilege on two other special bases: (1) Haspeslagh is the functional equivalent of Luc Tack's employee, and (2) communications with Haspeslagh are privileged under the *Kovel* doctrine.

The motion to compel was submitted to a special discovery master. The special master heard oral argument on 5 February 2019, and on 7 February 2019 recommended that the Business Court grant defendant's motion to compel.

The Business Court conducted a de novo review of the special master's recommendation. As part of its review, the Business Court asked GTA to submit all disputed documents for in camera review. GTA responded that it would "gather the correspondence as requested and submit the documents." When GTA failed to produce the documents promptly, the Business Court requested that GTA provide a timeframe for the documents' production. GTA responded that it "hoped to review the [documents] before providing them to the Court" and that it wanted

more time to do so. The Business Court accommodated GTA by instead allowing it to submit "a reasonable sampling of such communications." GTA agreed and submitted twelve emails involving Haspeslagh for in camera review. After this review, GTA did not ask the Business Court to review additional documents.

On 26 February 2019 the Business Court issued an order granting the motion to compel. GTA filed a motion for reconsideration with the Business Court. In its brief supporting the motion for reconsideration, GTA quoted selected portions from the allegedly privileged materials. After denial of its motion for reconsideration, GTA appealed to this Court.

GTA raises three issues on appeal. First, GTA argues that the Business Court erred by determining that communications involving Haspeslagh are not protected by the attorney-client privilege. Second, it argues that the Business Court erred by determining that communications involving Haspeslagh are not protected under the work-product doctrine. Third, it argues that the Business Court erred by not conducting an exhaustive in camera review of all communications involving Haspeslagh. Because we conclude that the Business Court did not abuse its discretion regarding any of these issues, we affirm.

**[1]** First, the Business Court did not abuse its discretion by determining that communications involving Haspeslagh are not privileged under the attorney-client privilege. This Court reviews a trial court's application of the attorney-client privilege for abuse of discretion. *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 370 N.C. 235, 241, 805 S.E.2d 664, 669 (2017). As the party asserting the attorney-client privilege, GTA has the burden of establishing that privilege. *See State v. McNeill*, 371 N.C. 198, 240, 813 S.E.2d 797, 824 (2018). Communications do not merit the attorney-client privilege when they are made in the presence of a third party. *State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981). GTA has asserted several arguments that communications including Haspeslagh are protected under the attorney-client privilege. In essence, each of GTA's arguments improperly treat Haspeslagh as an agent of GTA who merits protection under the attorney-client privilege for conversations with GTA's attorneys.

GTA argues that Luc Tack and GTA are the same entity for the purpose of establishing the applicability of the attorney-client privilege; in other words, that GTA is Tack's alter ego. This argument ignores clearly established North Carolina corporate law. This Court has long acknowledged that "[a] corporation is an entity distinct from the shareholders which own it." *Bd. of Transp. v. Martin*, 296 N.C. 20, 28, 249 S.E.2d 390,

396 (1978) (citing *Troy Lumber Co. v. Hunt*, 251 N.C. 624, 627, 112 S.E.2d 132, 134 (1960)). Even a corporation owned by a "single individual" is a distinct entity from its shareholder. *Id.* at 28–29, 249 S.E.2d at 396 (citing *Huski-Bilt, Inc. v. Trust Co.*, 271 N.C. 662, 669–670, 157 S.E.2d 352, 358 (1967); *Acceptance Corp. v. Spencer*, 268 N.C. 1, 8–9, 149 S.E.2d 570, 575–576 (1966)). This rule ensures that a shareholder who forms a corporation "to secure its advantages" cannot "disregard the existence of the corporate entity" to avoid its disadvantages. *Martin*, 296 N.C. at 29, 249 S.E.2d at 396. We decline to overturn this long-established precedent, which has informed North Carolina corporate law for over half a century. And GTA has not shown that circumstances exist which would require a court to disregard the corporate form. Accordingly, at best, Haspeslagh is Luc Tack's agent as to some of Tack's personal affairs, but Haspeslagh is not GTA's agent. The corporation could have made Haspeslagh its agent, but it did not do so. Regarding the custodian issue, GTA had specifically argued to the trial court that Haspeslagh had no role with respect to GTA. Because Haspeslagh is not GTA's agent, the Business Court did not abuse its discretion by concluding that GTA does not merit the attorney-client privilege for conversations which included Haspeslagh.

GTA's argument for specialized applications of the attorney-client privilege likewise fails because Haspeslagh is not GTA's agent. GTA claims that communications involving Haspeslagh are entitled to protection under the "functional[-]equivalent" test or, in the alternative, the *Kovel* doctrine. *See In re Bieter Co.*, 16 F.3d 929, 939 (8th Cir. 1994) (establishing the functional-equivalent test for federal courts in the Eighth Circuit); *United States v. Kovel*, 296 F.2d 918, 921–22 (2d Cir. 1961) (establishing the *Kovel* doctrine for federal courts in the Second Circuit). Neither of these specialized applications has been recognized under North Carolina law. *See, e.g.*, *Technetics Grp. Daytona, Inc. v. N2 Biomedical, LLC*, No. 17 CVS 22738, 2018 WL 5892737, *3–5 (N.C. Bus. Ct. Nov. 8, 2018).

Yet, even if these specialized attorney-client privilege applications were recognized under North Carolina law, the Business Court did not abuse its discretion by determining that these specialized applications do not apply in this case. Under the functional-equivalent test, an individual is the functional equivalent of a company's employee when his communications with counsel "fell within the scope of his duties" for the company. *In re Bieter Co.*, 16 F.3d at 940. This specialized application does not apply because Haspeslagh lacks any sort of agency relationship with GTA and thus cannot have "duties" at GTA.

Under the *Kovel* doctrine, communications involving a third party are privileged when the communications are "necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit." *Kovel*, 296 F.2d at 922. GTA does not argue that Haspeslagh's presence was necessary for GTA to communicate with its attorneys; rather, GTA argues that Haspeslagh's presence was highly useful for *Luc Tack* to communicate with GTA's attorneys. This argument, again, improperly assumes that Tack and GTA are the same entity. Therefore, communications involving Haspeslagh are not protected under either specialized application GTA requests.

Because GTA would not merit privilege even if these specialized applications of the attorney-client privilege were recognized under North Carolina law, this Court need not and does not address whether these specialized applications should be recognized under North Carolina law. Therefore, the Business Court did not abuse its discretion by determining that GTA does not merit a specialized application of the attorney-client privilege under the functional-equivalent test or *Kovel* doctrine.[1]

**[2]** Next, the Business Court did not abuse its discretion by determining that communications involving Haspeslagh are not protected under the work-product doctrine. The work-product doctrine only protects communications when they are "prepared in anticipation of litigation" by a person acting as a company's "consultant . . . or agent." N.C.G.S. § 1A-1, Rule 26(b)(3) (2019); *see also Willis v. Duke Power Co.*, 291 N.C. 19, 35–36, 229 S.E.2d 191, 201 (1976). Here, Haspeslagh has no role at GTA and has not been retained by GTA to work on this lawsuit. Indeed, Luc and Remy Tack both testified that Haspeslagh did not advise GTA about this lawsuit at all. Communications involving Haspeslagh therefore cannot be said to have been "prepared in anticipation of litigation" by Haspeslagh acting as GTA's consultant or agent. The Business Court did not abuse its discretion by determining that GTA does not merit protection under the work-product doctrine for the communications involving Haspeslagh.

**[3]** Finally, the Business Court did not abuse its discretion by not conducting an exhaustive in camera review of all communications involving Haspeslagh for which GTA sought protection. GTA cannot assert any argument for exhaustive in camera review because it failed to promptly provide all documents necessary for a full review, and because

1. Because we hold that no privilege exists protecting the disputed documents from discovery, we need not address defendants' argument that GTA waived its right to assert such a privilege.

it welcomed a more limited one. When the appellant fails to raise an argument at the trial court level, the appellant "may not . . . await the outcome of the [trial court's] decision, and, if it is unfavorable, then attack it on the ground of asserted procedural defects not called to the [trial court's] attention." *Nantz v. Emp't Sec. Comm'n*, 28 N.C. App. 626, 630, 222 S.E.2d 474, 477, *aff'd*, 290 N.C. 473, 484, 226 S.E.2d 340, 347 (1976).

Here GTA challenges the Business Court's decision to adopt a limited in camera review procedure instead of an exhaustive in camera review procedure, apparently because the Business Court's ruling that came after that limited review is unfavorable to GTA. Significantly, the Business Court adopted this limited review to accommodate GTA. The court initially proposed an exhaustive in camera review, but GTA indicated that it needed more time for an internal review before it would comply. The Business Court then permitted GTA to submit a "reasonable sampling" of the documents for a limited in camera review as an accommodation to GTA. GTA agreed to this procedure and submitted twelve emails for review. After the limited review, GTA did not ask the Business Court for a more exhaustive review. Because GTA did not promptly comply with the court's request as necessary for an exhaustive review, and because the Business Court's limited review was an accommodation which GTA welcomed, GTA cannot now claim that the Business Court's accommodation constitutes reversible error.

Even if GTA could properly raise an in camera review argument, the Business Court did not abuse its discretion by conducting a limited in camera review. A trial court acting in its discretion may require an in camera review of documents to assist in ascertaining whether certain materials are entitled to privileged status. *Duke Power Co.*, 291 N.C. at 36, 229 S.E.2d at 201; *see also In re Miller*, 357 N.C. 316, 336–37, 584 S.E.2d 772, 787 (2003). Though this Court has not directly addressed the issue of limited in camera reviews, courts in this state and around the nation have consistently permitted limited in camera reviews as a substitute for exhaustive in camera reviews. *See, e.g.*, *In re Vioxx Prods. Liab. Litig.*, Nos. 06-30378, 06-30379, 2006 WL 1726675, at *3 (5th Cir. May 26, 2006); *Wachovia Bank, National Ass'n v. Clean River Corp.*, 178 N.C. App. 528, 531–32, 631 S.E.2d 879, 882 (2006). In *Clean River Corporation*, our own Court of Appeals rejected an argument claiming that the trial court had abused its discretion because the "[a]ppellants could have, but chose not to, produce the documents for *in camera* inspection." 178 N.C. App. at 532, 631 S.E.2d at 882. We find that court's reasoning persuasive here because GTA asserts that the Business Court erred by accommodating GTA with a limited in camera review instead

of an exhaustive review, which the Business Court originally intended to conduct. Both limited and exhaustive reviews were thus within the Business Court's discretion.

Furthermore, the fundamental issue presented to the Business Court was whether communications which included Haspeslagh were privileged. The Business Court properly considered the twelve emails GTA selected for its consideration as well as the other evidence. It determined, as previously discussed, that no privilege exists. Therefore, the court had no need to review additional emails.

In sum, we hold that the Business Court did not abuse its discretion by determining that GTA's conversations in which Haspeslagh participated do not merit protection under the attorney-client privilege or the work-product doctrine. Nor did the Business Court abuse its discretion by conducting a limited in camera review of the contested communications. The decision of the Business Court is affirmed.

AFFIRMED.

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EVE GYGER, PLAINTIFF
v.
QUINTIN CLEMENT, DEFENDANT

No. 31PA19

Filed 14 August 2020

**Child Custody and Support—affidavits—person residing outside the state—signed under penalty of perjury—notarization not required**

In a child support case, the trial court erred by declining to admit into evidence the affidavit of plaintiff-mother, who resided outside of the United States, on the basis that the affidavit was not notarized and plaintiff was not present to be examined. Pursuant to the special evidentiary rule in N.C.G.S. § 52C-3-315(b) (part of the Uniform Interstate Family Support Act), the affidavit was admissible because plaintiff signed it under penalty of perjury, and notarization was not required.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 823 S.E.2d 400 (N.C. Ct. App. 2018),

upholding a denial of plaintiff's Rule 60(b) motion for relief from an order vacating the registration of her foreign support order entered on 30 November 2017 and 2 January 2018 by Judge Lora C. Cubbage in District Court, Guilford County. Heard in the Supreme Court on 17 June 2020.

*George Daly and Anna Daly for plaintiff-appellant.*

*D. Martin Warf for defendant-appellee.*

NEWBY, Justice.

In this case we decide whether an affidavit under N.C.G.S. § 52C-3-315(b) (2019), which applies to child support cases involving parties residing out of state, must be notarized. Notaries, as defined by our legal system, may not be readily accessible in all parts of the world. In recognition of the hardship that may result from the traditional notary requirement, the General Assembly created special evidentiary rules provided in Chapter 52C, the "Uniform Interstate Family Support Act" (UIFSA) to permit affidavits in some circumstances to be admitted into evidence without notary acknowledgement if they were sworn to under penalty of perjury. Here, for an international party in a child support action, the party's signature on the affidavit under penalty of perjury suffices. No notarization is required under subsection 52C-3-315(b). The decision of the Court of Appeals is reversed.

Between 1997 and 1999, plaintiff-mother Eve Gyger and defendant-father Quintin Clement were involved in a romantic relationship in North Carolina. In 2000, the parties had two children who were born in Geneva, Switzerland. In October 2007, plaintiff initiated an action in the Court of First Instance, Third Chamber, Republic and Canton of Geneva against defendant to establish paternity and child support. Defendant did not appear, and the Swiss court entered judgment against defendant on both counts.

In May 2014, the Swiss Central Authority for International Maintenance Matters applied to register and enforce the Swiss support order with the North Carolina Department of Health and Human Services, Office of Child Support and Enforcement. The Guilford County Clerk of Court registered the Swiss support order for enforcement on 13 June 2016. Defendant was served with a Notice of Registration of Foreign Support Order on 20 June 2016. On 1 July 2016, defendant filed a Request for Hearing to, among other things, vacate the registration of the foreign support order. After a hearing in District Court, Guilford County,

the trial court vacated the registration of the foreign support order under N.C.G.S. §§ 52C-6-607(a)(1) and 52C 7-706(b)(3) and dismissed the action, finding that the court file lacked any evidence that defendant had been provided with proper notice of the Swiss proceedings.

On 26 July 2017 plaintiff filed a Motion for Relief from the trial court's order under N.C.G.S. § 1A-1, Rules 60(b)(1), (2), (4), and (6). The trial court conducted a hearing on the motions, and plaintiff attempted to introduce two affidavits and a transcript. The trial court excluded the first affidavit, an "Affidavit of Eve Gyger" purportedly signed by plaintiff, because it was not notarized and plaintiff was not present to be examined.[1] The trial court ultimately denied plaintiff's motions for relief from judgment, and plaintiff timely appealed.

The Court of Appeals affirmed the trial court's ruling denying plaintiff's Rule 60(b) motions for relief from the order vacating the registration of her foreign support order. *Gyger v. Clement*, 263 N.C. App. 118, 130, 823 S.E.2d 400, 409 (2018). The court based its decision on this Court's ruling in *Alford v. McCormac*, 90 N.C. 151, 152–53 (1884), that an essential element of an affidavit is an oath administered by an officer authorized by law to administer it. *Gyger*, 263 N.C. App. at 125, 823 S.E.2d at 406. The Court of Appeals thereby interpreted N.C.G.S. § 52C-3-315(b) to require notarization for the affidavit to be admissible. *Id.* at 125, 823 S.E.2d at 406. Because plaintiff's purported affidavit was not notarized, the court concluded that it lacked proper certification and could not be used in this case. *Id.*

Plaintiff petitioned this Court for discretionary review, and this Court allowed review as to the issue of whether N.C.G.S. § 52C-3-315(b), which allows affidavits to be admitted into evidence if given under penalty of perjury, requires affidavits to be notarized.

We hold that the trial court erred by not admitting into evidence plaintiff's affidavit under N.C.G.S. § 52C-3-315(b). Generally, affidavits must be notarized. But the General Assembly, recognizing the challenges of interstate and international document production, created an exception for certain Chapter 52C cases.

Chapter 52C of the North Carolina General Statutes, the "Uniform Interstate Family Support Act," applies to situations involving child support with parties residing outside of this State. Within Chapter 52C the General Assembly chose to provide "Special Rules of Evidence and

1. The other affidavit, an "Affidavit of Translation," was excluded as well. It is not at issue before this Court.

Procedure" to accommodate those special circumstances which arise when parties reside outside of North Carolina. N.C.G.S. § 52C-3-315(b). That subsection provides that

> [a]n affidavit, a document substantially complying with federally mandated forms, or a document incorporated by reference in any of them, which would not be excluded under the hearsay rule if given in person, is admissible in evidence if given under penalty of perjury by a party or witness residing outside this State.

N.C.G.S. § 52C-3-315(b).

Defendant argues that this provision continues to require affidavits filed under it to be notarized. As with any question of statutory interpretation, the intent of the legislature controls. *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001). "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).

Subsection 52C-3-315(b)'s plain terms do not require notarization. The provision instead simply requires an "affidavit" to be "given under penalty of perjury." Our case law, however, generally expects affidavits to be notarized if they are to be admissible. *See, e.g.*, *Alford v. McCormac*, 90 N.C. at 152–53.

Nevertheless, the General Assembly has the power to make exceptions to general rules for special circumstances as it sees fit. It did so with the provision relevant to this case. In 2015 the legislature expanded subsection 52C-3-315(b) from applying only to parties in other states to applying to parties outside of this State. *Compare* N.C.G.S. § 52C-3-315(b) (2013) (prior version of the statute applying to parties or witnesses "in another State") *with* N.C.G.S. § 52C-3-315(b) (2019) (current version of the statute applying to parties or witnesses "residing outside this State"). According to the Official Commentary, the purpose of this expansion was to extend its reach to an individual residing anywhere, including individuals residing outside of the United States. N.C.G.S. § 52C-3-315 (2019), Official Comment (2015). More specifically, the Official Commentary states that

> [s]ubsections (b) through (f) provide *special rules of evidence* designed to take into account the *virtually unique nature* of interstate proceedings under this act. These subsections provide exceptions to the otherwise

> guiding principle of UIFSA . . . . Because the out-of-state party, and that party's witnesses, necessarily do not ordinarily appear in person at the hearing, *deviation from the ordinary rules of evidence is justified in order to assure that the tribunal will have available to it the maximum amount of information on which to base its decision*.

*Id.* (emphases added).

When the legislature expanded the statute to apply to international residents, it recognized the difficulties that parties may face when dealing with child support claims in this State. Other nations have legal practices and traditions significantly different from those of our own, and thus in certain locations obtaining notarization of affidavits may be impractical or impossible. Notaries, as understood by the United States legal system, may not be as accessible in other parts of the world, so if notarization were required for affidavits involving international parties, many relevant and helpful materials likely would not be presentable before the court. Subsection 52C-3-315(b), as amended, allows the trial court to consider helpful evidence when it must decide child support issues involving nonresident parties.

Not surprisingly, then, subsection (b) is not the only place where the General Assembly made appropriate accommodations to address the special circumstances arising in child support cases involving out-of-state parties. Subsection 52C-3-315(f), for example, permits depositions of out-of-state parties and witnesses to simply be taken "under penalty of perjury" by telephone or other electronic means.

Though the preceding analysis of legislative intent is sufficient to discern that the subsection at issue does not require notarization, additional evidence bolsters this conclusion. Since the statute substantially mirrors the 2008 Model UIFSA[2], *see* Uniform Interstate Family Support Act § 316 (2008), we may reference the commentary to the Model UIFSA for further evidence of statutory meaning. Though an oath was once required by the model statute, that requirement was removed in 2001. Unif. Interstate Fam. Support Act § 316 (2001). The comment to the 2001 Model UIFSA explains that the change "replaces the necessity of swearing to a document 'under oath' with the simpler requirement that the

2. The provisions of Chapter 52C closely reflect the corresponding Model UIFSA provisions. Section 316(b) of the UIFSA corresponds with the specific provision in question, subsection 52C-3-315(b).

document be provided 'under penalty of perjury' . . . ." *Id.* at § 316 cmt. Thus, the uniform law provision on which subsection 52C-3-315(b) is based does not require an oath if the affidavit is submitted under penalty of perjury.

The legislature has the ability to explicitly require an oath if it deems it necessary, and it has done so in other provisions within Chapter 52C. For example, N.C.G.S. § 52C-3-311 (2019) provides that "an affidavit . . . under oath" is required when a party raises an issue of child endangerment. Thus, the lack of a specific oath requirement in subsection 52C-3-315(b) is significant evidence of legislative intent.

Allowing affidavits into evidence in accordance with a proper interpretation of the statute here is not likely to harm trial court processes. An affidavit serves to convey information from the signing party in a form that attests to the statement's credibility. In 2004, *Black's Law Dictionary* defined an affidavit as "a voluntary declaration of fact written down and sworn to by the declarant before an officer authorized to administer oaths." *Affidavit*, *Black's Law Dictionary* (8th ed. 2004). Eventually, though, the definition was changed to "a voluntary declaration of fact written down and sworn by a declarant, *usu[ally]* before an officer authorized to administer oaths." *Affidavit*, *Black's Law Dictionary* (10th ed. 2014) (emphasis added). This change contemplates that affidavits may be valid and acceptable in some circumstances even when not sworn to in the presence of an authorized officer.

One such circumstance is when an affidavit is submitted under penalty of perjury. Affidavits without notarization may still be substantially credible. When a statement is given under penalty of perjury, it alerts the witness of the duty to tell the truth and the possible punishment that could result if she does not. "The form of the administration of the oath is immaterial, provided that it involves the mind of the witness, the bringing to bear [of the] apprehension of punishment [for untruthful testimony]." *United States v. Looper*, 419 F.2d 1405, 1406 (4th Cir. 1969).

Accordingly, in federal court proceedings too, written declarations made under penalty of perjury are permissible in lieu of a sworn affidavit subscribed to before a notary public. *See* 28 U.S.C § 1746 (stating that an unsworn declaration under penalty of perjury has the same "force and effect" as an affidavit).

Because petitioner submitted her affidavit under penalty of perjury, she was made aware of her duty to tell the truth and of the possible punishment if she failed to do so. The document satisfied the requirements

of subsection 52C-3-315(b). The trial court may accord whatever *weight* to plaintiff's statements it deems appropriate, but plaintiff's affidavit is at the very least admissible.

Asserting to the contrary, defendant and the Court of Appeals relied on cases which did not involve special rules of evidence due to special circumstances. None involved international parties or triggered the statutory provision applicable in this case. *See Alford*, 90 N.C. at 152–53 (holding that an affidavit verifying a complaint is not complete until it is certified by the officer before whom the oath was taken); *Ogburn v. Sterchi Bros. Stores*, 218 N.C. 507, 508, 11 S.E.2d 460, 461 (1940) (holding that a statement followed by an unsigned, unsealed, and unauthenticated statement was not an affidavit when seeking authorization to sue as a pauper); *In re Adoption of Baby Boy*, 233 N.C. App. 493, 500–02, 757 S.E.2d 343, 347–48 (2014) (holding that a critical part of an acknowledgement under oath was that the word "swear" was administered to the witness in the presence of a notary when relinquishing parental rights). Rather, each case involved affidavits used in more standard proceedings that do not implicate a special statutory procedure adopted by the General Assembly to address situations when parties reside out-of-state or out-of-country.

In recognition of the unique nature of these types of proceedings the General Assembly enacted an exception to the usual notarization requirement, and for that reason subsection 52C-3-315(b) does not require that an affidavit given under penalty of perjury be notarized to be admissible. Plaintiff's affidavit is admissible because it was executed under penalty of perjury as allowed by subsection 52C-3-315(b). We therefore reverse the decision of the Court of Appeals and remand the case to that court with instructions to remand to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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| NHUNG HA AND NHIEM TRAN | ) | |
| | ) | |
| v. | ) | From Wake County |
| | ) | |
| NATIONWIDE GENERAL INSURANCE COMPANY | ) | |

312A19

ORDER

The Court of Appeals' judgment in this case is vacated and the matter is remanded. On remand to the Court of Appeals, that court is to determine whether Article 41, Article 36 or other statutes govern in this matter. The Court of Appeals may remand this matter to the trial court for further proceedings if necessary.

By order of the Court in Conference, this the 14th day of August, 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 August, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court of
North Carolina

s/Amy L. Funderburk
~~Assistant~~ Clerk

**IN RE E.F.**

[375 N.C. 88 (2020)]

IN THE MATTER OF E.F., I.F., H.F., Z.F.

No. 14A20

Filed 14 August 2020

**1. Termination of Parental Rights—best interests of child—statutory factors—likelihood of adoption—aid in accomplishing permanent plan**

The trial court did not abuse its discretion by determining that termination of a mother's parental rights to her four children was in the children's best interests. Although the father of the three youngest children retained his parental rights at the time of the termination hearing, the trial court properly found that the children had a high likelihood of being adopted and that terminating the mother's parental rights would aid in accomplishing the children's permanent plan of adoption (N.C.G.S. § 7B-1110(a)(2)-(3)) where competent evidence showed that the father wanted his children's foster caretaker to adopt the children and that the foster caretaker had already taken steps toward doing so.

**2. Termination of Parental Rights—best interests of child—potential guardian—findings of fact—not required**

In determining that termination of a mother's parental rights to her four children was in the children's best interests, the trial court did not err by failing to consider the maternal great-grandmother as a potential guardian because the mother presented insufficient evidence of the great-grandmother's willingness or ability to provide the children a permanent home. Thus, when making its best interests determination, the court was not obligated to enter findings under N.C.G.S. § 7B-1110(a)(6) about the great-grandmother's eligibility as a placement option for the children.

**3. Termination of Parental Rights—best interests of child—consideration of factors—no abuse of discretion**

The trial court did not abuse its discretion by determining that termination of a mother's parental rights to her four children was in the children's best interests. When making its best interests determination, the court properly considered each dispositional factor under N.C.G.S. § 7B-1110(a), entered findings of fact supported by the evidence, and assessed the children's best interests in a way that was consistent with those findings and with the recommendations made by the children's guardian ad litem.

**IN RE E.F.**

[375 N.C. 88 (2020)]

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 12 September 2019 by Judge Stephen Higdon in District Court, Union County. This matter was calendared for argument in the Supreme Court on 29 July 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

*Perry, Bundy, Plyler & Long, LLP, by Ashley J. McBride and Dale Ann Plyler, for petitioner-appellee Union County Division of Social Services.*

*La-Deidre Matthews for appellee Guardian ad Litem.*

*David A. Perez for respondent-appellant.*

NEWBY, Justice.

Respondent appeals from the trial court's order (termination order) terminating her parental rights in her minor children Ethan, Isaac, Henry, and Zane.[1] Because we conclude the trial court did not abuse its discretion by determining that it was in the children's best interests that respondent's parental rights be terminated, we affirm.

Ethan was born in January 2011. His father is Jamie R. Dallas W. is the father of respondent's twins, Isaac and Henry, born in September 2012, and of Zane, born in April 2014. On 19 February 2018, the Union County Division of Social Services (DSS) filed a juvenile petition alleging neglect and dependency. On 26 March 2018, DSS obtained nonsecure custody of the four children. The trial court adjudicated the children to be neglected and dependent juveniles on 22 August 2018.

In support of the adjudication, the trial court found that respondent left the children with Dallas W. when she was arrested on 6 March 2018; that Dallas W. subsequently placed the children with Angela S., a caretaker for the children, because he was unable to care for them; and that Angela S. was unable to obtain necessary medical care for the children because she lacked their Medicaid information and parental authorization. The trial court further found that the family had a history of instability and inadequate housing; that respondent had been evicted from her residence and was unable to secure suitable housing; and that

1. We use pseudonyms to protect the privacy of the juveniles discussed in this opinion.

respondent was unemployed, suffered from untreated mental health issues, and had expressed no willingness to engage in remedial services for herself or her children. Respondent signed a DSS case plan agreeing to complete parenting classes and domestic violence counseling and comply with all recommendations, submit to a mental health and substance abuse assessment and comply with all recommendations, submit to random drug screens, and obtain and maintain stable employment and housing.

DSS filed a petition to terminate the parental rights of respondent, Jamie R., and Dallas W. on 19 February 2019. At the time, Dallas W. was incarcerated. None of the parents filed an answer to the termination petition. See N.C.G.S. § 7B-1107 (2019). After a series of continuances, the trial court convened a hearing on the termination petition on 21 August 2019. Counsel for DSS advised the trial court that it was proceeding only against respondent and Jamie R. and that it was not proceeding against Dallas W. at that time.

At the adjudicatory stage of the termination hearing, the trial court heard testimony from respondent, her DSS social worker, and Angela S., who had served as the children's foster care placement since their entry into DSS custody in March 2018. Respondent testified that she was unemployed, homeless, and using heroin daily, including on the morning of the termination hearing. She had been arrested five times since March 2018 and was awaiting trial on pending charges. Despite paying for her heroin habit, respondent had contributed nothing toward the children's cost of care while they were in DSS custody. Respondent acknowledged she was "unstable and unfit and that [she] need[ed] help." The trial court concluded there were grounds to terminate respondent's parental rights for neglect, failure to pay a reasonable portion of the children's cost of care, and dependency. N.C.G.S. § 7B-1111(a)(1), (3), (6) (2019). The trial court also found grounds to terminate the parental rights of Jamie R.

At the dispositional stage, the trial court received written reports from DSS and the children's guardian *ad litem* (GAL) and heard testimony from the social worker and the GAL. In accordance with the recommendations of DSS and the GAL, the trial court concluded that terminating the parental rights of respondent and Jamie R. was in the best interests of their respective children. The trial court entered its written termination order on 12 September 2019. Respondent filed notice of appeal.[2]

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2. There is no indication that Jamie R. appealed the termination order, and he is not a party to this appeal.

**[1]** Respondent does not challenge the grounds for termination adjudicated by the trial court under N.C.G.S. § 7B-1111(a), but argues that the trial court abused its discretion in concluding it was in the children's best interests that respondent's parental rights be terminated. "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.*, 374 N.C. 50, 57, 839 S.E.2d 735, 740 (2020) (quoting *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998)). The trial court's dispositional findings are binding on appeal if they are supported by any competent evidence. *Id.* We are likewise bound by all uncontested dispositional findings. *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 65 (2019).

The dispositional stage of a proceeding to terminate parental rights is governed by N.C.G.S. § 7B-1110(a), which provides 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) (2019). Although the trial court must "consider" each of the statutory factors, *id.*, we have construed subsection (a) to require written findings only as to those factors for which there is conflicting evidence. *In re A.R.A.*, 373 N.C. 190, 199, 835 S.E.2d 417, 424 (2019).

The trial court's termination order expressly states that the trial court "considered all factors set out in N.C.G.S. [§] 7B-1110 in

determining whether terminati[ng] the parental rights of [respondent] to her children" is in their best interests. The trial court made written findings about each of the criteria in N.C.G.S. § 7B 1110(a)(1)–(5) as follows:

> (A) The age of the juveniles: [Zane] is 5 Years and 4 Months, [Henry] and [Isaac] are 7 Years and 11 Months, [Ethan] is 8 Years and 7 Months.
>
> (B) The likelihood of adoption of the juveniles: The juveniles' [foster] placement wants to adopt the juveniles. There is a high likelihood of adoption.
>
> (C) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juveniles: The permanent plan for the juveniles is adoption. Termination of [respondent's] and Jamie R[.'s] parental rights will aid in [the] accomplishment of the permanent plan of adoption.
>
> (D) The bond between the juveniles and their parent: The juveniles do not have a good bond with [respondent]. [Respondent's] own action contributed to the court staying her visitation with the juveniles [on 22 August 2018]. The lack of visitation has affected the bond between the children and their mother.
>
> (E) . . . The quality of the relationship between the juveniles and the proposed adoptive parents: The juveniles and Angela S[.] and her family have a strong bond. The S[.'s] have tended to all of the juveniles' well-being needs. They have provided a safe, stable and loving home to the juveniles since being placed in the S[.] home around March of 2018. The S[.'s] intend to adopt the juveniles.

To the extent that respondent does not contest these findings, they are binding. *See In re Z.L.W.*, 372 N.C. at 437, 831 S.E.2d at 65.

Specifically, respondent argues these findings fail to account for the fact that DSS did not proceed against Dallas W. at the termination hearing, thereby leaving intact his parental rights in Isaac, Henry, and Zane. Because Dallas W. retained his parental rights in these children, respondent contends the evidence did not show a high likelihood that they would be adopted or that terminating her parental rights would facilitate their adoption. Respondent did not raise Dallas W.'s parental

rights or their impact on the prospects for adoption as an issue during the dispositional hearing.

The record shows only that DSS filed a petition to terminate his parental rights, but was not proceeding against him at the termination hearing.[3] The fact that Dallas W.'s parental rights remained in place at the time of the termination hearing does not render the trial court's findings under N.C.G.S. § 7B 1110(a)(2)–(3) erroneous. Subsection (a)(2) refers to the "likelihood"—not the certainty—of the children's adoption. N.C.G.S. § 7B-1110(a)(2). Similarly, subsection (a)(3) asks whether terminating respondent's parental rights would "*aid in the accomplishment of* the permanent plan for the juvenile[s]." N.C.G.S. § 7B-1110(a)(3) (emphasis added). Unquestionably, the termination of respondent's parental rights was a necessary precondition of the children's adoption.

Moreover, the DSS social worker attested to the high likelihood of the children's adoption and to the fact that terminating respondent's parental rights would aid in realizing the permanent plan of adoption. The social worker further advised the trial court that Dallas W. had made no effort to regain custody of his children and wanted Angela S. to adopt them. The GAL reported that Angela S. and her spouse "have gone through the licensing procedure to be able to adopt the children and have expressed a strong desire to do so." This competent evidence is sufficient to support the trial court's findings as to the likelihood of adoption. In the absence of an evidentiary conflict, the trial court is not required to make written findings under N.C.G.S. § 7B-1110(a)(6) on this issue. *See In re A.R.A.*, 373 N.C. at 199, 835 S.E.2d at 424.

**[2]** Respondent makes a similar argument regarding the availability of her own maternal grandmother, Linda R., as a potential guardian for the children. Although the GAL's written report included a bare statement that Linda R. "has been approved for consideration of guardianship/adoption of the children, and the home has been approved by DSS," Linda R. is only mentioned once during the adjudicatory stage of the termination proceeding. We recognize the trial court may—and should—consider evidence introduced during the adjudicatory stage of a termination hearing in determining the children's best interests

3. The record on appeal includes a "Notice of Dismissal of Petit[io]n for Termination of Parental Rights" filed in the trial court by DSS on 11 October 2019. The notice of dismissal states that Dallas W. had relinquished his parental rights in Isaac, Henry, and Zane and that "the time for revocation has expired." It appears this document may not have been before the trial court at the time of the termination hearing on 21 August 2019.

during the disposition stage. *See In re Pierce*, 356 N.C. 68, 71–72, 75–76, 565 S.E.2d 81, 84, 86 (2002); *In re M.A.I.B.K.*, 184 N.C. App. 218, 225, 645 S.E.2d 881, 886 (2007). Respondent, however, made no reference to Linda R. or any other alternative placement for the children at the disposition stage, during which the sole focus was upon identifying the best possible outcome for the children. *See* N.C.G.S. § 7B-1110(a)–(b); *see also In re Pierce*, 356 N.C. at 76, 565 S.E.2d at 86 (characterizing the "determination of best interests [a]s more in the nature of an inquisition" than an adversarial process).

Respondent testified only that her grandparents "want" her children and would allow respondent to "live with them once [she is] clean and once [she has] treatment and everything." Absent additional evidence regarding Linda R.'s willingness or ability to provide permanence for respondent's children, the trial court cannot be said to have erred even if, *arguendo*, it failed to consider Linda R. as a placement option. *Cf. In re S.D.C.*, 373 N.C. 285, 290, 837 S.E.2d 854, 858 (2020) (explaining "the extent to which it is appropriate" for the trial court to consider a relative placement for a child under N.C.G.S. § 7B-1110(a)(6) is "dependent upon the extent to which the record contains evidence tending to show whether such a relative placement is, in fact, available").

DSS and the GAL presented undisputed evidence that Angela S. and her husband had provided excellent care for respondent's four children since March 2018 and wished to provide them a permanent home through adoption. Because respondent did not present evidence about Linda R. to contradict the evidence that DSS and the GAL presented, the trial court was not obligated to make written findings about Linda R. under N.C.G.S. § 7B-1110(a)(6). *See In re A.R.A.*, 373 N.C. at 199, 835 S.E.2d at 424.

**[3]** Finally, we hold that respondent has failed to show the trial court abused its discretion under N.C.G.S. § 7B-1110(a) by concluding it was in the children's best interests to terminate her parental rights. The termination order reflects the trial court's consideration of the statutory dispositional factors. Its findings are supported by the evidence. Its assessment of the children's best interests arises rationally from its findings of fact and is consistent with the recommendation of the children's GAL. Accordingly, we affirm.

AFFIRMED.

**IN RE E.J.B.**

[375 N.C. 95 (2020)]

IN THE MATTER OF E.J.B., R.S.B.

No. 217A19

Filed 14 August 2020

**Native Americans—Indian Child Welfare Act—termination of parental rights—tribal notice requirements**

The trial court erred in terminating a father's parental rights to two children without fully complying with the notice requirements of the Indian Child Welfare Act (25 U.S.C. § 1912(a)) and related federal regulations (25 C.F.R. § 23.111). Although notices were sent to each of three federally-recognized Cherokee tribes, albeit not in a timely manner, which prompted responses from two of those tribes, the notices were legally insufficient because they did not include all necessary information. Even if the notices had been sufficient, the trial court failed to ensure that the county department of social services exercised due diligence when contacting the tribes, particularly with regard to the third tribe that did not respond to the notice.

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 15 March 2019 by Judge Faith Fickling in District Court, Mecklenburg County. Heard in the Supreme Court on 17 June 2020.

*Stephanie Jamison, Senior County Attorney, for petitioner-appellee Mecklenburg County Department of Social Services.*

*Law Office of Matthew C. Phillips, PLLC, by Matthew C. Phillips for appellee Guardian ad Litem.*

*Robert W. Ewing for respondent-appellant father.*

BEASLEY, Chief Justice.

On appeal, respondent-father asks this Court to vacate the trial court's order terminating his parental rights and remand the matter to the trial court for compliance with all requirements under the Indian Child Welfare Act (the Act).[1] Because we conclude that the trial court

1. We use the terms "Indian" and "Indian child" to comply with the terminology used in the Indian Child Welfare Act.

failed to comply with the Act's notice requirements and that the post termination proceedings before the trial court did not cure the errors, we remand the matter to the trial court so that all of the requirements of the Act can be followed.

I. Background

The Mecklenburg County Department of Social Services (DSS) filed a juvenile petition on 7 April 2015, alleging that Eric and Robert[2] were neglected and dependent juveniles. The trial court entered a Non-Secure Custody Order on 7 April 2015, granting custody of the children to DSS. That same day, the DSS social worker contacted respondent-father, who denied being the children's biological father. The trial court held an initial seven-day hearing on 14 April 2015 and found that the Act did not apply. At the time of this hearing, respondent-father had not yet been served with the juvenile petition.

In preparation for the adjudication and disposition hearing scheduled for 3 June 2015, DSS filed a court summary report on 1 June 2015. The report included a section titled "Indian Child Welfare Act," which indicated that respondent-father "reported that he is affiliated with the Cherokee Indian tribe" but noted that "he has not provided this social worker with the necessary information to further investigate." The report also included the transcript from a Child and Family Team Meeting held on 4 May 2015, that quoted respondent-father as telling the team his "roots are Irish and Indian."

Respondent-father was personally served at the 3 June 2015 hearing, and the trial court found good cause to continue the matter until 12 August 2015. The adjudication hearing was continued for good cause on 12 August 2015 and ultimately took place on 3 December 2015. The trial court adjudicated the children to be dependent juveniles, as defined by N.C.G.S. § 7B-101(9), and ordered that they remain in the custody of DSS.

The trial court held multiple permanency planning hearings until the trial court ultimately granted sole physical and legal custody to the children's biological mother on 2 August 2017. Seven additional DSS court reports filed prior to this hearing included respondent-father's statements about his affiliation with the Cherokee Indian tribe. The trial court converted the matter to a Chapter 50 civil custody action and terminated

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

the jurisdiction of the Juvenile Court. Respondent-father gave notice of his appeal on 11 October 2017.[3]

While respondent-father's appeal was pending, DSS filed a second juvenile petition on 2 January 2018, alleging that the minor children were neglected and dependent juveniles. The trial court entered a Non-Secure Custody Order on 2 January 2018, granting custody of the children to DSS. The children remained in the custody of DSS throughout these proceedings. On 10 July 2018 the trial court adjudicated the children neglected and dependent as defined in N.C.G.S. § 7B-101(9) and (15).

On 24 August 2018 DSS filed a motion to terminate respondent-father's parental rights. A termination hearing was held on 15 February 2019, at which the trial court found that respondent-father neglected the children as defined in N.C.G.S. § 7B-101(15), failed to make reasonable progress in correcting the conditions that led to the removal of the juveniles, and willfully failed to pay a reasonable portion of the cost of care for his children. The trial court concluded that it was in the best interests of the juveniles to terminate respondent-father's parental rights. Respondent-father filed his notice of appeal on 27 March 2019.

While respondent-father's appeal was pending before this Court, the trial court held post termination of parental rights hearings on 20 August 2019 and 18 February 2020, pursuant to N.C.G.S. § 7B-908. At the 18 February 2020 post termination hearing, the court made specific findings regarding compliance with the Act. The trial court found that, pursuant to the Act, notices had been sent to two Cherokee tribes in Oklahoma and one Cherokee tribe in North Carolina. Each notice had also been sent to the appropriate regional director of the Bureau of Indian Affairs.

Each relevant tribe was served by mail, with return receipt requested. As of 30 August 2019, the Eastern Band of Cherokee Indians and the Cherokee Nation tribes both replied and indicated that the children were neither registered members nor eligible to be registered as members of those tribes. The United Keetoowah Band of Cherokee Indians tribe received the notice in August 2019 but failed to respond. Ultimately, the trial court found that the Act did not apply.

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3. The Court of Appeals issued a unanimous unpublished opinion on 1 May 2018 dismissing respondent-father's appeal from the trial court's order granting custody to the children's biological mother. *See In re E.J.B.*, 812 S.E.2d 911, 2018 WL 2016138 (N.C. Ct. App. 2018) (unpublished).

II. Indian Child Welfare Act

In 1978 the United States Congress passed the Act, which established "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes" in order to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902 (2018).

The Act was a product of growing awareness in the mid-1970s of abusive child welfare practices that led to an "Indian child welfare crisis . . . of massive proportions." H.R. Rep. No. 95-1386, at 9 (1978) (hereinafter House Report); *see also Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32, 109 S. Ct. 1597, 1599–1600). Studies conducted by the Association on American Indian Affairs in 1969 and 1974, and presented during Senate oversight hearings in 1974, showed that between twenty-five and thirty-five percent of all Native American children were living in foster homes, adoptive homes, or institutions. *Miss. Band*, 490 U.S. at 32–33, 109 S. Ct. at 1600 (citing Indian Child Welfare Program, Hearings before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs, 93d Cong., 2d Sess., 3 (statement of William Byler) (hereinafter 1974 Hearings)); *see also* House Report, at 9. Moreover, approximately ninety percent of Native American children removed from their families were placed in non-Native American homes.[4] *Miss. Band*, 490 U.S. at 33, 109 S. Ct. at 1600 (citing 1974 Hearings, at 75–83). On the basis of extensive empirical and anecdotal evidence collected during congressional hearings in 1974, 1977, and 1978, Congress concluded that the "wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today," causing long term emotional harm for Native American children who lose their cultural identity,[5] mass trauma for Native American families,[6]

4. House Report, at 11 ("Discriminatory standards have made it virtually impossible for most Indian couples to qualify as foster or adoptive parents, since they are based on middle-class values.").

5. 1974 Hearings at 27–28 (citing research showing that the majority of removed Native American children suffered identity confusion contributing to problems "in meeting the demands of adult life" and the "[d]evelopment of self-defeating styles of behavior and attitudes").

6. 1974 Hearings at 28 (citing anecdotal evidence of "[g]rief of village parents, not only at their children's leaving home, but also at their children's personal disintegration away from home").

and the erosion of tribal communities, heritage, and sovereignty.[7] *See* House Report at 9; *see also* Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,781 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23).

Although this crisis flowed from multiple sources, Congress found that state agencies and courts were largely to blame for conducting unnecessary child removal and termination of parental rights proceedings. *See* Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,779–80) (citing 25 U.S.C. 1901(4)–(5)); House Report at 10–12). During the 1978 hearings, Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and a representative of the National Tribal Chairmen's Association, summarized the consensus that had emerged regarding the principal cause of the crisis as follows:

> One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful [sic] of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.

*Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 2d 191–12 (1978).

Congress found that "in judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists." House Report at 10. "For example, the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social

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7. Congress found that this "wholesale removal of Tribal children by nontribal government and private agencies constitutes a serious threat to Tribes' existence as on-going, self-governing communities," and that the "future and integrity of Indian tribes and Indian families are in danger because of this crisis." Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,781 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23) (alterations in original) (quoting 124 Cong. Rec. H38103).

workers, untutored in the ways of Indian family life, or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights." *Id.* Congress incorporated these sentiments into the congressional findings supporting the Act as follows:

> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . .
>
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
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> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1901; *Miss. Band*, 490 U.S. at 35–36, 109 S. Ct. at 1601.

The Act governs child custody proceedings involving Indian children. Child custody proceedings include: (1) foster care placements; (2) terminations of parental rights; (3) preadoptive placements; and (4) adoptive placements. 25 U.S.C. § 1903(1)(i)–(iv) (2018). An Indian child is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). The Act further provides that:

> [i]n any involuntary proceeding in a State court where the court knows or has reason to know that an Indian child is involved, the party seeking the . . . termination of parental rights to[ ] an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.

25 U.S.C. § 1912(a) (2018). No child custody proceedings may occur until at least ten days after the receipt of the notice, and tribes may request an additional twenty days to prepare for the proceedings. *Id.*

Since its passage, the Act has helped stem the tide of the Native American child welfare crisis; however, the implementation and interpretation of the Act has been inconsistent, and Native American children are still disproportionately likely to be removed from their homes and communities. *See* Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 at 38,784 (internal citations omitted).

In 2016, after finding that its nonbinding guidelines were "insufficient to fully implement Congress's goal of nationwide protections for Indian children, parents, and Tribes," the Department of the Interior issued binding regulations to promote the uniform application of the Act. Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,782 (citations omitted). Specifically, the Department considered the promulgation of binding regulations necessary because "[s]tate courts frequently characterize the guidelines as lacking the force of law and conclude that they may depart from the guidelines as they see fit." *Id.*

In implementing binding regulations, the Department updated existing notice provisions and added a new subpart I to the regulations promulgating the Act. *See* 25 C.F.R. §§ 23.101–.144; *see also* Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,867–68. The new regulations did not affect termination of parental rights proceedings that were initiated prior to 12 December 2016 but do apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child. 25 C.F.R. § 23.143.

Under subpart I of the current federal regulations, state courts bear the burden of ensuring compliance with the Act. *See* 25 C.F.R. § 23.107(a), (b); *In re L.W.S.*, 255 N.C. App. 296, 298 n.4, 804 S.E.2d 816, 819, n.4 ("We note that, now, it seems to be the case that the burden has shifted to state courts to inquire at the start of a proceeding whether the child at issue is an Indian child . . . ."). State courts must ask each participant in a child custody proceeding, on the record, whether that participant knows or has reason to know that the matter involves an Indian child. 25 C.F.R. § 23.107(a). The trial court must also inform the parties of their duty to notify the trial court if they receive subsequent information that provides reason to know the child is an Indian child. *Id.*

If the trial court has reason to know that the child is an Indian child, but lacks sufficient evidence to make a definitive determination, the trial court must:

> [c]onfirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of

> which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership) . . . .

25 C.F.R. § 23.107(b)(1). While the trial court is seeking this additional information, it must treat the child as an Indian child until it determines that the child does not qualify for that status. 25 C.F.R. § 23.107(b)(2). State courts should seek to allow tribes to determine membership because "[t]he Indian Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) determines whether the child is a member of the Tribe, or whether the child is eligible for membership in the Tribe." 25 C.F.R. § 23.108(a). This determination is committed to the sole jurisdiction of the tribe, and state courts cannot substitute their own determination regarding a child's membership for that of the tribe. 25 C.F.R. § 23.108(b). If a tribe fails to respond to multiple written requests, the trial court must first seek assistance from the Bureau of Indian Affairs. 25 C.F.R. § 23.1005(c). State courts can only make their own determination as to the child's status if the tribe and Bureau of Indian Affairs fail to respond to multiple requests. Indian Child Welfare Act Proceedings 81 Fed. Reg. at 38,806.

III. Analysis

Respondent-father asks this Court to vacate each of the judgments and orders entered in this case because the trial court failed to comply with the mandatory notice requirements under the Act before terminating his parental rights. He argues that his statements concerning his own Indian heritage were sufficient to trigger the notice requirements of the Act and that the trial court lacks jurisdiction because it failed to comply with said requirements. Petitioners moved to dismiss the appeal, asking this Court to hold that the post termination notices were adequate to cure the trial court's failure to provide notice in compliance with the Act, rendering moot respondent-father's arguments on appeal.[8] We conclude that the post termination notices failed to comply with the Act and therefore cannot cure the trial court's error.

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8. Although these notices and findings by the trial court were not in the record, this Court takes judicial notice of the actions by both DSS and the trial court during the post termination hearings. *See State ex rel. Utils. Comm'n v. S. Bell Tel. and Tel. Co.*, 289 N.C. 286, 287, 221 S.E.2d 322, 324 (1976) ("Consideration of matters outside the record is especially appropriate where it would disclose that the question presented has become moot, or academic, and therefore neither of the litigants has any real interest in supplementing the record.").

Here, the record shows that the trial court had reason to know that an Indian child might be involved. In eight separate filings, DSS indicated in its court reports that respondent-father indicated that he had Cherokee Indian heritage. Respondent-father also raised his Indian heritage during a Child and Family Team Meeting, and his comments were included in a report filed by DSS with the trial court. Although the trial court had reason to know that an Indian child might be involved in these proceedings, the trial court failed to readdress its initial finding that the Act did not apply and failed to ensure that any Cherokee tribes were actually notified.

The trial court was required to ask each participant in the proceeding, on the record, whether that participant knows or has reason to know that the matter involves an Indian child and inform them of their duty to inform the trial court if they learn any subsequent information that provides a reason to know that an Indian child is involved. *See* 25 C.F.R. § 23.107(a).[9] The party seeking the termination of parental rights, DSS, was required to notify the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of the tribe's right to intervene. 25 U.S.C. § 1912(a).

Here, there is no evidence in the record that the trial court inquired at the beginning of the proceeding whether any participant knew or had reason to know that an Indian child was involved or informed the participants of their continuing duty to provide the trial court with such information. In an attempt to rectify its failure to comply with the notice provisions of the Act, Mecklenburg County Department of Social Services Youth and Family Services sent a notice, with return receipt requested, on 1 August 2019 to each federally-recognized Cherokee tribe[10]: the Eastern Band of Cherokee Indians; the Cherokee Nation and the United Keetoowah Band of Cherokee Indians. Each notice was also sent to the appropriate regional director of the Bureau of Indian Affairs. Included with each notice was a copy of the juvenile petition and nonsecure custody order filed 2 January 2018. On 9 August 2019, a representative of the Eastern Band of Cherokee Indians tribes responded, indicating that the juveniles were neither registered members nor eligible to register as a member of the tribe. On 13 November 2019, a representative

9. Because the proceedings stemming from the 2 January 2018 juvenile petition began after 12 December 2016, the trial court was required to follow the binding federal regulations in addition to the statutory provisions of the Act.

10. *See* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5,462 (Jan. 30, 2020).

of the Cherokee Nation tribe responded, indicating that the juveniles were not "Indian children" as defined in the Act. Both tribes indicated they did not have the legal right to intervene in the matters. The United Keetoowah Band of Cherokee Indians tribe received the notice on 5 August 2019 and had not responded as of the 18 February 2020 post termination of parental rights hearing.

Although the trial court attempted to comply with the Act by sending notices to these tribes after respondent-father appealed to this Court, the notices failed to include all necessary information as required under 25 U.S.C. § 1912 and 25 C.F.R. § 23.111(d). The notices did not contain any language informing the tribes of their right to intervene in the proceedings, and we find no other evidence in the record that these tribes were notified of their right of intervention, as mandated in 25 U.S.C. § 1912(a).

We further conclude that the notices were legally insufficient because they failed to contain all necessary information. Pursuant to binding federal regulations, notices must also include the following information:

> (1) [T]he child's name, birthdate, and birthplace;
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> (2) [A]ll names known (including maiden, married, and former names and aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment numbers if known;
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> (3) [I]f known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents;
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> (4) [T]he name of each Indian Tribe in which the child is a member (or may be eligible for membership if a biological parent is a member); [and]
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> (5) [A] copy of the petition, complaint, or other document by which the child-custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing[.]

25 C.F.R. § 23.111(d)(1)–(5). Notices must also include statements setting out the following:

> (i) [T]he name of the petitioner and the name and address of petitioner's attorney.

> (ii) [T]he right of any parent or Indian custodian of the child, if not already a party to the child-custody proceeding, to intervene in the proceedings.
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> (iii) [T]he Indian Tribe's right to intervene at any time in a State-court proceeding for the foster-care placement of or termination of parental rights to an Indian child.
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> (iv) [T]hat, if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigency by the court, the parent or Indian custodian has the right to court-appointed counsel.
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> (v) [T]he right to be granted, upon request, up to 20 additional days to prepare for the child-custody proceedings.
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> (vi) [T]he right of the parent or Indian custodian and the Indian child's Tribe to petition the court for transfer of the foster-care placement or termination-of-parental rights proceeding to Tribal court as provided by 25 U.S.C. § 1911 and § 23.115.
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> (vii) [T]he mailing addresses and telephone numbers of the court and information related to all parties to the child-custody proceeding and individuals notified under this section.
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> (viii) the potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian.
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> (ix) that all parties notified must keep confidential the information contained in the notice and the notice should not be handled by anyone not needing the information to exercise rights under [the Act].

25 C.F.R. § 23.111(d)(6)(i)–(ix). Upon careful review of the notices sent, we observe that the notices also failed to fully comply with these regulations.

The notices failed to include: (1) the children's birthplaces, as required by 25 C.F.R. § 23.111(d)(1); (2) notice of the tribe's right to intervene, as required by 25 C.F.R. § 23.111(d)(6)(iii); (3) notice of the tribe's right to request an additional twenty days to prepare for the hearing, as required by 25 C.F.R. § 23.111(d)(6)(v); and (4) notice of the tribe's right to petition for a transfer of the proceeding to tribal court, as required by 25 C.F.R. § 23.111(d)(6)(vi).

Each of the three notices sent by DSS failed to comply with the Act and were not sent in a timely manner. The Eastern Band of Cherokee Indians and Cherokee Nation tribes responded to their respective notices, indicating that Robert and Eric were not "Indian children" as defined in 25 U.S.C. § 1903(4). Based on these responses, the trial court no longer had reason to know that Eric and Robert might be Indian children due to their affiliation with the Eastern Band of Cherokee Indians or Cherokee Nation tribes.

However, the trial court still had reason to know that Robert and Eric might be Indian children due to their affiliation with the United Keetoowah Band of Cherokee Indians tribe. The only notice that the tribe received was legally insufficient and it failed to comply with the Act because it did not contain all information required in 25 U.S.C. § 1912(a) and 25 C.F.R. § 23.111(d). Assuming, *arguendo*, that the notice was legally sufficient, the trial court still erred by finding that the Act did not apply because it failed to ensure that DSS used due diligence when contacting all three tribes. 25 C.F.R. § 23.107(b)(1). Tribes, not trial courts, determine whether a child is a member or is eligible for membership, and therefore considered an Indian child under the Act. 25 C.F.R. § 23.108. If a tribe fails to respond, the trial court must seek assistance from the Bureau of Indian Affairs prior to making its own independent determination. 25 C.F.R. § 23.105(c). This is because "[t]he State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe." 25 C.F.R. § 23.108(b).

We therefore conclude that the post termination notice sent to the Keetoowah Band of Cherokee Indians tribe did not cure the trial court's failure to comply with the Act prior to terminating respondent-father's parental rights.

IV. Conclusion

The order terminating respondent-father's parental rights is reversed. We remand this matter to the trial court to issue an order requiring that a notice be sent to the Keetoowah Band of Cherokee Indians tribe by DSS that fully complies with the requirements of 25 U.S.C. § 1912(a) and 25 C.F.R. § 23.111. If the Keetoowah Band of Cherokee Indians tribe indicates that the children are not Indian children pursuant to the Act, the trial court shall reaffirm the order terminating respondent-father's parental rights. In the event that the Keetoowah Band of Cherokee tribe indicates that the children are Indian children pursuant to the Act, the trial court shall proceed in accordance with the relevant provisions of the Act.

REVERSED and REMANDED.

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

Justice NEWBY dissenting.

The ultimate question presented in this case is whether each child involved in this termination proceeding is an "Indian child" as defined by the Indian Child Welfare Act (ICWA). The specific question is whether the appropriate Indian tribes were notified of the allegation that the children were potentially of Indian heritage. While the Mecklenburg County Department of Social Services, Youth and Family Services (YFS) and the trial court did not timely investigate whether the ICWA applied, during post-termination proceedings YFS did provide notice to the three relevant Indian tribes and the respective directors of the Bureau of Indian Affairs. The notices were sent with return receipts requested, and all necessary entities received notification. Two tribes responded that the children were not eligible for membership. Although in receipt of the notification, the third tribe did not respond to the notice over a period of nearly seven months. The third tribe was notified through two separate avenues, to the tribe directly and to the regional director of the Bureau of Indian Affairs. Similarly, the Bureau of Indian Affairs did not respond. This information was presented to the trial court, and after evaluating all the evidence, it determined that the children are not Indian children. This determination rendered the ICWA inapplicable since the trial court had no reason to believe that the children were Indian children based on the tribes' responses, or lack thereof. Even if the notices to the tribes could have provided additional information about the tribes' respective rights in the proceedings, that information is unnecessary unless the children are Indian children. As such, and because the trial court has properly made the determination that the ICWA does not apply here, the appeal should be dismissed as moot.

Under North Carolina law the guiding principle in termination of parental rights cases is the best interests of the child. Children are best served with timely proceedings and placements in permanent homes. As a result of the majority's decision, the children in this case must endure months of further uncertainty waiting for the last tribe to respond, if it will. If the children are Indian children, the last tribe would have responded already. Despite the seeming lack of interest by the third tribe and the Bureau of Indian Affairs, the majority places the burden of obtaining a response from the tribe on the trial court and YFS. The

majority is also critical of the notice provided, saying that additional information should have been included. The majority assumes that Indian tribes are not motivated to respond if the research reveals the children's Indian heritage, or that tribes do not understand their rights. It uses these assumptions to keep these children embroiled in a continued, lengthy termination proceeding. Because the majority improperly elevates the form of the statutory notice requirements over the substance of actual notice, thereby undermining the best interests of the children, I respectfully dissent.

The children were initially placed with YFS in 2015, and after a series of proceedings in which the children's mother was awarded custody, she relinquished her rights to the children in 2018. Ultimately, on 15 March 2019 the trial court terminated respondent's parental rights.

Though respondent informed YFS that he was "affiliated with the Cherokee Indian tribe," YFS did not investigate because it believed that respondent had not provided the information necessary to require further inquiry into the matter. On 1 August 2019, YFS sent notices to three Indian tribes and the Bureau of Indian Affairs, with return receipts requested as required by statute, informing them that the children were currently involved in dependency actions and that the children may be eligible for enrollment in one of the tribes. Upon receipt of the notice, two of the tribes responded that the children were not eligible for enrollment; as such, the tribes noted that they were therefore not legally able to intervene. The third tribe, the United Keetoowah Band of Cherokee Indians, signed the return receipt indicating that they received notice in August of 2019, but the tribe did not respond, and still has not responded, to the notice. The Bureau of Indian Affairs affiliated with the United Keetoowah Band of Cherokee Indians was also served and did not respond.

The trial court conducted two post-termination hearings. At the second hearing on 18 February 2020, based on the information set forth above, the trial court determined that the ICWA does not apply.

The ICWA provides that:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the . . . termination of parental rights to[ ] an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and their right of intervention.

25 U.S.C. § 1912(a) (2018). By its terms, this provision only applies when the court knows or should know that an Indian child as defined by the ICWA may be involved. According to the ICWA, an Indian child is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4) (2018).

In accordance with the regulations promulgated under the ICWA, state courts must generally ask parties involved whether the children at issue are Indian children. 25 C.F.R. § 23.107(a) (2019). If the trial court has reason to suspect the children are Indian children through any of the avenues recognized in 25 C.F.R. § 23.107(c), including an allegation of Indian heritage, then the trial court must confirm that the relevant state agency or other party involved in the proceeding has sought a determination of the children's tribal membership status by the appropriate Indian tribe or tribes. 25 C.F.R. § 23.107(b)(1). The trial court should treat a child as an Indian child unless it is determined that the child does not meet the "Indian child" definition. 25 C.F.R. § 23.107(b)(2). Ultimately, "[s]tate courts have discretion as to when and how to make this determination." Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,806 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23). Moreover, the regulations provide a ten-day waiting period for termination proceedings to occur once a tribe has received notice, and the impacted tribe may request up to twenty days to prepare for the proceeding if an Indian child is in fact involved. 25 C.F.R. § 23.112 (2019). If the trial court determines that the children involved are not Indian children, then the ICWA does not apply. 25 C.F.R. § 23.107(b)(2).

These regulations place the burden on the trial court and Department of Social Services to determine whether a child is an Indian child when they have notice that an Indian child may be involved in the proceeding. While respondent here merely informed YFS that he had Cherokee Indian heritage, this information was sufficient to put the trial court and YFS on notice that the ICWA may apply. Therefore, the burden was on the trial court and YFS to investigate as soon as respondent provided this information.

While notice should have been provided earlier in the proceeding, YFS did ultimately provide notice to the three relevant Cherokee Indian tribes. The evidence arising from the notices was sufficient to allow the trial court to determine that the ICWA is inapplicable. The purpose of the ICWA is to notify the Indian tribes that a potential Indian child is involved in the state proceeding, not to delay termination proceedings

based on unsubstantiated allegations of Indian heritage. Given the responses from two tribes, and the third tribe's failure to respond in the nearly seven months after it received notice, the trial court properly determined that the ICWA is inapplicable.

It appears that the majority would put the termination proceeding on hold awaiting an actual response from the third tribe which failed to respond even though it indisputably received notice. It seems this issue has already caused a significant delay and that further delay will now occur. Our case law has supported the idea that the best interests of the child should be the lodestar in juvenile proceedings. *See In re T.H.T.*, 362 N.C. 446, 448, 665 S.E.2d 54, 56 (2008) (recognizing the importance of effectuating a child's best interests and the need for children to be timely placed in a permanent home); *id.* at 450, 665 S.E.2d at 57 (stating that, because a child's perception of time differs from that of an adult, "[t]he importance of timely resolution of cases involving the welfare of children cannot be overstated"); *see also* N.C.G.S. § 7B-100(5) (2019). Also, this Court has consistently recognized that form should not be elevated over substance. *See, e.g.*, *In re A.P.*, 371 N.C. 14, 19–22, 812 S.E.2d 840, 844–45 (2018) (reading the juvenile code holistically to determine that, despite statutory language to the contrary, the legislature did not intend to limit the proper petitioner in a juvenile adjudication to a single individual within a department of social services, as a determination to the contrary would not achieve the best interests of the child); *In re T.L.H.*, 368 N.C. 101, 111–12, 772 S.E.2d 451, 458 (2015) (concluding that, though the trial court could have conducted an inquiry into respondent's competence at trial in light of her mental health conditions, the trial court had a reasonable basis for concluding that respondent was capable of participating in the proceeding since its conclusion rested on other legitimate considerations); *In re J.T.*, 363 N.C. 1, 672 S.E.2d 17 (2009) (concluding that it would be unnecessary to address deficiencies in the summons, that the juveniles were not named in the petition as respondents nor was the summons served on a GAL, because the GAL fully participated in the proceedings despite any deficiency). Because the ultimate goal of juvenile proceedings is to determine and effectuate the best interests of the child, the proceedings in this case should not be invalidated over technical deficiencies.

Moreover, the majority seems to say that any allegation of Indian heritage, even one unsupported by anything more than a statement that a party has Indian heritage, is sufficient to halt all child proceedings so long as a tribe does not respond. This impractical approach does not appear to be the intent of the ICWA, nor is it consistent with our case law and statutes

recognizing the paramount interest being the best interests of the child, which favors timely resolution of these already lengthy proceedings.

Instead of asking if the trial court had evidence that the unresponsive tribe received notice about the children and the state court proceeding, the majority renders the notice deficient because, in addition to the fact that the tribe failed to respond, the notice itself did not include information such as the children's birthplace or an explicit statement that the tribe had a right to intervene. The majority fails to indicate why these technical deficiencies had any impact on the notice here since the United Keetoowah Band of Cherokee Indians failed to respond well beyond the time recognized in the federal regulations. As previously mentioned, two of the tribes who were given notice indicated a clear understanding of their rights, explicitly stating that the ineligibility meant they could not intervene in the proceeding. Moreover, those tribes were able to establish that the children were not eligible for membership in their tribes without being provided with the children's birthplace. Therefore, requiring additional notices to be sent in this case will only serve to delay the proceeding, which in turn delays permanency for the children.

In sum, the majority elevates form over substance, needlessly delaying indefinitely the permanency that would be in the children's best interests. Because the Indian tribes were all notified and the trial court, in consideration of the evidence, determined that the ICWA is inapplicable, this appeal should be dismissed as moot. I respectfully dissent.

**IN RE J.A.E.W.**

[375 N.C. 112 (2020)]

IN THE MATTER OF J.A.E.W.

No. 380A19

Filed 14 August 2020

**Termination of Parental Rights—grounds for termination—failure to pay a reasonable portion of the cost of care**

The trial court properly terminated a father's parental rights to his daughter based on willful failure to pay child support (N.C.G.S. § 7B-1111(a)(3)) where the evidence showed that the father was employed during the six months prior to the filing of the termination petition, that he earned some income during that time, and that he had the financial means to support his child. The trial court was not obligated to enter findings about the father's living expenses in order to support its adjudication.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered 27 June 2019 by Judge Wes W. Barkley in District Court, Burke County. This matter was calendared in the Supreme Court on 29 July 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.

*N. Elise Putnam, and Mona E. Leipold for petitioner-appellee Burke County Department of Social Services.*

*Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Gray Wilson and Michael W. Mitchell, for appellee Guardian ad Litem.*

*Robert W. Ewing, for respondent-appellant father.*

EARLS, Justice.

Respondent-father appeals from the trial court's order terminating his parental rights to J.A.E.W. (Jennifer).[1] We affirm.

Jennifer was born in December of 2003. On 19 August 2014, the Burke County Department of Social Services (DSS) obtained non-secure custody of Jennifer and filed a juvenile petition alleging that Jennifer

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

was a neglected and dependent juvenile. The petition alleged that on 9 February 2014, law enforcement officers responded to a residence where Jennifer, Jennifer's half-brother, her maternal grandmother, and her mother were present.[2] The mother and maternal grandmother appeared to be under the influence of an impairing substance, and the maternal grandmother had been involved in a physical altercation with another minor child while in the presence of Jennifer and Jennifer's half-brother. As a result, Jennifer and her half-brother were placed with a relative.

The petition further alleged that on 26 March 2014, the Catawba County Department of Social Services visited the mother's home and found her to be under the influence. On 19 June 2014, the mother was charged with prostitution. On 19 August 2014, law enforcement officers executed a search warrant for the mother's home and discovered the mother had removed Jennifer and her half-brother from the kinship placement. The mother was selling counterfeit heroin, appeared to be impaired, and admitted to using opiates, benzodiazepines, and marijuana. Needles and cocaine were located within reach of the children. At the time Jennifer came into DSS custody, respondent-father was incarcerated and had a projected release date of 2 February 2016.

The trial court held a hearing on the juvenile petition on 25 September 2014. On 20 November 2014, the trial court entered a consolidated adjudication and disposition order determining Jennifer to be a dependent juvenile. Custody of Jennifer was continued with DSS.

In a permanency planning order entered on 27 August 2015, the trial court found that respondent "writes letters and sends cards" to Jennifer. The permanent plan was reunification with respondent, concurrent with adoption and guardianship. In a permanency planning order entered 28 January 2016, the trial court found that respondent kept in regular contact with DSS through letters.

Following a hearing held on 5 May 2016, the trial court entered a permanency planning order on 19 May 2016. The trial court found that respondent was released from incarceration on 2 February 2016. The day following his release, he provided DSS his contact information and new address. The trial court further found that on 11 April 2016 respondent signed a family case plan and agreed to: (1) obtain and maintain stable housing, (2) obtain and maintain legal employment, (3) refrain from taking part in any illegal activities, (4) remain out of jail or prison, (5) obtain and utilize reliable transportation, and (6) maintain regular

2. Jennifer's half-brother is not a subject of this appeal.

and consistent contact with Jennifer. Respondent was authorized two hours per month of supervised visitation with Jennifer. The permanent plan remained reunification with respondent, concurrent with a plan of adoption and guardianship.

On 1 August 2016, DSS filed a motion requesting that all contact and visitation between Jennifer and respondent stop until Jennifer's therapist "recommends that it resumes," citing concerns raised by Jennifer's therapist that respondent had sexually abused Jennifer. On 25 August 2016, the trial court entered an order finding that the Wilkes County Department of Social Services was conducting an investigation of respondent's alleged sexual abuse of Jennifer, that was expected to be completed in the next sixty days. The trial court suspended visitation and contact between respondent and Jennifer and held that if the allegations were "not substantiated and [Jennifer's] therapist recommends visitation and telephone contact should resume, then visitation will resume as ordered in the previous order."

Prior to the completion of Wilkes County DSS's investigation, the trial court held a hearing on 22 September 2016 and entered a permanency planning order on 18 October 2016. The trial court found that since being released from jail, respondent had been charged with driving while under the influence. He was employed by Tyson Foods and was living with a girlfriend in a friend's home. Although DSS requested his girlfriend's information in order to complete a background check, respondent refused to provide it.

After a hearing held on 15 December 2016, the trial court entered a permanency planning order on 19 January 2017 finding that respondent was not complying with his case plan; a fact that he admitted. He also admitted to living with "people that are inappropriate." The primary permanent plan was changed to adoption. On 11 January 2017, the Wilkes County Department of Social Services closed its investigation of respondent with a determination that the allegations of abuse were unsubstantiated. Supervised visitation between respondent and Jennifer resumed on 26 January 2017.

Following a hearing held on 9 February 2017, the trial court entered a permanency planning order on 23 March 2017 finding that respondent's employer informed DSS that respondent had been fired from his job on 4 January 2017 for gross misconduct and would not be allowed to return. Respondent last reported that he was living with friends in Wilkes County but had purchased a trailer. However, because respondent failed to provide DSS with the address to either residence, DSS had been unable to

verify their safety. The trial court further found that Jennifer's therapist recommended respondent complete a parenting assessment, parenting classes, and therapy on how to parent a child with limited intellectual ability. Respondent refused to complete any of the therapist's recommendations, stating that he had "done enough" to be able to be reunited with Jennifer. The trial court suspended visitations with respondent based on his failure to engage in parenting classes.

Following a 1 June 2017 hearing, the trial court entered a permanency planning order on 24 August 2017 finding that respondent had failed to make progress on his case plan. The permanent plan was changed to a primary plan of adoption and secondary plan of guardianship, and the trial court ceased reunification efforts with respondent.

The trial court held subsequent permanency planning review hearings on 21 September 2017, 12 December 2017, 22 March 2018, and 9 August 2018. Respondent continued to fail to make progress on his case plan. Following the hearing held on 12 December 2017, the trial court entered a permanency planning order on 8 February 2018 allowing respondent to communicate with Jennifer's therapist "about [Jennifer's] needs/wishes." At the permanency planning review hearing held on 22 March 2018, however, the trial court found that respondent had not contacted the therapist. The therapist recommended that there only be phone contact between respondent and Jennifer. In the order entered after the 9 August 2018 hearing, respondent was permitted to have supervised phone calls with Jennifer "as long [as] the contact is therapeutically recommended by the juvenile's therapist."

The trial court held a hearing on 10 January 2019 and entered a permanency planning order on 24 January 2019. The trial court found that respondent reported that he was employed as an electrical apprentice. Although respondent had completed one section of the Triple P online parenting class, he had not completed the in-person course, as had been requested. The trial court further found that respondent failed to have contact with DSS since 30 April 2018. Respondent had been having supervised phone calls with Jennifer, but Jennifer asked for the phone calls to cease in August 2018 "due to her father not understanding that she wants to be adopted."

On 15 March 2019, DSS filed a petition to terminate respondent's parental rights. DSS alleged that respondent had neglected Jennifer and there was a reasonable likelihood that Jennifer would be neglected if placed in respondent's custody, *see* N.C.G.S. § 7B-1111(a)(1) (2019), respondent had willfully left Jennifer in foster care or placement

outside the home for more than twelve months without making reasonable progress to correct the conditions that led to her removal, *see* N.C.G.S. § 7B-1111(a)(2) (2019), respondent had for a continuous period of six months preceding the filing of the petition willfully failed to pay a reasonable portion of the cost of care for Jennifer although physically and financially able to do so, *see* N.C.G.S. § 7B-1111(a)(3) (2019), and respondent had willfully abandoned Jennifer, *see* N.C.G.S. § 7B-1111(a)(7) (2019).

Following a hearing held on 13 June 2019, the trial court entered an order on 27 June 2019 concluding that the evidence supported all four grounds alleged in the petition. The trial court also determined that it was in Jennifer's best interests that respondent's parental rights be terminated, and the court terminated his parental rights. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent appeals.

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 to treat respondent-father's brief as a certiorari petition and to issue a writ of certiorari authorizing review of respondent-father's challenges to the trial court's termination order on the merits 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).

On appeal, respondent argues that the trial court erred in adjudicating that grounds existed to terminate his parental rights. Specifically, respondent challenges the trial court's conclusions that grounds existed under N.C.G.S. § 7B-1111(a)(1) and (7) to terminate his parental rights even though he remained in contact with Jennifer when permitted to do so by her therapist; that grounds existed under N.C.G.S. § 7B-1111(a)(2) when he had corrected the conditions that led to Jennifer's removal and his efforts placed him in a position to regain custody of Jennifer; and that grounds existed under N.C.G.S. § 7B-1111(a)(3) to terminate his parental rights when the findings of fact were insufficient to demonstrate that he had the ability to pay for Jennifer's cost of care.

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. N.C.G.S. § 7B-1109(e), (f) (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 conclusion of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 132 (1982)).

A trial court is authorized to order the termination of parental rights based on an adjudication of one or more statutory grounds. *See In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133 (holding that an appealed order should be affirmed when any of the grounds found by the trial court is supported by findings of fact based on clear, cogent, and convincing evidence). *See also*, *In re S.E.*, 373 N.C. 360, 367, 838 S.E.2d 328, 333 (2020) (declining to address additional arguments when evidence established the ground of parent's failure to pay reasonable portion of the costs of care). Here we only address the ground of willfully failing to pay a reasonable portion of the cost of care of a juvenile who is in the custody of a county department of social services if the parent is physically and financially able to do so. N.C.G.S. § 7B-1111(a)(3) (2019). The relevant statutory time period for this ground is the six months prior to the filing of the TPR petition. *Id.*

It is undisputed that respondent failed to make any child support payments during the almost five years that Jennifer was in the DSS's custody. He also did not buy Jennifer clothing or other necessities while she was in foster care. Respondent testified that he had steady employment in the year and a half prior to the termination-of-parental-rights hearing, earning between ten and twelve dollars an hour. He further admitted that at times he "had money saved in the bank," and that at the time of the hearing he was "financially able to take care of [Jennifer]." Therefore, clear, cogent, and convincing evidence supports the trial court's conclusion that respondent willfully failed to pay a reasonable portion of Jennifer's cost of care despite his physical and financial ability to do so. Indeed, "[n]ot only was this ground proven by clear, cogent and convincing evidence, there was no evidence to the contrary." *In re Moore*, 306 N.C. at 405, 293 S.E.2d at 133.

Nevertheless, Respondent contends that the trial court's decision with respect to this ground for termination was erroneous because respondent also testified that he did not earn enough to live on and because the trial court needed to make findings regarding his living expenses before being able to conclude as a factual matter that he had the means and ability to contribute an amount more than zero to his child's cost of care. However, while there must be a finding that the parent has the ability to pay support, *see In re Ballard*, 311 N.C. 708, 716–17, 319 S.E.2d 227, 233 (1984), in the circumstances of this case, the trial court did not need to make findings regarding respondent's own living expenses. It is enough here, when respondent made no payments whatsoever to cover the costs of Jennifer's care, that the trial court found that respondent was employed with some income. Respondent's living expenses might be relevant evidence to be taken into account if he had

made some child support payments during the applicable time period and the issue was whether the amount he contributed to the cost of Jennifer's care was reasonable, but here the trial court found that he had income and made no contributions at all. *Cf. In re J.E.M.*, 221 N.C. App. 361, 364, 727 S.E.2d 398, 401 (2012) (quoting *In re Huff*, 140 N.C. App. 288, 293, 536 S.E.2d 838, 842 (2000)) (reaching the same conclusion in analogous circumstances).

Respondent was working in the six months prior to the filing of the petition, earned some income, and testified that he had the financial means to support Jennifer. He was able to pay some amount greater than zero, and it is undisputed that he failed to do so. Therefore, the trial court properly terminated respondent father's rights based on an adjudication under N.C.G.S. § 7B-1111(a)(3) that he willfully failed to pay child support in the six months prior to the filing of the termination-of-parental-rights petition. As respondent does not challenge the trial court's ultimate conclusion that termination of his parental rights to Jennifer is in her best interest, we affirm the trial court's order.

AFFIRMED.

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IN THE MATTER OF K.L.M., K.A.M., AND K.L.M.

No. 365A19

Filed 14 August 2020

**Termination of Parental Rights—best interests of the child—weighing of dispositional factors**

In a private termination action, the trial court did not abuse its discretion in determining that termination of a father's parental rights would be in his children's best interests where the unchallenged dispositional findings included the children's young ages, the children's positive living arrangements with their mother and grandparents, the son's significant progress in overcoming the trauma of seeing his father shoot his mother in the leg, the lack of any bond between the children and the father, and the mother's demonstrated ability to meet the children's needs. The trial court's weighing of the dispositional factors was neither arbitrary nor manifestly unsupported by reason.

**IN RE K.L.M.**

[375 N.C. 118 (2020)]

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 13 May 2019 by Judge Robert J. Crumpton in District Court, Wilkes County. This matter was calendared for argument in the Supreme Court on 29 July 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.

*Paul W. Freeman Jr. for petitioner-appellee mother.*

*Sean P. Vitrano for respondent-appellant father.*

NEWBY, Justice.

Respondent appeals from the trial court's order terminating his parental rights to K.L.M. (Kevin)[1], K.A.M. (Amy), and K.L.M. (Laura) in this private termination action. We affirm.

Respondent and petitioner are the biological father and mother of Kevin, who was born in 2012, and twins Amy and Laura, who were born in 2017. Respondent and petitioner were married in February 2013 and lived together as husband and wife until their separation in March 2017. During their marriage, respondent abused drugs; committed acts of violence against petitioner, which included shooting petitioner in the leg in Kevin's presence; failed to provide for the needs of the children; and was either incarcerated, in rehabilitation, or otherwise absent from the home with his whereabouts unknown for much of the time.

On 3 December 2018, petitioner filed a petition to terminate respondent's parental rights to Kevin, Amy, and Laura on the grounds of neglect, dependency, and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1), (6)–(7) (2019). Around the same time that petitioner filed the petition for termination, petitioner also filed a complaint for absolute divorce and custody of the children. On 9 January 2019, the trial court entered a judgment for absolute divorce that also granted legal and physical custody of the children to petitioner and ordered respondent not to have contact with petitioner or the children unless and until he seeks such contact by motion and obtains a court order granting it.

The trial court terminated respondent's parental rights on the grounds of neglect, dependency, and willful abandonment on 13 May 2019. *See* N.C.G.S. § 7B-1111(a)(1), (6)–(7). In making its determination, the trial court found the relationship between petitioner and respondent

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

to be "chaotic and defined in many ways by the repeated acts of violence perpetrated upon the Petitioner by the Respondent, and the Respondent's subsequent apologies and promises of changed behavior, the Petitioner's acceptance of these promises, reconciliation, and subsequent repetition of violence." The trial court described the incident during which respondent shot petitioner, respondent's abuse of drugs, and respondent's failure to provide financial and emotional support for the children. The trial court found that respondent had "demonstrated a complete indifference to the children" and "ha[d] abandoned the children."

The trial court made the following findings regarding the best interests of the children:

> 15. [Kevin] is currently six (6) years old; [Amy] is currently two (2) years old; and [Laura] is currently two (2) years old. All of the children are physically healthy and are thriving in Wilkes County, North Carolina.
>
> 16. The Petitioner and children reside with the maternal grandparents . . . . They have resided with [the maternal grandparents] since moving to Wilkes County. The children are doing well in this home and all of their needs are being met.
>
> 17. Although physically healthy, [Kevin] is participating in mental health counseling. He began this therapy to deal with the trauma surrounding the Respondent shooting the Petitioner in [Kevin's] presence. [Kevin] has greatly improved since moving to Wilkes County and participating in counseling. When he first arrived in Wilkes [County], [Kevin] was angry and withdrawn. Now, he is happy, smiling and more outgoing. He is doing well in school and has adapted readily to the consistency and predictability of his current living arrangements. He has a regular schedule and is thriving in his current environment.
>
> 18. None of the children have a bond with the Respondent. The twins have had no relationship with the Respondent at any time.
>
> 19. Adoption is not an issue in these proceedings.
>
> 20. The Petitioner is gainfully employed and is able to meet the children's material needs.

21. The Petitioner is meeting all of the children's emotional needs.

Based on the findings, the trial court concluded that grounds existed to terminate respondent's parental rights and that "[i]t [was] in the best interests of the children to terminate the Respondent's parental rights." Respondent appealed.

Respondent does not challenge the above dispositional findings; therefore, those findings are binding on appeal. *See 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)). In fact, respondent asserts that

> [t]he trial court appropriately considered and made factual findings regarding [the best interest] factors [provided by N.C.G.S. § 7B-1110](a)(1), (2), and (4): the children's ages, likelihood of adoption, and bond with Respondent. The court also appropriately considered under (a)(6) that the children lived in a stable, nurturing, and financially secure environment with Petitioner and her parents in Wilkes County.

Nevertheless, respondent challenges the trial court's conclusion that it was in the best interests of the children to terminate his parental rights, essentially arguing the trial court erred in weighing the factors. We disagree.

"Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94, 839 S.E.2d 792, 796–97 (2020) (citing N.C.G.S. §§ 7B-1109, -1110 (2019)). If the trial court determines at the adjudicatory stage that one or more of the grounds in N.C.G.S. § 7B-1111(a) exists to terminate parental rights, the trial court proceeds to the dispositional stage at which point it must "determine whether terminating the parent's rights is in the juvenile's best interest[s]" 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). The trial court is required to consider all of the factors and make written findings regarding those that are relevant. *Id.*

"The [trial] court's assessment of a juvenile's best interest[s] at the dispositional stage is reviewed only for abuse of discretion." *In re A.R.A.*, 373 N.C. 190, 199, 835 S.E.2d 417, 423 (2019); *see also In re Z.A.M.*, 374 N.C. at 99, 839 S.E.2d at 800 (reaffirming this Court's application of an abuse of discretion standard of review to the trial court's best interests determination). "[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.R.A.*, 373 N.C. at 199, 835 S.E.2d at 423 (alteration in original) (quoting *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015)).

Respondent relies on the decision of the North Carolina Court of Appeals in *Bost v. Van Nortwick*, 117 N.C. App. 1, 449 S.E.2d 911 (1994), for the assertion that "a finding that the children are well settled in their new family unit . . . does not alone support a finding that it is in the best interest[s] of the children to terminate respondent's parental rights," *id.* at 8, 449 S.E.2d at 915. The trial court's best interests determination here, however, was not based solely on a finding that Kevin, Amy, and Laura were settled in a new family unit. In addition to finding that the children were doing well in the home with petitioner and their maternal grandparents, the trial court considered the young ages of the children, the children's lack of a bond with respondent, Kevin's success in therapy in overcoming the trauma caused by witnessing respondent shoot petitioner in his presence, the benefits to Kevin from the consistency of the current living arrangements, and petitioner's ability to meet the children's material and emotional needs. The trial court made its determination regarding the children's best interests in this case after weighing the combination of these facts, along with the trial court's finding that adoption was not an issue.

Moreover, unlike the father in *Bost*, the children in this matter have no bond with respondent, and respondent has never acted consistent with his declarations that he wanted to be involved in the children's lives and was willing to make the necessary changes to do so. The trial court made additional, unchallenged findings that respondent (1) had failed in past attempts to stop using drugs despite stints in in-patient

rehabilitation; (2) had not contacted the children since December 2017; (3) had failed to provide for the family's needs, even when he was not incarcerated; (4) had shown no interest in the children since the parties' separation; and (5) "is not currently able to provide care for the children and will be incapable of providing care for the children for the foreseeable future." Lastly, unlike *Bost*, the guardian *ad litem* that was appointed to represent the interests of the juveniles in this case advocated for the termination of respondent's parental rights. *See id.* at 9–13, 449 S.E.2d at 916–18.

In our recent decision in *In re C.J.C.*, 374 N.C. 42, 839 S.E.2d 742 (2020), a private termination case, this Court explained that the likelihood of adoption "is only one factor which the trial court must consider." *Id.* at 49, 839 S.E.2d at 748.

> 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 [the child'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 [the child's] best interests.

*Id.* at 49, 839 S.E.2d at 747. Thus, we held that the trial court's conclusion that termination was in the child's best interests was neither arbitrary nor manifestly unsupported by reason and affirmed the termination order. *Id.* at 50, 839 S.E.2d at 748.

As in *In re C.J.C.*, the trial court's findings in this case concerning the young ages of the children, the children's well-being in their current living arrangements with petitioner and their maternal grandparents, the lack of any bond between the children and respondent, Kevin's success in overcoming the trauma caused by respondent, and respondent's lack of interest and involvement in the children's lives demonstrate that the trial court considered the factors in N.C.G.S. § 7B-1110(a), and the trial court's findings support its conclusion that it was in the best interests of Kevin, Amy, and Laura to terminate respondent's parental rights. The trial court's determination that termination of respondent's parental rights was in the juveniles' best interests was neither arbitrary nor manifestly unsupported by reason. Accordingly, the order terminating respondent's parental rights is affirmed.

AFFIRMED.

**IN RE L.E.W.**

[375 N.C. 124 (2020)]

IN THE MATTER OF L.E.W.

No. 390A19

Filed 14 August 2020

**1. Termination of Parental Rights—permanency planning order—standard of proof—misstated—harmless error**

Before terminating a mother's parental rights to her daughter, the trial court did not commit prejudicial error by misstating the applicable standard of proof in a permanency planning order that eliminated reunification with the mother from the child's permanent plan. Under the misstated standard, the trial court's decision to eliminate reunification from the permanent plan rested upon findings of fact that required the petitioner (the Department of Social Services) to present stronger proof than the law actually required; therefore, the trial court's error worked in the mother's favor.

**2. Termination of Parental Rights—permanency planning order—reunification with parent—eliminated—sufficiency of findings**

Before terminating a mother's parental rights to her daughter, the trial court did not err by entering a permanency planning order eliminating reunification with the mother from the child's permanent plan. Not only did the trial court's findings of fact address each of the factors stated in N.C.G.S. § 7B-906.2(d) for evaluating the likely success of future reunification efforts, but the court also expressly found that the mother and the child's father—who shared a continuing pattern of domestic violence and often neglected to feed their child—acted in a manner inconsistent with the child's health and safety.

**3. Termination of Parental Rights—permanency planning order—visitation—reduced—proper**

Before terminating a mother's parental rights to her daughter, the trial court did not abuse its discretion by entering a permanency planning order reducing the amount of visitation the mother was entitled to have with the child. In addition to properly eliminating reunification with the mother from the child's permanent plan, the court found that the mother neglected to take full advantage of her existing visitation rights, frequently missing or arriving late to visits with her daughter.

**4. Termination of Parental Rights—grounds—willful failure to make reasonable progress**

The trial court properly terminated a mother's parental rights to her daughter based upon a willful failure to make reasonable progress toward correcting the conditions that led to the child's removal from the family home (N.C.G.S. § 7B-1111(a)(2)). The trial court found that the mother failed to maintain stable housing and employment, frequently missed scheduled visits with her daughter, and failed to attend most of her individual and group therapy sessions despite continuing to be involved in incidents of domestic violence with the daughter's father since the child's removal from the home.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 1 April 2019 by Judge Robert J. Crumpton in District Court, Alleghany County, and on appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 16 July 2019 by Judge Jeanie R. Houston in District Court, Alleghany County. This matter was calendared for argument in the Supreme Court on 29 July 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.

*Anné C. Wright and John Benjamin "Jak" Reeves for petitioner-appellee Alleghany County Department of Social Services.*

*Erin K. Otero, GAL Appellate Counsel, for appellee Guardian ad Litem.*

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

ERVIN, Justice.

Respondent-mother Christine W. appeals from orders eliminating reunification from the permanent plan for her daughter L.E.W.[1] and terminating her parental rights in the child. After careful consideration of the arguments advanced in respondent-mother's brief in light of the record and the applicable law, we hold that the challenged permanency planning and termination of parental rights orders should be affirmed.

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

## I. Factual Background

The Alleghany County Department of Social Services became involved with respondent-mother and respondent-father Brandon W. in February 2017, prior to Luna's birth, based upon reports alleging domestic violence between and substance abuse involving the parents. Following an investigation into these reports, the parents entered into an in-home services agreement with DSS on 30 March 2017.

Luna was born on 28 April 2017. In June 2017, DSS received reports that the parents were continuing to engage in acts of domestic violence and were failing to properly feed Luna. In an attempt to address these concerns, the parents entered into a safety plan with DSS in which they agreed to feed Luna every two hours and to attend regular appointments at which Luna's weight would be checked.

On 26 June 2017, Luna was diagnosed with failure to thrive. On 3 July 2017, the parents failed to bring Luna to an appointment to check her weight despite the fact that multiple attempts had been made to have the parents keep that appointment. On 5 July 2017, DSS filed a petition alleging that Luna was a neglected juvenile and obtained the entry of an order authorizing it to take Luna into non-secure custody.

On 5 December 2017, Judge Houston entered an order adjudicating Luna to be a neglected and dependent juvenile,[2] placing Luna in the legal and physical custody of DSS, granting supervised visitation to the parents, and ordering the parents to comply with an Out of Home Family Services Agreement into which they had entered with DSS. After a permanency planning review hearing held on 3 July 2018, Judge Crumpton entered an order on 31 July 2018 in which he set the permanent plan for Luna as termination of parental rights with a concurrent plan of reunification.

On 27 September 2018, DSS filed a petition seeking to have both parents' parental rights in Luna terminated on the grounds of neglect, willful failure to make reasonable progress toward correcting the conditions that had led to Luna's removal from the family home, failure to pay a reasonable portion of the cost of the care that had been provided to Luna, dependency, and abandonment. N.C.G.S. § 7B-1111(a)(1)–(3), (6)–(7) (2019). On 5 March 2019, Judge Crumpton conducted a permanency

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2. As an aside, we note that the trial court lacked the authority to adjudicate Luna to be a dependent juvenile because dependency was not alleged in the initial juvenile petition. *See* N.C.G.S. § 7B-802 (2019) (providing that "[t]he adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition").

planning hearing, which led to the entry of an order on 1 April 2019 that eliminated reunification with the parents from Luna's permanent plan, relieved DSS from any obligation to attempt to effectuate reunification between Luna and the parents, and changed Luna's permanent plan to a primary plan of termination of parental rights coupled with a concurrent plan of guardianship. On 29 April 2019, respondent-mother filed a notice preserving her right to seek appellate review of Judge Crumpton's permanency planning order.

After a hearing held on 1 April 2019, Judge Houston entered an order on 16 July 2019 in which she found that both parents' parental rights in Luna were subject to termination based upon each of the grounds for termination set out in the termination petition and that it would be in Luna's best interests for the parents' parental rights in Luna to be terminated. As a result, the trial court terminated the parents' parental rights in Luna.[3]

On 5 August 2019, respondent-mother noted an appeal from Judge Houston's termination order to this Court pursuant to N.C.G.S. §§ 7A-27(a)(5) and 7B-1001(a1)(1). On 17 December 2019, DSS and the guardian ad litem filed a motion seeking to have respondent-mother's appeal from the 1 April 2019 permanency planning review order dismissed on the grounds that no reference to that order had been made in respondent-mother's notice of appeal. On 20 December 2019, respondent-mother filed a petition seeking the issuance of a writ of certiorari authorizing appellate review of the 1 April 2019 permanency planning order. On 9 January 2020, this Court entered orders granting the dismissal motion and allowing respondent-mother's certiorari petition. As a result, we are reviewing both the permanency planning and the termination orders.

## II. Substantive Legal Analysis

### A. Permanency Planning Review Order

#### 1. Standard of Proof

**[1]** As an initial matter, respondent-mother contends that Judge Crumpton misstated the applicable standard of proof in the 1 April 2019 permanency planning order. More specifically, respondent-mother contends that Judge Crumpton erroneously stated in the challenged permanency planning order that "the court finds that the following findings of

3. Respondent-father has not challenged the permanency planning order or Judge Houston's decision to terminate his parental rights in Luna on appeal before this Court.

fact have been proven by clear, cogent, and convincing evidence." We conclude that respondent-mother is not entitled to relief from the trial court's permanency planning order on the basis of this argument.

As this Court has stated:

> "The essential requirement[ ] at . . . the review 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." In light of this objective, neither the parent nor the county department of social services bears the burden of proof in permanency planning hearings, and the trial court's findings of fact need only be supported by sufficient competent evidence.

*In re L.M.T.*, 367 N.C. 165, 180, 752 S.E.2d 453, 462 (2013) (alterations in original) (citations omitted). As a result, respondent-mother is correct in pointing out that the standard of proof set out in the challenged permanency planning order conflicts with the standard of proof applicable to permanency planning proceedings as articulated in this Court's prior decisions.

Although respondent-mother asserts that the "confusion" reflected in the trial court's misstatement of the applicable standard of proof adversely affected her chances for a more favorable outcome at the permanency planning hearing, we believe that the trial court's error worked in favor of, rather than against, respondent-mother's chances for a more favorable outcome given that the decision to eliminate reunification from Luna's permanent plan and to reduce respondent-mother's visitation with Luna rested upon findings of fact that required DSS to present stronger proof than the law actually required. As the Court of Appeals has clearly held in cases subject to Chapter 7B of the North Carolina General Statutes, "to obtain relief on appeal, an appellant must not only show error, but that . . . the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action." *In re B.S.O.*, 234 N.C. App. 706, 713, 760 S.E.2d 59, 65 (2014) (alteration in original) (quoting *Starco, Inc. v. AMG Bonding and Ins. Servs.*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996)). Thus, we hold that Judge Crumpton's misstatement of the applicable standard of proof in the 1 April 2019 permanency planning order constituted harmless error that does not entitle respondent-mother to relief from the challenged order.

2. Elimination of Reunification from Luna's Permanent Plan

**[2]** Secondly, respondent-mother argues that Judge Crumpton erred by failing to make the factual findings required by N.C.G.S. § 7B-906.2 in eliminating reunification with the parents from Luna's permanent plan. More specifically, respondent-mother argues that Judge Crumpton erred in the course of eliminating reunification from Luna's permanent plan because "[n]one of the findings of fact made the ultimate required finding that reunification efforts would be futile or inconsistent with Luna's needs." We do not find respondent-mother's argument persuasive.

As we have previously stated, appellate review of a trial court's permanency planning review order "is limited to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law," *In re L.M.T.*, 367 N.C. at 168, 752 S.E.2d at 455 (alteration in original) (quoting *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010)), with "[t]he trial court's findings of fact [being] conclusive on appeal if supported by any competent evidence." *Id.* "At a permanency planning hearing, '[r]eunification shall be a primary or secondary plan unless,' *inter alia*, 'the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety.' " *In re J.H.*, 373 N.C. 264, 268, 837 S.E.2d 847, 850 (2020) (alteration in original) (quoting N.C.G.S. § 7B-906.2(b) (2019)). As part of that process, the trial court is required to make written findings "which shall demonstrate the degree of success or failure toward reunification," including:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
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> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
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> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C.G.S. § 7B-906.2(d) (2019). Although "use of the actual statutory language [is] the best practice, the statute does not demand a verbatim recitation of its language." *In re L.M.T.*, 367 N.C. at 167, 752 S.E.2d at 455. Instead, "the order must make clear that the trial court considered the evidence in light of whether reunification 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." *Id.* at 167–68, 752 S.E.2d at 455 (cleaned up). In *In re L.M.T.*, we upheld a permanency planning order as "embrac[ing] 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" based upon findings that the parents had created an injurious environment for the child and that the parents had engaged in substance abuse, domestic violence, and deceptive activities directed at the court and a conclusion that the relevant Department of Social Services should be relieved of reunification and visitation efforts. *Id.* at 169, 752 S.E.2d at 456.

In the challenged permanency planning order, Judge Crumpton found as a fact that:

> 5. The minor child was diagnosed as "failure to thrive" due to the neglect of the parents. Upon going into DSS custody, the child immediately began gaining weight. The parents continue to ignore requests of the department to properly feed the child at visits. The parents seem to think the child is over-eating although the child appears to now be healthy.
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> 6. The parents admitted to several incidents of domestic violence which they referred to as "arguments[.]" These incidents seem volatile and the parents seem dismissive of them. On one occasion, law enforcement was called. On another, the mother was seeking medical treatment and the father made her leave due to a fight rather than getting treatment.
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> . . . .
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> 13. The evidence heard was that the parents have complied with portions of their plan, but it has not been completed. . . .
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> 14. The mother moved away in May 2018 to Louisiana and stopped working her case plan. Prior to doing so, she dismissed a pending domestic violence order against the father. The mother moved back to North Carolina a few months later and indicated she wanted to work her case plan and also took out a new [domestic violence order] against the father. The department is concerned

that substantial efforts have not been made to alleviate the concerns that originally caused the removal of the minor child.

15. The Court remains extremely concerned about domestic violence affecting the minor child and the parents' ability to provide adequate food for the minor child.

16. Since the last hearing, the mother has made some efforts to work her plan. However, the Court remains concerned about the lack of progress over such a substantial amount of time. The Court understands the difficulty caused by her moving away, but this was her choice to move and not work her plan. Since moving back, the mother has again moved to Virginia. This has caused her difficulties with finding work. The department has been unable to confirm the mother's housing and has requested an [Interstate Compact on the Placement of Children home study] which has not been completed.

17. The mother is attending her [D]aymark appointments sporadically. She was recommended for the women's trauma group. Since 11/14/2018 to present, she could have attended 12 sessions but has only attended 7. The mother is not employed despite being licensed as a CNA in [North Carolina]. The mother formerly had a good job earning over $12 per hour but quit. The mother does not have proof of housing. She indicates that she has housing but does not have to pay for it. She also testified that her landlord gives her money for expenses. The mother is ordered to pay child support but has not made a payment since November of 2018. The mother is often late to visits and missed the most recent [Children's Development and Services Agency meeting] for the child.

18. The mother testified that she goes to physical therapy three times per week for back pain but is not sure how she hurt her back. She does not have a car. The mother says she cannot get a job but did not explain any efforts to obtain employment. The mother is permitted to have phone calls with the foster family but indicates she does not utilize them because they can

> be used against her. The mother has missed visits, but claims it was due to physical therapy or the wea[th]er. She indicates that she has thought about moving back to [North Carolina]. She has a smart phone.
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> . . . .
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> 21. Pursuant to [N.C.G.S. §] 7B-906.2, the Court finds that the parents are not making adequate progress under their case plan. However, the Court does acknowledge that the parents remain available to the Court, and therefore finds that a concurrent plan is appropriate. The parents continue to act in a manner inconsistent with the health and safety of the juvenile.

Based upon these findings of fact, Judge Crumpton ordered that "[t]he Department shall hereinafter be relieved of reasonable efforts at this time" and that "[t]he Permanent Plan for the minor child shall be termination of parental rights," that "[t]he concurrent plan shall be guardianship," and that "[a] termination of parental rights petition has been filed."

A careful examination of Judge Crumpton's findings of fact[4] establishes that he addressed each of the factors specified in N.C.G.S. § 7B-906.2(d) by determining that respondent-mother had not been making adequate progress satisfying the components of her case plan, that respondent-mother had remained in contact with DSS and the court, and that respondent-mother was acting in a manner that was inconsistent with Luna's health and safety. Aside from the fact that there was no necessity for Judge Crumpton to have made findings of fact couched in the relevant statutory language, *In re L.M.T.*, 367 N.C. at

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4. Respondent-mother argues in her brief that "[t]he evidence did not support the trial court's determination that the trial court remained concerned about domestic violence affecting the minor child" and that "there was no evidence to support a finding that [respondent-mother] was unable to provide adequate food for Luna." However, Judge Crumpton stated in the challenged permanency planning order that he was, in fact, "extremely concerned about domestic violence affecting the minor child and the parents' ability to provide adequate food for the minor child." We are unable to see how Judge Crumpton's statement of the extent to which he was concerned about a particular issue does not suffice to show the existence of that concern. In addition, Judge Crumpton "incorporated" "previous orders of this Court" "by reference" in its 2 November 2018 permanency planning order, in which Judge Crumpton found, as he did in the challenged permanency planning order, that "[t]he parents have not followed through with the feeding schedule and have failed to show or been late to several weight checks," "continue to ignore requests of the department to properly feed the child at visits," and "seem to think the child is over-eating although the child appears to now be healthy." As a result, the challenged findings of fact have adequate record support.

167–68, 752 S.E.2d at 455, and the fact that the findings that we upheld in *In re L.M.T.*—which focused upon the fact that the parents had created an injurious environment for the juvenile and had engaged in substance abuse, domestic violence, and deceptive conduct, *id.* at 169, 752 S.E.2d at 456—cannot be distinguished in any meaningful way from the findings that Judge Crumpton made in this case, which focused upon the trial court's continued concerns about domestic violence between the parents, respondent-mother's failure to consistently attend meetings of the women's trauma group, and her failure to provide proof of housing or to explain her continued unemployment, Judge Crumpton expressly found that "[t]he parents continue to act in a manner inconsistent with the health and safety of the juvenile." In view of the fact that the relevant language from N.C.G.S. § 7B-906.2 is couched in the disjunctive and the fact that the trial court found that respondent-mother was acting "in a manner that is inconsistent with the health and safety of the juvenile," we have no difficulty in holding that Judge Crumpton actually made an ultimate finding of the type that respondent-mother claims to have been omitted. As a result, given the statutory requirement that a permanency planning order that eliminates reunification from the child's permanent plan "must address the statute's concerns," *id.* at 168, 752 S.E.2d at 455, by showing "that the trial court considered the evidence in light of whether reunification 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," *id.* at 167–68, 752 S.E.2d at 455 (cleaned up), and given that the findings of fact contained in the challenged permanency planning order satisfy that legal standard, we hold that respondent-mother's challenge to Judge Crumpton's decision to eliminate reunification with respondent-mother from Luna's permanent plan lacks merit.

3. Visitation

**[3]** In her final challenge to the 1 April 2019 permanency planning order, respondent-mother argues that Judge Crumpton erred by reducing the amount of visitation that she was entitled to have with Luna from two weekly visits, one of which was an unsupervised visit of three hours in duration and the other of which was a supervised visit of one hour in duration, to two monthly visits, both of which would be of one hour in duration, with DSS having the "discretion to increase the duration or to make them unsupervised." According to respondent-mother, Judge Crumpton abused his discretion by taking this action "[w]ithout finding why these visits were detrimental to the child or needed to be changed," particularly given that there "were no concerns regarding recent

unsupervised visits," which "had been on-going, including the Friday before the termination hearing." Once again, we are not persuaded by respondent-mother's argument.

"An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation." N.C.G.S. § 7B-905.1(a). "The [visitation] plan shall indicate the minimum frequency and length of visits and whether the visits shall be supervised." N.C.G.S. § 7B-905.1(b). At review and permanency planning hearings, "the court shall consider . . . [several] criteria and make written findings regarding those that are relevant," including "[r]eports on visitation that has occurred and whether there is a need to create, modify, or enforce an appropriate visitation plan in accordance with [N.C.]G.S. [§] 7B-905.1." N.C.G.S. § 7B-906.1(d)(2). We agree with the Court of Appeals that appellate courts "review[ ] the trial court's dispositional orders of visitation for an abuse of discretion," *In re C.S.L.B.*, 254 N.C. App. 395, 399, 829 S.E.2d 492, 495 (2017) (quoting *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007)), with an abuse of discretion having occurred "only upon a showing that [the trial court's] actions are manifestly unsupported by reason." *Id.* (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

Judge Crumpton found as a fact in the challenged permanency planning order that "[t]he mother is often late to visits" and "has missed visits," with respondent-mother attributing these missed visits to the need to participate in physical therapy for an unexplained back injury or the weather. In addition, Judge Crumpton noted that respondent-mother had failed to make "adequate progress under [her] case plan," that "termination of parental rights shall be considered," and that "[t]he parents continue to act in a manner inconsistent with the health and safety of the juvenile" before concluding that "[t]he Permanent Plan for the minor child shall be termination of parental rights" and that "[t]he concurrent plan shall be guardianship." In light of the deficiencies in the manner in which respondent-mother took advantage of her existing opportunities to visit with Luna and Judge Crumpton's decision to eliminate reunification with respondent-mother from Luna's permanent plan, we are unable to say that Judge Crumpton abused his discretion by reducing the extent to which respondent-mother was entitled to visit with Luna. As a result, we conclude that respondent-mother's challenge to the visitation component of the 1 April 2019 permanency planning order lacks merit.

B. Termination of Parental Rights Order

**[4]** In her order terminating respondent-mother's parental rights in Luna, Judge Houston concluded that respondent-mother's parental rights in Luna were subject to termination on the grounds of neglect, N.C.G.S. § 7B-1111(a)(1), willful failure to make reasonable progress toward correcting the conditions that had led to Luna's removal from the family home, N.C.G.S. § 7B-1111(a)(2), failure to pay a reasonable portion of the cost of Luna's care despite having the ability to do so, N.C.G.S. § 7B-1111(a)(3), dependency, N.C.G.S. § 7B-1111(a)(6), and abandonment, N.C.G.S. § 7B-1111(a)(7).[5] In challenging the lawfulness of the termination order before this Court, respondent-mother argues that Judge Houston erred by finding that any of the statutory grounds for terminating her parental rights in Luna existed. As a result of our determination that Judge Houston did not err by determining that respondent-mother's parental rights in Luna were subject to termination based upon her willful failure to make reasonable progress toward correcting the conditions that had led to Luna's removal from the family home pursuant to N.C.G.S. § 7B-1111(a)(2), we hold that Judge Houston did not err by finding the existence of at least one ground for termination in this case.[6]

According to N.C.G.S. § 7B-1111(a)(2), a parent's parental rights in a juvenile are subject to termination 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." A trial court should not determine "that a parent has failed to make 'reasonable progress . . . in correcting those conditions which led to the removal of the

5. We note that Judge Houston stated that respondent-mother's parental rights in Luna were subject to termination on the basis of abandonment as authorized by N.C.G.S. § 7B-1111(a)(7) in the body of the termination order without making any reference to that ground for termination in its conclusions of law. We need not address this apparent inconsistency in the termination order given our determination that Judge Houston did not err by concluding that respondent-mother's parental rights in Luna were subject to termination for willful failure to make reasonable progress toward correcting the conditions that led to Luna's removal from the family home pursuant to N.C.G.S. § 7B-1111(a)(2).

6. In light of our determination that Judge Houston did not err by finding that respondent-mother's parental rights in Luna were subject to termination for willful failure to make reasonable progress toward correcting the conditions that led to Luna's removal from the family home as authorized by N.C.G.S. § 7B-1111(a)(2), we will refrain from addressing respondent-mother's challenges to the remaining grounds for termination set out in Judge Houston's termination order.

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. 372, 385, 831 S.E.2d 305, 314 (2019) (alteration in original) (citation omitted). However, "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). Moreover, as the Court of Appeals has correctly noted, the willfulness of a parent's failure to make reasonable progress toward correcting the conditions that led to a child's removal from the family home "is established when the [parent] 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). A trial court's determination that grounds exist to terminate one's parental rights in his or her child is reviewed on appeal for the purpose of determining "whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings support the trial court's conclusions of law." *In re B.O.A.*, 372 N.C. at 379, 831 S.E.2d at 310 (citation omitted).

In determining that respondent-mother's parental rights in Luna were subject to termination based upon her willful failure to make reasonable progress toward correcting the conditions that had led to Luna's removal from the family home, Judge Houston found that, in accordance with her case plan, respondent-mother was required to "learn appropriate developmental care to ensure [Luna] continues to thrive"; "[a]ttend and participate effectively in substance abuse group in order to learn skills and support needed to achieve and maintain sobriety"; "[a]ttend individual therapy, mood and anxiety group . . . in order to deal with life's stressors and to be able to acquire knowledge on how to manage and control her mental health"; "[f]eed[ Luna] the amount of formula specified by Foster Parents, be on time to visits, and demonstrate skills from parenting classes"; "[be] involved and [ ] attend CDSA appointments and meetings" and "[r]emain active in those needed services in order to know how to care for [Luna's] development needs when back in the home"; "[m]aintain employment and stable housing in order to provide [Luna] with a safe, stable home"; and "[a]cquire appropriate, healthy resolution skills" and "utilize the needed resources to be able to control [her] anger and use the skills learned by eliminating domestic violence in the home." According to Judge Houston, even though respondent-mother had completed parenting classes and substance abuse group sessions by 13 April 2018 and even though respondent-mother was participating in mood and anxiety group therapy as of that date, respondent-mother had

"moved away due to domestic violence with the Respondent Father and ceased services until July of 2018." As a result of her decision to leave the area, Judge Houston found that respondent-mother "had to complete a new assessment with Daymark," which recommended that she "attend Women's Trauma group" on a weekly basis. However, respondent-mother "only attended seven out of twelve trauma group sessions since November of 2018." In addition, Judge Houston found that respondent-mother had missed scheduled visits with Luna on 12 February 2018, 16 March 2018, 3 August 2018, 14 December 2018, 25 January 2019, and 13 February 2019 and was late to her scheduled visit on 17 August 2018, resulting in the cancellation of that visit. Moreover, Judge Houston found that the parents "were regularly five to fifteen minutes late to their scheduled visits." Judge Houston further found that respondent-mother had failed to schedule or attend CDSA appointments and meetings in December 2017, January 2018, and March 2018 and had failed to contact CDSA at all after 28 January 2019. Judge Houston's findings reflected that respondent-mother moved to Louisiana to live with her mother in May 2018, moved to Virginia in June 2018, and was unemployed at the time of the termination hearing. Finally, Judge Houston found that respondent-mother had only completed six of thirteen sessions of the Women's Trauma group and appeared to have been involved in incidents of domestic violence with respondent-father on 21 September 2017, 15 December 2017, 22 December 2017, 24 December 2017, 25 December 2017, 26 December 2017, 30 December 2017, and 30 April 2018. As a result, given that Judge Houston's findings establish that respondent-mother had failed to attend about half of the Women's Trauma group sessions since November 2018, had missed a material number of Mood and Anxiety group sessions, had failed to appear at most of her individual therapy sessions, had failed to consistently attend her visits with Luna in a timely manner, had failed to consistently participate in the CDSA process, had failed to maintain stable housing and employment, and continued to be involved in incidents of domestic violence with respondent-father until 30 April 2018, we have no hesitation in concluding that Judge Houston's findings of fact amply support her determination that respondent-mother's parental rights in Luna were subject to termination based upon a willful failure to make reasonable progress toward correcting the conditions that had resulted in Luna's removal from the family home as authorized by N.C.G.S. § 7B-1111(a)(2).[7]

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7. Although respondent-mother argues that a number of Judge Houston's findings of fact were, in actuality, conclusions of law or were drawn from earlier orders not subject to the clear and convincing evidence standard of proof applicable in termination of parental rights proceedings, N.C.G.S. § 7B-1111(b), the discussion of Judge Houston's findings

In seeking to persuade us to reach a different result, respondent-mother argues that "[t]here were no concerns over [respondent-mother's] ability to care for her daughter during supervised or unsupervised visits" and that "a parent can only receive unsupervised visits if [he or she] can provide a safe home," citing N.C.G.S. § 7B-903.1(c) (providing that, "[i]f a juvenile is removed from the home and placed in the custody or placement responsibility of a county department of social services, the director shall not allow unsupervised visitation with or return physical custody of the juvenile to the parent, guardian, custodian, or caretaker without a hearing at which the court finds that the juvenile will receive proper care and supervision in a safe home"). In addition, respondent-mother argues that "[f]ive missed visits" does not demonstrate that respondent-mother "was neglectful" and that, prior to 28 January 2019, respondent-mother had consistently attended CDSA." Similarly, respondent-mother argues that "[t]here were no concerns with substance abuse since [respondent-mother] never tested positive for illegal substances"; that DSS did not pay for the services that respondent-mother failed to complete; that, "at times, [respondent-mother's] work schedule and physical therapy for her back interfered with those appointments"; and that Judge Houston "failed to establish how missing these appointments to address her own trauma had an effect on [respondent-mother's] ability to parent Luna." Finally, respondent-mother argues that she "had addressed the domestic violence issue at the time of the termination hearing." As a result, respondent-mother contends that, "[w]hile [she] may not have addressed all the portions of her case plan, at the time of the termination hearing, she was able to parent Luna without domestic violence and [to] appropriately car[e] for her," with "[a]ny failure to complete her case plan [amounting to] elevating form over substance since there was no showing that these failures had [any] effect on [respondent-mother's] ability to care for Luna by appropriately feeding her and [staying] free of domestic violence."

A careful review of Judge Houston's findings relating to respondent-mother's compliance with the provisions of her case plan satisfies us that Judge Houston did not err by determining that respondent-mother

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contained in the text of this opinion is drawn from a portion of the termination order which respondent-mother has not challenged as being devoid of the necessary record support or as being legally deficient on other grounds. As a result, since "[u]nchallenged findings of fact made at the adjudicatory stage . . . are binding on appeal," *In re D.W.P.*, 373 N.C. 327, 330, 838 S.E.2d 396, 400 (2020) (citation omitted), the findings upon which our decision concerning the lawfulness of Judge Houston's decision to conclude that respondent-mother's parental rights in Luna were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) rests are properly before the Court for purposes of appellate review.

did not make reasonable progress toward correcting the conditions that had led to Luna's removal from the family home. Judge Houston's findings establish that respondent-mother failed to adequately participate in the Women's Trauma group, the Mood and Anxiety group, and individual therapy as required by her case plan. Respondent-mother contends that these portions of her case plan had no relation to her ability to properly care for Luna. However, these portions of respondent-mother's case plan appear to have been intended to address the domestic violence that had characterized respondent-mother's relationship with respondent-father. As a result, respondent-mother's failure to complete these portions of her case plan supports an inference that she had failed to adequately address the domestic violence concerns that constituted one of the principal bases for Luna's removal from the family home. Moreover, the fact that respondent-mother voluntarily left her employment in order to enhance her ability to comply with the provisions of her case plan overlooks the fact that obtaining and maintaining employment was, in and of itself, a component of that plan. Similarly, respondent-mother does not challenge the validity of Judge Houston's findings concerning the nature and extent of her visitation with Luna or contend that she satisfied the requirement that she obtain and maintain satisfactory housing in which she and Luna could live. Finally, the fact that the last incident of domestic violence between respondent-father and respondent-mother occurred on 30 April 2018 does not mean that respondent-mother has adequately addressed the domestic violence issue given her failure to complete the portions of her case plan that were intended to provide her with the tools that were necessary to avoid becoming entangled in a violent relationship with someone else in the future and given that respondent-father had been incarcerated and in institutional care for mental health concerns during a portion of the time after 30 April 2018. Thus, Judge Houston had ample basis for concluding that, even though respondent-mother had, in fact, made some progress toward compliance with the provisions of her case plan, she had failed to make reasonable progress toward correcting the conditions that had led to Luna's removal from the family home despite having had the ability to do so. As a result, given that the existence of a single ground for termination is sufficient to support the termination of a parent's parental rights, *In re B.O.A.*, 372 N.C. at 380, 831 S.E.2d at 311 (stating 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"), and given that respondent-mother has not challenged the lawfulness of Judge Houston's determination that the termination of her parental rights in Luna would be in the child's best interests, the challenged termination order should be affirmed.

III. Conclusion

For the reasons set forth above, we conclude that Judge Crumpton did not commit prejudicial error by misstating the applicable standard of proof, eliminating reunification as a component of the permanent plan for Luna, or reducing the amount of visitation that respondent-mother was entitled to have with Luna in the 1 April 2019 permanency planning order. We also conclude that Judge Houston did not err by finding that respondent-mother's parental rights in Luna were subject to termination based upon her willful failure to make reasonable progress toward correcting the conditions that had led to Luna's removal from the family home. As a result, the 1 April 2019 permanency planning order and the 16 July 2019 termination order are affirmed.

AFFIRMED.

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ORLANDO RESIDENCE, LTD.
v.
ALLIANCE HOSPITALITY MANAGEMENT, LLC, ROLF A. TWEETEN, AXIS HOSPITALITY, INC., AND KENNETH E. NELSON

No. 113A19

Filed 14 August 2020

**1. Civil Procedure—crossclaims—dismissal of original action—dismissal of crossclaims not required**

The Business Court erred by concluding that a defendant's crossclaims against a co-defendant were automatically subject to dismissal simply because plaintiff's claims were being dismissed. The dismissal of an original action does not, by itself, require the dismissal of crossclaims that meet the requirements of Civil Procedure Rule 13(g) (with the exception of certain types of crossclaims that require the continued litigation of the original claim in order to remain viable).

**2. Collateral Estoppel and Res Judicata—res judicata—identity element—crossclaims—failure to obtain ruling in prior action**

Several of defendant's crossclaims related to his percentage ownership in co-defendant-company were subject to dismissal based on res judicata where those crossclaims required a determination of

the total number of membership units in co-defendant-company, for which defendant failed to obtain a ruling in a prior action.

**3. Civil Procedure—joinder—crossclaims—qualifying claims dismissed—remaining claims must be dismissed**

Where defendant asserted 18 crossclaims against a co-defendant, and the only crossclaims that met the requirements of Civil Procedure Rule 13(g) were barred by res judicata, the remaining crossclaims were properly dismissed. The Supreme Court adopted the federal approach—that if a qualifying claim asserted by a defendant is dismissed, then all claims joined under Rule 18 must also be dismissed.

**4. Civil Procedure—dismissal with prejudice—discretion of trial court—protracted litigation**

The trial court did not abuse its discretion by dismissing defendant's crossclaims with prejudice—rather than without prejudice—where Civil Procedure Rule 41(b) vests trial courts with such discretion and dismissal with prejudice brought some measure of finality to the protracted litigation involving defendant's debts to plaintiff and his membership interests in co-defendant-company.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order entered on 20 December 2018 by Judge James L. Gale, Senior Business Court Judge, 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(b). Heard in the Supreme Court on 11 December 2019.

*No brief for plaintiff Orlando Residence, Ltd.*

*Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Gray Wilson and Jackson W. Moore Jr., for defendant-appellees Alliance Hospitality Management, LLC, Rolf A. Tweeten, and Axis Hospitality, Inc.*

*Kenneth Nelson, defendant-appellant, pro se.*

DAVIS, Justice.

In this case, we address several issues relating to the ability of a defendant to assert crossclaims against a co-defendant pursuant to the North Carolina Rules of Civil Procedure. Based on our conclusion that the dismissal of the defendant's crossclaims here was proper, albeit on

different grounds than those relied upon by the Business Court, we modify and affirm the decision of the Business Court.

## Factual and Procedural Background

This appeal arises from the latest lawsuit in protracted litigation between Kenneth Nelson; Alliance Hospitality Management, LLC (Alliance); and Orlando Residence, Ltd. (Orlando). Alliance is a Georgia company that provides hotel management services with its principal place of business in North Carolina. Nelson is a former employee of Alliance who possesses an ownership interest in the company. Axis Hospitality, Inc. (Axis) is an Illinois corporation that is the majority owner of Alliance. Axis is wholly owned and managed by an individual named Rolf Tweeten. Orlando is a judgment creditor of Nelson.[1]

In order to fully analyze the issues before us in this appeal, it is necessary to review in some detail the extensive factual and procedural history between the parties.

### I. Nelson's Ownership Interest in Alliance

In 2007, Axis purchased a 51% interest in Alliance. Around this same time, Tweeten hired Nelson as a consultant to help him acquire the remainder of Alliance. In 2008, Tweeten reached an oral agreement with Nelson that granted him a limited ownership interest in Alliance. Nelson was also made a director of Alliance and later became Chief Financial Officer of the company. He served in that role until 31 January 2011.

On 25 February 2011, Nelson filed a lawsuit (the Nelson Action) in Superior Court, Wake County, against Alliance, Axis, and Tweeten (collectively, the Alliance Defendants) in which he asserted claims for (1) breach of fiduciary duty; (2) constructive fraud; (3) judicial dissolution of Alliance; (4) a declaratory judgment regarding the extent of Nelson's ownership in Alliance's "membership interest units"; and (5) wrongful termination.[2] All of Nelson's claims were dismissed prior to trial with the exception of the fourth claim seeking a declaratory judgment with regard to Nelson's ownership interest in Alliance. Nelson's declaratory judgment claim asserted that he owned 10 of the existing 61 membership units in Alliance, thereby giving him a 16.4% ownership interest. The Alliance

1. Despite the fact that it originally instituted this action, Orlando has not participated in this appeal, which solely involves the dismissal of crossclaims asserted by Nelson against his co-defendants.

2. The matter was designated a complex business case by the Chief Justice on 1 June 2011 and transferred to the North Carolina Business Court.

Defendants, conversely, contended that Nelson had been granted only a 10% interest.

A trial was held on the declaratory judgment claim beginning on 16 March 2015, and at the close of the evidence, the jury was tasked with answering—along with an additional question not relevant to this appeal—the following question: "Did Alliance's board of directors issue 10 membership units to Kenneth E. Nelson?" The jury answered in the affirmative. The jury was not asked, however, to determine the total number of membership units existing in Alliance, thereby leaving unanswered the precise percentage of Nelson's ownership interest in Alliance. On 27 March 2015, the Business Court entered an order declaring Nelson to be "the holder of 10 membership units in Alliance . . . ." The Business Court further ordered that Alliance's Board of Directors "adopt a resolution, or otherwise amend the corporate records, to reflect that Kenneth E. Nelson owns 10 membership units." Nelson appealed the Business Court's pre-trial dismissal of his damages claims, and the Court of Appeals affirmed the Business Court's ruling. *See Nelson v. Alliance Hosp. Mgmt., LLC*, 2016 N.C. App. LEXIS 412 (N.C. Ct. App. 2016) (unpublished).

## II. Orlando's Enforcement of Foreign Judgments Against Nelson in North Carolina

As a result of a failed business venture dating back to the late 1980s, Orlando secured two money judgments against Nelson[3] during the years preceding the filing of the present lawsuit. The first judgment was issued by the Chancery Court for Davidson County, Tennessee on 7 October 2004 in the amount of $797,615. In an effort to enforce this judgment against Nelson in North Carolina, Orlando filed a motion for a "charging order" in Superior Court, Wake County. On 12 May 2011, the superior court issued such an order, finding that Orlando's judgment had not been completely satisfied and stating, in part, that "any distribution, allocations, or payments in any form otherwise due from Alliance . . . to Kenneth E. Nelson up to $121,127.85 . . . shall instead be paid to Orlando Residence, Ltd."

The second judgment was entered by a federal court in the District of South Carolina on 15 August 2012 in the amount of $4,000,000. Seeking to enforce this judgment against Nelson in North Carolina, on

3. The first of these judgments was actually entered against Nashville Lodging Company, a corporation controlled by Nelson that he was found to have used to facilitate fraudulent conveyances and avoid Orlando's collection efforts. *See Orlando Residence, Ltd. v. GP Credit Co., LLC*, 553 F.3d 550, 553 (7th Cir. 2009).

11 September 2012 Orlando filed the judgment in Superior Court, Wake County, and once again sought a charging order. On 14 February 2013, the superior court issued a charging order providing that "any distributions, allocations, or payments in any form otherwise due from Alliance Hospitality Management, LLC, to Kenneth E. Nelson up to $4,000,000 plus post judgment interest, shall not be paid to Nelson, but shall instead be paid to Orlando Residence, Ltd. . . . "

On 3 September 2015, Orlando filed—under the same case number utilized in the second charging order proceeding—a motion for civil contempt against Alliance in Superior Court, Wake County, for its alleged failure to make distribution payments in the appropriate amounts as required pursuant to the charging orders. In this motion, Orlando asserted that between 12 May 2011—the date of the first charging order—and 1 September 2015, Alliance had paid Orlando only $716,708.61 of the $7,167,086 in total distributions that Alliance had disbursed to its owners during that time frame. Orlando contended that Alliance's calculation of the amounts of Nelson's distributions was based on Alliance's erroneous position that Nelson held only a 10% membership interest in Alliance. Orlando maintained that, in actuality, Alliance had a total of 61 membership units—10 of which were owned by Nelson—and that, as a result, Orlando was entitled to receive 16.4% of past and future Alliance distributions pursuant to the charging orders.

A hearing was held on the motion for contempt on 9 November 2015. The superior court issued an order denying Orlando's motion on 24 November 2015, ruling that "there has been no judicial determination . . . that there were 61 total membership units in Alliance or that Nelson owned 16.4% of Alliance . . . . The only judicial determination that has been made is the jury's verdict that Nelson holds 10 membership units in Alliance." The superior court concluded that "Alliance acted appropriately to distribute the $716,708.62[4] to [Orlando] that corresponded to a 10% ownership interest by Nelson" and that "Alliance has not failed to comply with a court order . . . ."

### III. The Present Action

On 15 March 2017, Orlando filed the present lawsuit in Superior Court, Wake County, against the Alliance Defendants and Nelson[5] seeking

4. Orlando's motion asserted that it had been paid $716,708.6*1*, but the trial court's order stated that the amount that had been paid as of that date was $716,708.6*2*.

5. Orlando's complaint did not assert any claims directly against Nelson and instead designated him as a "nominal defendant . . . solely for purposes of North Carolina Rule of Civil Procedure 19(a) as a person who may be united in interest with [Orlando]."

"recovery of funds Alliance wrongfully transferred to Tweeten and/or Axis in violation of two charging orders previously entered." The complaint alleged that the charging orders required distributions to be calculated on the basis of Nelson holding a 16.4% membership interest in Alliance rather than merely a 10% interest. In its complaint, Orlando asserted claims for (1) civil contempt; (2) violation of the Uniform Fraudulent Transfers Act; (3) constructive trust; (4) conversion; (5) accounting; and (6) a declaratory judgment that "there are 61 units outstanding in Alliance, that Nelson owns 16.4% of Alliance, and that Alliance was and in the future is required to pay 16.4% of all distributions to [Orlando] until such time as [Orlando's] judgments against Nelson are satisfied." The case was designated a mandatory complex business case and transferred to the Business Court on 16 March 2017.

On 3 May 2017, the Alliance Defendants filed a motion to dismiss the claims contained in Orlando's complaint based on lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure and failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). In this motion, the Alliance Defendants argued that Orlando's claims should be dismissed on the grounds that (1) Orlando lacked standing to pursue claims concerning the internal corporate governance of Alliance; (2) certain claims asserted by Orlando were barred by the doctrines of res judicata and collateral estoppel; and (3) the statute of limitations also served to bar a number of Orlando's claims.

Prior to the filing of a responsive pleading by the Alliance Defendants, on 4 April 2017, Nelson, appearing pro se, filed a document entitled "Answer, Defenses, and Crossclaims of Kenneth E. Nelson," in which he asserted eighteen crossclaims against the Alliance Defendants seeking damages and various forms of equitable relief. Specifically, Nelson asserted claims for (1) conversion against Tweeten, Alliance, and Axis; (2) wrongful taking against Tweeten, Alliance, and Axis; (3) common law conspiracy against Tweeten; (4) statutory conspiracy under Wis. Stat. § 134.01 against Tweeten; (5) conspiracy to slander title against Tweeten; (6) aiding and abetting slander of title against Tweeten; (7) breach of fiduciary duty against Tweeten; (8) constructive fraud against Tweeten and Axis; (9) a constructive trust against Tweeten and Axis; (10) an equitable accounting against Tweeten, Alliance, and Axis; (11) unjust enrichment against Tweeten, Alliance, and Axis; (12) *quantum meruit* against Tweeten, Alliance, and Axis; (13) breach of contract and breach of the duty of good faith and fair dealing against Tweeten; (14) breach of contract and breach of the duty of good faith and fair

dealing against Axis; (15) a derivative action for constructive fraud against Tweeten and Axis; (16) a derivative action for breach of fiduciary duty against Tweeten; (17) alternatively, a direct action for breach of fiduciary duty against Tweeten; and (18) alternatively, a direct action for constructive fraud against Tweeten and Axis. In addition, Nelson filed a motion requesting that he not be identified and treated as merely a "nominal defendant."

On 30 May 2017, the Alliance Defendants moved to dismiss Nelson's crossclaims pursuant to Rules 12(b)(1) and (6). In their motion, they contended, in part, that with the exception of his first, second, and ninth crossclaims, Nelson's crossclaims were not related to the subject matter of Orlando's complaint and were therefore procedurally improper. The Alliance Defendants also asserted that Nelson's crossclaims were barred by res judicata, collateral estoppel, and the statute of limitations.

The Business Court entered an order on 20 December 2018 addressing the pending motions. First, the court granted the Alliance Defendants' motion to dismiss the claims asserted by Orlando. The court ruled that Orlando's claims constituted an impermissible collateral attack on the 24 November 2015 order issued by the Superior Court, Wake County, determining that Alliance had complied with the charging orders in making its distributions to Orlando.

Second, the Business Court dismissed with prejudice all of Nelson's crossclaims. Initially, the Business Court expressed its belief that fifteen of Nelson's crossclaims "bear no relation to Orlando's claims and so are not properly brought as crossclaims pursuant to Rule 13(g)" of the North Carolina Rules of Civil Procedure. The Business Court ultimately ruled that *all* of Nelson's crossclaims were subject to dismissal, stating the following:

> The Court first notes that, in light of the dismissal of Orlando's claims, none of Nelson's crossclaims are properly before this Court. A related underlying transaction or occurrence is a prerequisite to the bringing of crossclaims. *See* N.C. Gen. Stat. § 1A-1, Rule 13(g).
>
> . . . .
>
> The Court notes that Nelson unsuccessfully sought to interject many of these claims or the facts regarding them into the Nelson Action. However, the Court need not wade into the waters of claim preclusion or estoppel to conclude that Nelson's claims are in any event not proper in

> this action. *Rather, those claims are not proper because the right to assert them depends on Orlando's Complaint surviving, which it has not.*

(Emphasis added).[6] On 17 January 2019, Nelson gave notice of appeal to this Court pursuant to N.C.G.S. § 7A-27(a)(2) seeking review of the Business Court's dismissal of his crossclaims against the Alliance Defendants.

**Analysis**

**[1]** The sole issue in this appeal is whether the Business Court properly dismissed Nelson's eighteen crossclaims. For the reasons set out below, we hold that the dismissal of Nelson's crossclaims was appropriate but based on different grounds than those relied upon by the Business Court.

"This Court reviews de novo legal conclusions of a trial court, including orders granting or denying a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6)." *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332, 828 S.E.2d 467, 471 (2019). In his appeal, Nelson argues that the Business Court incorrectly ruled that a crossclaim asserted by one defendant against a co-defendant automatically ceases to be viable once the plaintiff's original claims against the defendants are dismissed. We agree.

Rule 13(g) of the North Carolina Rules of Civil Procedure sets out the requirements for the filing of crossclaims and states as follows:

> Crossclaim against coparty. — A pleading may state as a crossclaim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such crossclaim may include a claim that the party against whom it is asserted is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

N.C.G.S. § 1A-1, Rule 13(g) (2019).

In its order dismissing Nelson's crossclaims, the Business Court—as quoted above—determined that the crossclaims "are not proper because the right to assert them depends on Orlando's Complaint surviving,

6. The Business Court also denied Orlando's motion seeking leave to amend its complaint.

which it has not." This Court has not previously had occasion to consider whether a defendant's crossclaims against a co-defendant are no longer viable once the plaintiff's original claims against the defendants have been dismissed. However, the Court of Appeals addressed this precise issue 35 years ago in *Jennette Fruit & Produce Co. v. Seafare Corp.*, 75 N.C. App. 478, 331 S.E.2d 305 (1985).

In *Jennette*, the plaintiff sued multiple defendants, including Seafare Corporation (Seafare), two individuals (the Staffords), and Trenor Corporation (Trenor). The plaintiff sought monetary damages from Seafare and further sought to set aside a conveyance of real property from Seafare to the Staffords based on the plaintiff's assertion that the conveyance was made without consideration and with the intent to defraud the plaintiff. Thereafter, the Staffords had conveyed the property to Trenor. Seafare filed crossclaims against the Staffords and Trenor. *Id.* at 479, 331 S.E.2d at 306.

Following the filing of Seafare's crossclaims, the plaintiff voluntarily dismissed its claims against all defendants. The trial court subsequently dismissed Seafare's crossclaims without prejudice based on its determination "that the dismissal of the plaintiff's claims against the crossclaiming defendants requires the dismissal of said crossclaims." *Id.* at 479–480, 331 S.E.2d at 306. Seafare appealed to the Court of Appeals, which held that Seafare could continue to litigate its crossclaims despite the plaintiff's dismissal of the original action. In reaching this conclusion, the Court of Appeals held as follows:

> We perceive no valid or compelling reason to dismiss a crossclaim over which the courts of this state have jurisdiction merely because the plaintiff's original claim against the crossclaiming defendant has been dismissed. To hold otherwise would needlessly force a defendant who has filed a proper crossclaim concerning a matter governed by state law to refile its claim as a new action. This would require additional time and expense, including court costs and counsel fees. Further, absent adoption of "relation-back" principles which could unnecessarily complicate the litigation, it could result in the time-barring of claims once timely filed. Such a holding would elevate form over substance. It would also be inconsistent with the purpose of Rule 13(g) to enlarge the scope of permissible crossclaims, which pre-Rules law permitted only for indemnification in a tort action.

> The aim of procedural rules is facilitation, not frustration, of decisions on the merits. The canon of interpretation of the Rules is one of liberality, and the general policy of the Rules is to disregard technicalities and form and determine the rights of litigants on the merits. To allow litigation of properly filed crossclaims to proceed regardless of whether a plaintiff's original claim remains extant will facilitate resolution of the crossclaims on their merits, while to disallow such is to regard technicalities and form without serving a substantive purpose. We thus hold that, unless a crossclaim is dependent upon plaintiff's original claim (as would be, e.g., a crossclaim for indemnity or contribution) or is purely defensive, a plaintiff's dismissal of its claims against all defendants does not require dismissal of crossclaims properly filed in the same action.

*Id.* at 483, 331 S.E.2d at 307–308 (cleaned up) (citations omitted).

We agree with the Court of Appeals' analysis in *Jennette*. Nothing in the plain language of Rule 13(g) expressly states, or otherwise suggests, that a plaintiff's original claims must continue to exist in order for a crossclaimant to obtain an adjudication of the crossclaims that it has properly asserted. The crossclaim is a procedural mechanism crafted "to avoid multiple suits and to encourage the determination of the entire controversy among the parties before the court with a minimum of procedural steps." *Selective Ins. Co. v. NCNB Nat'l Bank*, 324 N.C. 560, 565, 380 S.E.2d 521, 525 (1989) (quoting C. Wright & A. Miller, *Federal Practice and Procedure* § 1431 at 161 (1971)). To require the automatic dismissal of a defendant's crossclaims upon the dismissal of the plaintiff's original action would run counter to the objective of efficiently resolving all of the parties' related claims while they are present before the court. Accordingly, we hold that—with the exception of crossclaims such as claims for indemnity or contribution that necessarily require the continued litigation of the plaintiff's original claims in order to remain viable—the dismissal of the original action does not, by itself, mandate the dismissal of a crossclaim so long as the crossclaim meets the Rule 13(g) prerequisites for bringing such a claim.

In light of our ruling on this issue, it is clear that the Business Court erred in concluding that Nelson's crossclaims were automatically subject to dismissal simply because Orlando's claims were being dismissed. The Alliance Defendants assert, however, that the Business Court reached the correct result in dismissing Nelson's crossclaims even if its basis for doing so was incorrect. In so contending, they rely on the

principle previously recognized by this Court that "[w]here a trial court has reached the correct result, the judgment will not be disturbed on appeal even where a different reason is assigned to the decision." *Eways v. Governor's Island*, 326 N.C. 552, 554, 391 S.E.2d 182, 183 (1990); *see also Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) ("If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered."). Thus, we must determine whether—as the Alliance Defendants contend—some other valid basis exists for the Business Court's dismissal of Nelson's crossclaims.

**[2]** In making this determination, we begin by examining whether Nelson's crossclaims met the requirements of Rule 13(g). In so doing, we must first identify the "transaction or occurrence that is the subject matter . . . of the original action" and "any property that is the subject matter of the original action." N.C.G.S. § 1A-1, Rule 13(g). Here, the "original action" was Orlando's lawsuit against the Alliance Defendants. This lawsuit was exclusively concerned with the issue of whether Alliance had underpaid Orlando by making distributions under the charging orders premised on Nelson holding a 10%—rather than a 16.4%— interest in Alliance.

Next, we must determine whether Nelson's crossclaims are sufficiently related to Orlando's original action. The Business Court concluded that fifteen of Nelson's crossclaims "bear no relation to Orlando's claims . . . ." We agree with the Business Court that only three of Nelson's crossclaims relate directly to the claims asserted by Orlando in its complaint. Nelson's first crossclaim asserts that the Alliance Defendants converted 6.4% of his interest in Alliance by failing to issue distributions to him of 16.4% of the total amount of money disbursed to Alliance's owners. Similarly, crossclaim 2 alleges that the Alliance Defendants have engaged in a wrongful taking of Nelson's additional 6.4% interest in Alliance. Finally, crossclaim 9 seeks the imposition of a constructive trust as to 6.4% of the total membership interests in Alliance and 6.4% of all Alliance distributions made since 1 January 2011.

The Alliance Defendants assert that (1) crossclaims 1, 2, and 9 are all subject to dismissal based on the doctrine of res judicata; and (2) because these were the only three of Nelson's eighteen crossclaims that met the requirements of Rule 13(g), the remaining fifteen crossclaims must likewise be dismissed. We address these arguments *seriatim*.

Res judicata "provides that a prior adjudication on the merits in a prior suit bars a subsequent, identical cause of action between the same

parties or their privies," *State ex rel. Lewis v. Lewis*, 311 N.C. 727, 730, 319 S.E.2d 145, 147–48 (1984), and also prevents relitigation of claims that "in the exercise of reasonable diligence, could have been presented for determination in the prior action." *Smoky Mountain Enters. v. Rose*, 283 N.C. 373, 378, 196 S.E.2d 189, 192 (1973). This doctrine was "developed by the courts for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993). "The essential elements of *res judicata* are: (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." *State ex rel. Utils. Comm'n. v. Thornburg*, 325 N.C. 463, 468, 385 S.E.2d 451, 453–54 (1989) (quoting *State ex rel. Utils. Comm'n. v. Public Staff*, 322 N.C. 689, 692, 370 S.E.2d 567, 569 (1988)).

The Alliance Defendants' invocation of res judicata principles here is based upon the Nelson Action. In the Nelson Action, Nelson sued the Alliance Defendants and sought, among other things, a declaratory judgment defining Nelson's ownership interest in Alliance. The jury determined that Alliance "issue[d] 10 membership units to Kenneth E. Nelson," and the trial court entered a judgment declaring Nelson to be an owner of 10 membership units in Alliance.

The first and third elements of res judicata are clearly satisfied. It is undisputed that a final judgment was rendered in the Nelson Action. Moreover, Nelson and the Alliance Defendants were all parties to the action. Nelson argues, however, that the second element of res judicata —an identity of the causes of action in both cases—has not been met because there was no ruling in the Nelson Action as to the total number of membership units in Alliance or as to the specific percentage of Nelson's ownership interest in Alliance. We disagree.

As discussed above, crossclaims 1, 2, and 9 seek relief on the theory that Nelson actually owns 16.4% of Alliance and was therefore entitled to distributions from Alliance reflecting this percentage. The record makes clear that the extent of Nelson's ownership in Alliance was a relevant issue in the Nelson Action based on the parties' contentions in that lawsuit. In his claim for declaratory relief, Nelson expressly sought a judgment that he owned 10 of Alliance's 61 membership units. For reasons that are not clear from the record, however, the jury was not asked to decide the question of what specific percentage ownership interest Nelson held in Alliance or how many total membership units existed.

The record reflects that after the jury rendered its verdict, Nelson's counsel requested that the court's final judgment include a statement that "Axis Hospitality, Inc. owns [the remaining] 51 membership units" in Alliance. The Alliance Defendants responded by noting that it was Nelson's counsel who had drafted the jury issues and that "the jury was [not] asked to, and made no finding concerning, the number of units owned by Axis." The Alliance Defendants argued that the judgment "should reflect the jury's verdict but should not include matters not decided by the jury" and should not "expand on the jury's verdict in the Final Judgment." Ultimately, the Business Court entered a final judgment simply declaring that "Nelson is the holder of 10 membership units in Alliance" without making any reference to the total number of membership units in Alliance or Nelson's percentage ownership interest in the company.

Thus, crossclaims 1, 2, and 9—all of which necessarily require a determination of the total number of membership units in Alliance in order to calculate Nelson's percentage ownership interest—present issues that *could* have been adjudicated in the Nelson Action but were not. As the party seeking the declaratory judgment in the Nelson Action, it was Nelson's obligation to obtain a ruling on those issues, but he failed to do so. Nor does the record reflect that in his appeal in the Nelson Action he made any argument that the Business Court had erred in failing to instruct the jury on those questions or that the court had otherwise committed error by not ruling on those issues itself. Accordingly, we conclude that the second element of res judicata is also satisfied and that crossclaims 1, 2, and 9 were therefore properly dismissed.[7]

**[3]** Having determined that res judicata bars crossclaims 1, 2, and 9—the only crossclaims asserted by Nelson that met the criteria of Rule 13(g)

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7. Although Nelson has not raised this issue, we take this opportunity to note that as a general matter a declaratory judgment action's preclusive effect is limited to issues "actually litigated by the parties and determined by a declaratory judgment" and therefore exists only in the context of *issue* preclusion (collateral estoppel) as opposed to *claim* preclusion (res judicata). 18A Wright & Miller, *Federal Practice and Procedure* § 4446 (2d ed. 2002). However, as our Court of Appeals has correctly noted, "[f]ederal courts . . . have consistently held that the general rule limiting the preclusive effect of declaratory judgments to issue preclusion 'applies only if the prior action *solely* sought declaratory relief.' " *Barrow v. D.A.N. Venture Props. of N.C., LLC*, 232 N.C. App. 528, 532, 755 S.E.2d 641 (2014) (emphasis added) (quoting *Laurel Sand and Gravel, Inc. v. Wilson*, 519 F.3d 156, 164 (4th Cir. 2008)). We see no reason why these basic principles should be applied differently in the courts of our state. It is clear that Nelson asserted additional claims seeking different types of relief in the Nelson Action along with his claim for a declaratory judgment. Thus, we are satisfied that the application of the doctrine of claim preclusion to the Nelson Action is appropriate.

—we must next determine the effect of that ruling on Nelson's remaining 15 crossclaims. Rule 18(a) of the North Carolina Rules of Civil Procedure states that "[a] party asserting a claim for relief as an original claim, counterclaim, *cross claim*, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party." N.C.G.S. § 1A-1, Rule 18(a) (emphasis added). Nelson contends that because one or more of his crossclaims did, in fact, relate to the subject matter of Orlando's original claims, thereby satisfying Rule 13(g), he was permitted to join all of his other crossclaims as additional claims under Rule 18(a). As a result, he asserts, the remaining fifteen claims should be allowed to go forward even if crossclaims 1, 2, and 9 are dismissed on res judicata grounds.

As quoted above, Rule 18(a)—as a general proposition—allows a party that has properly asserted a claim for relief against another party to join as many additional claims as it has against that other party. We believe, however, that implicit in Rule 18(a) is the notion that in order for a crossclaimant to be permitted to maintain such additional joined claims against a co-defendant as provided for under that Rule, the predicate crossclaim asserted by the crossclaimant in accordance with Rule 13(g) must survive the pleading stage. A leading treatise has noted that pursuant to Rule 18(a) of the Federal Rules of Civil Procedure—the federal rule on joinder—in order to take advantage of the more expansive joinder rules available in federal courts "a party must assert what may be called a 'qualifying claim,' " and "[u]ntil the party does so, the party is not a claimant, and may not invoke the claim joinder provision of Rule 18." 4 Moore's Federal Practice § 18.02[2][a]. (3d ed. 2014).[8] As such, "it follows that if the qualifying claim asserted by a defendant is dismissed, all claims joined under Rule 18 must also be dismissed." *Id.* § 18.02[2][c]; *see, e.g.*, *Friedman v. Hartmann*, 787 F. Supp. 411, 423 (S.D.N.Y. 1992) (dismissing additional claims brought under Rule 18(a) on the basis that the underlying qualifying claim failed to state a claim upon which relief could be granted and therefore could not serve as the basis for the joinder of the unrelated claims).

In applying these principles here, we conclude that the dismissal of Nelson's remaining fifteen crossclaims was proper. As discussed above,

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8. Federal Rule of Civil Procedure 18(a) is essentially identical to N.C. R. Civ. P. 18(a). We have frequently recognized that although this Court is not bound by the decisions of federal courts with respect to the Rules of Civil Procedure, "[d]ecisions under the federal rules are . . . pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules." *Turner v. Duke Univ.*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989).

all three of his crossclaims that met the requirements of Rule 13(g)—his qualifying claims—fail as a matter of law based on res judicata. Although we acknowledge that a purpose of Rule 18(a) is to provide for the liberal joinder of claims, the ability to join claims under this Rule is not limitless. We therefore adopt the federal approach by rejecting an interpretation of Rule 18(a) that would permit claims asserted by a crossclaimant against a co-defendant that are unrelated to the plaintiff's original action to remain viable once the crossclaimant's qualifying claim or claims against the co-defendant as required by Rule 13(g) have been dismissed at the pleading stage. A ruling to the contrary would be inconsistent with the purpose underlying Rule 13(g)'s prerequisite for the assertion of crossclaims in the first place.

**[4]** Finally, we address Nelson's contention that even assuming the dismissal of his crossclaims was, in fact, appropriate, the dismissal should have been without prejudice. Rule 41(b) of the North Carolina Rules of Civil Procedure, which governs the involuntary dismissal of actions, states that—subject to three exceptions not applicable here—"[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this section and *any dismissal not provided for in this rule* . . . operates as an adjudication upon the merits." N.C.G.S. § 1A-1, Rule 41(b) (emphasis added). This Court has held that this Rule vests trial courts with the discretion to dismiss claims without prejudice. *Whedon v. Whedon*, 313 N.C. 200, 213, 328 S.E.2d 437, 445 (1985) ("The trial court's authority to order an involuntary dismissal without prejudice is therefore exercised in the broad discretion of the trial court and the ruling will not be disturbed on appeal in the absence of a showing of abuse of discretion.") A discretionary ruling by the trial court will be overturned for abuse of discretion "only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 370 N.C. 235, 241, 805 S.E.2d 664, 669 (2017).

Based on our thorough review of the lengthy record in this case, we are unable to say that the Business Court's decision to dismiss Nelson's crossclaims with prejudice constituted an abuse of discretion. For over thirty years, Nelson—and, at times, his wife and business entities that he controlled—has been engaged in various legal proceedings involving his debts to Orlando. *See Orlando Residence LTD v. GP Credit Co., LLC*, 553 F.3d 550, 553–54 (7th Cir. 2009). In 2009, the United States Court of Appeals for the Seventh Circuit stated that "[t]he time has come to put an end to the defendants' stubborn efforts to prevent Orlando from obtaining the relief to which it is entitled." *Id.* at 559. At the suggestion of the

Seventh Circuit, the United States District Court for the Eastern District of Wisconsin entered a "bill of peace" order enjoining Nelson, his wife, and a business entity found to be the alter ego of Nelson from filing any further legal actions or claims against Orlando without prior approval of the court given Nelson's "well-established" history of attempts to "evade Orlando's collection efforts." *Orlando Residence LTD v. GP Credit Co.*, 609 F. Supp. 2d 813, 817 (E.D. Wis. 2009).

Moreover, for almost a decade, Nelson and the Alliance Defendants have been engaged in a seemingly never-ending process of litigation over Nelson's membership interests and rights with respect to Alliance. It was not unreasonable for the Business Court to determine that Nelson's crossclaims should be dismissed with prejudice in an effort to bring some measure of finality between the parties. Accordingly, we conclude that the Business Court did not abuse its discretion.

**Conclusion**

For the reasons set out above, we hold that the dismissal of Nelson's crossclaims was proper.

MODIFIED AND AFFIRMED.

Justice MORGAN took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA
v.
JOHN THOMAS COLEY

No. 2A19

Filed 14 August 2020

**Criminal Law—jury instructions—self-defense—defense of habitation—use of deadly force**

At a trial for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury, the trial court committed prejudicial error by refusing to instruct the jury on self-defense and the defense of habitation. Viewed in the light most favorable to defendant, the evidence showed that defendant (who had a broken leg and used a wheelchair) reasonably believed that using deadly force was necessary to protect himself against an intruder who had already attacked him earlier that night at a neighbor's house, followed him home, broken into his home twice to violently assault him, and was breaking into the home for the third time when defendant shot him.

Appeal pursuant to N.C.G.S. § 7A 30(2) from the unpublished decision of a divided panel of the Court of Appeals, 263 N.C. App. 249, 822 S.E.2d 762 (2018), finding error in and reversing judgments entered on 25 September 2017 by Judge Richard S. Gottlieb in Superior Court, Guilford County, and ordering a new trial. Heard in the Supreme Court on 5 November 2019.

*Joshua H. Stein, Attorney General, by Michael T. Henry, Assistant Attorney General, for the State-appellant.*

*Kimberly P. Hoppin for defendant-appellee.*

MORGAN, Justice.

The sole issue before this Court is whether the trial court erred by declining to deliver defendant's requested jury instructions on self-defense and the defense of habitation. We hold that the evidence, when viewed in the light most favorable to defendant, was sufficient to require the trial court to give defendant's requested instructions to the jury. Accordingly, we affirm the decision of the Court of Appeals reversing

defendant's convictions, vacating the trial court's judgments, and granting defendant a new trial.

*Factual and Procedural Background*

The evidence presented at trial tended to show that Derrick Garris "stayed at [defendant's] house off and on" during the early months of 2016. Although the relationship between Garris and defendant was initially cordial, Garris eventually suspected that defendant was working with law enforcement in connection with the detection of criminal activity. On the evening of 7 June 2016, defendant was sitting outside of a neighbor's house with a group of friends when Garris approached defendant and punched him, causing defendant to fall out of his chair. At the time, defendant was recovering from a broken leg and his mobility required the use of crutches and a wheelchair. After Garris hit defendant, defendant got up and began walking home. Garris followed defendant.

When defendant arrived at his residence, Garris grabbed defendant and threw him against the door of the home. After defendant opened the door, Garris seized defendant again and hurled him over two chairs. Defendant bounced off of the chairs and landed on the floor. Garris then snatched up defendant and flung him against a recliner. During this altercation, Garris repeatedly accused defendant of "snitch[ing] on [his] brothers" for trafficking in guns. Defendant denied making such statements to law enforcement officers. At trial, when asked on direct examination about "what happens to snitches," defendant testified that "it could go from being killed, beaten with bats. . . . there's no limit to what could happen to you." Garris eventually left defendant's residence but quickly returned, accompanied by a friend, Djimon Lucas. Defendant testified at trial that at this point, he was "[s]cared, fearful" and "didn't know what was going on at the time." As defendant attempted to explain the earlier events to Lucas, Garris struck defendant a couple more times and then departed the house again.

By the time defendant had climbed from the floor into his wheelchair, he saw Garris once more entering defendant's house. Defendant testified at trial that he "never knew what he left to go get, as if he might have . . . went and got another weapon." Defendant stated that he feared that "[Garris] was going to jump on [him] again or possibly even kill [him]." As Garris burst into defendant's home for a third time, defendant reached down beside his wheelchair, retrieved a gun, and shot Garris, injuring him. Defendant was ultimately indicted for the offenses of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon.

Defendant had given notice at trial of his intent to rely upon a theory of self-defense. During the jury charge conference conducted after the presentation of all of the evidence, defendant requested jury instructions on self-defense and the defense of habitation. The trial court, however, declined to deliver defendant's requested instructions to the jury and instead directed the jury to consider only whether defendant was guilty of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon. No form of a self-defense instruction was presented to the jury by the trial court. Defendant objected and preserved the jury instruction issue for appeal.

Upon the conclusion of deliberations, the members of the jury found defendant not guilty of the offenses of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. The jury instead found defendant guilty of assault with a deadly weapon inflicting serious injury—a lesser-included offense of assault with a deadly weapon with intent to kill inflicting serious injury—and possession of a firearm by a felon. Following the jury's verdicts, the trial court sentenced defendant to a term of imprisonment of twenty-six to forty-four months for the assault with a deadly weapon inflicting serious injury offense, together with a consecutive term of thirteen to twenty-five months of incarceration for the offense of possession of a firearm by a felon. Defendant appealed his convictions to the Court of Appeals based upon the trial court's failure to give his requested self-defense and defense-of-habitation instructions to the jury.

On appeal, defendant argued that the trial court erred by (1) denying his request to instruct the jury on self-defense, (2) failing to instruct the jury on the "stand-your-ground" provision, and (3) denying his request to instruct the jury on the defense of habitation. A divided panel of the Court of Appeals agreed. In reaching its decision, the Court of Appeals majority determined that "[d]efendant had an objectively reasonable belief [that] he needed to use deadly force to repel another physical attack to his person" and prevent death or great bodily harm to his person. *State v. Coley*, 263 N.C. App. 249, 256, 822 S.E.2d 762, 767 (2018). The Court of Appeals majority further concluded that in the event that defendant's requested jury instructions had been properly delivered to the jury, there was a reasonable possibility that the jury would have reached a different result. *Id.* at 258, 822 S.E.2d at 768. The majority therefore held that the trial court committed error by failing to give instructions to the jury, as requested by defendant, on the law of self-defense with the stand-your-ground provision and the law of the defense of habitation because the

evidence was sufficient to support the instructions submitted by defendant when the evidence is viewed in the light most favorable to him. Accordingly, the Court of Appeals reversed defendant's convictions, vacated the trial court's judgments, and granted defendant a new trial with complete self-defense instructions. *Id.* The dissenting judge at the Court of Appeals opined that defendant's warning shot at Garris was an act that exceeded the level of force that was reasonably necessary to protect defendant from death or serious bodily harm, thus precluding a jury instruction on self-defense. *Id.* at 261, 822 S.E.2d at 770 (Zachary, J., dissenting). The dissenting judge also considered the trial court to be correct in declining to give defendant's requested jury instruction on the defense of habitation, viewing defendant's testimony about the warning shot and considering Garris to be a lawful occupant of defendant's residence as obviating the necessity for the delivery of such an instruction. *Id.* at 263, 822 S.E.2d at 771.

We agree with the Court of Appeals majority in its resolution of the matters presented in this case, as this Court concludes that the decision of the lower appellate court is sound and correct.

*Analysis*

"The jury charge is one of the most critical parts of a criminal trial." *State v. Watson*, 367 N.C. 721, 730, 766 S.E.2d 312, 318 (2014). "It is the duty of the trial court to instruct on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). This Court has consistently held that "where competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case, and the trial judge must give the instruction even absent any specific request by the defendant." *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986) (emphasis omitted) (citations omitted); *see also*, *e.g.*, *State v. Deck*, 285 N.C. 209, 215, 203 S.E.2d 830, 834 (1974) ("When supported by competent evidence, self-defense unquestionably becomes a substantial and essential feature of a criminal case."). In determining whether a defendant has presented competent evidence sufficient to support a self-defense instruction, we take the evidence as true and consider it in the light most favorable to the defendant. *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010). Once a showing is made that the defendant has presented such competent evidence, "the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence." *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974). "[A] defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction,

which includes the relevant stand-your-ground provision." *State v. Bass*, 371 N.C. 535, 542, 819 S.E.2d 322, 326 (2018).

In North Carolina, the right to use deadly force to defend oneself is provided both by statute and case law. Pursuant to the applicable statutory law, there are two circumstances in which individuals are justified in using deadly force, thus excusing them from criminal culpability under the theory of self-defense. Firstly, section 14-51.3 of the General Statutes of North Carolina provides, in pertinent part, the following:

> (a) A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, *a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if* either of the following applies:
>
> (1) *He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.*
>
> (2) Under the circumstances permitted pursuant to G.S. 14-51.2.
>
> (b) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force . . . .

N.C.G.S. § 14-51.3 (2019) (emphases added). Secondly, N.C.G.S. § 14.51.2(b) states the following:

> The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:
>
> (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.

(2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

N.C.G.S. § 14-51.2(b) (2019).

Under either statutory provision a person does not have a duty to retreat but may stand his ground against an intruder. *State v. Lee*, 370 N.C. 671, 675, 811 S.E.2d 563, 566 (2018); *see also Bass*, 371 N.C. at 541, 819 S.E.2d at 325–26 ("Both sections provide that individuals using force as described . . . have no duty to retreat before using defensive force.") Consequently, when an individual who was not the aggressor is located in his home when the assault on him occurred, he "may stand his ground and defend himself from attack when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another." *Bass*, 371 N.C. at 541, 819 S.E.2d at 326. "The reasonableness of his belief is to be determined by the jury from the facts and circumstances as they appeared to him at the time" he committed the forceful act against his adversary. *See State v. Gladden*, 279 N.C. 566, 572, 184 S.E.2d 249, 253 (1971).

Applying these statutory and case law principles to the present case, defendant's evidence shows that Garris was the aggressor toward defendant from the very beginning of the interaction between the two of them when Garris confronted defendant while defendant was seated outside of the neighbor's home, striking defendant with such force as to knock defendant out of his chair. Without a violent response to Garris, defendant arose from the ground and, with his previously injured broken leg, retreated to his nearby home on foot. Garris followed defendant and, when defendant arrived at his home, Garris once again employed force against defendant by grabbing defendant and throwing him against the door of the residence. Garris then forcibly entered defendant's home as he continued to inflict assaultive punishment upon defendant in light of Garris's expressed belief that defendant had been a "snitch[ed]" to law enforcement concerning Garris's brothers. Defendant held a fearful belief concerning the potential for physical violence that he felt was wreaked upon "snitches" as Garris briefly left defendant's residence, but immediately returned with another individual. During this second uninvited and unlawful entry into defendant's residence by Garris, defendant was pummeled by Garris. After Garris departed from defendant's home and defendant, who was injured, had repositioned himself from the floor back into his wheelchair, defendant observed the third entry of Garris into defendant's home. Due to the force that Garris had been using

and the harm that had been occurring toward defendant in his home through the increasingly violent and unpredictable actions of Garris, when Garris rushed into the residence of defendant on the third occasion, defendant shot Garris.

Viewing the evidence at trial in the light most favorable to defendant in order to determine whether the evidence was competent and sufficient to support the jury instructions on self-defense and the defense of habitation, we conclude that defendant was entitled to both instructions. In assessing the provisions of N.C.G.S. § 14-51.3 governing the right of a person such as defendant to justifiably utilize force against another person such as Garris when and to the extent that the person in defendant's position reasonably believed that the conduct was necessary to defend oneself against another's imminent use of unlawful force, this Court determines that defendant in the instant case presented competent and sufficient evidence to warrant the self-defense instruction. This includes the use of deadly force without a duty to retreat in any place that he had the lawful right to be when he holds a reasonable belief that such force is necessary to prevent imminent death or great bodily harm to himself or herself. Similarly, in reviewing the elements of N.C.G.S. § 14-51.2(b) regarding the presumption of a lawful occupant of a home—such as defendant in his residence—to have held a reasonable fear of imminent death or serious bodily harm to himself or herself when using defensive force that is intended or likely to cause death or serious bodily harm to another person, such as Garris here, if such person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, the lawful occupant's home and the person using the defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred, we conclude that the evidence presented at trial was competent and sufficient to support defendant's requested instruction on the defense of habitation.

The dissenting judge at the Court of Appeals in this case focuses primarily upon defendant's testimony at trial that he fired a warning shot at Garris as rationale for the dissenting judge's view that the trial court correctly declined to instruct the jury on self-defense and the defense of habitation. The dissenting judge deems defendant's act as exceeding the response to Garris's conduct which was reasonably necessary to protect defendant from death or serious bodily harm, thereby precluding a jury instruction on self-defense, while also precluding a jury instruction on the defense of habitation because defendant's testimony at trial about a warning shot rebuts the statutory presumption of "reasonable fear of

imminent death or serious bodily harm" when using defensive force in one's home. The dissenting judge relies upon the Court of Appeals opinion in *State v. Ayers*, 261 N.C. App. 220, 819 S.E.2d 407 (2018), *disc. review denied*, 372 N.C. 103, 824 S.E.2d 407 (2019), for the conclusion that the warning shot demonstrates that defendant "did not 'inten[d] to strike the victim with the blow' " so as to preclude defendant from the right to a self-defense instruction. *Coley*, 263 N.C. App. at 260, 822 S.E.2d at 769 (Zachary, J., dissenting) (alteration in original) (quoting *Ayers*, 261 N.C. App. at 225, 819 S.E.2d at 411). Likewise, the dissenting judge cites the Court of Appeals opinion of *State v. Cook*, 254 N.C. App. 150, 802 S.E.2d 575 (2017), for the premise that the statutory defense of habitation with its presumption of reasonable fear does not apply when a defendant testifies that he fired a warning shot and did not intend to shoot the attacker because such words disprove the presumption that the defendant was in reasonable fear of imminent harm. *Coley*, 263 N.C. App. at 262–63, 822 S.E.2d at 770. Finally, the dissenting judge also submits that defendant did not have a right to a jury instruction on the defense of habitation because Garris was a lawful occupant of defendant's home in light of Garris's occasional residency there, Garris's possession of a key to defendant's residence, and the presence of some of Garris's personal possessions inside of defendant's home. *Id.* at 262–63, 822 S.E.2d at 770–71.

The dissenting judge's perspective ignores the principle that we set out in *Dooley* that although there may be contradictory evidence from the State or discrepancies in the defendant's evidence, nonetheless the trial court must charge the jury on self-defense where there is evidence that the defendant acted in self-defense. Indeed, as expressly noted by the Court of Appeals majority in its decision, when viewing defendant's testimony as true, competent evidence was presented from which a jury could reasonably infer that defendant intended to "strike the blow" when he aimed and fired his gun at Garris. Ultimately, just as the Court of Appeals majority correctly observed that "[p]resuming [that] a conflict in the evidence exists as to whether Garris had a right to be in the home, it is to be resolved by the jury, properly instructed," *id.* at 257, 822 S.E.2d at 767, it is appropriately within the purview of the jury to resolve any conflicts in the evidence presented at trial and to render verdicts upon being properly instructed by the trial court based upon the evidence which competently and sufficiently supported the submission of such instructions to the jury for collective consideration.

We agree with the majority opinion of the Court of Appeals that the trial court erred by failing to instruct the jury on self-defense and

on the defense of habitation. We further agree with the lower appellate court's conclusion that the trial court's failure to properly instruct the jury constituted error that was prejudicial to defendant. Subsection 15A-1443(a) states, in pertinent part, that a defendant is prejudiced by an error 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 out of which the appeal arises. N.C.G.S. § 15A-1443(a) (2019); *see also State v. Ramos*, 363 N.C. 352, 355, 678 S.E.2d 224, 227 (2009). In this regard, the Court of Appeals majority astutely observes in its opinion that "[d]efendant was acquitted by the jury on all charges involving an intent to kill," which was a criminal offense element that served as a factor in the trial court's denial of the requested jury instructions at trial. *Coley*, 263 N.C. App. at 258, 822 S.E.2d at 768.

*Conclusion*

Based on the aforementioned reasons, we affirm the decision of the Court of Appeals that there was sufficient evidence presented at trial to support the submission of defendant's requested instructions to the jury on self-defense and the defense of habitation. We also affirm the determination of the lower appellate court to reverse the convictions of defendant, to vacate the judgments against defendant, and to grant a new trial to defendant with complete self-defense instructions, based upon our determination that there is a reasonable possibility that had the trial court not committed prejudicial error in its presentation of instructions to the jury, a different result would have been reached at the trial.

AFFIRMED.

**STATE v. COX**

[375 N.C. 165 (2020)]

STATE OF NORTH CAROLINA
v.
JAMES A. COX

No. 94PA19

Filed 14 August 2020

**Conspiracy—criminal—robbery with a dangerous weapon—sufficiency of evidence—felonious intent**

Where defendant (with the help of two other people) broke into a woman's home and ordered her at gunpoint to return the money he had previously paid her for illegal drugs, the trial court properly denied defendant's motion to dismiss a charge of criminal conspiracy to commit robbery with a dangerous weapon because there was substantial evidence of felonious intent. Although defendant believed he had a bona fide claim of right to the money, the law did not permit him to "engage in self-help" to forcibly recover personal property from an illegal transaction. Additionally, because there was sufficient evidence of felonious intent, the trial court properly refused to dismiss a charge for felony breaking and entering based on the same incident.

Appeal pursuant to N.C.G.S. § 7A-31 from the published decision of a unanimous panel of the Court of Appeals, 264 N.C. App. 217, 825 S.E.2d 266 (2019), finding error and reversing a judgment entered on 16 January 2018 by Judge William W. Bland in the Superior Court, Onslow County. Heard in the Supreme Court on 4 May 2020.

*Joshua H. Stein, Attorney General, by Daniel P. O'Brien, Special Deputy Attorney General, for the State.*

*Glenn Gerding, Appellate Defender, and Andrew DeSimone, Assistant Appellate Defender, for defendant-appellee.*

MORGAN, Justice.

In this case we must determine whether the trial court erroneously denied defendant's motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon and the charge of felonious breaking or entering at the close of all of the evidence. In light of our conclusion that the State presented sufficient evidence at defendant's trial to show that defendant possessed the requisite felonious intent necessary

to support defendant's convictions of each of these charged offenses, we find no error in the trial court's ruling. Accordingly, we reverse the decision of the Court of Appeals and reinstate these convictions.

*Factual and Procedural Background*

At trial, the State's evidence tended to show that on 8 August 2015, defendant and his girlfriend Ashley Jackson went to the home of Richard Linn. Prior to this date, defendant had given $20.00 to Linn so that Linn could purchase, *inter alia*, Percocet tablets on behalf of Jackson. These tablets constituted a prescription medication which neither defendant nor Linn could legally possess. After receiving the $20.00 amount of funds from defendant, Linn contacted Angela Leisure to obtain the controlled substances sought by defendant, added some of Linn's own money to defendant's $20.00 amount, and ultimately gave Leisure an amount of funds between $50.00 and $60.00 for the purchase of drugs. While Leisure had operated as a regular "go-between" for Linn in his past efforts to acquire illicit controlled substances, on this occasion, Leisure neither obtained the illegal drugs which were requested by Linn nor returned any of the drug purchase money to him.

Upon arriving at Linn's residence on 8 August 2015, defendant displayed a gun to Linn and demanded that Linn accompany defendant and Jackson in going to Leisure's house "to talk with her about their money." Defendant, Jackson, and Linn went to Leisure's home by vehicle. When they arrived, Leisure's boyfriend Daniel McMinn was standing outside of Leisure's residence. Defendant, Jackson, and Linn entered Leisure's home, followed by McMinn. Once inside, Jackson pulled Leisure's hair, punched her, and forced her to the floor, demanding "their money." McMinn started to call the police, but he stopped when defendant displayed a handgun "in a threatening way." After a few minutes, Linn told Jackson to stop her assault on Leisure, saying: "I think she's had enough." As defendant, Jackson, and Linn departed Leisure's residence, defendant kicked a hole in the front door of Leisure's home and fired a shot into the residence, striking a mirrored door inside the home. Defendant, Jackson, and Linn did not obtain money or any personal property from Leisure's home.

Based on the events of 8 August 2015, defendant was arrested and charged with first-degree burglary, conspiracy to commit robbery with a dangerous weapon, and discharging a weapon into an occupied property.

Following the State's presentation of its evidence at trial, defendant moved to dismiss the charges against him for insufficiency of the evidence. After the motion was denied, defendant presented evidence in his

defense, including his own testimony. Defendant testified that he went to Linn's home on 8 August 2015 to give Linn $20.00 to purchase pain relievers for Jackson, and that later in the day, Linn had asked defendant to transport Linn to Leisure's home because Leisure had taken the $20.00 but then would not answer Linn's telephone calls. According to defendant, Linn said that Linn would get defendant's money back during an in-person encounter with Leisure. In his testimony, defendant claimed that neither he, Jackson, or Linn had a weapon during the encounter on 8 August 2015 and stated that it was Jackson rather than defendant who had kicked the front door at Leisure's home. At the close of all of the evidence, defendant renewed his motion to dismiss the charges against him. The trial court denied the motion.

After instructing the jury regarding the charges and the pertinent law in the case, the trial court further provided the jury with written copies of the jury instructions. After deliberating for approximately two hours, the jury submitted two questions to the trial court, each relating to the conspiracy to commit robbery charge: (1) "Can we get clarification of 'while the defendant knows that the defendant is not entitled to take the property,' " [with regard to the definition in the jury instructions on Conspiracy to Commit Robbery with a Dangerous Weapon] and (2) "Is it still Robbery to take back . . . one owns [sic] property?" After conferring with all counsel, and specifically without any objection from defendant, the trial court declined to answer the jury's questions and instead referred the jury to the written jury instructions which the trial court had previously provided to it.

On 16 January 2018, the jury returned guilty verdicts against defendant on the charges of conspiracy to commit robbery with a dangerous weapon, felonious breaking or entering, and discharging a weapon into an occupied property. The trial court sentenced defendant to a consolidated term of 60–84 months of incarceration for the offenses of conspiracy to commit robbery with a dangerous weapon and discharging a weapon into an occupied property. For the felonious breaking or entering offense, defendant received a suspended sentence of incarceration of 6–17 months and was placed on supervised probation for a term of 24 months. Defendant appealed to the Court of Appeals.

The Court of Appeals reversed defendant's conviction for conspiracy to commit robbery with a dangerous weapon. Although on appeal defendant did not contest his conviction for discharging a weapon into an occupied property, nonetheless the lower appellate court remanded the case in which defendant was convicted of discharging a weapon into an occupied property for resentencing because it was consolidated

for judgment with the conspiracy to commit robbery with a dangerous weapon conviction, which the Court of Appeals decided to reverse. The court below also reversed defendant's conviction for felonious breaking or entering and remanded the matter in order for the trial court to arrest judgment with respect to this felony conviction and to enter judgment against defendant for misdemeanor breaking or entering. In reversing defendant's conviction for the offense of conspiracy to commit robbery with a dangerous weapon, the Court of Appeals relied upon our decision in *State v. Spratt*, 265 N.C. 524, 144 S.E.2d 569 (1965) and its predecessor cases in concluding here that defendant could not be guilty of conspiracy to commit robbery with a dangerous weapon because defendant did not have the required felonious intent when attempting to take property from Leisure under a bona fide claim of right to the money which she had been given on defendant's behalf. Concomitantly, the Court of Appeals held that the lack of felonious intent on the part of defendant negated his ability to be convicted of the offense of felonious breaking or entering; however, since misdemeanor breaking or entering is a lesser-included offense of felonious breaking or entering, and since the lesser offense contains all of the elements of the greater offense except for felonious intent, the lower appellate court reasoned that the jury's determination that defendant had committed an offense of breaking or entering would, under these circumstances, be converted to the commission of a misdemeanor breaking or entering offense by defendant.

The State sought a temporary stay of the operation of the mandate of the Court of Appeals, which we allowed on 22 March 2019. On 9 April 2019, the State filed a petition for discretionary review, seeking to be heard by this Court on the issue of whether the Court of Appeals erred by reversing defendant's convictions for the offenses of conspiracy to commit armed robbery and felonious breaking or entering on the basis of insufficiency of the evidence. On 17 April 2019, defendant filed a response to the State's petition for discretionary review, as well as his conditional petition for discretionary review. On 14 August 2019, we allowed the State's petition for discretionary review, issued a writ of supersedeas, and denied defendant's conditional petition for discretionary review.

*Analysis*

The test for sufficiency of the evidence in a criminal prosecution is well-established. "[T]he trial court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference. If there is substantial evidence of each element

of the offense charged or lesser included offenses, the trial court must deny defendant's motion to dismiss as to those charges supported by substantial evidence and submit them to the jury for its consideration; the weight and credibility of such evidence is a question reserved for the jury." *State v. Williams*, 330 N.C. 579, 584, 411 S.E.2d 814, 818 (1992) (citations omitted).

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. Arnold*, 329 N.C. 128, 142, 404 S.E.2d 822, 830 (1991). Therefore, in the present case, the State had the burden to present substantial evidence tending to show that defendant and Jackson agreed to commit each element of robbery with a dangerous weapon against Leisure.

For the offense of robbery with a dangerous weapon, the State must prove three elements: (1) the unlawful taking or attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened. *State v. Wiggins*, 334 N.C. 18, 35, 431 S.E.2d 755, 765 (1993); N.C.G.S. § 14-87(a) (2019). The taking or attempted taking must be done with felonious intent. *State v. Norris*, 264 N.C. 470, 472, 141 S.E.2d 869, 871 (1965) (citing *State v. Lawrence*, 262 N.C. 162, 163–68, 136 S.E.2d 595, 597–600 (1964)). "Felonious intent is an essential element of the crime of robbery with firearms and has been defined to be the intent to deprive the owner of his goods permanently and to appropriate them to the taker's own use." *State v. Brown*, 300 N.C. 41, 47, 265 S.E.2d 191, 196 (1980).

In the present case, the Court of Appeals has been persuaded by defendant's contention, citing our holding in *Spratt*, that a person cannot be guilty of robbery if he or she forcibly takes personal property from the actual possession of another under a bona fide claim of right or title to the property, since such a bona fide claim negates the requisite felonious intent required for the offense of robbery with a dangerous weapon. The State, however, argues that the law does not permit a person to use violence to collect on a perceived debt for illegal drugs.

In the opinion which it rendered in this case, the Court of Appeals exercised studious review of our decisions in *Spratt* and *Lawrence*, as well as other appellate decisions which it considered to involve issues which are similar to those which exist in the present case. The lower appellate court went on to conclude that it "remain[ed] bound to follow and apply *Spratt*" in the resolution of this case.

In *Spratt*, the defendant entered a convenience store, brought items of merchandise to the cashier's counter for apparent purchase, and when the cashier opened the cash register at the counter to conduct the transaction, defendant put his hand in the cash register drawer in which money was located. Defendant wielded a pistol, told the cashier "it was a stickup," demanded the money, and reached for it. The cashier was able to foil defendant's effort to obtain the money from the store's cash register, and defendant left without the money. Defendant was charged with the offense of attempt to commit armed robbery and was found by a jury to be guilty of the charged crime. In this Court's issued opinion in which no error was found in defendant's conviction upon his appeal, we discussed the concept of felonious intent, noting that it is an essential element of the offense of attempt to commit armed robbery. In this Court's discussion of felonious intent in *Spratt*, we cited *Lawrence* for the proposition that

> where the evidence relied on by defendant tends to admit the taking but to deny that it was with felonious intent, it is essential that the court fully define the 'felonious intent' contended for by the State and also explain defendant's theory as to the intent and purpose of the taking, in order that the jury may understandingly decide between the contentions of the State and defendant on that point . . . . For instance, as in *Lawrence*, defendant may contend that his conduct in taking the property amounts only to a forcible trespass.

265 N.C. at 526, 144 S.E.2d at 571 (citation omitted).

In the course of our discussion of the role of the element of felonious intent in different criminal offenses and our rumination about the courts' assessment of the element of felonious intent in light of different theories of criminal culpability in *Spratt*, we offered the following observation which the Court of Appeals mistakenly treats in the instant case as our dispositive holding in *Spratt*:

> A defendant is not guilty of robbery if he forcibly takes personal property from the actual possession of another under a bona fide claim of right or title to the property, or for the personal protection and safety of defendant and others, or as a frolic, prank or practical joke, or under color of official authority.

*Id.* at 526–27, 144 S.E.2d at 571.

The defendant in *Lawrence*—the case which *Spratt* primarily relies on in its discussion of felonious intent—was the operator of a motor vehicle who offered a ride to the prosecuting witness Wimbley, a member of the United States Marine Corps who was dressed in civilian clothes on this occasion, as Wimbley walked along the street after his own motor vehicle experienced mechanical failure. Wimbley accepted the offer of a ride and joined the defendant and a passenger in the vehicle. During the journey, the defendant and Wimbley bought some whiskey with all three individuals consuming some of it. Later, the defendant stopped the vehicle on a dead-end road with defendant and his original passenger both striking Wimbley with their fists. The defendant said to Wimbley, "You owe me something," to which Wimbley replied, "What do I owe you . . . I would be glad to pay you." The defendant then said, "That's okay, I'll get it myself," and then forcibly seized Wimbley's wallet and removed money from it. The defendant was charged with the offenses of robbery and felonious assault. A jury found the defendant guilty of robbery. On appeal, this Court determined that the defendant was entitled to a new trial because the trial court erred by instructing the jury to determine if there was an unlawful taking rather than giving a legal explanation of the term "felonious taking" and directing the jury to apply it to the facts. *Lawrence*, 262 N.C. at 168, 136 S.E.2d at 600. This conclusion was reached upon our evaluation of the defendant's contention in *Lawrence* that his actions amounted only to a forcible trespass, a crime which required an unlawful taking but no felonious intent, which he had the right to have a jury to consider upon proper instructions. *Id.*

This review of the respective facts, analyses, and outcomes of the two cases decided by this Court upon which the Court of Appeals expressly relies in its decision in the present case—*Spratt* and *Lawrence*—serves to place them in proper context and assist in determining how they apply in this case. While we recognized in *Spratt* the pivotal nature of felonious intent as an element of the offense of attempt to commit armed robbery, the defendant in *Spratt*, in attempting to take money from a convenience store's cash register while employing a firearm, was not attempting to forcibly take personal property from the actual possession of another under a bona fide claim of right or title to the property—as defendant contends that defendant was undertaking in the instant case in attempting to obtain money that he considered to belong to him from Leisure. This distinction between *Spratt* and the current case renders *Spratt* inapplicable here, including the passage from our opinion in *Spratt* which this Court intended to be illustrative and which the Court of Appeals construed here to be dispositive. *Lawrence*, the predecessor of *Spratt*, is distinguishable from, and hence inapplicable to, the

present case in that, although the element of felonious intent constituted an issue in *Lawrence* just as it does in the present case, the position adopted by defendant in *Lawrence* rested on an alternative and lesser measure of criminal culpability regarding the intent which he harbored concerning the money, while the position adopted by defendant in the instant case fully rests on a total lack of criminal culpability regarding the intent which he harbored concerning the money. Significantly neither *Spratt*, nor *Lawrence*, nor any other case in this state has heretofore authorized a party to legally engage in "self-help" by virtue of the exercise of a bona fide claim of right or title to property which is the subject of an illegal transaction. Here, defendant was involved with other individuals in an effort to regain money which was the subject of an illegal transaction involving the purchase of controlled substances.[1] In this regard, the Court of Appeals has erroneously extended beyond existing legal bounds the right of a party to engage in "self-help" and to forcibly take personal property from the actual possession of another under a bona fide claim or right to the property. Accordingly, with regard to the trial court's denial of defendant's motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon, we conclude that the trial court did not err.

We likewise hold that the trial court reached a correct ruling with respect to defendant's motion to dismiss the charge of felonious breaking or entering. "The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *Williams*, 330 N.C. at 585, 411 S.E.2d at 818. As already discussed, the trial court properly denied defendant's motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon because the record contained evidence tending to show that defendant possessed the requisite felonious intent to support the charge. Since both of the issues presented to this Court concern whether defendant possessed the same requisite felonious intent necessary to support both of his convictions, we conclude that the trial court also properly denied defendant's motion to dismiss the charge of felonious breaking or entering.

*Conclusion*

For the reasons stated, we find no error in defendant's convictions of the offense of conspiracy to commit armed robbery with a dangerous

1. Indeed, the nature of defendant's transaction and agreement with Leisure means that determining the existence of a bona fide claim would likely require the application of commercial law principles to an illegal drug deal. We cannot imagine that the common law tradition or the General Assembly would require such an approach.

weapon and the offense of felonious breaking or entering. Due to the existence of sufficient evidence regarding felonious intent, the trial court properly denied defendant's motions to dismiss the charges against him. Accordingly, we reverse the decision of the Court of Appeals and order defendant's convictions to be reinstated.

REVERSED.

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STATE OF NORTH CAROLINA
v.
MARCUS REYMOND ROBINSON

No. 411A94-6

Filed 14 August 2020

**Constitutional Law—North Carolina—double jeopardy—Racial Justice Act—death sentence vacated—judgment not appealed**

In a case involving the Racial Justice Act (RJA)--which, before its repeal, allowed a defendant to challenge a death sentence on the basis that racial bias infected the prosecution--review of the trial court's judgment and commitment order resentencing defendant to life imprisonment without the possibility of parole was precluded pursuant to double jeopardy principles. Although the State did seek appellate review of the trial court's accompanying order finding that defendant was entitled to relief under the RJA (an order which was previously vacated by the Supreme Court on non-substantive grounds), its failure to petition for and obtain review of the separate judgment and commitment order rendered that judgment final.

Justice HUDSON concurring in result.

Justice NEWBY dissenting.

Justice ERVIN dissenting.

Justice DAVIS joins in this dissenting opinion.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order denying defendant's motion for appropriate relief filed pursuant

to the Racial Justice Act entered on 25 January 2017 by Judge W. Edwin Spainhour in Superior Court, Cumberland County. Heard in the Supreme Court on 26 August 2019.

*Joshua H. Stein, Attorney General, by Danielle Marquis Elder, Senior Deputy Attorney General, and Jonathan P. Babb, Special Deputy Attorney General, for the State-appellee.*

*Cassandra Stubbs, Donald Beskind, David Weiss, and Brian Stull for defendant-appellant.*

*James E. Coleman Jr. for Charles Becton, Charles Daye, Valerie Johnson, Irving L. Joyner, Floyd B. McKissick Jr., Cressie H. Thigpen Jr., and Fred J. Williams, amici curiae.*

*Jeremy M. Falcone, Paul F. Khoury, Robert L. Walker, and Madeline J. Cohen for Former State and Federal Prosecutors, amicus curiae.*

*Carlos E. Mahoney, Jin Hee Lee, and W. Kerrel Murray for NAACP Legal Defense and Educational Fund, Inc., amicus curiae.*

*Janet Moore for National Association for Public Defense, amicus curiae.*

*James E. Williams Jr., Burton Craige, and Bidish Sarma for North Carolina Advocates for Justice, amicus curiae.*

*Grady Jessup for North Carolina Association of Black Lawyers, amicus curiae.*

*Cynthia F. Adcock for North Carolina Council of Churches, amicus curiae.*

*Lisa A. Bakale-Wise and Irving Joyner for North Carolina State Conference of the NAACP, amicus curiae.*

*Professors Robert P. Mosteller & John Charles Boger, amicus curiae.*

*Robert P. Mosteller for Retired Members of the North Carolina Judiciary, amicus curiae.*

*Joseph Blocher for Social Scientists, amicus curiae.*

BEASLEY, Chief Justice.

On 6 August 2009 the North Carolina General Assembly, recognizing the egregious legacy of the racially discriminatory application of the death penalty in this state, enacted the Racial Justice Act (the RJA or the Act). The goal of this historic legislation was simple: to abolish racial discrimination from capital sentencing. That is, to ensure that no person in this state is put to death because of the color of their skin.

Once implemented, the RJA worked as intended. Immediately, proceedings initiated pursuant to the Act revealed pervasive racial bias in capital sentencing in North Carolina. For defendant Marcus Reymond Robinson, the first condemned inmate to have a hearing pursuant to the RJA, the trial court found that he successfully proved that racial discrimination infected his trial and sentencing.

After Robinson proved his entitlement to relief under the RJA, the General Assembly amended the statute to increase the burden of proof, thereby making it more difficult for claimants to prove racial bias and obtain relief. Nonetheless, the trial court held that the next three claimants met the higher standard and demonstrated that racial bias had infected their capital proceedings as well.

With 100% of claimants successfully proving their entitlement to relief and with more than 100 additional RJA claims filed, the vast majority of death row inmates were on the precipice of an opportunity to individually demonstrate that the proceedings in which they were sentenced to death were fundamentally flawed by racial animus. Rather than allowing these proceedings to follow their course, the General Assembly repealed the Act. The repeal was made retroactive: Robinson and the three other defendants who had already proven that their capital sentences were based on racially biased proceedings were returned to death row to await execution.

Today, we are not asked to pass on the wisdom of repealing a statutory mechanism for rooting out the insidious vestiges of racism in the implementation of our state's most extreme punishment.[1] That decision is for the General Assembly. Instead, this Court must decide whether the North Carolina Constitution allows for that repeal to be retroactive. We hold that it does not.

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1. Nor are we asked to review the underlying facts of Robinson's offenses and his ultimate conviction of first-degree murder. Given the nature of the appeal before this Court, this Court's ruling on Robinson's claim under the Racial Justice Act does not negate or diminish his criminal culpability.

I.

The Racial Justice Act prohibited capital punishment if race was a significant factor in the decision to seek or impose the death penalty. 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, -2011 (2009)) (repealed 2013). Defendants could use statistical evidence to meet their evidentiary burden and show that race was a significant factor in the county, the prosecutorial district, the judicial division, or the state at the time their sentence was imposed. *Id.*, § 1, 2009 N.C. Sess. Laws at 1214.

Defendants could show that race was a significant factor by demonstrating evidence of one or more of the following: that death sentences were sought or imposed significantly more frequently upon persons of one race; that death sentences were sought or imposed more frequently based on the race of the victim; or that race was a significant factor in decisions to exercise peremptory strikes during jury selection. *Id.* The State could offer rebuttal evidence, including its own statistical evidence. *Id.* If race was found to be a significant factor, defendants were legally ineligible to receive the death penalty; instead, they were sentenced to life imprisonment without the possibility of parole. *Id.*

The RJA was legislation unique to this state, most notably in its allowance of statistical evidence to prove racial discrimination. The Supreme Court of the United States has previously rejected the use of statewide statistical evidence in constitutional challenges to Georgia's death penalty scheme, finding that state legislatures "are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions.' " *McCleskey v. Kemp*, 481 U.S. 279, 319, 107 S. Ct. 1756, 1781 (1987) (quoting *Gregg v. Georgia*, 428 U.S. 153, 186, 96 S. Ct. 2909, 2931 (1976)). The General Assembly, however, recognized the difficulty of proving systemic discrimination absent statistical evidence. During the debates over the Act in the North Carolina Senate, Senator Doug Berger explained why the use of statistics was necessary, arguing that "[r]ace 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.' "[2]

The RJA was the first law in the country to allow for a finding of racial discrimination during jury selection without requiring proof

2. Sen. Doug Berger, Floor Debate on Racial Justice Act (May 14, 2009), https://archive.org/details/NorthCarolinaSenateAudioRecordings20090514/North_Carolina_Senate_Audio_Recordings_20090514.mp3

of intentional discrimination. The ability to serve on a jury is one of the many ways African-Americans have struggled to participate in our democratic processes. An understanding of the history and evolution of racial discrimination is necessary in order to understand why the RJA was passed. After the Civil War, the Supreme Court of the United States barred statutes that excluded African-Americans from serving as jurors. *Strauder v. West Virginia*, 100 U.S. 303 (1879). Recognizing that "[t]he very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine," the Supreme Court held that the Equal Protection Clause barred the exclusion of jurors based on their race. *Id.* at 308. Discrimination still occurred in practice as local jurisdictions excluded African-Americans from being in jury venires, preventing them from being in the jury pool.

The Supreme Court of the United States addressed this newest form of discrimination by prohibiting "any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers" that led to the exclusion of African-American jurors. *Carter v. Texas*, 177 U.S. 442, 447, 20 S. Ct. 687, 689 (1900); *see also State v. Peoples*, 131 N.C. 784, 790, 42 S.E. 814, 816 (1902) ("How can the forcing of [an African-American defendant] to submit to a criminal trial by a jury drawn from a list from which has been excluded the whole of his race, purely and simply because of color . . . be defended? Is not such a proceeding a denial to him of equal legal protection? There can be but one answer, and that is that it is an unlawful discrimination.").

Following these decisions, neither statutes nor local practices could legally exclude African-Americans from jury service. After the Civil War and Reconstruction, however, racism and legal segregation remained rampant in North Carolina and across the South. Facially race-neutral statutes, such as poll taxes and literacy tests, and the "separate but equal" fallacy were instituted to legally discriminate against African-Americans. In the early 1900s, African-Americans were excluded from jury service in North Carolina through laws requiring that jurors: (1) had paid taxes the preceding year; (2) were of good moral character; and (3) possessed sufficient intelligence. *See Peoples*, 131 N.C. at 788, 42 S.E. at 815; Benno C. Schmidt Jr., *Juries, Jurisdiction and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 Tex. L. Rev. 1401, 1406 (1983) ("The problem of jury discrimination encompasses the half-century from the end of Reconstruction to the New Deal, during which the systematic exclusion of [B]lack men from Southern juries was about as plain as any legal discrimination could be short of proclamation in state statutes or confession by state officials.")

The same racially oppressive beliefs that fueled segregation manifested themselves through public lynchings, the disproportionate application of the death penalty against African-American defendants, and the exclusion of African-Americans from juries. Given the racially oppressive practices and beliefs that permeated every level of American society during the Jim Crow era, the constitutionally protected right of African-American defendants to be tried by a jury of their peers became increasingly important. The Supreme Court of the United States recognized that facially neutral statutes could violate the Fourteenth Amendment because "equal protection to all must be given—not merely promised." *Smith v. Texas*, 311 U.S. 128, 130, 61 S. Ct. 164, 165 (1940). The Supreme Court recognized that putting the fate of African-American defendants in the hands of all-white juries contradicted "our basic concepts of a democratic society and a representative government." *Id.*

As progress was made toward ensuring equal representation in juries, discrimination shifted from the composition of the venire to the composition of the jury itself. Peremptory challenges became the next tool for limiting African-Americans from serving as jurors because there were previously no African-American jurors on the jury panel against whom peremptory challenges could be used. In North Carolina, the number of authorized peremptory challenges increased from six to fourteen during this period.[3]

In 1986 the Supreme Court of the United Sates recognized the persistent impact of racial discrimination and the exclusion of jurors of color during jury selection and established a three-part test to challenge discriminatory peremptory challenges. *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). Although the Supreme Court's ruling in *Batson* and subsequent decisions sought to eliminate discrimination through the use of peremptory challenges, this Court has *never* held that a prosecutor intentionally discriminated against a juror of color.[4] The RJA

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3. *See* An Act to Amend the Laws Relating to Criminal Procedure, ch. 711, § 1, 1977 N.C. Sess. Laws 711; An Act to Amend G.S. 9-21(b) to Increase from Six to Nine the Peremptory Challenges Allowed the State in Capital Cases, 1971 N.C. Sess. Laws 56.

4. The North Carolina Court of Appeals has held that there was a *Batson* violation in only one case, where the prosecutor failed to offer any explanation for using peremptory challenges to strike two jurors. *State v. Wright*, 189 N.C. App. 346, 352–54, 658 S.E.2d 60, 64–65 (2008)). In two cases, the Court of Appeals held that the defendant had met their prima facie showing, but the underlying *Batson* challenge was unsuccessful upon remand. *See State v. McCord*, 158 N.C. App. 693, 696–99, 582 S.E.2d 33, 35–37 (2003); *State v. Sessoms*, 119 N.C. App. 1, 4–7, 458 S.E.2d 200, 202–04 (1995). The only "successful" *Batson* challenges have involved challenges alleging African-American defendants discriminated

was the General Assembly's recognition of *Batson*'s ineffectiveness in this state.

II.

Robinson was convicted of first-degree murder and sentenced to death in 1994 in Superior Court, Cumberland County. On direct appeal, this Court found no error in his conviction and death sentence. *State v. Robinson*, 342 N.C. 74, 463 S.E.2d 218 (1995), *cert. denied*, 517 U.S. 1197 (1996). Robinson's claims for post-conviction relief were denied in state and federal court. *State v. Robinson*, 350 N.C. 847, 539 S.E.2d 646 (1999); *Robinson v. Polk*, 444 F.3d 225 (4th Cir. 2006), *cert. denied* 549 U.S. 1003 (2006). Robinson's claims under the RJA do not negate or diminish his guilt or the impact of his crimes on the victim's family, the victim's friends, and the community. Rather, the Act ensured that even those who commit the most serious offenses are entitled to a trial and sentencing free from racial discrimination.

Robinson filed a timely Motion for Appropriate Relief pursuant to the RJA on 6 August 2010. His hearing was scheduled thirteen months later on 6 September 2011. The State requested and the trial court granted a continuance of the hearing for an additional four months but later denied the State's third motion to continue on 30 January 2012. Robinson's hearing, which lasted thirteen days, involved testimony by seven expert witnesses and the introduction of over 170 exhibits.

Robinson's claim under the RJA relied heavily on a study of jury selection conducted by researchers at Michigan State University College of Law. Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012) [hereinafter MSU Study]. The MSU Study examined jury selection in at least one proceeding for every inmate on death row in North Carolina as of 1 July 2010. This comprehensive study found that overall, African-American jurors were 2.26 times more likely than all other jurors to be struck by the State. The State struck 52.6% of eligible African-American venire members, while only striking 25.7% of all other eligible venire members. The researchers also performed a fully-controlled regression analysis, controlling for non-race factors that could potentially have caused the juror to be struck. Even after taking into account all of these other factors, the results remained the same—African-American jurors

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against white jurors. *See State v. Hurd*, 246 N.C. App. 281, 294, 784 S.E.2d 528, 537 (2016); *State v. Cofield*, 129 N.C. App. 268, 277–80, 498 S.E.2d 823, 830–32 (1998).

were more than two times as likely to be struck as all other jurors. The MSU Study also showed similar disproportionate disparities in the county and judicial district of Robinson's trial.[5] In stark contrast to these findings, this Court has *never* ruled that the State intentionally discriminated against a juror of color in violation of *Batson*. Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. Rev. 1957, 1961-62 (2016).[6]

In support of the findings from the MSU Study, Robinson also presented evidence obtained through discovery. After introducing evidence that prosecutors across North Carolina attended a "Top Gun" training, which taught them how to articulate facially race-neutral reasons for striking African-American jurors, Robinson presented transcripts from a capital case in Cumberland County in which the prosecutor used those exact reasons to justify striking an African-American juror. The trial court noted that "[i]nstead of training on how to comply with *Batson v. Kentucky*, and its mandate to stop discrimination in jury selection, North Carolina prosecutors received training in 1995 and 2011 about how to circumvent *Batson*." Robinson also obtained hand-written notes made by a prosecutor during jury selection in another Cumberland County capital case. These notes showed that an African-American juror with a criminal history was called a "thug," while a white juror with a criminal record was a "fine guy." An African-American juror was a "blk wino," while a white juror with a conviction for driving while impaired was a "country boy—ok."

Robinson also presented expert testimony about the role of implicit bias during jury selection. Robinson's experts testified about how race can influence decision-making at a subconscious level. One of Robinson's experts, Dr. Samuel Sommers, explained how "race often has an effect on judgments that we don't articulate when we are asked about those

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5. In Cumberland County, African-American jurors were struck at a rate of 52.7% compared to 20.5% for all other jurors. Cumberland County was a part of Second Judicial District from 1990 to 1999. In that district, African-American jurors were struck at a rate of 51.5%, compared to 25.1% for all other jurors. From 2000 to 2010 in the current Superior Court Division 4, African-American jurors were struck at a rate of 62.4%, compared to 21.9% for all other jurors.

6. This Court recently published two *Batson* decisions, *State v. Hobbs*, 374 N.C. 345, 841 S.E.2d 492 (2020) and *State v. Bennett*, 843 S.E.2d 222 (2020). Although this Court ultimately remanded both matters for a new *Batson* hearing, we did not find that the State intentionally discriminated against a juror in violation of *Batson*.

judgments." Rather than seeking to understand the role of implicit bias in their decision-making, prosecutors attended training to ensure that their race-based reasons for excluding jurors would not be subject to judicial scrutiny.

Robinson presented specific instances across the state where the race-neutral explanations given by prosecutors were pretextual or overtly based on race. Robinson presented evidence that an African-American juror was struck from the jury because of his membership in a historic African-American civil rights organization, the NAACP, and that another juror was struck from the jury because she graduated from a historically black college and university, North Carolina A&T State University. Robinson further showed how African-American jurors were struck after being asked explicitly race-based questions, such as whether an African-American juror would be the "subject of criticism" by their "black friends" if they were to return a verdict of guilty. In multiple cases, prosecutors targeted African-American jurors by asking the jurors different questions than other jurors, such as whether their child's father was paying child support. African-American jurors were also struck for patently irrational reasons, such as membership in the armed forces. Robinson also showed more than thirty examples of prosecutors striking African-American jurors for objectionable characteristics yet passing on other similarly situated jurors.

The trial court, in its meticulously detailed findings, laid out how Robinson had shown that race was a significant factor during jury selection in his case. The trial court concluded that race was a significant factor in the decisions of prosecutors to exercise peremptory challenges to strike African-American jurors in Cumberland County, the former Second Judicial District, and the State of North Carolina as a whole from 1990 to 2010 and resentenced Robinson to life imprisonment without the possibility of parole.

Following Robinson's hearing, the General Assembly amended the RJA, limiting the scope of statistical evidence for future hearings. An Act to Amend Death Penalty Procedures, S.L. 2012-136, §§ 1–10, 2012 N.C. Sess. Laws 471 [hereinafter Amended RJA] (repealed 2013). The Amended RJA also included a provision that applied the amendment to any trial court orders vacated or overturned upon appellate review, which could only apply to Robinson's case. Amended RJA, S.L. 2012-136, § 8, 2012 N.C. Sess. Laws at 473. After the overwhelming statistical evidence of systemic racial discrimination presented by Robinson, the General Assembly limited the use of that evidence in future proceedings.

On 1 October 2012, an evidentiary hearing under the Amended RJA was held for three additional defendants: Christina Walters, Quintel Augustine, and Tilmon Golphin. On 13 December 2012, the trial court entered an order granting relief for the three defendants after finding that they had established race as a significant factor in the State's use of peremptory challenges during jury selection.

After Robinson, Walters, Augustine, and Golphin showed that their death sentences were sought or imposed on the basis of race, the General Assembly repealed the RJA. Act of June 13, 2013, S.L. 2013-154, § 5.(a), 2013 N.C. Sess. Laws 368, 372 [hereinafter RJA Repeal]. The RJA Repeal was signed by the Governor on 19 June 2013. The repeal was retroactive and voided all pending motions for appropriate relief. *Id.*, 5.(d), 2013 N.C. Sess. Laws at 372. However, the RJA Repeal did not apply to a trial court order resentencing a defendant to life imprisonment without parole if that order is affirmed upon appellate review. *Id.*

The State petitioned this Court for a writ of certiorari, which this Court allowed on 11 April 2013, arguing that the trial court had abused its discretion by failing to grant the State's third motion to continue. We agreed and vacated the trial court's order granting Robinson's motion for appropriate relief without addressing the merits of the underlying claim or the constitutional and statutory challenges to the RJA. *State v. Robinson*, 368 N.C. 596, 597, 780 S.E.2d 151, 152 (2015).[7]

A joint hearing was held in the Superior Court, Cumberland County, on 29 November 2016 on the motions for appropriate relief filed by Robinson, Walters, Augustine, and Golphin. The sole question considered by the trial court was whether the defendants' claims were rendered void by the RJA Repeal. The trial court found that the defendants' rights had not vested and that the RJA Repeal was not an ex post facto law, but the trial court did not reach the defendants' claims that the RJA Repeal violated the double jeopardy protections of the state and federal constitutions. The trial court erred by failing to consider Robinson's constitutional arguments. As discussed in Section III of this opinion, a proper analysis of Robinson's double jeopardy protections focuses on whether the trial court's order granting relief under the RJA constituted an acquittal of the death penalty. Because such an acquittal would

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7. This Court also vacated the orders granting relief to Walters, Augustine, and Golphin, finding that the trial court erred by joining the cases for an evidentiary hearing and that the error recognized in *State v. Robinson*, 368 N.C. 596, 780 S.E.2d 151 (2015), infected the trial court's decision. *State v. Augustine*, 368 N.C. 594, 594, 780 S.E.2d 552, 552 (2015).

categorically bar reimposition of the death penalty, it is a threshold matter to be addressed prior to any inquiries into the effect of legislation enacted subsequent to the acquittal. The trial court concluded that the RJA Repeal retroactively voided the defendants' claims and dismissed each of the defendants' motions for appropriate relief.

Robinson filed a Petition for Writ of Certiorari on 30 May 2017, asking this Court to consider whether the retroactive application of the RJA Repeal violates the double jeopardy protections enshrined in our state constitution. We allowed the petition on 1 March 2018, and today we hold that the retroactivity provision constitutes such a violation.[8]

III.

Robinson argues that the RJA Repeal's retroactive application to those who previously received a sentence of life imprisonment without the possibility of parole after a hearing under the RJA violates the constitutional prohibition against double jeopardy. We agree. Once Robinson's death sentence was vacated under the RJA, Article I, Section 19 of the North Carolina Constitution barred the reinstatement of his capital sentence.

The prohibition against double jeopardy is a "fundamental and sacred principle of the common law, deeply imbedded in our criminal jurisprudence." *State v. Crocker*, 239 N.C. 446, 449, 80 S.E.2d 243, 245 (1954). It is an integral part of the Law of the Land clause, which guarantees that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19; *State v. Sanderson*, 346 N.C. 669, 676, 488 S.E.2d 133, 136 (1997) (citing *Crocker*, 239 N.C. 446, 80 S.E.2d 243) (noting that the prohibition against double jeopardy is embodied in the Law of the Land Clause of the North Carolina Constitution).[9] This clause has appeared in every

8. Robinson also argues that the retroactivity provision is (1) an ex post facto law; (2) in violation of his vested rights; (3) a bill of attainder; (4) an arbitrary application of the death penalty; and (5) in violation of the separation of powers. Because this Court holds that the double jeopardy protections afforded under the North Carolina Constitution's Law of the Land Clause bar Robinson from being resentenced to death, we do not address Robinson's other constitutional arguments.

9. The Law of the Land Clause, which dates back to Chapter 39 of the Magna Carta, originally appeared in Section 12 of the Declaration of Rights in 1776 and read "[t]hat no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land." *See* Magna Carta ch. 39 (1215); *see also* John V. Orth & Paul M. Newby, *The North Carolina State Constitution* 68 (2d ed. 2013).

version of the North Carolina Constitution. *See* N.C. Const. of 1776, Declaration of Rights, § 12; N.C. Const. of 1886, art. I, § 17; N.C. Const. art. I, § 19.

A prohibition against double jeopardy was also included in the Bill of Rights of the Constitution of the United States in 1791 and applies to the states through the Fourteenth Amendment. U.S. Const. amend. V; *Benton v. Maryland*, 395 U.S. 784, 796, 89 S. Ct. 2056, 2063 (1969). Our Court held that incorporation "added nothing to our law" because North Carolina's prohibition against double jeopardy "has always been an integral part of the law of North Carolina." *State v. Battle*, 279 N.C. 484, 486, 183 S.E.2d 641, 643 (1971). North Carolina's prohibition against double jeopardy, found in our Law of the Land Clause, predates any protections afforded under the Constitution of the United States. *See Crocker*, 239 N.C. at 449, 80 S.E.2d at 245 (finding that double jeopardy protections are an integral part of the Law of the Land Clause of our state constitution); *State v. Prince*, 63 N.C. 529, 531 (1869) (noting that the prohibition against double jeopardy "is a sacred principle of the [English] common law"); *State v. Garrigues*, 2 N.C. 241, 242 (1795) (disallowing the retrial of a defendant for the same offense after a hung jury).

In interpreting the double jeopardy protections of our state's Law of the Land Clause, we have often been guided by the decisions of the Supreme Court of the United States. *See Sanderson*, 346 N.C. 669, 488 S.E.2d 133. However, "[q]uestions concerning the proper construction and application of the North Carolina Constitution can be answered with finality only by this Court." *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998). This Court has "the responsibility to protect the state constitutional rights of the citizens," and this obligation "is as old as the State." *Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992). Thus, although we base our holding on the North Carolina Constitution, we may treat as persuasive the Supreme Court of the United States' reasoning regarding the double jeopardy protections afforded by the Constitution of the United States; we do so in this case. *See State ex rel. Martin v. Preston*, 325 N.C. 438, 450, 385 S.E.2d 473, 479 (1989) (observing that although this Court is not bound by the Supreme Court of the United States when interpreting state laws and our constitution, the reasoning used may be persuasive); *Bulova Watch Co., Inc. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974) (noting that "in the construction of the provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this Court").

Double jeopardy protections apply only if there has been some event, such as an acquittal, that terminates the original jeopardy. *Richardson v. United States*, 468 U.S. 317, 325, 104 S. Ct. 3081, 3086 (1984). If jeopardy is terminated by an acquittal, the State is barred from appealing any decision that might subject the defendant to another trial for the same offense. *See State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986). An acquittal is "any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *Evans v. Michigan*, 568 U.S. 313, 318, 133 S. Ct. 1069, 1074–75 (2013). The prohibition on review of acquittals is one of the most fundamental rules in the history of double jeopardy. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S. Ct. 1349, 1354 (1977); *see also Evans*, 568 U.S. at 318, 133 S. Ct. at 1074; *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S. Ct. 671, 672 (1962); *Green v. United States*, 355 U.S. 184, 188, 78 S. Ct. 221, 224 (1957). Accordingly, acquittals are final and unreviewable, even if based in error. *Ball v. United States*, 163 U.S. 662, 671, 16 S. Ct. 1192, 1195 (1896).

This is true even when the error made by the trial court is patent and unambiguous. In *Fong Foo*, the trial court, *sua sponte* in the middle of trial, directed the jury to acquit the defendant, which it did. *Fong Foo*, 369 U.S. at 141–42, 82 S. Ct. at 671. As an explanation, the trial court alleged that the prosecutor had behaved improperly and that the witnesses had been unconvincing. The Court of Appeals for the First Circuit held that the trial court had no power to grant the mid-trial acquittal, and it subsequently directed the trial court to vacate the judgment and remanded the case for a new trial. *Id.* at 142, 82 S. Ct. at 671.

The Supreme Court of the United States reversed, holding that the case "terminated with the entry of a final judgment of acquittal," which "could not be reviewed without putting (the petitioners) twice in jeopardy"—an act flatly prohibited by the Fifth Amendment. *Id.* at 143, 82 S. Ct. at 672 (quoting *Ball*, 163 U.S. at 671, 16 S. Ct. at 1195). The Court acknowledged that it was reasonable to believe that the acquittal should be set aside because it "was based upon an egregiously erroneous foundation," but to set it aside would, nevertheless, violate the constitution. *Id.* The Supreme Court has "applied *Fong Foo*'s principle broadly." *Evans*, 568 U.S. at 318, 133 S. Ct. at 1074.

An acquittal, whether granted by the jury, the trial court, or an appellate court, is non-reviewable. *See Arizona v. Rumsey*, 467 U.S. 203, 210, 104 S. Ct. 2305, 2309 (1984) (noting that the fact the sentencer was the trial court rather than the jury did not limit double jeopardy protections); *Burks v. United States*, 437 U.S. 1, 17, 98 S. Ct 2141, 2150 (1978) (stating

that the "purposes of the [Double Jeopardy] Clause would be negated" if double jeopardy did not prohibit retrial after an appellate court's finding of insufficient evidence); *United States v. Morrison*, 429 U.S. 1, 3, 97 S. Ct. 24, 26 (1976) (concluding that the trial court's finding of guilt is equivalent to a jury verdict of guilt for double jeopardy purposes).

Double jeopardy protections also extend to capital sentencing proceedings. *Sanderson*, 346 N.C. at 676, 488 S.E.2d at 136. Unlike other sentencing proceedings when the sentencer has "unbound discretion to select an appropriate punishment from a wide range" and the prosecutor "simply recommend[s] what [he or she believes] to be an appropriate punishment," capital sentencing proceedings bear "the hallmarks of the trial on guilt or innocence." *Bullington v. Missouri*, 451 U.S. 430, 438–39, 101 S. Ct. 1852, 1858 (1981). Those proceedings present the sentencer with a choice between two alternatives, provide statutory standards to guide their decision-making, and require the prosecutor to prove certain additional facts in order to justify a particular sentence. *Id.*

In capital sentencing proceedings, a defendant is acquitted of the death penalty for purposes of double jeopardy when a life sentence is imposed after a finding that the State's evidence was insufficient to prove the existence of a single aggravating circumstance. *Rumsey*, 476 U.S. at 211, 104 S. Ct. at 2310. A life sentence "based on findings sufficient to establish legal entitlement to the life sentence[ ] amounts to an acquittal on the merits." *Id.* Therefore, the relevant inquiry to determine whether imposition of a life sentence was an acquittal for purposes of double jeopardy is "whether the sentencing judge or the reviewing court has 'decid[ed] that the prosecution has not proved its case' for the death penalty." *Poland v. Arizona*, 476 U.S. 147, 154, 106 S. Ct. 1749, 1754 (1986) (alteration in original) (quoting *Bullington*, 451 U.S. at 443, 101 S. Ct. at 1860).

Our jurisprudence confirms that this is the proper inquiry. In *Sanderson*, we clarified that double jeopardy protections do not attach to each and every aggravating circumstance not sufficiently proved by the State, but rather attach in whole when the State has failed to prove the existence of any aggravating circumstance. *Sanderson*, 346 N.C. at 679, 488 S.E.2d at 138. This is because in the capital sentencing phase the State's burden is not to prove the existence of every aggravating circumstance—akin to proving every essential element of a crime—but to prove the existence of at least one. N.C.G.S. § 15A-2000(c)(1) (2019). If the State fails to prove the existence of at least one aggravating circumstance, then the defendant is acquitted of the death penalty, jeopardy terminates, and the State may not seek to reimpose capital punishment. *Id.*

A defendant is acquitted of the charges against him when the State fails to carry its burden to prove the essential elements of an offense. *Evans*, 568 U.S. at 318, 133 S. Ct. at 1074–75. He may also be acquitted when the State proves every essential element of the crime, but the defendant successfully proves the existence of an excuse or justification in the form of an affirmative defense that negates his criminal liability.

In *Burks*, the defendant's principal defense at trial was the affirmative defense of insanity. *Burks*, 437 U.S. at 2, 98 S. Ct. at 2143. On appeal, he admitted that the State had proven the necessary elements to convict him of the offense but argued that the State had not presented sufficient evidence to overcome his affirmative defense. *Id.* at 3, 98 S. Ct. at 2413. The Court of Appeals for the Sixth Circuit agreed, finding insufficient evidence that the State had "effectively rebu[tted]" the testimony of the defendant's three expert witnesses regarding his affirmative defense. *Id.* at 4, 98 S. Ct. at 2143. The defendant's judgment was vacated, and the case was remanded so the trial court could determine whether he should receive a directed verdict or a new trial. *Id.* Defendant appealed, arguing that the appellate court's ruling constituted an acquittal, regardless of whether it was entered before or after the verdict. *Id.* at 5, 98 S. Ct. at 2144. The Supreme Court of the United States agreed and held that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient." *Id.* at 18, 98 S. Ct. at 2150–51.

The same principles apply here because claims for relief under the RJA were similar in kind to an affirmative defense. Though the State carried its burden at trial by proving the existence of at least one aggravating circumstance, the Act allowed Robinson to be acquitted of the death penalty by presenting evidence that racial discrimination infected his trial and capital sentencing proceedings. The Act provided the State an opportunity to present rebuttal evidence, but the trial court found the State's rebuttal evidence to be insufficient. Just as in *Burks*, the fact that this "acquittal" was made by a reviewing court after the original trial in Robinson's case does not negate or limit his double jeopardy protections.

Once the trial court found that Robinson had proven all of the essential elements under the RJA to bar the imposition of the death penalty, he was acquitted of that capital sentence, jeopardy terminated, and any attempt by the State to reimpose the death penalty would be a violation of our state's constitution.

We conclude that the trial court's order resentencing Robinson to life in prison was an acquittal for purposes of double jeopardy. The

sentence was imposed after a hearing bearing "the hallmarks of the trial on guilt or innocence" and was based on findings sufficient to establish that Robinson was legally entitled to the imposition of a life sentence. *See Bullington*, 451 U.S. at 438–39, 101 S. Ct. at 1858. In finding that Robinson had proven his entitlement to relief under the RJA, the trial court acquitted him of the death penalty.

The RJA required the trial court to determine whether Robinson had proven his claim that his sentence of death was sought or imposed on the basis of his race. The Act established both the type and scope of evidence that Robinson could use to meet his burden. Original RJA, § 1, 2009 N.C. Sess. Laws at 1214. The trial court's order included findings of fact that established, in great detail, that Robinson had presented sufficient evidence to establish that race played a significant factor in the State's decision to seek or impose the death penalty and that his sentence was obtained on the basis of race. The trial court's order also included findings of fact establishing that the State had not offered evidence sufficient to rebut this determination. These findings established that Robinson was legally entitled to a life sentence under the Act. Therefore, the trial court did not merely impose a life sentence, it acquitted Robinson of the death penalty based on findings he was legally entitled to receive a life sentence under the Act.

Death penalty acquittals receive double jeopardy protection because of "both the trial-like proceedings at issue and the severity of the penalty at stake." *Monge v. California*, 524 U.S. 721, 733, 118 S. Ct. 2246, 2253 (1998) (emphasis omitted). The death penalty is the most serious punishment the state can impose, and the interests protected by our Law of the Land Clause are consequently at their zenith. This Court has previously recognized that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual." *State v. Courtney*, 372 N.C. 458, 462, 831 S.E.2d 260, 264 (2019) (quoting *Green v. United States*, 355 U.S. 184, 187–88, 78 S. Ct. 221, 223 (1957)). To allow it to do so creates an "unacceptably high risk that the [State], with its superior resources, [will] wear down a defendant." *Bullington*, 451 U.S. at 445, 101 S. Ct. at 1861. The State must also not be allowed to use its superior resources and power to make repeated attempts to have a defendant sentenced to death, especially after that defendant has followed the procedures created by the state, has proven all that was required to be proved, and has been awarded relief under the statutory scheme designed by the state.[10]

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10. Justice Ervin's dissenting opinion argues that Robinson is entitled to a new hearing, based on this Court's decision in *State v. Ramseur*, but it fails to recognize the

The General Assembly passed legislation barring death sentences obtained on the basis of race. Robinson filed a timely motion for appropriate relief and presented sufficient evidence to show that he was entitled to a sentence of life imprisonment without parole. The State failed to present sufficient rebuttal evidence. After Robinson was granted relief, the General Assembly limited the use of the very statistical evidence that he had relied upon. After Walters, Augustine, and Golphin also showed that their sentences were sought or obtained on the basis of race, the General Assembly repealed the legislation altogether. The State is not only seeking another attempt at imposing a death sentence, it is seeking another attempt after having created a process which provided relief upon a showing of racial discrimination. If our constitution does not permit the State to use its power and resources over and over to obtain a conviction or impose the death penalty, it certainly does not allow the state to use that same power and resources to eliminate the remedy after a defendant has successfully proven his entitlement to that relief.

Double jeopardy protections provide certainty for defendants so that once acquitted of the death penalty, they have finality such that they may not later be resentenced to death. It also provides that same closure to the families of victims so that they are not asked to endure additional legal proceedings, never sure whether the current proceeding will, in fact, be the last. Additional proceedings beyond the hearing on Robinson's motion for appropriate relief would fail to protect either interest.

The Law of the Land Clause and the protections it affords against double jeopardy are older than this state. Those protections exist to protect defendants against the abuse of the State's virtually unlimited power to pursue prosecutions and the interests that they protect—a defendant's very life and liberty—are the weightiest interests that our

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significance of subjecting Robinson to an additional RJA hearing in its double jeopardy analysis. Citing to the case of *United States v. Wilson*, 420 U.S. 332, 95 S. Ct. 1013 (1975), the dissent argues that double jeopardy considerations do not prevent the government's ability to appeal an acquittal because reversal would simply reinstate the original verdict. However, if this matter were remanded for an additional hearing, the trial court would not be able to merely reinstate the original verdict. Instead, it would conduct a full RJA hearing, subjecting Robinson to an additional RJA proceeding. In the case of *Rumsey*, the Supreme Court expressly rejected the applicability of *Wilson* in the context of capital sentencing proceedings. *Rumsey*, 467 U.S. at 211, 104 S. Ct. at 2310. It reasoned that double jeopardy was not implicated in *Wilson* because, on remand, the trial court would "simply order the jury's guilty verdict reinstated" and the defendant would not be subjected to a second trial. *Id*. at 211-212, 104 S. Ct. at 2310. The Supreme Court noted that that if it were to remand the matter, the trial court would hold an additional capital sentencing hearing and would not merely reinstate the original verdict. *Id*. at 212, 104 S. Ct. at 2310.

state and federal constitutions serve to protect. We hold that the State is barred from reimposing a death sentence under Article I, Section 19 of our state constitution, and Robinson's sentence of life imprisonment without the possibility of parole must be reinstated.[11]

IV.

A valid judgment of a competent court is "the real and only authority for the lawful imprisonment of a person who pleads or is found guilty of a criminal offense." *In re Swink*, 243 N.C. 86, 90, 89 S.E.2d 792, 795 (1955). A judgment is final when there is no statutory basis for appeal and no petition for writ of certiorari has been filed. *State v. Green*, 350 N.C. 400, 408, 514 S.E.2d 724, 729 (1999).

The North Carolina Rules of Appellate Procedure allow for review of judgments and orders through a writ of certiorari, but review of a judgment or an order must be sought by the party seeking review. N.C. R. App. P. 21(a)(1). The distinction between seeking review of a judgment and seeking review of an order is also present in Rule 4, which governs appeals in criminal cases. *See* N.C. R. App. P. 4(b) ("The notice of appeal . . . shall designate the judgment or order from which appeal is taken . . . ."); *see also State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 543 (2010) (holding that the court lacked jurisdiction to hear the defendant's appeal of his judgment because the defendant appealed only the trial court's order denying his motion to suppress, not the trial court's final judgment).

Here, the State failed to petition this Court for review of the judgment through a writ of certiorari. When the trial court entered its order granting Robinson's motion for appropriate relief on 20 April 2012, it also entered a separate judgment and commitment order resentencing

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11. We briefly address the impact of this Court's 18 December 2015 order vacating the trial court's order resentencing Robinson. The State filed a petition for writ of certiorari, which this Court allowed, asking this Court to review whether the trial court erred in: (1) its interpretation of the Racial Justice Act; (2) its findings of fact and conclusions of law; and (3) its failure to grant the State's third motion to continue. This Court ultimately determined that the trial court "abused its discretion by denying petitioner's third motion for a continuance" and remanded the matter for "reconsideration of respondent's motion for appropriate relief." *State v. Robinson*, 368 N.C. 596, 596–97, 780 S.E.2d 151, 151–52 (2015). We issued a similar order in the cases of Walters, Augustine, and Golphin. *See State v. Augustine*, 368 N.C. 594, 780 S.E.2d 552 (2015). Having now determined that defendant was acquitted of the death penalty under the Racial Justice Act, we conclude that any error by the trial court did not alter the essential character of the acquittal and our previous order does not impact our ultimate conclusion that Section 1, Article 19 of the North Carolina Constitution bars the reinstatement of defendant's capital sentence.

him to life in prison, pursuant to N.C.G.S. § 15A-1301. On 10 July 2012, the State filed a petition for writ of certiorari, which this Court allowed, that sought review of the order granting Robinson's motion for appropriate relief but not the trial court's judgment and commitment order vacating Robinson's death sentence and resentencing him to life in prison. No notice of appeal or petition for writ of certiorari was filed by the State as to the judgment or commitment order. Further, we note that parties must petition for review of post-conviction proceedings in death penalty cases within sixty days after delivery of the transcript of the hearing on the motion for appropriate relief to the petitioning party, a deadline that elapsed years ago. N.C. R. App. P. 21(f). Therefore, the State has failed to seek review of and now cannot seek timely review of the judgment sentencing Robinson to life in prison.

Furthermore, the State lacked the statutory authority to seek review of the judgment; it is, therefore, final and not subject to appellate review. The General Assembly has granted the State the statutory authority to seek appellate review in limited circumstances, and we construe those statutes narrowly. *State v. Elkerson*, 304 N.C. 658, 669, 285 S.E.2d 784, 791 (1982).

As a threshold matter, the General Assembly did not grant the State the power to appeal through the RJA. *See* Original RJA, §§ 1–2, 2009 N.C. Sess. Laws at 1213–15. The Act did provide that the procedures and hearing "shall follow and comply with G.S. 15A-1420, 15A-1421, and 15A-1422." *Id.*, § 1, 2009 N.C. Sess. Laws at 1215. Section 15A-1422 of the North Carolina General Statutes provides the State the right to seek review of a trial court's ruling on a motion for appropriate relief, but review is limited to those filed pursuant to N.C.G.S. § 15A-1415. N.C.G.S. § 15A-1422(c) (2019). Robinson's motion for appropriate relief was not filed pursuant to N.C.G.S. § 15A-1415. Rather, it was filed pursuant to the Act. Therefore, we find that the State lacked the statutory authority to appeal Robinson's judgment pursuant to N.C.G.S. § 15A-1422.

The State's only other statutory right to appeal is contained in N.C.G.S. § 15A-1445, which provides the State a right to appeal in the following circumstances, unless prohibited by the rule against double jeopardy:

> (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.
>
> (2) Upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law.

(3) When the State alleges that the sentence imposed:

> (a) Results from an incorrect determination of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
>
> (b) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level;
>
> (c) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
>
> (d) Imposes an intermediate punishment pursuant to G.S. 15A-1340.13(g) based on findings of extraordinary mitigating circumstances that are not supported by evidence or are insufficient as a matter of law to support the dispositional deviation.

N.C.G.S. § 15A-1445(a)(1)–(3) (2019). None of these provisions grant the State the statutory authority to appeal the trial court's judgment sentencing Robinson to life in prison. Therefore, the State lacked and continues to lack the statutory authority to appeal life sentences entered pursuant to the RJA.

Because the retroactivity provision of the RJA Repeal violates the double jeopardy protections of the North Carolina Constitution, because the State failed to appeal the judgment of the trial court, and because the State lacked the statutory authority to appeal that judgment in any event, we vacate the trial court's order dismissing Robinson's claim under the RJA and remand for the reinstatement of a sentence of life imprisonment without parole.

VACATED AND REMANDED.

Justice HUDSON concurring in result.

While I agree with the majority that this case is controlled by double jeopardy principles stemming from the Law of the Land Clause of the North Carolina Constitution, I prefer to rely on the analysis of Part IV of the majority opinion. I do not agree that the trial court's lengthy order

entered on 20 April 2012 was final; the State was permitted to and did seek review of it by filing a petition for writ of certiorari as provided by the Racial Justice Act. For the reasons set forth in Part IV of the majority opinion, however, I agree that the separate judgment and commitment order in which defendant Robinson was sentenced to life imprisonment without the possibility of parole, entered on that same date, was and remains a final judgment of which appellate review was neither sought nor obtained. Therefore, double jeopardy precludes further review of the judgment. Accordingly, I respectfully concur in the result.

Justice NEWBY dissenting.

As a monarch, King Louis XVI once famously said, "*C'est légal, parce que je le veux*" ("It is legal because it is my will.").[1] Today, four justices of this Court adopt the same approach to the law, violating the norms of appellate review and disregarding or distorting precedent as necessary to reach their desired result. Apparently, in their view, the law is whatever they say it is.

In essence the majority opinion presents three novel and unsupported theories of double jeopardy:

1) In the majority opinion Part III, it argues that this Court lacked the authority to vacate the 2012 RJA order, despite our order explicitly vacating it based on our holding that the trial court procedure was fundamentally flawed. Thus, the 2012 RJA order was not vacated and any attempt at appellate review violates double jeopardy principles.

2) In the majority opinion Part IV, it argues that, while this Court had the authority to review the 2012 RJA order and the corresponding amended judgment and commitment order (the amended J & C), the State failed to seek review of the amended J & C. In its petition for writ of certiorari which this Court granted, the State only sought review of the underlying 2012 RJA order. While the 2012 RJA order which was the basis for the amended J & C was vacated, our order did not vacate the corresponding amended J & C. The amended J & C is thus a final order.

3) In the majority opinion Part IV, it argues that, while this Court had the authority to review the 2012 RJA order, it did not have the authority to review the corresponding amended J & C.

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1. Jay Winik, *The Great Upheaval: America and the Birth of the Modern World, 1788–1800* 108 (HarperCollins 2007).

The only theory of the majority opinion that has four votes is the second theory. Justice Hudson's opinion concurring in the result notes that, while she believes the State had the authority to seek review of the 2012 RJA order and corresponding amended J & C, it only specifically sought review of the 2012 RJA order. Because the State failed to seek review of the corresponding J & C, it became a final judgment. Even though four justices agree on only one of the theories, because that theory is set out in her opinion, and for ease of reading, I refer to Chief Justice Beasley's opinion as the "majority opinion."

The votes of the four justices prevent defendant's execution for murder. It appears, however, that three justices may have a larger purpose: to establish that our criminal justice system is seriously—and perhaps irredeemably—infected by racial discrimination. To accomplish that purpose, the three adopt findings of fact made by the trial court in an order previously vacated by this Court, the 2012 RJA order. Their reliance on a vacated order is totally at odds with fundamental legal principles and this Court's many precedents holding that vacated orders are null and void. What makes their action even more remarkable—and indefensible—is that we vacated that order because the trial court denied the State adequate time to respond to the complex statistical evidence presented by defendant in support of his motion for appropriate relief under the Racial Justice Act. A one-sided version of the "facts" seems to suit their purpose.

The only order properly before this Court is the one the trial court entered after we vacated the 2012 RJA order and remanded the case, the 2017 remand order. The 2017 remand order dismissed defendant's RJA MAR upon finding that the General Assembly's repeal of the RJA applied to defendant's case. Because confining itself to the 2017 remand order would deprive it of the opportunity to attack the motives of prosecutors, jurors, and even judges, three justices try to revive the vacated order through a misapplication of double jeopardy law that fully deserves to be labeled judicial activism; the court is legislating changes in the law from the bench.

None of the majority opinion's theories implicate the constitutional prohibition against double jeopardy because none call into question the facts supporting defendant's conviction or the imposition of his capital sentence.

Although I dissented from this Court's holding in *State v. Ramseur*, 843 S.E.2d 106 (N.C. 2020), that case plainly controls the outcome here. It holds that the General Assembly's repeal of the RJA does not apply

retroactively. Based on the trial court order which is actually before us, according to *Ramseur* and our 2015 order, we should be returning this case to the trial court for a full hearing on the merits of defendant's RJA claim at a proceeding where the State has a fair chance to respond. Instead of doing the legally correct thing, the majority opinion picks its preferred destination and reshapes the law to get there. Inasmuch as today's decision cannot be justified on any legal basis, I respectfully dissent.

I.

a. Defendant's Crime and Punishment

In 1994 a jury convicted defendant of the murder of seventeen-year-old Erik Tornblom, who would have been a senior at Douglas Byrd High School. *State v. Robinson*, 342 N.C. 74, 78–80, 463 S.E.2d 218, 221–22 (1995) (*Robinson I*). Defendant and his accomplice, seventeen-year-old Roderick Williams, shot Tornblom in the face with a sawed-off shotgun after he agreed to give them a ride in his car. *Id.* at 79, 463 S.E.2d at 221. Before leaving the crime scene, defendant and Williams stole Tornblom's wallet and divided the twenty-seven dollars from it between them. *Id.* at 79, 463 S.E.2d at 221–22. Defendant admitted to law enforcement that they shot Tornblom even though he "kept begging and pleading for [defendant and Williams] not to hurt him, because he didn't have any money." *Id.* at 79, 463 S.E.2d at 221. Two days before the murder, defendant told his aunt that "he was going to burn him a whitey"; defendant repeated this statement three times. *Id.* at 80, 463 S.E.2d at 222. At trial a witness testified that, the day after the murder, defendant admitted that he had robbed a white man the night before and had shot him in the head. *Id.*[2]

Defendant pled guilty to the charges of first-degree kidnapping, robbery with a dangerous weapon, possession of a weapon of mass destruction, felonious larceny, and possession of a stolen vehicle. *Id.* at 78, 463 S.E.2d at 221. The State tried defendant capitally on the count of first-degree murder. *Id.* On the murder charge, the jury found defendant guilty both on the basis of premeditation and deliberation and under the felony murder rule. *Id.* Defendant filed a pretrial motion, citing *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), but neither the State nor

2. Despite the heinous nature of this crime, and the crimes committed by the defendants listed in footnote 7, the majority opinion hollowly asserts that its judicial elimination of the capital sentence "do[es] not negate or diminish [defendant's] guilt or the impact of his crimes on the victim's family, the victim's friends, and the community."

the defense raised a *Batson* objection during jury selection. *See Batson*, 476 U.S. at 79, 106 S. Ct. at 1712 (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).

At the sentencing phase of the trial, the trial court presented the jury with the statutory aggravating circumstances supported by the evidence, *see Robinson I*, 342 N.C. at 85–86, 463 S.E.2d at 225; the jury was required to find that one or more of those aggravating circumstances existed beyond a reasonable doubt and outweighed any mitigating circumstances before recommending the death penalty, *see* N.C.G.S. § 15A-2000(c)(1)–(3) (2019). In recommending the death penalty, the jury unanimously found as aggravating circumstances that the murder was committed while defendant was engaged in the commission of first-degree kidnapping and robbery with a firearm and that the murder was especially heinous, atrocious, or cruel. *Robinson I*, 342 N.C. at 88–89, 463 S.E.2d at 227; *see* N.C.G.S. § 15A-2000(e)(5), (9) (2019). Consistent with the jury's recommendation, and as required by statute, the trial court entered a death sentence. *Id.*; *see, e.g.*, N.C.G.S. § 15A-2000 (2019).

On direct appeal, this Court unanimously found no error either in the trial or in the sentencing proceeding for the first-degree murder conviction and affirmed defendant's sentences, including the death sentence. *Robinson I*, 342 N.C. at 91, 463 S.E.2d at 228. Defendant raised no claims of racial discrimination on appeal. This decision included a proportionality review, in which this Court found the punishment consistent with other capital sentences given the circumstances of the crime. *Id.* at 88–91, 463 S.E.2d at 227–28. The Supreme Court of the United States denied further review. *Robinson v. North Carolina*, 517 U.S. 1197, 116 S. Ct. 1693 (1996). Defendant exhausted both state and federal post-conviction review and received a full evidentiary hearing in state court on his motion for appropriate relief (MAR). Defendant was scheduled to be executed on 26 January 2007, but his execution has been stayed.[3]

b. The 2012 RJA Order

Defendant committed his crimes in 1991, before the original RJA was enacted in 2009. On 11 August 2009 the RJA became law, which

3. On 22 January 2007, defendant filed a civil action in Superior Court, Wake County and obtained injunctive relief of his execution on the grounds that use of lethal injection to execute him would violate the Eighth Amendment.

allowed defendant and other death row inmates one year to file a motion pursuant to the Act. North Carolina Racial Justice Act, S.L. 2009-464, § 2, 2009 N.C. Sess. Laws 1213, 1215 [hereinafter the RJA] (codified at N.C.G.S. § 15A-2010 (2009)) (repealed 2013). Defendant filed a motion pursuant to the RJA (RJA MAR) on 6 August 2010. Defendant offered as his primary evidence a statistical study conducted by professors at the Michigan State University College of Law between 2009 and 2011, assessing jury selection statistics from across North Carolina. At the start of the hearing, the State moved for a third continuance because it needed more time to collect additional data from prosecutors throughout the state in order to address the study. *See State v. Robinson*, 368 N.C. 596, 597, 780 S.E.2d 151, 152 (2015) (*Robinson II*). The trial court denied that motion. *Id.* The trial court conducted a hearing and entered an order dated 20 April 2012 with a corresponding amended J & C. In its 2012 RJA order, the trial court stated: "[H]aving determined that Robinson is entitled to appropriate relief as to [his RJA claims], [the court] concludes that Robinson is entitled to have his sentence of death vacated, and Robinson is resentenced to life imprisonment without the possibility of parole." The amended J & C was entered based solely on this ruling in the 2012 RJA order.[4] This Court allowed the State's petition for writ of certiorari to review the 2012 RJA order (including the amended J & C entered with it).[5]

After careful review, on 18 December 2015, this Court vacated the 2012 RJA order, including the corresponding amended J & C. *Robinson II*, 368 N.C. at 597, 780 S.E.2d at 152. In our order, we stated:

> Central to [defendant's] proof in this case is a statistical study that professors at the Michigan State University College of Law conducted between 2009 and 2011. [Defendant] gave [the State] all of the data used for the study in May 2011 and a report summarizing the study's findings in July 2011. [Defendant] then provided the final version of the study to [the State] in December 2011, approximately one month before the hearing on [defendant's]

4. Four justices hold that the State failed to seek review of this amended J & C.

5. Before this Court could review the trial court's order, however, the legislature repealed the statutory provisions upon which defendant's RJA MAR relied. Act of June 13, 2013, S.L. 2013-154, § 5.(a), 2013 N.C. Sess. Laws 368, 372 [hereinafter the RJA Repeal]. On 19 June 2013, the RJA was repealed in its entirety. RJA Repeal, §§ 5.(a), 6, 2013 N.C. Sess. Laws at 372. On its face, the RJA Repeal legislation was to apply retroactively, though it exempted any judgments granting relief under the RJA that were affirmed on appeal and became final orders before the repeal's effective date. *Id.*, § 5.(d), 2013 N.C. Sess. Laws at 372.

> motion began. At the start of the hearing, [the State] moved for a third continuance because it needed more time to collect additional data from prosecutors throughout the state and to address [defendant's] study. The trial court denied the motion.

*Id.* at 596, 780 S.E.2d at 151. We determined that the trial court should have allowed the State's motion to continue:

> Section 15A-952 of the Criminal Procedure Act 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. N.C.G.S. § 15A-952(g)(2) (2013). [Defendant's] study concerned the exercise of peremptory challenges in capital cases by prosecutors in Cumberland County, the former Second Judicial Division, and the State of North Carolina between 1990 and 2010. The breadth of [defendant's] study placed [the State] in the position of defending the peremptory challenges that the State of North Carolina had exercised in capital prosecutions over a twenty-year period. [The State] had very limited time, however, between the delivery of [defendant's] study and the hearing date. Continuing this matter to give [the State] more time would have done no harm to [defendant], whose remedy under the Act was a life sentence without the possibility of parole. *See* N.C.G.S. § 15A-2012(a)(3). *Under these exceptional circumstances*, *fundamental fairness required that [the State] have an adequate opportunity to prepare for this unusual and complex proceeding.* Therefore, the trial court abused its discretion by denying [the State's] third motion for a continuance.

*Id.* (emphasis added). This Court further concluded that "[t]he trial court's failure to give [the State] adequate time to prepare resulted in prejudice." *Id.* at 597, 780 S.E.2d at 151–52.[6] In its decision, this Court "express[ed] no opinion on the merits of [defendant's] motion for appropriate relief," but vacated the 2012 RJA order and remanded to the trial court to "address [the State's] constitutional and statutory challenges

6. In seeking to reinstate the 2012 RJA order, the majority opinion remarkably faults the State for its failure to "present sufficient rebuttal evidence" despite this fundamentally flawed procedure.

pertaining to the Act." *Id.* at 596, 780 S.E.2d at 152. With the 2012 RJA order vacated, the case was remanded to the trial court to consider the State's challenges and, if needed, to conduct a new hearing, after giving the State adequate time to prepare. *Id.*; *see also State v. Augustine*, 368 N.C. 594, 780 S.E.2d 552 (2015).[7] The Supreme Court of the United States denied defendant's request to review this Court's order vacating the 2012 RJA order. *Robinson v. North Carolina*, 137 S. Ct. 67 (2016). Thus, without question, the decision by this Court to vacate the 2012 RJA order is final.

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7. For the same and additional reasons, this Court also vacated a combined trial court order addressing RJA claims of three other defendants in *State v. Augustine*, 368 N.C. 594, 780 S.E.2d 552 (2015). On remand, since the primary issue involved whether the RJA Repeal could be applied retroactively, the trial court considered the viability of defendant's RJA MAR post-repeal along with the RJA MARs filed by the three defendants.

In *State v. Augustine*, 359 N.C. 709, 616 S.E.2d 515 (2005), this Court affirmed defendant Augustine's conviction for first-degree murder on the basis of malice, premeditation and deliberation and affirmed his death sentence for the killing of Officer Roy Gene Turner, Jr. In that case, one witness testified that he heard defendant Augustine say that "he was angry because his brother had '[gotten] some time' and that he wanted to shoot a police officer," *id.* at 713, 616 S.E.2d at 520 (alteration in original), and other witnesses testified that they "saw defendant [Augustine] take a black pistol out of his pocket and cock it while the officer was still in his car. As Officer Turner emerged from his vehicle, defendant [Augustine] raised himself up on the telephone booth and fired three or four rounds at close range, causing the officer to fall to his knees." *Id.* at 714, 616 S.E.2d at 521.

In *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), co-defendants and brothers Kevin Salvador Golphin and Tilmon Charles Golphin, Jr., were tried capitally and each were convicted of two counts of first-degree murder, two counts of robbery with a dangerous weapon, one count of assault with a deadly weapon with intent to kill, one count of discharging a firearm into occupied property, and one count of possession of a stolen vehicle. *Id.* at 379, 533 S.E.2d at 183. In that case, the evidence showed that the defendants shot and killed two police officers, Trooper Lloyd E. Lowry and Deputy David Hathcock, when the officers stopped the defendants while responding to a dispatch call that identified the defendants as fleeing the scene of a robbery of a finance company while driving a stolen vehicle. *Id.* at 380, 533 S.E.2d at 183–84.

In *State v. Walters*, 357 N.C. 68, 588 S.E.2d 344 (2003), defendant Walters was tried capitally, was found guilty of two counts of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule, and was sentenced to death for both. *Id.* at 75, 588 S.E.2d at 349. Along with the murder charges, defendant Walters was found guilty of nine other felonies arising out of a gang's crime spree that involved, *inter alia*, multiple random kidnappings of women and their execution-style shooting, ultimately resulting in the death of two of those victims, Susan Moore and Tracy Lambert, and serious injury to the other victim, Debra Cheeseborough. *Id.* at 75–78, 588 S.E.2d at 349–50. "One of the two murder victims watched as her friend was fatally shot in her presence. The other begged to be shot versus having her throat cut before she was shot in the head. The surviving victim was kidnapped at gunpoint." *Id.* at 113, 588 S.E.2d at 371.

This Court's decision today would seem to control the outcome of these cases as well.

c. The 2017 Remand Order

On remand, consistent with this Court's order, the trial court only considered whether the retroactive repeal of the RJA rendered void defendant's RJA MAR. It ultimately dismissed defendant's RJA MAR in an order filed on 25 January 2017, citing the legislature's intent that the 19 June 2013 repeal of the RJA apply retroactively. The trial court determined that "[t]his repealing legislation . . . unambiguously expressed the conclusion of the legislature that statistical evidence should not and could not be used to prove purposeful racial discrimination in a specific case." The statutory language, as the trial court noted, acknowledges that capital defendants retain all the constitutional rights, safeguards, and protections, including the right to a trial free from racial bias, that they enjoyed before the enactment of the RJA, during its tenure, and following its repeal. *See* Act of June 13, 2013, S.L. 2013-154, § 5.(b), 2013 N.C. Sess. Laws 368, 372 [hereinafter the RJA Repeal]. But, as the trial court concluded, the RJA Repeal "prohibited statistical evidence from unrelated cases from admission in evidence in a specific case."

The trial court acknowledged that the statutory language, on its face, "provides that it is retroactive and applies to any MAR filed pursuant to the RJA before 19 June 2013, and that all MARs filed before that date are void. Each MAR in these cases was filed prior to the effective date of the act, 13 June 2013[;]" therefore, the RJA Repeal should retroactively apply to them. Applying the statutory language of the RJA Repeal, the trial court determined that the "resentencing orders to life imprisonment without parole were not affirmed upon appellate review, and because th[o]se orders were subject to appellate review, and were vacated, they were not final orders by a court of competent jurisdiction." 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 RJA Repeal, and his RJA claims were void as a matter of law.

Having interpreted the statutory language as determinative, the trial court acknowledged contentions "that the repeal of the Racial Justice Act violates [defendants'] constitutional rights or limits access to the protections from discrimination that already exist under the North Carolina and United States Constitutions." Such contentions must overcome the presumption that the General Assembly enacts constitutional legislation. Relying on case law from this Court, the trial court concluded that a final judgment, rather than the filing of a MAR, could vest a defendant's right to a remedy under the RJA. Without a final judgment,

the statutory remedy can be repealed by the legislature without constitutional implications.

In short, the remand trial court determined that, because no final order had been entered on defendant's RJA claims, those claims were controlled by the repeal of the RJA, and his RJA claims were void as a matter of law. The trial court concluded that the unconditional repeal of the RJA warranted the dismissal of defendant's RJA motion, 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, 912 (1972).

d. Effect of the Vacated 2012 RJA Order

The 2017 remand order and this order alone is the subject of our review in this case. The 2012 RJA order, including its corresponding amended J & C, having been vacated no longer exists.

Significantly, on remand the trial court never conducted an evidentiary hearing or reached the merits of defendant's RJA claims. The State has never had an opportunity to present its evidence. Legally, there is no trial court order on the merits; it was vacated. Though I disagree with its decision, this Court has previously addressed the merits of the 2017 remand order in *Ramseur*, 843 S.E.2d 106, and invalidated the retroactive nature of the RJA Repeal. *Id.* at 118; *see id.* at 122–39 (Newby, J., dissenting).[8]

As stated in Justice Ervin's dissent, the decision in *Ramseur* should control this matter. But, unwilling to simply follow the law and decide the issue presented, the majority opinion takes the unprecedented and indefensible step of attempting to recreate and reinstate a trial court order that legally no longer exists. The only trial court order granting defendant relief under the RJA, the 2012 RJA order, has been declared null and void. The majority opinion, by an act of judicial will, seeks to resurrect whole cloth the 2012 RJA order, which this Court held to have been based on a fundamentally flawed process. *See Robinson II*, 368 N.C. at 597, 780 S.E.2d at 151–52. Thus, this Court vacated it as a result of its unfair proceedings. *Id.* ("The trial court's failure to give [the State] adequate time to prepare resulted in prejudice. Without adequate time to gather evidence and address [defendant's] study, [the State] did not have a full and fair opportunity to defend this proceeding." (internal citations

8. This dissent's analysis of the RJA, including its separation-of-powers discussion, is hereby incorporated by reference.

omitted)). Nonetheless, the majority opinion faults the State for its failure to present adequate rebuttal evidence.

A vacated order is treated as if the order were never entered. *See Alford v. Shaw*, 327 N.C. 526, 543 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" (quoting *Black's Law Dictionary* 1388 (rev. 5th ed. 1979))). It "render[s] the judgment null and void"; if a judgment is vacated, "no part of it could thereafter be the law of the case." *Id.* "A void judgment is, in legal effect, no judgment. No rights are acquired or d[i]vested by it. It neither binds nor bars any one, and all proceedings founded upon it are worthless—as if judgment be rendered without service on the party, or his appearance." *Stafford v. Gallops*, 123 N.C. 19, 21–22, 31 S.E. 265, 266 (1898) (citations omitted). Regardless of the nature of the trial court's order, once it is vacated, it has no legal effect. Furthermore, the 2012 RJA order procedurally is not even before this Court. Nonetheless, without analysis or apology, the majority opinion simply seeks to recreate it by raw judicial power. Despite the irredeemably flawed procedure and the State's never having had an opportunity to present its evidence, the majority opinion relies on and seeks to enforce the 2012 RJA order.

As stated earlier, the majority opinion presents three arguments only one of which garners four votes, resulting in the narrow holding that the State failed to appeal the amended J & C so that order is final. This argument is presented in Part IV of the majority opinion. Nonetheless, this dissent will address the arguments in the order in which they are presented in the majority opinion.

II.

Even if by some judicial magic the 2012 RJA order were recreated and properly before the Court procedurally, the majority opinion's creative double jeopardy analysis is flawed. I agree with Justice Ervin's assessment that the double jeopardy argument is "barred by the law of the case doctrine." Furthermore, in a capital-sentencing context, double jeopardy only applies if the final reviewing court determines that the State failed to present evidence sufficient to establish an aggravating circumstance as required to justify a capital sentence. If the State failed to present sufficient evidence, it does not get another chance. Here there is no dispute that more than sufficient evidence supported the jury's finding of both aggravating circumstances, justifying the jury's death sentence recommendation. Thus, a double jeopardy claim is not viable.

At the time of its passage, the General Assembly intended the RJA to provide a new MAR procedure through which a capitally sentenced defendant could collaterally challenge a death sentence. The RJA's procedure does not equate to a defendant's capital-sentencing proceeding because it does not conform to the standards of a criminal trial. It does not negate the facts of the underlying offense or aggravating circumstances, and it cannot serve as an affirmative defense to a sentence imposed during a defendant's capital sentencing. The RJA was simply a mechanism for a defendant to collaterally attack his sentence. Given that on appeal this Court vacated the only trial court order under the RJA, that order cannot constitute a final judgment on defendant's RJA MAR let alone an "acquittal" for double jeopardy purposes. There is no legal support for this approach. The majority opinion misstates and misapplies double jeopardy principles.

The Fifth Amendment of the United States Constitution contains a guarantee that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V; *see also Benton v. Maryland*, 395 U.S. 784, 794–96, 89 S. Ct. 2056, 2062–63 (1969) (incorporating the Double Jeopardy Clause to the States by the Fourteenth Amendment and noting its "fundamental nature" rooted in the English common law and dating back to the Greeks and the Romans); *State v. Brunson*, 327 N.C. 244, 247, 393 S.E.2d 860, 863 (1990) (recognizing the Law of the Land Clause of the North Carolina Constitution as affording the same protections as the Double Jeopardy Clause of the federal constitution). "The law of the land clause, the basis for the former jeopardy defense in North Carolina, is conceptually similar to federal due process," and therefore we "view the opinions of the United States Supreme Court with high regard in the context of interpreting our own law of the land clause." *Brunson*, 327 N.C. at 249, 393 S.E.2d at 864 (citations omitted). This Court has previously rejected a "defendant's contention that the law of this state confers greater former jeopardy protection upon defendants than the federal law does." *Id.*

"Our double jeopardy case law is complex, but at its core, the Clause means that those acquitted or convicted of a particular 'offence' cannot be tried a second time for the same 'offence.' " *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) (quoting U.S. Const. amend. V). The protections against double jeopardy prevent multiple attempts to convict a defendant of an offense or to retry him for that offense when he has already been acquitted. "It benefits the government by guaranteeing finality to decisions of a court and of the appellate system, thus promoting public confidence in and stability of the legal system. The objective is to

allow the prosecution one complete opportunity to convict a defendant in a fair trial." *Brunson*, 327 N.C. at 249, 393 S.E.2d at 864 (1990) (citing *Arizona v. Washington*, 434 U.S. 497, 505, 98 S. Ct. 824, 830 (1978)).

Conceptually, "jeopardy" centers around the *factual* inquiry that determines guilt or innocence. "[A] defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before *the trier of the facts*, whether the trier be a jury or a judge." *United States v. Jorn*, 400 U.S. 470, 479, 91 S. Ct. 547, 554 (1971) (emphasis added). A conviction or guilty plea brings finality if it represents the final judgment "with respect to the guilt or innocence of the defendant." *See Burks v. United States*, 437 U.S. 1, 15, 98 S. Ct. 2141, 2149 (1978) (discussing that "evidentiary insufficiency," rather than a trial error, decides whether the government has failed to prove its case "with respect to the guilt or innocence of the defendant"). The protection against *double* jeopardy provides that, "once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106, 123 S. Ct. 732, 736 (2003). The State simply cannot retry a convicted defendant in pursuit of harsher punishment. *See Green v. United States*, 355 U.S. 184, 190–91, 78 S. Ct. 221, 225–226 (1957).

Finding double jeopardy presupposes a preceding final judgment, *see Burks*, 437 U.S. at 15, 98 S. Ct. at 2149. It "does not bar reprosecution of a defendant whose conviction is overturned on appeal." *Justices of Bos. Mun. Court v. Lydon*, 466 U.S. 294, 308, 104 S. Ct. 1805, 1813 (1984). "Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." *Serfass v. United States*, 420 U.S. 377, 391–92, 95 S. Ct. 1055, 1064 (1975); *see also State v. Courtney*, 372 N.C. 458, 463 n.5, 831 S.E.2d 260, 265 n.5 (2019) ("[T]he State may proceed with a retrial when a defendant secures the relief of a new trial after an original conviction is vacated on appeal.").

Jeopardy will always terminate following a defendant's acquittal regardless of whether the acquittal originated from a jury or judge. *See Evans v. Michigan*, 568 U.S. 313, 328–29, 133 S. Ct. 1069, 1080–81 (2013). Hence, "[a] verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final," *Bullington v. Missouri*, 451 U.S. 430, 445, 101 S. Ct. 1852, 1861 (1981), even if obtained erroneously, *see Green*, 355 U.S. at 188, 192, 78 S. Ct. at 223–24, 226. Notably, "an 'acquittal' cannot be divorced from the procedural context," *Serfass*, 420 U.S. at 392, 95 S. Ct. at 1064; it has "no significance . . . unless jeopardy has once attached

and an accused has been subjected to the risk of conviction," *id.* at 392, 95 S. Ct. at 1065.

An acquittal, by its very definition, requires some finding of innocence and "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S. Ct. 1349, 1355 (1977). An acquittal is "any ruling that the prosecution's proof is insufficient to establish criminal liability for the offense." *Evans*, 568 U.S. at 318, 133 S. Ct. at 1074–75. In a capital-sentencing context, insufficient proof to establish criminal liability supporting the capital sentence means that the State failed to present evidence sufficient to prove that at least one of the statutory aggravating circumstances existed at the time that the defendant committed the capital offense. Like proving a criminal offense in the guilt or innocence phase of a capital trial, these circumstances must be presented to a jury, and the jury must find at least one of the statutory aggravating circumstances existed beyond a reasonable doubt to impose the death penalty.

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), the Supreme Court of the United States clarified that "if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact—no matter how the State labels it—constitutes an element, and must be found by a jury beyond a reasonable doubt." *Sattazahn*, 537 U.S. at 111, 123 S. Ct. at 739 (citing *Apprendi*, 530 U.S. at 482–84, 120 S. Ct. at 2348). Thus, in the capital-sentencing context, aggravating circumstances that make a defendant eligible for the death penalty "operate as 'the functional equivalent of an element of a *greater offense*.' " *Id.* (quoting *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 2428 (2002)). It is in that sense that the sentencing phase of a capital trial carries the "hallmarks of the trial on guilt or innocence." *Bullington*, 451 U.S. at 439, 101 S. Ct. at 1858; *id.* at 438, 101 S. Ct. at 1858 ("The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence."). North Carolina's death penalty statutes reflect these principles. *See, e.g.*, N.C.G.S. § 15A-2000(c), (e), (f) (2019).[9]

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9. Following a guilty verdict of first-degree murder, in a separate trial phase the jury considers aggravating circumstances from a comprehensive list, N.C.G.S. § 15A-2000(e), presented pursuant to the Rules of Evidence, *see* N.C.G.S. § 8C-1 (2019), and weighs any mitigating circumstances in the defendant's favor, N.C.G.S. § 15A-2000(f). The jury must find the existence of an aggravating circumstance beyond a reasonable doubt and that that circumstance outweighs any mitigating circumstances before recommending the death penalty. N.C.G.S. § 15A-2000(c)(1)–(3). This Court automatically reviews cases where a

"If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that 'acquittal' on the offense of 'murder plus aggravating circumstance(s).' " *Sattazahn*, 537 U.S. at 112, 123 S. Ct. at 740. The reason for this determination "is not that a capital-sentencing proceeding is 'comparable to a trial,' but rather that 'murder plus one or more aggravating circumstances' is a separate offense from 'murder' simpliciter." *Id.* (first quoting *Arizona v. Rumsey*, 467 U.S. 203, 209, 104 S. Ct. 2305, 2309 (1984); then citing *Bullington*, 451 U.S. at 438, 101 S. Ct. at 1861) (internal citations omitted)).

In a capital-sentencing context, only after there has been a finding that no aggravating circumstance is present can a defendant claim an acquittal, *State v. Sanderson*, 346 N.C. 669, 679, 488 S.E.2d 133, 138 (1997), and "the touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal,' " *Sattazahn*, 537 U.S. at 109, 123 S. Ct. at 738. "[A]n acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge." *Poland v. Arizona*, 476 U.S. 147, 154, 106 S. Ct. 1749, 1754 (1986) (citing *Rumsey*, 467 U.S. at 211, 104 S. Ct. at 2310).

The majority opinion correctly defines the term "acquittal" initially, but then blurs the lines between capital trials, capital-sentencing proceedings, and post-conviction procedures to broaden its definition. Simply referring to an event as an acquittal, however, does not make it so. For an event to be an "acquittal," it must tie factually to a defendant's guilt or innocence of the offense charged or factually determine that an aggravating circumstance to justify the death penalty does not exist. That definition of an acquittal remains the same and must be met regardless of the stage of the defendant's proceedings, whether during a defendant's capital trial or capital-sentencing proceedings, on appeal, or during post-conviction proceedings.

In *Sattazahn* the state statute required a unanimous jury to impose a death sentence. *Sattazahn*, 537 U.S. at 109–10, 123 S. Ct. at 738–39. When a jury was hopelessly deadlocked in the penalty stage, the same statutory scheme required the judge to enter life sentence. *Id.* At defendant Sattazahn's trial, the jury convicted him but was hopelessly deadlocked on the death penalty, and the judge imposed a life sentence. *Id.* at 104–05, 123 S. Ct. at 736. Defendant Sattazahn appealed, and the appellate court

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death sentence is imposed 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. *See* N.C.G.S. § 7A-27(a)(1) (2019).

reversed the first-degree murder conviction and remanded the case for a new trial. *Id.* at 105, 123 S. Ct. at 736. On remand the State presented evidence of an *additional* aggravating circumstance, the jury again convicted defendant Sattazahn of first-degree murder, but this time imposed a death sentence. *Id.* Both the conviction and sentence were affirmed on appeal. *Id.* On review the Supreme Court of the United States determined that defendant Sattazahn's original life sentence was not an acquittal on the merits, *id.* at 109, 123 S. Ct. at 738, reiterating that "it is not the mere imposition of a life sentence that raises a double-jeopardy bar," *id.* at 107, 123 S. Ct. at 737. The judge's imposition of a life sentence during the first trial was not an "acquittal" for double jeopardy purposes because the jury's inability to agree did not constitute a finding of fact that no aggravating circumstance existed. *See id.* at 112–13, 123 S. Ct. at 740.[10]

In *Bobby v. Bies*, 556 U.S. 825, 129 S. Ct. 2145 (2009), the Supreme Court of the United States considered a post-conviction attempt to vacate a defendant's death sentence based on the aggravating and mitigating circumstances the jury considered at his capital-sentencing proceeding. *Id.* at 831, 129 S. Ct. at 2150. In its analysis, the Supreme Court distinguished an actual acquittal for double jeopardy purposes from a post-conviction attempt to vacate a death sentence. *Id.* at 829, 129 S. Ct. at 2149. Defendant Bies argued that a then-recent case *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002), which prohibited the execution of intellectually disabled defendants, entitled him to post-conviction sentencing relief. *Id.* at 832, 129 S. Ct. at 2151. Defendant Bies contended that, because the jury in his case had found his intellectual disability to be a mitigating circumstance at his prior sentencing hearing, the jury essentially found facts sufficient to settle the issue of his intellectual disability. *Id.* Considering this fact-finding as a type of "issue preclusion," the federal appeals court concluded that it, in conjunction with defendant Bies's newly recognized "*Aktins* defense" of intellectual disability, "acquitted" defendant Bies of his death sentence and vacated his death sentence. *Id.* at 832–33, 129 S. Ct. at 2151. In that court's view,

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10. A jury can also revisit previously submitted aggravating circumstances in a new capital-sentencing proceeding without implicating double jeopardy, if there has been no conclusive factual finding on those factors. *Sanderson*, 346 N.C. at 679, 488 S.E.2d at 138 (Double jeopardy principles did not prevent a jury's consideration of aggravating circumstances in a third capital-sentencing proceeding when neither jury previously found that no aggravating circumstance existed). *Compare Poland*, 476 U.S. at 154, 106 S. Ct. at 1755 (The failure to find one particular aggravating circumstance is not an acquittal for double jeopardy purposes and does not preclude the death penalty.), *with Rumsey*, 467 U.S. at 203, 205, 104 S. Ct. at 2305, 2307 (A life sentence imposed by a judge during a capital-sentencing proceeding, who found no aggravating circumstances, constituted an acquittal of the death penalty for purposes of the Double Jeopardy Clause.).

any proceedings on defendant Bies's intellectual disability would violate double jeopardy. *Id.* at 833, 129 S. Ct. at 2151.

On review the Supreme Court of the United States first reiterated that "[t]he touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.' " *Id.* (quoting *Sattazahn*, 537 U.S. at 109, 123 S. Ct. at 738). Since the State presented sufficient evidence to support the jury's finding of aggravated circumstances during the capital-sentencing proceeding, and the jury then voted to impose the death penalty, there was no "acquittal." *Id.* at 833–34, 129 S. Ct. at 2152. The State did not "twice put [defendant Bies] in jeopardy" because "neither the judge nor the jury had acquitted the defendant in his first . . . proceeding by entering findings sufficient to establish legal entitlement to the life sentence." *Id.* at 833, 129 S. Ct. at 2151–52 (first quoting U.S. Const. amend. V; then quoting *Sattazahn*, 537 U.S. at 108–09, 123 S. Ct. at 738). The issue in *Bies* did not involve serial prosecutions or an attempt by the State to procure a conviction or to increase defendant Bies's punishment, but rather his "second run at vacating his death sentence." *Id.* at 833–34, 129 S. Ct. at 2152 (quoting *Bies v. Bagley*, 535 F.3d 520, 531 (6th Cir. 2008) (Sutton, J., dissenting)). Such an inquiry does not implicate double jeopardy. *Id.*

A RJA MAR hearing does not involve serial prosecutions or an attempt by the State to procure a conviction or to increase a defendant's punishment. It is not akin to a trial on the merits as to the issue of punishment. The subject matter of the RJA hearing is unrelated to the murder that led to a defendant's conviction and sentence. Even if relief is granted under the RJA, it does not invalidate, excuse, or justify a defendant's guilt for that murder. A RJA hearing does not seek to increase a defendant's punishment; a defendant asserting RJA claims has already received the highest punishment available. Even if relief is initially granted under the RJA, a RJA hearing does not invalidate the aggravating circumstances that justified the imposition of the death sentence as required for an acquittal. Because defendant here "cannot establish that the jury or the court 'acquitted' him during his first capital-sentencing proceeding," *Sattazahn*, 537 U.S. at 109, 123 S. Ct. at 738, double jeopardy does not apply.

Nonetheless, the majority opinion creatively cites *Burks* in an attempt to support its argument. *See Burks*, 437 U.S. 1, 98 S. Ct. 2141. *Burks*, however, simply stands for the same basic proposition that the evidence presented at the guilt or innocence phase of defendant's capital trial must be sufficient to justify a defendant's conviction. *Id.* At his trial for a bank robbery, defendant Burks relied on an insanity defense and

presented multiple expert witnesses to support that theory. *Id.* at 2–3, 98 S. Ct. at 2143. The prosecution offered, *inter alia*, its expert witnesses in rebuttal, but they acknowledged defendant Burks's "character disorder" and one of those witnesses equivocally answered whether defendant Burks was capable of conforming his conduct to the law. *Id.* at 3, 98 S. Ct. at 2143. Defendant Burks unsuccessfully moved for an acquittal before the case was submitted to the jury, which found him guilty. *Id.* Following his conviction, he argued that the evidence was insufficient to support the guilty verdict, and the trial court denied any relief. *Id.*

On direct appeal the reviewing court held that the prosecution had failed to rebut defendant Burks's proof of insanity at the guilt or innocence phase, a defense that could excuse his criminal culpability for the offense itself. *Id.* at 17–18, 98 S. Ct. at 2150–51. The appellate court reversed and remanded the case for the trial court to decide whether defendant was entitled to a new trial or a directed verdict of acquittal. *Id.* at 4, 98 S. Ct. at 2144.

On appeal to the Supreme Court of the United States, the issue presented was "whether a defendant may be tried a second time when a reviewing court has determined that in a prior trial the evidence was insufficient to sustain the verdict of the jury." *Id.* at 5, 98 S. Ct. at 2144. The Supreme Court concluded that, once the reviewing court found the evidence presented at his first trial insufficient to warrant a guilty verdict, the protection against double jeopardy prevented a *second trial* during which the prosecution could try to supply the evidence once lacking and secure a guilty verdict. *Id.* at 18, 98 S. Ct. at 2150–51.

> The appellate decision unmistakably meant that the [trial court] had erred in failing to grant a judgment of acquittal. . . . The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials.

*Id.* at 11, 98 S. Ct. at 2147 (footnote omitted). The Supreme Court then placed defendant Burks's scenario within the traditional double jeopardy protection that prevents a series of trials and repeated attempts *to convict* a defendant of a criminal offense:

> The Clause does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being

> subjected to the hazards of trial and possible conviction more than once for an alleged offense."

*Id.* (quoting *Green*, 355 U.S. at 187, 78 S. Ct. at 223).

The RJA, however, does not constitute an affirmative defense to a capital offense because RJA relief does not negate proof of the elements of any capital offense or any aggravating circumstance in capital sentencing. The cases relied on by the majority opinion only find an acquittal when the evidence is legally *insufficient* to support proof of the offense committed or proof of the aggravating factors beyond a reasonable doubt. Defendant has already been convicted at his capital trial, received the highest sentence possible at his capital-sentencing proceeding before a jury, and both his conviction and sentence has been affirmed on appeal. Defendant has never received an "acquittal on the merits." *See Poland*, 476 U.S. at 154, 106 S. Ct. at 1754.

RJA claims are not part of a defendant's capital trial or capital-sentencing proceeding at all, but must be pursued by filing a collateral MAR. A post-conviction hearing on a RJA MAR does not bear "the hallmarks of the trial on guilt or innocence," as argued by the majority opinion because, as it also concedes, defendant's guilt or any other factual inquiry surrounding the nature of the offense at the time of its commission are not at issue.

To support the desired outcome, the majority opinion here seeks to expand the interpretation of double jeopardy far beyond that recognized by our case law or that of the federal courts. Without authority, the majority opinion tries to embed that expansive interpretation into our state constitution. Notably, this Court has held that the double jeopardy protection provided by our state constitution provides no greater protection than its federal counterpart. *Brunson*, 327 N.C. at 249, 393 S.E.2d at 864 (rejecting the "defendant's contention that the law of this state confers greater former jeopardy protection upon defendants than the federal law does").

III.

Recognizing the deficiencies in its double jeopardy analysis based on its attempt to resurrect the 2012 RJA order, the majority opinion submits alternative theories, again unsupported by law: The majority opinion argues that the State only sought appellate review of the 2012 RJA order, not the corresponding amended J & C entered pursuant to the 2012 RJA order. The majority opinion reasons that, even if the 2012 RJA order were vacated, the companion amended J & C remains effective

because it was not part of the certiorari review allowed by this Court. As previously noted, this theory—that the State failed to seek review of the amended J & C—is the only theory for which there are four votes. The majority opinion further argues that the State was prohibited from seeking any appellate review of the amended J & C.

Both of these creative arguments are indefensible. The only legal basis for the trial court's entry of the amended J & C was the 2012 RJA order. By allowing the State's petition for writ of certiorari to review the court's ruling of defendant's RJA MAR, this Court granted review of the entire proceeding. Once the 2012 RJA order was vacated, everything arising from it was likewise void. It is nonsensical to concede that the 2012 RJA order was properly before the Court, but the amended J & C was not. Similarly, there is no support that this Court's review of the amended J & C was prohibited. Both under our state constitution and applicable statutes the State had the authority to seek appellate review. Finally, as previously discussed, the validity of the 2012 RJA order with its corresponding amended J & C is not procedurally before this Court.

The General Assembly intended the RJA to allow a capitally sentenced defendant to collaterally challenge a death sentence by generally following the MAR procedures. Like any other trial court decision on a MAR, it is subject to appellate review. By allowing the State's petition for writ of certiorari, this Court provided appellate review of the entire MAR proceeding, including the process and any resulting orders. It is indisputable that this Court has the authority to review the actions of any lower court.

The state constitution recognizes this Court's jurisdiction to review any decision of the courts below, N.C. Const. art. IV, § 12, and that it has subject matter jurisdiction regardless whether the trial court grants or denies relief, *see id.* art IV, § 12(1) ("The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference."). This basic principle of appellate review rings particularly true here because this Court has appellate jurisdiction by statute over death penalty cases like this one. *See* N.C.G.S. § 7A-27(a)(1) (2019).

I agree with the statutory analysis of Justice Ervin in his dissenting opinion that the amended J & C was subject to appellate review which we granted when this Court allowed the State's petition for writ of certiorari. Our case law supports this perspective. In *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2015), this Court determined "the Court of Appeals has subject matter jurisdiction to review the State's appeal from a trial

court's ruling on a [MAR] when the defendant has been granted relief in the trial court." *Id.* at 41, 42–43, 770 S.E.2d at 76. In that case, defendant Stubbs's 1973 guilty plea resulted in a sentence of life imprisonment, *id.* at 40, 770 S.E.2d at 75, but under the new Structured Sentencing Act, the length of his sentence would have likely been much shorter, *id.* at 40 n.1, 770 S.E.2d at 75 n.1 (citing N.C.G.S. §§ 15A-1340.10 to 1340.23 (effective 1 Oct. 1994)). In 2011 defendant Stubbs filed a pro se MAR in the Superior Court, Cumberland County arguing that the new Structured Sentencing Act made "significant changes" in the sentencing laws and that his 1973 sentence now constituted cruel and unusual punishment under the Eighth Amendment to the federal constitution. *Id.* at 40, 770 S.E.2d at 75. After an evidentiary hearing, the trial court agreed, granted the MAR, and vacated defendant Stubbs's judgment and life sentence. *Id.* The trial court then resentenced defendant Stubbs to a term of thirty years, applied time served, and ordered his immediate release. *Id.* The State sought review by a petition for writ of certiorari. *Id.*

A panel of the Court of Appeals reversed the trial court's order and remanded to the trial court for reinstatement of the original 1973 sentence. *Id.* In doing so, it "addressed whether it had subject matter jurisdiction to review the State's appeal from a trial court's decision on a defendant's MAR when the defendant prevailed in the trial court." *Id.* at 42, 770 S.E.2d at 75. In taking up this same question on appeal, this Court first noted that "the General Assembly has specified when appeals relating to MARs may be taken" by writ of certiorari, for instance, when "the time for appeal has expired and no appeal is pending." *Id.* at 42–43, 770 S.E.2d at 76 (quoting N.C.G.S. § 15A-1422(c) (2014)). "[S]ubsection 15A-1422(c) does not distinguish between a MAR when the State prevails below and a MAR under which the defendant prevails." *Id.* at 43, 770 S.E.2d at 76.

> Accordingly, given that our state constitution authorizes the General Assembly to define the jurisdiction of the Court of Appeals, and given that the General Assembly has given that court broad powers "to supervise and control the proceedings of any of the trial courts of the General Court of Justice," [N.C.G.S.] § 7A-32(c), and given that the General Assembly has placed no limiting language in subsection 15A-1422(c) regarding which party may appeal a ruling on an MAR, we hold that the Court of Appeals has jurisdiction to hear an appeal by the State of an MAR when the defendant has won relief from the trial court.

*Id.* A trial court may not unilaterally reduce sentences without being subjected to appellate review. A trial court's order on a MAR is subject to review regardless of the prevailing party or subject matter. Significantly, this Court did not distinguish between review of the trial court's MAR ruling and any corresponding amended J & C.

In *State v. Bowden*, 367 N.C. 680, 766 S.E.2d 320 (2014), defendant Bowden unsuccessfully sought application of various credits to his life sentence at the trial court through a petition for writ of habeas corpus and later following a MAR hearing under N.G.G.S. § 15A-1420. *Id.* at 681–82, 766 S.E.2d at 321–22. Upon a second remand from the Court of Appeals, the trial court granted defendant relief and calculated and applied all of his credits to determine that defendant had served his entire sentence. *Id.* at 682, 766 S.E.2d at 322. Notably, though ordering defendant's unconditional release, the trial court anticipatorily "stayed its order the following day *pending final appellate review*." *Id.* (emphasis added). This Court reversed, recognizing that these credits have never applied toward the calculation of an unconditional release date for a similarly situated inmate like Bowden serving a life sentence." *Id.* at 685–86, 766 S.E.2d at 324. Even though the trial court had ordered defendant Bowden's immediate release through a MAR, this Court reversed upon review, and defendant "remain[ed] lawfully incarcerated." *Id.* Like defendant Stubbs, defendant Bowden received more than one round of appellate review, both with the Court of Appeals and with this Court, even though he was twice denied relief by the trial court and once granted relief by the trial court.

Here the 2012 RJA order including the corresponding amended J & C, has been subjected to appellate review, has been determined to be the result of a fundamentally flawed procedure, and has been vacated. A vacated trial court order certainly carries no degree of finality and is void. *See Robinson II*, 368 N.C. at 597, 780 S.E.2d at 152.

It is ludicrous to say that defendant's resentencing in the amended J & C can stand alone when that resentencing could only legally occur based on the underlying 2012 RJA order. Certainly, the State sought review of defendant's resentencing through its petition for writ of certiorari when it sought review of the 2012 RJA order. That order explicitly stated that, "having determined that Robinson is entitled to appropriate relief as to [his RJA claims], . . . Robinson is entitled to have his sentence of death vacated, and Robinson is resentenced to life imprisonment without the possibility of parole." The amended J & C simply effectuated this order. There is no legal support for the holding that the State failed to appeal the amended J & C.

IV.

In its apparent eagerness to undermine defendant's death sentence, the majority opinion steps outside our time-honored judicial role of simply deciding the case before us. Of the three novel theories presented, only one, the narrowest, has four votes. These four justices hold that the State failed to seek judicial review of the amended J & C when this Court allowed review of the 2012 RJA order. As with the other two theories, there is no legal support for this position. There is no explanation of how an amended J & C, which effectuated the 2012 RJA order can legally exist apart from the 2012 RJA order. It does exist and is given substance purely by four votes. The majority opinion's extraordinary judicial activism is completely unnecessary. This case should be controlled by our prior decision in *Ramseur* and remanded to the trial court for a new RJA hearing. The majority opinion's result guarantees that the State will never have a fair hearing in court. The ultimate damage to our jurisprudence and public trust and confidence in our judicial system is yet to be determined. I dissent.

Justice ERVIN, dissenting.

I am unable to join the Court's decision to reinstate the trial court's original order and judgment sentencing defendant to a term of life imprisonment rather than death based upon a determination that Judge Weeks' order finding that defendant's race had been a significant factor in the imposition of his death sentence was entitled to double jeopardy effect and that the State had not sought and was not entitled to seek appellate review of the judgment that Judge Weeks entered in light of the determination reflected in his order. On the contrary, I believe that the Court's holding that Judge Weeks' "order resentencing [defendant] to life in prison was an acquittal for purposes of double jeopardy" (1) fails to take the procedural context in which that decision was made into account despite the fact that the double jeopardy-related rules applicable to acquittals that occur before and after the initial verdict are different and (2) implicitly vacates this Court's 2015 order overturning Judge Weeks' decision and remanding this case to the Superior Court, Cumberland County, *State v. Robinson*, 368 N.C. 596, 780 S.E.2d 151 (2015), *cert. denied*, 137 S. Ct. 67, 196 L. Ed. 2d 34 (2016), despite the fact that the State sought review of Judge Weeks' decision in accordance with the applicable statutory provisions and prevailed before this Court on procedural grounds. As a result, given my belief that the Court's decision is simply inconsistent with the relevant decisions of this Court and the Supreme Court of the United States and with this Court's statutory

authority to review decisions of the trial court in proceedings conducted pursuant to the Racial Justice Act, I respectfully dissent from the Court's decision and would, instead, reverse the trial court's order and remand this case to the Superior Court, Cumberland County, for a hearing concerning the merits of defendant's Racial Justice Act claim on the basis of the logic set out in this Court's decision in *State v. Ramseur*, 843 S.E.2d 106 (2020), and our 2015 order.

As an initial matter, the Court's determination that Judge Weeks' order granting relief pursuant to the Racial Justice Act constituted a final acquittal for double jeopardy purposes cannot be squared with the relevant decisions of the Supreme Court,[1] which have stated that, in the event that a defendant is acquitted following a jury verdict or a decision made at a bench trial, double jeopardy considerations do not prevent the government from appealing the acquittal decision given that an appellate reversal would simply reinstate the original verdict rather than subject the defendant to a second trial. *See United States v. Wilson*, 420 U.S. 332, 344–45, 95 S. Ct. 1013, 1022, 43 L. Ed. 2d 232, 242 (1975). In view of the fact that the effect of an appellate decision vacating Judge Weeks' order and the related judgment and remanding this case to the Superior Court, Cumberland County, for further proceedings would, depending upon the result reached on remand, at most, have the effect of reinstating the original jury verdict and the resulting death sentence, I am not persuaded that Judge Weeks' order and the related judgment were entitled to preclusive effect or that the order and judgment must be reinstated.

In *Wilson*, the defendant was charged with converting union funds in order to pay for his daughter's wedding reception in violation of federal law. *Id*. at 333, 95 S. Ct. at 1017, 43 L. Ed. 2d at 235–36. The government began its investigation into the defendant's alleged unlawful conduct in April 1968, concluded that investigation in June 1970, and did not indict the defendant for another sixteen months, formally charging him three days prior to the expiration of the applicable statute of limitations. *Id*. at 333–34, 95 S. Ct. at 1017, 43 L. Ed. 2d at 235–36. The defendant filed a pretrial motion seeking to have the indictment dismissed on the grounds that the government's delay in charging him had prejudiced his ability to

1. As this Court has previously stated, the double jeopardy protection inherent in article I, section 19 of the state constitution affords the same protections to criminal defendants as the double jeopardy provision of the Fifth Amendment to the Constitution of the United States. *State v. Oliver*, 343 N.C. 202, 205, 470 S.E.2d 16, 18 (1996) (discussing double jeopardy and N.C. Const. art. I, § 19).

obtain a fair trial given that two defense witnesses—one of whom had died and the other of whom was suffering from a terminal illness—would be unavailable to testify. *Id.* at 334, 95 S. Ct. at 1017, 43 L. Ed. 2d at 236. After the trial court denied the defendant's dismissal motion, the jury found the defendant guilty. *Id.* Following the return of the jury's verdict, the defendant filed several post-verdict motions in which he reiterated his assertion that, among other things, the charge that had been lodged against him should have been dismissed on the basis of preindictment delay. *Id.* At that point, the district court reversed itself and dismissed the indictment that had been returned against the defendant on the grounds that he had been subject to unreasonable preindictment delay that had prejudiced his ability to obtain a fair trial. *Id.* Although the government appealed from the trial court's order, the United States Court of Appeals for the Third Circuit dismissed the government's appeal on the grounds that the trial court's dismissal decision constituted an acquittal that was entitled to double jeopardy effect. *Id.* at 335, 95 S. Ct. at 1017–18, 43 L. Ed. 2d at 236–37. After granting certiorari, the Supreme Court reversed the Third Circuit's decision on the grounds that the government was entitled to appeal from the district court's dismissal order given that the challenged order was not entitled to preclusive effect.[2] *Id.* at 352–53, 95 S. Ct. at 1026, 43 L. Ed. 2d at 246–47.

In rejecting the defendant's argument that the Double Jeopardy Clause precluded the government from appealing the district court's dismissal order, the Supreme Court recognized that "[t]he development of the Double Jeopardy Clause from its common-law origins . . . suggests that it was directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial." *Id.* at 342, 95 S. Ct. at 1021, 43 L. Ed. 2d at 241. Thus, "where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended." *Id.* at 344, 95 S. Ct. at 1022, 43 L. Ed. 2d at 242. For that reason, prosecutorial appeals of adverse rulings noted after the return of the jury's verdict or the judge's decision at the conclusion of a bench trial do not implicate double jeopardy considerations because "reversal on appeal would merely reinstate the jury's verdict" without "offend[ing] the policy against multiple prosecution." *Id.* at 344–45, 95 S. Ct. at 1022, 43 L. Ed. 2d at 242. Simply put, the "[c]orrection of [a post-verdict error of law by a trial judge] would

2. The Supreme Court of the United States assumed, without deciding, that an order dismissing a case based upon prejudicial preindictment delay would constitute an acquittal for double jeopardy purposes. *Wilson*, 420 U.S. at 336, 95 S. Ct. at 1018, 43 L. Ed. 2d at 237.

not grant the prosecutor a new trial or subject the defendant to the harassment traditionally associated with multiple prosecutions." *Id.* at 352, 95 S. Ct. at 1026, 43 L. Ed. 2d at 247. As a result, the Supreme Court held that, "when a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause," *id.* at 352–53, 95 S. Ct. at 1026, 43 L. Ed. 2d at 247, and that, given that the jury had returned a verdict convicting the defendant, the government's appeal from the district court's order dismissing the indictment that had been returned against the defendant could be entertained by the appellate courts without placing the defendant in jeopardy multiple times for the same offense. *Id.* at 353, 95 S. Ct. at 1026–27, 43 L. Ed. 2d at 247 (stating that, "if [the defendant] prevails on appeal, the matter will become final, and the Government will not be permitted to bring a second prosecution against him for the same offense").[3]

Although this Court has not previously addressed the issue decided by the Supreme Court in *Wilson*, the Court of Appeals has adopted an approach to this issue that is consistent with the one that I believe to be appropriate. In *State v. Scott*, the State appealed from the trial court's order granting a post-verdict motion to dismiss for insufficiency of the evidence. 146 N.C. App. 283, 285, 551 S.E.2d 916, 918 (2001), *rev'd on other grounds*, 356 N.C. 591, 573 S.E.2d 866 (2002). In rejecting the defendant's contention that the State had no right to note an appeal from the trial court's dismissal order and that allowing the State's appeal would result in a double jeopardy violation, *id.* at 285–86, 551 S.E.2d at 918–19, the Court of Appeals began by recognizing that, "[a]t common law, the State had no right to bring an appeal" and could only be "authorized to do so by statute." *Id.* at 285, 551 S.E.2d at 918. As a general proposition, the State is entitled to pursue an appeal from an adverse trial court decision "[u]nless the rule against double jeopardy prohibits further

3. The Supreme Court has reiterated its decision that the Government is entitled to seek appellate review of a post-verdict ruling acquitting a defendant as long as such an appeal does not subject the defendant to multiple prosecutions or punishments on multiple occasions since *Wilson*. *See, e.g.*, *Smith v. Massachusetts*, 543 U.S. 462, 467, 125 S. Ct. 1129, 1134, 160 L. Ed. 2d 914, 922–23 (2005) (stating that, "[w]hen a jury returns a verdict of guilty and a trial judge (or an appellate court) sets aside that verdict and enters a judgment of acquittal, the Double Jeopardy Clause does not preclude a prosecution appeal to reinstate the jury verdict of guilty" (citing *Wilson*, 420 U.S. at 352–53, 95 S. Ct. at 1026, 43 L. Ed. 2d at 246–47)); *Evans v. Michigan*, 568 U.S. 313, 329–30 n.9, 133 S. Ct. 1069, 1081 n.9, 185 L. Ed. 2d 124, 140 n.9 (2013) (stating that, "[i]f a court grants a motion to acquit after the jury has convicted, there is no double jeopardy barrier to an appeal by the government from the court's acquittal, because reversal would result in reinstatement of the jury verdict of guilt, not a new trial" (citing *Wilson*, 420 U.S. at 332, 95 S. Ct. at 1013, 43 L. Ed. 2d at 232)).

prosecution," including instances in which "there has been a decision or judgment dismissing the criminal charges as to one or more counts." N.C.G.S. § 15A-1445(a)(1) (2019). In light of the fact that the trial court's dismissal order constituted a decision or judgment dismissing criminal charges, the Court of Appeals concluded that "the State [was] within its statutory authority to bring this appeal as long as it [did] not violate the rule against double jeopardy," *Scott*, 146 N.C. App. at 285, 551 S.E.2d at 918, and that the State's appeal did not result in a double jeopardy violation because "reversal would only serve to reinstate the verdict rendered by the jury," with "defendant [being] in no danger of re[-]prosecution [because] the appeal does not place the defendant in double jeopardy." *Id.* at 286, 551 S.E.2d at 918 (citing *Wilson*, 420 U.S. at 344–45, 95 S. Ct. at 1022–23, 43 L. Ed. 2d at 242). According to the Court of Appeals, "[t]he emphasis of double jeopardy is on the possibility of [the] defendant being subjected to a new trial—not whether the dismissal acts as a verdict of not guilty"—and that, "[a]s long as [the] defendant would not be subjected to a new trial on the issues, his double jeopardy rights have not been violated." *Id.* at 286, 551 S.E.2d at 919. As a result, the Court of Appeals held that the State could lawfully bring its appeal. *Id.*

Assuming, for the purpose of discussion, that Judge Weeks' decision to grant defendant's motion for appropriate relief by affording defendant relief pursuant to the Racial Justice Act and to enter a judgment sentencing him to a term of life imprisonment constituted an acquittal as that term is used in double jeopardy jurisprudence, that decision was not unreviewable and double jeopardy was not implicated because any appellate reversal of that decision would, at most, result in the reinstatement of the defendant's original sentence and would not subject defendant to a new trial.[4] All of the decisions upon which this Court relies in reaching a different result involve either acquittals that occurred during or prior to, rather than after, the return of initial jury or judicial verdicts convicting or acquitting the defendant of the commission

4. The fact that a refusal to afford Judge Week's order double jeopardy effect will require defendant to participate in a new hearing under the Racial Justice Act does not, unlike the situation at issue in *Arizona v. Rumsey*, 467 U.S. 203, 211–12, 104 S. Ct. 2305, 2310, 81 L. Ed. 2d 164, 172 (1984), in which the "acquittal" that barred retrial occurred on direct appeal from the trial court's initial judgment rather than in a post-conviction proceeding, does not, at least in my opinion, suffice to require that Judge Weeks' order be treated differently than any other postconviction acquittal, with there being no decision of either this Court or the Supreme Court of which I am aware having reached such a result and with the Supreme Court's decision to remand for further proceedings in *Bobby v. Bies*, 556 U.S. 825, 837, 129 S. Ct. 2145, 2154, 173 L. Ed. 2d 1173, 1183 (2009), appearing to me to conflict with the logic upon which the Court relies.

of a substantive criminal offense or sentencing the defendant to death; determinations that the decision in defendant's favor was not entitled to double jeopardy effect at all; or holdings that a determination made on direct appeal or in postconviction proceedings was entitled to double jeopardy effect upon becoming final. *Evans*, 568 U.S. at 324, 133 S. Ct. at 1078, 185 L. Ed. 2d at 137 (holding that the trial court's erroneous ruling that the prosecution had failed to prove the existence of an alleged element of the crime at defendant's trial that it was not, in fact, required to prove was not subject to appellate review); *Monge v. California*, 524 U.S. 721, 734, 118 S. Ct. 2246, 2253, 141 L. Ed. 2d 615, 628 (1998) (refusing to afford double jeopardy effect to an appellate determination that a trial court conclusion that the defendant had committed a "qualifying felony" for purposes of California's "three strikes and you're out" law lacked sufficient evidentiary support on the grounds that this determination did not constitute an acquittal for double jeopardy purposes); *Poland v. Arizona*, 476 U.S. 147, 157–57, S. Ct. 1749, 1757, 90 L. Ed. 2d 123, 133 (1986) (holding that a new capital sentencing hearing may be held when, in the course of a death-sentenced defendant's direct appeal, the reviewing court determines that, even though the evidence did not suffice to support the submission of the sole aggravating circumstance upon which the sentencing judge relied in sentencing the defendant to death, the record did contain sufficient evidence tending to show the existence of an aggravating circumstance that the sentencing judge erroneously found to be legally, rather than factually, inapplicable); *Rumsey*, 467 U.S. at 212, 104 S. Ct. at 2311, 81 L. Ed. 2d at 172 (holding that a trial court's decision at the defendant's initial trial and capital sentencing hearing that no aggravating circumstance existed and that the defendant was not death-eligible under Arizona law was entitled to double jeopardy effect despite a decision made in connection with the State's cross-appeal that the record evidence did, in fact, support a finding of the existence of an aggravating circumstance); *Bullington v. Missouri*, 451 U.S. 430, 446–47, 101 S. Ct. 1852, 1862, 68 L. Ed. 2d 270, 283–84 (1981) (holding that the jury's determination at the defendant's capital sentencing hearing that the defendant should be sentenced to life imprisonment rather than death was entitled to double jeopardy effect despite a decision by the trial court allowing a post-verdict motion and awarding the defendant a new trial on the issue of guilt); *Burks v. United States*, 437 U.S. 1, 17–18, 98 S. Ct. 2141, 2150–51, 57 L. Ed. 2d 1, 13 (1978) (holding that a final appellate decision that the record evidence did not suffice to support the defendant's conviction was entitled to double jeopardy effect and precluded a retrial); *Morrison v. United States*, 429 U.S. 1, 3–4, 97 S. Ct. 24, 26, 50 L. Ed. 2d 1, 4 (1976) (holding that an acquittal

at a bench trial has the same effect as an acquittal by a jury for double jeopardy purposes); *Fong Foo v. United States*, 369 U.S. 141,143, 82 S. Ct. 671, 672, 7 L. Ed. 2d 629, 631 (1962) (holding that a trial court's determination during the course of the defendant's trial that the defendant should be acquitted on a legally unsupportable ground was entitled to double jeopardy effect). Simply put, the Court has not cited any decision of either the Supreme Court or this Court holding that a postconviction acquittal of the type at issue here is subject to preclusive effect unless and until that decision has become final at the conclusion of the process of appellate review, and I have been unable to find any such decision in the course of my own research. As a result, I feel compelled to conclude that the Court's double jeopardy analysis, which relies upon general statements of double jeopardy jurisprudence that were made in a procedural context that is completely different from the one that is present here, is fundamentally flawed.

In addition, the Court fails to recognize that essentially the same double jeopardy argument that it now finds persuasive was presented to this Court during the proceedings that led to the entry of our 2015 order, from which defendant unsuccessfully sought relief from the Supreme Court and which has, given the absence of such relief, become final. I am unable to read our 2015 order to vacate Judge Weeks' order and to remand this case to the Superior Court, Cumberland County, as anything other than a rejection of defendant's double jeopardy claim in light of the fact that no such remand would have been permissible had Judge Weeks' order and the related judgment been entitled to double jeopardy effect. As a result, it would appear to me that defendant's double jeopardy claim is, in addition to lacking support in our jurisprudence relating to that constitutional provision, barred by the law of the case doctrine. *Hayes v. City of Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 681–82 (1956) (stating that, "when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal") (citations omitted).

In apparently holding that our 2015 order is a nullity, the Court concludes that the State was not entitled to seek appellate review of Judge Weeks' order and the related judgment and that, by failing to list the judgment that Judge Weeks entered in conjunction with his order concluding that defendant was entitled to relief from his death sentence pursuant to the Racial Justice Act as one of the determinations of which

it sought review in the certiorari petition that led to the entry of this Court's 2015 order, the State failed to properly seek and obtain review of Judge Weeks' sentencing decision. I am not persuaded by the Court's reasoning, which overlooks the relevant statutory provisions and the fundamental reason for which the State sought, and the Court granted further review of Judge Weeks' order granting relief to defendant on the basis of his Racial Justice Act claim and his decision to resentence defendant to life imprisonment.

The North Carolina Constitution provides that this Court "shall have jurisdiction to review upon appeal *any decision of the courts below*, upon any matter of law or legal inference." N.C. Const. art. IV, § 12(1) (emphasis added). While certain statutes generally limit the extent to which this Court is entitled to review the decisions of lower courts, "it is beyond question that a statute cannot restrict this Court's constitutional authority" to supervise the activities of North Carolina's lower courts. *State v. Ellis*, 361 N.C. 200, 205, 639 S.E.2d 425, 428 (2007). For that reason, "[t]his Court will not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice." *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975). In apparent recognition of our constitutional supervisory authority, the General Assembly has enacted N.C.G.S. § 7A-32(b), which provides that this Court "has jurisdiction . . . to issue the prerogative writs, including . . . certiorari, . . . in aid of its own jurisdiction or in exercise of its general power to supervise and control the proceedings of any of the other courts of the General Court of Justice." N.C.G.S. § 7A-32(b) (2019). This Court has utilized its general supervisory authority to hear appeals concerning motions for appropriate relief despite the absence of any statutory authority to do so and, in some instances, in the face of a statutory prohibition against appellate review of specific types of lower court orders or decisions. *See*, *e.g.*, *State v. Todd*, 369 N.C. 707, 709–10, 799 S.E.2d 834, 837 (2017); *Ellis*, 361 N.C. at 200, 639 S.E.2d at 425. As a result, this Court may well have had the authority to review Judge Weeks' order and the related judgment as a constitutional matter.

I see no need for further discussion of the Court's constitutional supervisory authority in this case, however, given that there is explicit statutory authority for the Court's decision to grant a certiorari petition authorizing review of Judge Weeks' original order. The Racial Justice Act expressly provided that "the procedures and hearing on the motion" seeking relief from a defendant's sentence on the basis that racial discrimination played a significant role in the decision to seek or impose the death penalty "shall follow and comply with" a number of statutory

provisions governing the litigation of motions for appropriate relief, including "[N.C.G.S. §] 15A-1422." North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1215 (codified at N.C.G.S. § 15-2012(c) (2009)) (repealed 2013). Subsection 15A-1422(c) provides, in turn, that "[t]he court's ruling on a motion for appropriate relief" is subject to review "[i]f the time for appeal has expired and no appeal is pending, by writ of certiorari." N.C.G.S. § 15A-1422(c) (2019).[5] Thus, the General Assembly expressly granted this Court the authority to review trial court decisions granting or denying relief pursuant to the Racial Justice Act through the use of its certiorari jurisdiction, which is the exact procedural vehicle that the State utilized in seeking and obtaining review of Judge Weeks' order.[6] As a result, I am further compelled to conclude that the Court's apparent determination that Judge Weeks' order granting relief pursuant to the Racial Justice Act was not subject to appellate review is erroneous.

Finally, I am equally unpersuaded by the Court's conclusion that the State's failure to list the judgment that Judge Weeks entered based upon his decision to grant defendant's request for relief from his death sentence pursuant to the Racial Justice Act in the certiorari petition that led to the entry of our 2015 order deprived us of any authority to vacate Judge Weeks' order and the related judgment following appellate review. Aside from the fact that no meaningful request for appellate review of the underlying judgment could be taken apart from review of the order granting defendant's request for relief from his death sentence under the Racial Justice Act and the fact that the State's certiorari petition cannot be understood as anything other than a challenge to the correctness of both Judge Weeks' order and the judgment that was entered in reliance

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5. The amended Racial Justice Act provided that a defendant's Racial Justice Act claim "shall be raised by the defendant . . . in postconviction proceedings pursuant to Article 89 of Chapter 15A of the General Statutes." An Act to Amend Death Penalty Procedures, S.L. 2012-136, § 3, 2012 N.C. Sess. Laws 471, 472 (enacting N.C.G.S. § 15A-2011(f)(1) (Supp. 2012)) (repealed 2013). Section 15A-1422 falls within Article 89 of Chapter 15A.

6. The fact that the General Assembly did not grant the State an appeal as of right from orders granting relief pursuant to the Racial Justice Act, upon which the Court places some emphasis in its opinion, has no bearing upon the proper resolution of this case given the General Assembly's decision to expressly authorize appellate review of such orders pursuant to N.C.G.S. § 15A-1422(c)(3) and former N.C.G.S. § 15A-2012(c). Similarly, the fact that N.C.G.S. § 15A-1422(c)(3) makes no mention of proceedings conducted pursuant to the Racial Justice Act is irrelevant to the issue of whether the State was entitled to seek the issuance of a writ of certiorari authorizing review of Judge Weeks' order given that the use of the procedure authorized by N.C.G.S. § 15A-1422(c) was expressly imported into Racial Justice Act proceedings by former N.C.G.S. § 15A-2012(c).

upon that order, the Court's decision, which seems to me to be overly technical for that reason alone, is inconsistent with the relevant statutory provisions governing review of trial court decisions made pursuant to the Racial Justice Act. According to N.C.G.S. § 15A-1422(c), which specifically provides for review of "[t]he court's ruling on a motion for appropriate relief," the order or decision that is subject to further review is the "ruling on a motion for appropriate relief" rather than any remedial judgment that the trial court might have entered for the purpose of effectuating its decision to afford relief to a defendant. I have a great deal of difficulty seeing how the General Assembly could have intended for this logic to permit review of the order entered in connection with the allowance of a motion for appropriate relief while requiring a separate request for review of the judgment that the trial court entered based upon the underlying order. The interpretation of N.C.G.S. § 15A-1422(c) that I believe to be appropriate is fully consistent with our certiorari-related jurisprudence, which brings the entire record forward for review and recognizes the fundamental principle that the trial court's judgment flows logically from the proceedings that led to its entry. *State v. Moore*, 258 N.C. 300, 302, 128 S.E.2d 563, 565 (1962); *In re Burton*, 257 N.C. 534, 545, 126 S.E.2d 581, 589 (1962). As a result, I believe that, in light of the language in which the relevant statutory provisions are couched and the effect of our decision to issue a writ of certiorari authorizing review of Judge Weeks' order, the fact that the State failed to expressly seek review of the judgment that was entered on the basis of Judge Weeks' order in the certiorari petition that led to the entry of our 2015 order does not have the effect of precluding further review of that judgment.[7]

I do not, by dissenting from the Court's decision in this case, wish to be understood as expressing any doubt about the fundamental importance of the goals sought to be achieved by the Racial Justice Act or the pressing need to completely eradicate racial and all other forms of odious discrimination from our system of justice, to cast any doubt upon the correctness of our recent decision in *Ramseur*, or to express any opinion concerning the extent to which the Court did or did not correctly grant relief from Judge Weeks' order in 2015, which was a decision in which I did not participate. However, it seems clear to me that

7. The majority's reference to *State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 543 (2010), has no bearing upon a proper analysis of this case given that the manner in which an appeal must be taken from an order denying a motion to suppress evidence differs from the manner in which appellate review of orders granting or denying relief pursuant to the Racial Justice Act must be sought. *See* N.C.G.S. § 15A-979 (b) (2019) (stating that "[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty").

a trial court order granting relief pursuant to the Racial Justice Act and the entry of a related judgment of life imprisonment is not an unreviewable decision entitled to double jeopardy protection, with there being no support in the relevant decisions of this Court or the Supreme Court or in the statutory provisions governing our review of lower court decisions in criminal cases. As a result, I am unable to join the Court's decision that defendant is entitled to have the sentence of life imprisonment without the possibility of parole that was imposed upon him as the result of Judge Weeks' order to grant defendant relief pursuant to the Racial Justice Act reinstated and would, instead, hold, for the reasons set forth in *Ramseur*, that the trial court erred by dismissing defendant's Racial Justice Act claim based upon the General Assembly's decision to repeal that legislation and that this case should be remanded to the Superior Court, Cumberland County, for further proceedings not inconsistent with this opinion, including the hearing on the merits contemplated in our 2015 order.

Justice DAVIS joins in this dissenting opinion.

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STATE OF NORTH CAROLINA
v.
CHRISTOPHER NATHANIEL SMITH

No. 119PA18

Filed 14 August 2020

**1. Appeal and Error—preservation of issues—motion to dismiss for insufficiency of evidence—specific argument at trial—all sufficiency issues preserved**

A criminal defendant's timely motion to dismiss and renewal of the motion preserved for appellate review any and all sufficiency of the evidence challenges; thus, even though defendant argued at trial that the evidence was insufficient to support allegations that sexual activity had occurred, he was entitled to argue on appeal that the evidence was insufficient to support the allegation that he was a "teacher" under the charging statute (N.C.G.S. § 14-27.7).

**2. Sexual Offenses—sexual activity with student by teacher—sufficiency of evidence—status as teacher**

There was substantial evidence that defendant was a "teacher" under the statute prohibiting sexual activity with students (N.C.G.S.

§ 14-27.7) where—even though he was denominated as a "substitute teacher" because he lacked a teaching certificate—he worked at a high school as a full-time physical education teacher, he had a planning period, and he had the same access to students as any certified teacher would. The Supreme Court rejected a hyper-technical interpretation of the statute in favor of a common-sense, case-by-case evaluation of whether an individual would qualify as a teacher under the statute.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, *State v. Smith*, No. COA17-680, 2018 WL 1598522 (N.C. Ct. App. Apr. 3, 2018), finding no error in part and remanding for resentencing a judgment entered on 8 July 2016 by Judge Reuben F. Young in Superior Court, Wake County. Heard in the Supreme Court on 8 January 2020.

*Joshua H. Stein, Attorney General, by Tiffany Y. Lucas, Special Deputy Attorney General, for the State.*

*Yoder Law PLLC, by Jason Christopher Yoder, for defendant.*

NEWBY, Justice.

In this case we decide whether defendant's motion to dismiss preserved for appellate review all sufficiency of the evidence challenges, and if so, whether defendant qualifies as a teacher under N.C.G.S § 14-27.7. Though at trial defendant made arguments about only one specific element of the crime with which he was charged in support of his motion to dismiss, defendant's timely motion and his timely renewal of that motion preserved for appellate review all sufficiency of the evidence issues. Nevertheless, the trial court properly denied defendant's motion to dismiss since, based on the facts of his case, defendant was properly categorized as a "teacher" under our criminal statutes prohibiting sexual offenses with students. Thus, we modify and affirm the Court of Appeals decision upholding defendant's convictions.

The evidence at trial showed the following: though denominated as a "substitute teacher," defendant worked full-time at Knightdale High School, initially as an In-School Suspension (ISS) teacher and then as a Physical Education (PE) teacher. He worked the same hours as a certified teacher, which included a regularly scheduled planning period. He taught at the school on a long-term assignment and was an employee of Wake County Public Schools. Defendant began the position with hopes

of becoming a certified teacher. While defendant did not have his teaching certificate, his transition to the PE department was intended for him to "get a feel for" the position so he would have experience and "be ready" when he tested to receive his certificate and began to serve as a licensed teacher through lateral entry. Defendant met minor D.F., a student at Knightdale High, during his time teaching at the school. On 29 October 2014 D.F. went to defendant's home. D.F. alleged the two engaged in sexual activity.

D.F.'s father became suspicious of D.F. and defendant's relationship, so he brought his concerns to the school's attention. After an internal investigation, the school's resource officer reported the matter to the Raleigh Police Department. Defendant was thereafter indicted for two counts of engaging in sexual activity with a student pursuant to N.C.G.S. § 14-27.7 (2013)[1]. The indictment alleged that:

> I. [O]n or about October 29, 2014, in Wake County, the defendant named above unlawfully, willfully, and feloniously did engage in vaginal intercourse with D.F. . . . At the time of this offense, the defendant was a teacher at Knightdale High School and the victim was a student at this same school. . . . This act was done in violation of N[.]C[.]G[.]S[.] § 14-27.7(B).
>
> II. [O]n or about October 29, 2014, in Wake County, the defendant named above unlawfully, willfully, and feloniously did engage in a sexual act with D.F. . . . At the time of this offense, the defendant was a teacher at Knightdale High School and the victim was a student at this same school. . . . This act was done in violation of N[.]C[.]G[.]S[.] § 14-27.7(B).

The case proceeded to trial. At the close of the State's evidence, defense counsel made a motion to dismiss based on insufficient evidence. He asserted the following:

> Your Honor, we would like to make a Motion to Dismiss. Very briefly, the State hasn't met every element of the charge. I don't think there are – I know that the Court is to take every inference in the light most favorable to the State but there's also case law when the State's case

1. Because the 2013 version of N.C.G.S. § 14-27.7 was the controlling version of the statute when the events occurred here, we utilize the 2013 version in this opinion. We note, however, that the statute has since been recodified as N.C.G.S. §§ 14-27.31, 14-27.32 (2015).

> conflict [sic] to such a degree the Court is to take that into consideration. We would argue this is that type of case, Your Honor.
>
> The victim has stated that sexual intercourse lasted five minutes. She then stated the next day it was between 20 and 30 minutes. She then stated in court it was between 10 and 15 minutes. There is evidence of the victim not being credible, Your Honor.
>
> There is a police report where she told her dad that she saved the contact information under "parentheses A." There was evidence that she told the officer that it was under "dot dot dot." There's evidence that she was interviewed by the officer and she didn't give the officer information. At first she said, well, I didn't, I wouldn't lie; I would just omit information, and then she changed that to hide information. She didn't tell information about marijuana. She was interviewed by Officer Emser twice and she didn't give information about alleged oral sex occurring on November 11. She was interviewed by two officers. But then she comes here in court and says that the act did occur.
>
> Your Honor, based on this evidence we would ask that you find that the State's evidence conflicts to such a degree that the Motion to Dismiss should be granted.

The trial court denied the motion. At the end of all the evidence, defense counsel renewed the motion to dismiss:

> Your Honor, at the end of all the evidence the Defendant would like to renew his Motion To Dismiss. There's no physical evidence. We would argue the eight pillows, the bottom sheet, the comforter, the blanket and the Toshiba laptop were not tested. There's been conflict in the victim's own testimony. Based on that we would renew our Motion to Dismiss.

The trial court again denied the motion. Ultimately, the jury convicted defendant of two counts of sexual activity with a student.

Defendant appealed, arguing to the Court of Appeals, *inter alia*, that the trial court erroneously denied his motion to dismiss because the evidence at trial did not establish that he was a "teacher" within the meaning of N.C.G.S. § 14-27.7(b). In the alternative, defendant argued

that his motion to dismiss should have been granted because there was a fatal variance between the indictment and proof at trial since the indictment alleged defendant was a "teacher," but his status as a substitute teacher made him "school personnel" under section 14-27.7(b).

The Court of Appeals concluded that defendant had failed to preserve either argument for appellate review. *State v. Smith*, 2018 WL 1598522, at *3 (N.C. Ct. App. Apr. 3, 2018). The Court of Appeals reasoned that, though a general motion to dismiss preserves for appellate review all arguments on the sufficiency of the evidence, *id.* at *2 (citing *State v. Stephens*, 244 N.C. 380, 383, 93 S.E.2d 431, 433 (1956)), when a defendant makes a more specific motion to dismiss, he only preserves for appellate review a sufficiency of the evidence argument for that specific element argued, *id.* at *3. Thus, it opined that any other sufficiency of the evidence argument pertaining to other elements of the crime would not be preserved by a defendant's motion to dismiss. *Id.* (citing *State v. Walker*, 252 N.C. App. 409, 411–12, 798 S.E.2d 529, 530–31 (2017), *abrogated by State v. Golder*, 374 N.C. 238, 839 S.E.2d 782 (2020)). The Court of Appeals noted that defendant's initial motion to dismiss "focused on the veracity of D.F.'s testimony and the lack of physical evidence supporting the allegations that any sexual conduct had occurred," which defendant narrowed in his renewed motion to dismiss when he referenced the preceding arguments and stated that his renewed motion was "based on [those arguments.]" *Id.* at *3. Thus, because it believed defendant had limited his motion to a single element, "whether sexual activity had occurred," the Court of Appeals concluded that defendant had not preserved appellate review of any argument based on whether he qualified as a teacher under the applicable statute. *Id.*[2] The Court of Appeals also concluded that defendant's fatal variance argument was not preserved because it was not expressly presented to the trial court. *Id.*

**[1]** Before this Court, defendant first asserts that he sufficiently preserved for appellate review all sufficiency of the evidence issues through his motion to dismiss at trial. At the time that the Court of Appeals decided this case, this Court had not addressed the specific issue of when a motion to dismiss preserves all sufficiency of the evidence issues for appellate review. Subsequently, this Court examined that question

2. The Court of Appeals also addressed defendant's argument that "if his trial counsel failed to preserve th[e substantive] issue for appeal, then he received ineffective assistance of counsel." *Smith*, 2018 WL 1598522, at *4. Because we ultimately conclude that defendant preserved his argument through the motion to dismiss at trial, we need not reach defendant's ineffective assistance of counsel claim.

in *State v. Golder*, 374 N.C. 238, 839 S.E.2d 782 (2020). In *Golder*, we held that "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." *Id.* Thus, as set forth in *Golder*, under Rule 10(a)(3), so long as a defendant moves to dismiss a case at the appropriate times, his motion preserves "all issues related to the sufficiency of the evidence for appellate review." *Id.* Because defendant here made a general motion to dismiss at the appropriate time and renewed that motion to dismiss at the close of all the evidence, his motion properly preserved all sufficiency of the evidence issues.

**[2]** On the merits of his case, defendant argues there was not substantial evidence that he was a "teacher" under the statute. He claims his position is better denominated as "substitute teacher," which falls under "school personnel." Thus defendant's argument requires us to evaluate the language of several statutes.

N.C.G.S. § 14-27.7(b) (2013) provides that

> If a defendant, who is a teacher, school administrator, student teacher, school safety officer, or coach, at any age, or who is other school personnel, and who is at least four years older than the victim engages in vaginal intercourse or a sexual act with a victim who is a student, at any time during or after the time the defendant and victim were present together in the same school, but before the victim ceases to be a student, the defendant is guilty of a Class G felony . . . . For purposes of this subsection, the terms "school", "school personnel", and "student" shall have the same meaning as in G.S. 14-202.4(d).

Section 14-202.4, which criminalizes taking indecent liberties with a student, states that " '[s]chool personnel' means any person included in the definition contained in G.S. 115C-332(a)(2), and any person who volunteers at a school or school-sponsored activity." N.C.G.S. § 14-202.4(d)(3) (2013). The statute referenced in section 14-202.4 is not within the chapter of the North Carolina General Statutes relating to criminal law but falls under a section about criminal history checks within North Carolina's education statutes. Section 115C-332 casts a wide net defining the identity of individuals who should be subjected to criminal history checks in a seeming attempt to require background checks for all those who interact with students in the school system. Therefore, section 115C-332 provides that

> (2) "School personnel" means any:
>
> a. Employee of a local board of education whether full-time or part-time, or
>
> b. Independent contractor or employee of an independent contractor of a local board of education, if the independent contractor carries out duties customarily performed by school personnel,
>
> whether paid with federal, State, local, or other funds, who has significant access to students. School personnel includes substitute teachers, driving training teachers, bus drivers, clerical staff, and custodians.

N.C.G.S. § 115C-332(a)(2) (2013).

Here we are asked to construe these statutes and determine what the General Assembly intended by the reference to teachers in N.C.G.S. § 14-27.7(b). It is a well-established principle of statutory construction that "the intent of the Legislature controls." *In re Hardy*, 294 N.C. 90, 95, 240 S.E.2d 367, 371 (1978). In evaluating all of the above statutes, it is evident that the General Assembly intended to cast a wide net prohibiting criminal sexual conduct with students by any adult working on school property. It is clear that the legislature intended that each category be read broadly with a common-sense understanding. A person's categorization as a "teacher" should be based on a common-sense evaluation of all the facts of the case, not a hyper-technical interpretation based solely on the individual's title. Such a case-by-case analysis involves evaluating, among other circumstances, whether the individual is serving in a full-time or truly part-time position, and whether the individual is in fact teaching students on a regular basis. Taking into account all circumstances in a specific case to determine whether an individual is a "teacher" under N.C.G.S. § 14-27.7 serves the intended purpose by giving a common-sense interpretation of the word "teacher" and protecting students from sexual offenses by adults serving within the school system.

This reasoning is supported by the fact that N.C.G.S. § 115C-332(a)(2) makes clear that the legislature intended to subject anyone working in a school-related role, even ones with less face-to-face access to students such as custodians and non-employees of the school system, to criminal history checks to ensure the protection of students. Therefore, the statutory reference to "substitute teacher" under "school personnel" does not preclude someone with the title of substitute teacher from actually being a "teacher" for purposes of the criminal statute, N.C.G.S. § 14-27.7.

To the contrary, whether an individual is a teacher under the criminal statute depends on the facts of the case and the nature of the position in which the individual served.

Thus, the facts of this case, not merely defendant's title, determine whether he was a "teacher" under the statute. The evidence indicated that defendant was in a full-time position. Defendant testified that in serving as a PE teacher, his understanding of the job was that he would work full-time and "be a teacher without my certification." Defendant served as an ISS teacher for a month on a regular basis before moving into the PE spot, which also provided a full-time schedule. This move to the PE department was intended for defendant to "get a feel for" the position so he would have experience and "be ready" when he qualified to receive his certificate and serve as a licensed teacher through lateral entry. Despite his lack of certification, defendant was at the school on a long-term assignment, an employee of Wake County Public Schools, and held to the same standards as a certified teacher. Defendant taught at the school daily, had a planning period, and had full access to students as any certified teacher would. The only difference between defendant and other teachers was his title based on his lack of a teaching certificate at that time.

Given the statute's clear intent to protect students from sexual encounters with adults working in their schools, it is evident that the various titles set forth in the relevant statutory language should be interpreted functionally, taking into account the nature in which an individual served, as opposed to simply considering the individual's title in a hyper-technical manner. The position defendant fulfilled falls within the "teacher" category as described by N.C.G.S. § 14-27.7. While every substitute teacher may not qualify as a "teacher" under the statute, given the circumstances and facts of this case, defendant fell within the "teacher" category under the statute.

Because we conclude that defendant was correctly deemed a teacher in this case, the same analysis would apply to defendant's secondary argument—that the trial court erred in denying defendant's motion to dismiss because there was a fatal variance between the indictment, alleging that defendant was a teacher, and the evidence at trial, which he asserts showed that defendant was actually "school personnel." Therefore, assuming without deciding that defendant's fatal variance argument was preserved, defendant's argument would not prevail for the same reasoning.

Since defendant moved to dismiss at the appropriate time at trial and timely renewed his motion, he sufficiently preserved for appellate

review whether the State presented sufficient evidence of each element of the crime for which he was convicted. Nonetheless, the trial court properly denied defendant's motion to dismiss as defendant falls within the teacher category as defined in N.C.G.S. § 14-27.7. The Court of Appeals decision is therefore modified and affirmed.

MODIFIED AND AFFIRMED.

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STATE OF NORTH CAROLINA
v.
JEFFERY DANIEL WAYCASTER

No. 294A18

Filed 14 August 2020

**Criminal Law—habitual felon status—proof of prior convictions—evidentiary requirements—statutory methods nonexclusive—ACIS printout**

In a plurality opinion, the Supreme Court determined that where the methods of proof listed in N.C.G.S. § 14-7.4 were not the exclusive means by which the State could prove prior convictions to establish habitual felon status, the State's use of a printout from the Automated Criminal/Infraction System (ACIS)—where the original judgment was not available—was admissible to prove a prior felony at defendant's habitual felon trial. There was a split among the justices regarding whether Evidence Rule 1005 applied, and if so, whether its application would allow the admission of the ACIS printout in this case.

Chief Justice BEASLEY concurring.

Justice MORGAN joins in this concurring opinion.

Justice EARLS concurring in part and dissenting in part.

Justice HUDSON joins in this opinion concurring in part and dissenting in part.

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, 260 N.C. App. 684, 818 S.E.2d 189 (2018), affirming a judgment entered on 16 May 2017 by Judge Gary M. Gavenus in Superior Court, McDowell County. Heard in the Supreme Court on 6 November 2019.

*Joshua H. Stein, Attorney General, by Alexander Walton, Assistant Attorney General, for the State-appellee.*

*Dylan J.C. Buffum, for defendant-appellant.*

DAVIS, Justice.

North Carolina's Habitual Felons Act references three ways by which the State may prove a defendant's prior convictions for the purpose of establishing that he is a habitual felon. The issue in this case is whether these methods of proof set out in the Act are exclusive. Because we conclude that the General Assembly intended for the means of proof mentioned in the Act to be nonexclusive, we affirm the decision of the Court of Appeals on that issue. Defendant also raised an additional issue relating to whether the trial court committed plain error by allowing the introduction of hearsay evidence during his trial. We now conclude that discretionary review of this additional issue was improvidently allowed.

**Factual and Procedural Background**

On 22 July 2014, defendant was sentenced to 30 months of supervised probation after pleading no contest to a charge of felony larceny. The terms of defendant's probation were modified on 3 September 2015, and pursuant to these modifications, he submitted to electronic monitoring and was required to wear an ankle monitor that tracked his location. In addition, although not under house arrest, defendant was required to comply with the curfew set by his primary probation officer, Matthew Plaster.

Defendant's electronic monitoring involved three different pieces of equipment: an ankle monitor worn by him, a Global Positioning System beacon that tracked the monitor, and a charger for the ankle monitor. The beacon was kept at defendant's home, and his probation officer would receive text messages or email alerts if he was not at home during his curfew. His probation officer would also receive notification if defendant tampered with his ankle monitor strap by cutting it off or otherwise trying to remove it. These alerts were sent from BI Total Monitoring (BI), a company with which the North Carolina Department of Public Safety

contracted to install and maintain the monitoring equipment assigned to probationers such as defendant.

On 24 September 2015, the probation officer on duty, David Ashe, received a text message alert from BI notifying him that defendant had tampered with his ankle monitor strap. Officer Ashe attempted to call defendant but received no answer. After consulting the BI computer program to locate the ankle monitor, Officer Ashe went to the last known location of the monitor and discovered that it had been cut off and left in a ditch approximately eight feet from a road that was located a few miles away from defendant's home. Upon returning to his office, Officer Ashe verified that the monitor he had found in the ditch was, in fact, the one that had been given to defendant, and he submitted a report of the incident to Officer Plaster.

On 26 October 2015, defendant was indicted on charges of interfering with an electronic monitoring device and attaining the status of a habitual felon. A trial was held in Superior Court, McDowell County, beginning on 16 May 2017. The jury returned a verdict of guilty on the charge of interfering with an electronic monitoring device on that same day. On the following day, the habitual felon phase of the trial began. The habitual felon indictment charged defendant with attaining habitual felon status based upon three prior felony convictions in McDowell County: (1) a 4 June 2001 conviction for felonious breaking and entering; (2) a 18 February 2010 conviction for felonious breaking and entering; and (3) a 22 July 2014 conviction for safecracking. At trial, the State admitted into evidence certified copies of the judgments for the latter two convictions in order to prove their existence.

With regard to the 4 June 2001 conviction, however, the prosecutor stated to the court that he had been informed by the Clerk of Court's office "that they didn't have the original" judgment associated with that conviction. In an effort to prove the existence of this conviction, the State called Melissa Adams, the Clerk of Court for McDowell County, as a witness. The State then introduced as an exhibit a computer printout from the Automated Criminal/Infraction System (ACIS). Adams testified that ACIS is a statewide computer system relied upon by courts and law enforcement agencies for accessing information regarding a defendant's criminal judgments, offense dates, and conviction dates. She further stated that the information contained in ACIS is taken from court records such as criminal judgments and manually entered into the database by an employee in the Clerk of Court's office. The ACIS printout offered by the State showed that defendant had been convicted of

felonious breaking and entering on 4 June 2001, and Adams testified that the printout was a "certified true copy of the ACIS system."

When the State formally moved to introduce the ACIS printout into evidence as proof of defendant's 4 June 2001 felony conviction, defense counsel objected, arguing that the ACIS printout was not a true copy of the actual judgment but rather "simply a computer printout of data entered at some time in the past by someone of what purports to be a judgment." Defense counsel contended that the ACIS printout was therefore insufficient to prove defendant's 2001 conviction. The trial court overruled the objection, stating that "ACIS is a way in which the State can introduce true copies of judgments entered in the system, and it's admissible under the rules of evidence."

The jury found that defendant had attained the status of a habitual felon, and the trial court sentenced him to a term of imprisonment of 38 to 58 months. Defendant appealed to the Court of Appeals.

Before the Court of Appeals, defendant made two arguments. First, he asserted that the trial court committed plain error by admitting hearsay evidence to establish that the ankle monitor found in the ditch belonged to him. Second, he contended that the trial court erred by allowing the ACIS printout to be introduced into evidence as proof of his 2001 conviction for the purpose of establishing that he was a habitual felon.

With regard to the first issue, defendant asserted that the trial court had plainly erred in allowing Officer Ashe to testify that he had verified through BI that the ankle monitor he found in the ditch belonged to defendant. Defendant contended that Officer Ashe's testimony constituted inadmissible hearsay because it was based entirely upon communications from BI and the State had failed to provide an adequate foundation to allow such information to be admitted pursuant to the business records exception to the hearsay rule set out in N.C.G.S. § 8C-1, Rule 803(6). Relying on its own precedent, the Court of Appeals rejected this argument and held that "hearsay statements based on 'GPS tracking evidence and simultaneously prepared reports are admissible under the business records exception to the hearsay rule.' " *State v. Waycaster*, 260 N.C. App. 684, 689, 818 S.E.2d 189, 193 (2018) (quoting *State v. Gardner*, 237 N.C. App. 496, 499, 769 S.E.2d 196, 198 (2014)).

As for the second issue, defendant argued that the trial court had improperly allowed the ACIS printout to be used as proof of his 2001 conviction because N.C.G.S. § 14-7.4 contained the exclusive methods for proving prior convictions in a proceeding to determine habitual felon

status. The Court of Appeals likewise rejected this argument based on its determination that the ACIS printout was "sufficient evidentiary proof of defendant's 4 June 2001 conviction under the Habitual Felon Act." *Waycaster*, 260 N.C. App. at 691, 818 S.E.2d at 195. The Court of Appeals stated that "ACIS 'duplicates the physical records maintained by each Clerk and constitutes the collective compilation of all records individually entered by' clerks of court." *Id.* (quoting *LexisNexis Risk Data Mgmt. Inc. v. North Carolina Admin. Office of the Courts*, 368 N.C. 180, 181, 775 S.E.2d 651, 652 (2015)). The Court of Appeals concluded that the use of the ACIS printout to prove defendant's prior conviction did not violate N.C.G.S. § 14-7.4 due to the fact that the statute "is permissive and does not exclude methods of proof that are not specifically delineated in the Act." *Id.* at 692, 818 S.E.2d at 195.

In a separate opinion concurring in part and dissenting in part, Judge Murphy concurred in the majority's decision with respect to the first issue but dissented from the portion of the majority's opinion relating to the issue of whether the admission of the ACIS printout satisfied N.C.G.S. § 14-7.4. He expressed his belief that the State was required by the statute to prove defendant's prior convictions by stipulation or by introducing either the actual judgments of the convictions or certified copies thereof. *Waycaster*, 260 N.C. App. at 693, 818 S.E.2d at 196 (Murphy, J., dissenting). He further stated that, in his view, the State had failed to demonstrate the exercise of reasonable diligence in seeking to obtain the actual judgment relating to the 4 June 2001 conviction. *Id.* at 695–96, 818 S.E.2d at 197–98. For this reason, he expressed his belief that the ACIS printout did not qualify as admissible secondary evidence pursuant to Rule 1005 of the North Carolina Rules of Evidence. *Id.* at 695, 818 S.E.2d at 197 (citing N.C.G.S. § 8C-1, Rule 1005 (2019)).

On 11 September 2018, defendant appealed to this Court as of right on the basis of the dissent. Defendant also filed a petition for discretionary review in which he requested that this Court review the first issue decided by the Court of Appeals regarding the use of hearsay evidence to establish that the ankle monitor located in the ditch belonged to him. This Court allowed the petition for discretionary review on 30 January 2019.

**Analysis**

North Carolina's Habitual Felons Act states, in pertinent part, that "[a]ny person who has been convicted of or pled guilty to three felony offenses . . . is declared to be a habitual felon and may be charged as a status offender . . . ." N.C.G.S. § 14-7.1(a) (2019). In such cases,

"[t]he trial for the substantive felony is held first, and only after defendant is convicted of the substantive felony is the habitual felon indictment revealed to and considered by the jury." *State v. Cheek*, 339 N.C. 725, 729, 453 S.E.2d 862, 864 (1995) (citing N.C.G.S. § 14-7.5). During the habitual felon phase of the trial, "the proceedings shall be as if the issue of habitual felon were a principal charge." N.C.G.S. § 14-7.5. When a defendant is found to have attained the status of a habitual felon, "the felon must . . . be sentenced at a felony class level that is four classes higher than the principal felony for which the person was convicted; but under no circumstances shall an habitual felon be sentenced at a level higher than a Class C felony." *Id.* § 14-7.6.

The Habitual Felons Act also references several specific methods of proof for establishing the existence of a defendant's prior felony convictions. Subsection 14-7.4 states as follows with regard to this subject:

> In all cases where a person is charged under the provisions of this Article with being an habitual felon, the record or records of prior convictions of felony offenses shall be admissible in evidence, but only for the purpose of proving that said person has been convicted of former felony offenses. A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein.

N.C.G.S. § 14-7.4.

In this appeal, defendant does not argue that the ACIS printout was inadmissible on the grounds of hearsay or lack of authentication. Instead, defendant's sole contention is that the methods referenced in the statute for proving the existence of a prior felony conviction—that is, by stipulation or by the introduction of either the original or a certified copy of the prior judgment—were intended by the General Assembly to be exclusive. Defendant's argument therefore raises an issue of statutory interpretation.

It is well established that "[i]n matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished. Legislative purpose is first ascertained from the plain words of the statute." *Elec. Supply Co. v. Swain Elec. Co.*,

328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (citations omitted). Thus, "[w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 811, 517 S.E.2d 874, 878 (1999) (citation omitted). However, "where a statute is ambiguous or unclear in its meaning, resort must be had to judicial construction to ascertain the legislative will, and the courts will interpret the language to give effect to the legislative intent." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 389 (1978) (citations omitted).

Defendant argues that the language utilized by the General Assembly in N.C.G.S. § 14-7.4 clearly expresses a legislative intent that the modes of proof set out therein be exclusive, contending that no logical reason would have existed for the legislature to identify certain methods of proof if it intended that the State be permitted to prove defendant's prior convictions by other means as well. The State, conversely, asserts that N.C.G.S. § 14-7.4 is permissive—rather than mandatory—with respect to the issue of how a defendant's prior convictions may be established and that such convictions may be proven by means of any admissible evidence.

In construing the language utilized by the General Assembly in N.C.G.S. § 14-7.4, we do not write on a clean slate. To the contrary, we construed identical statutory language in *State v. Graham*, 309 N.C. 587, 308 S.E.2d 311 (1983). In that case, the defendant pled guilty to four counts of felonious breaking and entering. During sentencing, the trial court determined that the defendant had prior convictions punishable by more than sixty days imprisonment and therefore found the existence of an aggravating factor pursuant to N.C.G.S. § 15A-1340.4(e) of the Fair Sentencing Act. The information concerning the defendant's prior convictions was presented to the court in the form of testimony from a sheriff's deputy "who had been informed by the law enforcement authorities in North Carolina and New York [and] advise[d] the court as to the defendant's conviction record." *Id.* at 593, 308 S.E.2d at 316.

On appeal, the defendant asserted that the trial court had erred in finding the aggravating factor based on his prior convictions because the State had failed to introduce a certified copy of his criminal record. *Id.* at 592, 308 S.E.2d at 315. In addressing his argument, we were required to interpret the following statutory language in the Fair Sentencing Act:

> A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court

> record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein.

*Id.* at 592, 308 S.E.2d at 315–16 (quoting N.C.G.S. § 15A-1340.4(e) (1983) (repealed 1994)).

Like defendant in the present case, the defendant in *Graham* asserted that this statutory language allowed his prior convictions to be proven only by stipulation or by the introduction of either the original or a certified copy of the court record of the prior convictions. *Id.* at 592–93, 308 S.E.2d at 315–16. We rejected defendant's argument, stating the following:

> We disagree that these are the exclusive methods by which prior convictions may be shown. As we emphasized in *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983), this Court and the Court of Appeals have repeatedly held that the enumerated methods of proof of N.C. Gen. Stat. § 15A-1340.4(e) are permissive rather than mandatory. We recognize that the more appropriate way to show the "prior conviction" aggravating circumstance would be to offer authenticated court records, for such records establish a prima facie case. However, the legislature did not intend to bind the State and the trial court by precluding other means of proof. Clearly the conviction could have been proven by the deputy's testimony as to his own personal knowledge or by defendant's admission. While here the deputy's testimony was hearsay, the record indicates that the defendant took the stand and admitted the prior convictions. Not only do we find that the defendant's testimony before the court constituted an acceptable form of proof of his prior convictions, but his admissions also cured any defect caused by the hearing of the deputy's testimony.

*Id.* at 593, 308 S.E.2d at 316 (citations omitted); *see also Thompson*, 309 N.C. at 424, 307 S.E.2d at 159 ("We agree with that portion of the Court of Appeals' opinion holding that the language of G.S. § 15A-1340.4(e) is permissive rather than mandatory respecting methods of proof. It provides that prior convictions 'may' be proved by stipulation or by original

certified copy of the court record, not that they *must* be. The statute does not preclude other methods of proof.").

Given that the key language of N.C.G.S. § 14-7.4 is identical to the statutory language this Court construed in *Graham*, we are unable to discern any valid basis for adopting a different construction in the present case. *See State v. Rose*, 327 N.C. 599, 606, 398 S.E.2d 314, 317 (1990) ("We find no justifiable reason for giving a different interpretation to the identical language found in the two statutes.").

Moreover, we believe that such a reading of N.C.G.S. § 14-7.4 is logical. This Court has repeatedly interpreted the General Assembly's usage of the word "may" as having a permissive—as opposed to a mandatory—effect. *See, e.g.*, *Campbell v. First Baptist Church*, 298 N.C. 476, 483, 259 S.E.2d 558, 563 (1979) ("We recognize that . . . the use of 'may' generally connotes permissive or discretionary action and does not mandate or compel a particular act." (citation omitted)); *Rector v. Rector*, 186 N.C. 618, 620, 120 S.E. 195 (1923) ("The word 'may,' as used in statutes, in its ordinary sense, is permissive and not mandatory." (citation omitted)).

Furthermore, we recognize that there are a number of different ways in which a defendant's prior convictions may be proven in a given case. It would make little sense for the legislature to have limited the universe of available methods of proof to merely those few expressly referenced in the statute.

We also reject defendant's contention that the State's interpretation of N.C.G.S. § 14-7.4 would render superfluous the statutory language utilized by the General Assembly that expressly mentions certain discrete methods of proof. This argument ignores the fact that the statute gives the State the benefit of a rebuttable presumption if the defendant's prior convictions are, in fact, proven by the admission of original or certified copies of the judgments evidencing those convictions. The statute makes clear that if the State elects to utilize these modes of proof, there will exist "prima facie evidence that the defendant named therein is the same as the defendant before the court, and . . . prima facie evidence of the facts set out therein." N.C.G.S. § 14-7.4. This presumption does not apply if alternative methods are utilized by the State to prove the defendant's prior convictions. Thus, while the admission of either the actual judgment or a certified copy may be the preferred methods of proof, they are not the only permissible means of establishing the defendant's prior convictions.

Based on its apparent inability to obtain the actual judgment of defendant's 4 June 2001 conviction, the State opted to prove the existence of

that conviction by introducing an ACIS printout. This Court recently explained the nature and purpose of the ACIS database as follows:

> The Automated Criminal/Infraction System (ACIS) is an electronic compilation of all criminal records in North Carolina. While the North Carolina Administrative Office of the Courts (AOC) administers and maintains ACIS, the information contained in ACIS is entered on a continuing, real-time basis by the individual Clerks of Superior Court, or by an employee in that Clerk's office, from the physical records maintained by that Clerk. Any subsequent modifications to that information are under the exclusive control of the office of the Clerk that initially entered the information, so that personnel in one Clerk's office cannot change records entered into ACIS by personnel in a different Clerk's office. In other words, the information in ACIS both duplicates the physical records maintained by each Clerk and constitutes the collective compilation of all records individually entered by the one hundred Clerks of Court.

*LexisNexis*, 368 N.C. at 181, 775 S.E.2d at 652.

During the habitual felon phase of defendant's trial, the Clerk of Court, Melissa Adams, testified as to the process used for entering information derived from criminal records into ACIS. She stated that the ACIS database contains information that includes the name, judgment, offense date, and conviction date for a defendant and that this information is manually entered into the ACIS system by herself or other employees of the Clerk's office. Adams further testified that the ACIS database is accessible statewide and that the information contained therein is relied upon by courts and law enforcement agencies in the discharge of their duties. She stated that her recordkeeping duties included ensuring that information from court records was accurately entered into the ACIS database. Upon being presented with the ACIS printout showing defendant's 4 June 2001 conviction for felonious breaking and entering, Adams testified that the printout was "a certified true copy of the ACIS system . . . that shows the conviction."

As noted above, defendant does not contend that the ACIS printout constituted inadmissible hearsay or that it was not properly authenticated. He does argue, however, that the State failed to comply with the best evidence rule contained in Rule 1005 of the North Carolina Rules

of Evidence before seeking the admission of the printout into evidence. Rule 1005 states as follows:

> The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

N.C.G.S. § 8C-1, Rule 1005.

Defendant argues that in the present case the State sought to prove the contents of the original judgment of his 4 June 2001 conviction, which is an "official record" for purposes of Rule 1005, and the ACIS printout constituted "secondary evidence" of those contents. Based on this reasoning, defendant asserts that such secondary evidence in lieu of the original judgment or a certified copy would have been admissible only if the State had first demonstrated the exercise of "reasonable diligence" as required by Rule 1005. Only then, defendant asserts, could "other evidence of the contents" of the judgment be offered in its place. N.C.G.S. § 8C-1, Rule 1005.

But defendant's argument collapses given our determination that the methods of proof listed in N.C.G.S. § 14-7.4 are not exclusive. Although defendant is correct that the ACIS printout was not the original judgment of his prior conviction or a certified copy of the judgment, neither was required to be produced. Rather, the State was permitted to prove the fact of defendant's 4 June 2001 conviction by other means. The State was not using the ACIS printout to prove the *contents* of the original judgment of defendant's prior conviction. Instead, the printout was utilized simply to show that the conviction had occurred. Thus, the State was not required to comply with the reasonable diligence provision contained in Rule 1005 for the simple reason that Rule 1005 has no application here.

The dissent reaches a different conclusion in an analysis that can only be described as self-contradictory. While initially claiming to accept the proposition that the methods of proof set out in N.C.G.S. § 14-7.4 are not exclusive, the dissent then proceeds to repeatedly express a preference for the use of original judgments, or certified copies thereof, to the exclusion of other ways of proving a defendant's prior convictions.

The dissent's analysis reflects a misunderstanding of the best evidence rule. While not actually saying so, the dissent appears to be operating under the misconception that the best evidence rule limits the State's proof to the "best" available evidence bearing upon the fact at issue. But such an interpretation of the rule is incorrect.

As this Court has made clear, "[t]he best evidence rule applies *only* when the contents of a writing are in question." *State v. Clark*, 324 N.C. 146, 156, 377 S.E.2d 54, 60 (1989) (emphasis added). As a leading commentator has noted, "[i]t is sometimes stated, as if it were a general rule of evidence, that when a fact is to be proved the best evidence must be produced which the nature of the case admits. There is, however, no such general rule[.]" 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 253, at 997 (7th ed. 2011) (footnotes omitted).

The dissent ignores the distinction between a conviction and a judgment. The issue here was *not* what was contained in the 4 June 2001 written judgment. Rather, the question was whether defendant had been convicted of the offense memorialized in the judgment. As a result, the State was not required to prove the contents of the written judgment. Instead, the State used the ACIS printout as an alternative method of proving the *conviction itself*. Thus, the best evidence rule does not apply here.

While the use of the original judgment may well be—as the dissent asserts—the preferred method of proving a prior conviction, it is by no means the only permissible way of doing so. Therefore, given that § 14-7.4 is nonexclusive, any other type of admissible evidence may be used to establish a defendant's prior conviction.

As discussed above, this Court explained the nature and purpose of the ACIS database in *LexisNexis*. In our opinion, we made clear that this database serves as "an electronic compilation of all criminal records in North Carolina" and "duplicates the physical records maintained by each Clerk[.]" *LexisNexis*, 368 N.C. at 181, 775 S.E.2d at 652. As such, the ACIS database serves as a court record—albeit an electronic one. As a court record in and of itself, the ACIS printout was not merely "other evidence" of the contents of defendant's original judgment regarding his 4 June 2001 conviction so as to invoke the best evidence rule contained in Rule 1005. It simply makes no sense to suggest that the best evidence rule should operate to preclude the admission into evidence of one court record under the misguided belief that the record in question is nothing more than evidence of the contents of a separate court record.

The dissent fails to offer a persuasive reason why a printout from this database is not admissible pursuant to N.C.G.S. § 14-7.4. Instead, the dissent merely notes that an original judgment is more reliable because it is reviewed not only by the Clerk of Court but also by the trial judge and by counsel. But even assuming that the original judgment is, in fact, the most reliable way of proving a prior conviction, N.C.G.S. § 14-7.4 does not require that the most reliable method be utilized. Instead, it permits the use of any admissible evidence on this issue. If the most reliable method of proof (i.e., the original judgment or a certified copy) was required, then the modes of proof set out in the statute *would* be exclusive.

In short, the dissent cannot have it both ways. Either the methods of proof contained in N.C.G.S. § 14-7.4 are exclusive or they are not. Our decision today makes clear that they are not exclusive—a ruling with which the dissent purports to agree. Because the State used a valid alternative method of proving defendant's prior conviction by introducing a printout of a court record that contained this information, the best evidence rule never became applicable.

Furthermore, the dissent's assertion that based on our decision the State will have no reason to ever offer the original judgment or a certified copy ignores the rebuttable presumption expressly stated in N.C.G.S. § 14-7.4. As noted above, in order for the State to obtain the benefit of that presumption, it must use these specified methods of proof, which serves as an incentive for it to do so.

While the dissent speculates about the possibility of error in the ACIS database as the result of a mistake in data entry,[1] nothing prohibits a defendant from making a similar argument to the jury during a habitual felon proceeding and expressly noting the prosecutor's failure to introduce the original judgment of the defendant's prior conviction. If the State wishes to use a less persuasive method of proof, it certainly has the right to do so subject to the risk that the jury will find that the evidence upon which it chose to rely is not credible. In other words, the State's choice of a less optimal method of proof goes to the weight—rather than the admissibility—of the evidence.

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1. We observe that neither at trial nor on appeal has defendant asserted that the information contained in the ACIS database regarding his 4 June 2001 conviction was inaccurate. Moreover, while the dissent claims that the database contains little to no information about the underlying offense for which a defendant was convicted, no such additional information is necessary under N.C.G.S. § 14-7.4. Instead, all that is required is a showing that the conviction occurred.

Finally, we note that in the event the General Assembly wishes to limit the methods that are available to the State for proving a defendant's prior convictions, it is, of course, free to do so by amending N.C.G.S. § 14-7.4. Based on the current language of the statute, however, we are satisfied that the admission of the ACIS printout for this purpose under the circumstances set out in the record before us was permissible.

**Conclusion**

For the reasons set out above, we affirm the decision of the Court of Appeals with respect to the issue of whether the admission of the ACIS printout for the purpose of establishing defendant's habitual felon status was proper. As for the issue raised in defendant's petition for discretionary review regarding whether the admission of Officer Ashe's testimony constituted plain error, we conclude that discretionary review was improvidently allowed. Therefore, the decision of the Court of Appeals on that issue remains undisturbed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Chief Justice BEASLEY, concurring.

Although I agree with the majority's conclusion that the State may prove the existence of a defendant's prior felony convictions by methods other than those expressly set out in the Habitual Felons Act, I write separately to note that as the State introduced the ACIS printout to prove the contents of the ACIS report, the State was required to comply with Rule 1005 of the North Carolina Rules of Evidence.

The majority mischaracterizes the purpose for introducing the ACIS printout, attempting to distinguish between the contents of the ACIS printout and its introduction solely to show that a prior conviction had occurred. The Habitual Felon Statute provides that "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon." N.C.G.S. § 14-7.1(a) (2019). Thus, the State must prove that the defendant did, in fact, commit three prior felony offenses. To do so requires the court to consider the contents of the record to be introduced for the purpose of confirming "that said person has been convicted of former felony offenses." N.C.G.S. § 14-7.4.

ACIS is "an electronic compilation of *all* criminal records in North Carolina" that "both duplicates the physical records maintained by each [Superior Court] Clerk and constitutes the collective compilation of all records individually entered by the one hundred Clerks of Court." *LexisNexis Risk Data Mgmt. v. N.C. Admin. Office of the Courts*, 368 N.C. 180, 181, 775 S.E.2d 651, 652 (2015) (emphasis added). Thus, the State introduced the ACIS printout to prove the *contents* of the ACIS report.

As the dissent correctly states, quoting N.C.G.S. § 8C-1, Rule 1101, "[t]he rules of evidence apply at a trial on a habitual felon indictment in the same way that they apply to 'all actions and proceedings in the courts of this State.' " Here, because the State introduced the ACIS printout as evidence of defendant's prior convictions, it must comply with the rules of evidence. The dissent, however, misconstruing the intended purpose of the ACIS printout, fails to properly apply Rule 1005.

Rule 1005 provides that the contents of "a document authorized to be recorded or filed and actually recorded or filed, *including data compilations in any form* . . . may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original." N.C.G.S. § 8C-1, Rule 1005 (emphasis added). "If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given." *Id.*

The dissent treats the ACIS printout as a document introduced to prove the contents of the original judgment. Instead, the State introduced the ACIS printout to prove that a judgment had occurred—information that is contained in the ACIS report itself. This is an important distinction because Rule 1005 is self-referential. The certified copy contemplated by the Rule is of the document offered for admission itself—here, that is the ACIS report. Thus, the second sentence of Rule 1005, which allows for the introduction of "other evidence" only if neither a certified copy nor a copy testified to be correct by a person who has compared it to the original can be obtained by reasonable diligence, has no applicability here.

During trial, the State called the Clerk of the McDowell County Superior Court as a witness. The Clerk identified the ACIS printout as "a certified true copy of the ACIS system" and explained that the information in the ACIS printout was consistent with the actual judgment. The State, however, admitted that the original judgment could not be located. As the information in ACIS is entered by the Clerk or "an employee in

that Clerk's office," *LexisNexis*, 368 N.C. at 181, 775 S.E.2d at 652, the Clerk could not testify to the accuracy of the ACIS printout without confirming that she (1) entered that exact information into the system or (2) compared the printout to the judgment. She did not claim to have taken either action.

Although the Clerk could not testify to the accuracy of the ACIS printout introduced at trial, the copy could be authenticated pursuant to Rule 1005 by certification in compliance with Rule 902. The Rule provides that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to" certified copies of public records. N.C.G.S. § 8C-1, Rule 902(4). An unsealed public record is considered certified when it bears the signature of the custodian or other person authorized to make the certification, who certifies that the data compilation is correct. *Id.* Here, the custodian of ACIS, the Clerk of Court for McDowell County, certified that the ACIS printout was a true copy. Thus, the ACIS printout is a self-authenticating document properly introduced pursuant to Rule 1005.

I respectfully concur.

Justice MORGAN joins in this concurring opinion.

Justice EARLS concurring in part and dissenting in part.

Identical language in two statutes about how a prior conviction may be proved should be interpreted the same way even if one statute has been repealed and even if the language in the repealed statute applies to sentencing proceedings while in the statute at issue here, the language applies to trials on the charge of having obtained the status of a habitual felon. *Compare* N.C.G.S. § 15A-3040.4(e) (Supp. 1993) (repealed 1994) ("A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction."), *with* N.C.G.S. § 14-7.4 (2019) ("A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction."). I can even accept that this Court should follow its precedents in *State v. Graham*, 309 N.C. 587, 308 S.E.2d 311 (1983), and *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983), on the question of how that statutory language should be interpreted, despite the fact that neither party cited nor discussed these precedents in their briefs in this Court. What I cannot accept is the proposition that the North Carolina Rules of Evidence, and in particular, Rules 1002 through 1005, do not apply to the State's use of the ACIS printout to

prove Mr. Waycaster's prior convictions beyond a reasonable doubt in this case.

The rules of evidence apply at a trial on a habitual felon indictment in the same way that they apply to "all actions and proceedings in the courts of this State." N.C.G.S. § 8C-1, Rule 1101(a) (2019). A trial on a habitual felon indictment is not a sentencing proceeding. It is a trial in front of a jury in which the rules of evidence apply. Ironically, the trial court applied other rules of evidence to exclude other documents the State offered at trial to prove Mr. Waycaster's prior convictions. When the State offered to admit into evidence a copy of a certified original "Order on Violation of Probation" to prove the same conviction alleged to be shown by the ACIS printout, the trial court excluded the evidence under Rule 403. The trial court therefore recognized that N.C.G.S. § 14-7.4 does not expressly or implicitly repeal the rules of evidence in this context. Nevertheless, in one citation-free paragraph, the majority holds that the State was not required to comply with the requirements of Rule 1005 because it is not applicable here. That holding is incorrect.

Rule 1005 states:

> The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

N.C.G.S. § 8C-1, Rule 1005. The majority reasons that this rule does not apply because the State was not using the ACIS printout to prove the contents of the original judgment but rather to prove that a conviction had occurred. But such sleight of hand, purporting to meaningfully distinguish between the contents of a court record and the fact of a conviction, should have no place in our jurisprudence.

First, as the dissenting opinion in the Court of Appeals pointed out,[1] the State certainly thought it was offering the ACIS printout to prove the contents of the original judgment of conviction:

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1. I agree with and incorporate by reference the arguments made and positions taken in the dissenting opinion below. I have generally limited this opinion to the few remaining points worth adding.

> The best evidence rule applies here because the ACIS printout was admitted to prove the contents of a judicial record (i.e. a "writing") that the State indicated was unavailable. In response to Defendant's objection, the State admitted that they had originally intended to use Defendant's judgment and commitment record to prove his conviction, but were using the ACIS printout (submitted as State's Exhibit 4) because the original could not be found.
>
> > *The State*: I'll tell you Your Honor that when we were gathering these documents, 4A had come from microfilming and they said that they didn't have the original of 4. So 4 is the record of the original judgment.

*State v. Waycaster*, 260 N.C. App. 684, 694–95, 818 S.E.2d 189, 197 (2018) (Murphy, J., concurring in part and dissenting in part). Moreover, the ACIS printout has no source of information independent of the court file. In other words, without "the contents" of the original judgment of conviction, there would be no ACIS printout showing the fact of the conviction. *LexisNexis Risk Data Mgmt. Inc.*, 368 N.C. 180, 181, 775 S.E.2d 651, 652 (2015) ("[T]he information contained in ACIS is entered on a continuing, real-time basis by the individual Clerks of Superior Court, or by an employee in that Clerk's office, from the physical records maintained by that Clerk.").

Finally, the testimony in this case is further proof that this is an illusory distinction. The Court of Appeals summarized that testimony as follows:

> The Clerk of McDowell County Superior Court, the individual tasked with maintaining the physical court records in McDowell County, testified that the printout was a certified true copy of the information in ACIS regarding this judgment. She also explained the information was 'the same as the judgment' and affirmed it 'is a different way of recording what's on a judgment[.]' The Clerk's certification of the ACIS printout as a true copy of the original information is significant due to her responsibility and control over the physical court records, copies, and ACIS entries, as described in *LexisNexis Risk Data Mgmt. Inc.*

*State v. Waycaster*, 260 N.C. App. at 691, 818 S.E.2d at 195. The truth is that, in this case, the State is attempting to prove the fact of a prior judgment of conviction against defendant, and when the original court file was not available, the State reasonably looked to other sources of

information to prove that a judgment convicting the defendant of crimes in the past existed. Rule 1005 is applicable here. The burden under that rule is not extreme, the party offering the evidence simply must make a showing that a copy of the official record "cannot be obtained by the exercise of reasonable diligence." N.C.G.S. § 8C-1, Rule 1005.

The majority states that "[a]s a court record in and of itself, the ACIS printout was not merely 'other evidence' of the contents of defendant's original judgment regarding his 4 June 2001 conviction so as to invoke the best evidence rule contained in Rule 1005." To the contrary, based on the testimony in this case and our prior decisions, that is exactly what an ACIS printout is: a court employee takes the original judgment and enters its information into a computer. Pretending that this is somehow separate, substantive evidence of defendant's conviction, rather than merely a secondary rendition of the contents of an official judgment, abrogates the best evidence rule in the absence of any legislative intent to do so.[2]

We have long held that introducing an original judgment into evidence is the "preferred method for proving a prior conviction." *State v. Maynard*, 311 N.C. 1, 26, 316 S.E.2d 197, 211 (1984) (citing *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981)). By holding that the best evidence rule does not apply here, that principle is severely undermined, making it a function of the State's discretion whether to offer the ACIS printout or a certified copy of the original judgment as proof of the prior conviction.

The danger of the majority's reasoning is two-fold. First, the fallacious logic employed to reach this result would apply to every instance in which a party seeks to prove a prior conviction for any purpose whatsoever. If the fact that a conviction has occurred is different from the contents of a court judgment for the purposes of the applicability of Rule 1005, then there never needs to be a showing that due diligence was pursued to find the original court records.[3] Any evidence, not the

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2. The concurring opinion's attempt to create a distinction between the "contents of the original judgment" and information "to prove that a judgment has occurred" fares no better. They are the same thing. The status offense of being a habitual felon requires proof of prior convictions. Here, the ACIS printout is being offered as evidence of a prior judgment of conviction, but it is not the official record. It does not matter whether you call it "information proving that a judgment has occurred" or proof of "the contents of the original judgment."

3. It is important to remember, as noted above, that Rule 1005 does not completely prohibit a party from offering into evidence an ACIS printout to prove the contents of a court record; it simply requires that the party make a showing that the original or a

best evidence, is admissible. The majority effectively rewrites Rule 1005 to say "the contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original, *unless the official record is a judgment of conviction, in which case the official record is not needed*." The General Assembly in its wisdom may wish to rewrite the statute that way, but this Court should not.

Second, the ACIS printout is not as reliable as the official record. Though this Court has stated that ACIS "duplicates" the physical records maintained by the clerk's office, *LexisNexis Risk Data Mgmt. Inc.*, 368 N.C. at 181, 775 S.E.2d at 652, that is only true when the records are completely and accurately entered into the database. It is undeniable that there is a potential for a data entry error. A criminal judgment is prepared by a clerk, reviewed, signed by a judge, and scrutinized by counsel for each party. However, similar procedural safeguards do not exist to guarantee the accuracy and completeness of the data entered into ACIS. That data is not verified by a third party after the staff member of the clerk's office has entered it into the system. An ACIS printout is not the judicial record of the criminal trial but rather a new record generated by the clerk's office independent of the criminal proceeding.

If there was to be a data entry error, proving a negative, for example, that a particular individual was not convicted of a particular crime on a certain date in the past, would be extremely difficult, depending on the circumstances. Even with a defendant's testimony that he was not convicted of a particular offense, the ACIS printout provides precious few details to allow an effective rebuttal of the truth or falsity of the information contained therein. This is the ACIS printout introduced into evidence in this case:

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certified copy of the original record is unavailable after the "exercise of reasonable diligence." N.C.G.S. § 8C-1, Rule 1005.

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580 MCDOWELL                    ICA INQUIRY 01  01CR 001216     FILM: 0200100023
DISPOSED                        R  S DOB/AGE      CR      FILING DATE: 030901
WARRANT                         W  M 12011982 DL#:
WAYCASTER,JEFFERY,DANIEL                          CIT#:          TRIAL DATE: 042402
213 TRIPLE J MHP       LOT #23          CSLR:          CSLRC:          AM
MARION            NC  28752  DEF ATTY: NEIGHBORS,RUSSELL          TYP: A    VRA:
CHG/ARRN OFFN: F BREAKING AND OR ENTERING (F)                  14-54(A)
COMPLAINANT: SHOOK,D                          SFF ISSUED: 030801   SERVED: 030801
OFFN DATE: 022001    ARRN DATE:          MOTIONS DATE:          DISP DATE: 060401
CONT. D: 08 S: 00 C: 00 NR: 00 INT?:   FRM:    RSONCO:      GANG REL:    DV CV: N

PLEA VER MOD      FINE         COSTS    WCC    REST     JUDGE   PAID   TO-BE-PAID
 GU  GU  JU   $            $  190.00       $  7009.00  DS      NO       060403
CONV OFFN: F BREAKING AND OR ENTERING (F)                  14-54(A)         CAB:
SENT LEN: 005 M - 006 M  SENT TYPE: C                  CONS F/JGMT:
PROB: 024 M       SUPERVISED   WITHDRAWN:              APPEALED TO SUPERIOR:
AREA CD:    ACCD:    HWY:          V LIC:                TRANS TO SUPERIOR:
CDL: N  CMV: N  HAZ: N   TRP/DIST:    V ST:     V TYP:        APPELLATE:
NO CONTACT W T HOLLIFIELD DR CL CAC 420.00


ARREST DATE: 030801 CHECK DIGIT: LW0638E SID: NC0913517A LID:
NEXT#:                      PF2 - NAME INQUIRY                 ADDL CHARGES: Y
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This particular printout contained a case number, the complainant's name, an offense date and disposition date, and the fine and restitution ordered, but very little information about the underlying offense. The ACIS printout was not signed by a judge. No judge, prosecutor, or court reporter was identified in the printout.

An official court record has significantly greater indicia of reliability and hence, the best evidence rule is a part of our law. Secondary evidence of the content of the original is only admissible if the State establishes that the original or a copy thereof is unavailable. *See* N.C.G.S. § 8C-1, Rule 1005. In this case, the State failed to show that the original judgment, or a copy of the original judgment, could not be obtained through reasonable diligence. *See State v. York*, 347 N.C. 79, 91, 489 S.E.2d 380, 387 (1997) ("The best evidence rule requires that secondary evidence offered to prove the contents of a recording be excluded whenever the original recording is available"). Rule 1005 exists for a reason, and this Court exceeds its authority by unilaterally declaring that the rule will not apply for this purpose in these proceedings.

Having concluded that the Rule 1005 applies to this trial and to the evidence of Mr. Waycaster's prior conviction, I agree with the dissent below that the evidence in this case failed to establish that the State engaged in due diligence to find the official record of the original court judgment. *Waycaster*, 260 N.C. App. at 695, 818 S.E.2d at 197 ("Here, there was an inadequate foundation regarding the State's exercise of 'reasonable diligence' to obtain a copy of the 4 June 2001 judgment record.") (Murphy, J., concurring in part and dissenting in part). Moreover, because this was the only evidence of Waycaster's prior conviction, the erroneous

admission of this evidence without the required findings was prejudicial. *See* N.C.G.S. § 15A-1443(a) (2019) (stating that to establish reversible error a defendant must show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial").

I would reverse the decision of the Court of Appeals on the question of whether the trial court properly admitted the ACIS printout in this case without the foundation required by Rule 1005 of the North Carolina Rules of Evidence. We should vacate the judgment and habitual felon verdict and remand for a new trial on that charge. Accordingly, I concur with that portion of the majority opinion which holds that N.C.G.S. § 14-7.4 (2019) must be interpreted as permissive and not exclusive with regard to the methods of proof of prior convictions. I agree that an ACIS printout is admissible as evidence of prior convictions under that statute.

However, I do not read N.C.G.S. § 14-7.4 as evincing any intent to abrogate the requirements of Rules 1002 to 1005 of the North Carolina Rules of Evidence. Reading these statutes *in pari materia*, N.C.G.S. § 14-7.4 is not exclusive and permits use of the ACIS printout as evidence of prior convictions, but because the ACIS printout is wholly derivative of the contents of a judgment, it must also comply with the best evidence rule. Therefore, I respectfully dissent from that part of the majority opinion which holds that the best evidence rule does not apply to an ACIS printout when offered as evidence of a prior conviction.

Justice HUDSON joins in this opinion concurring in part and dissenting in part.

GWENDOLYN DIANETTE WALKER, WIDOW OF ROBERT LEE WALKER, DECEASED EMPLOYEE
v.
K&W CAFETERIAS, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 99PA19

Filed 14 August 2020

**Insurance—commercial underinsured motorist policy—endorsement—choice of law clause—third-party settlement—subrogation**

Where a commercial uninsured/underinsured motorist (UIM) policy included an endorsement that specifically invoked South Carolina law, UIM proceeds paid to a widow on behalf of her husband's estate (in a settlement with a third party in a South Carolina wrongful death action) were not subject to subrogation under South Carolina law. The insurer was therefore not entitled to reimbursement from the UIM proceeds of worker's compensation death benefits paid in a previous action before the North Carolina Industrial Commission.

Justice NEWBY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of the unanimous decision of the Court of Appeals, 264 N.C. App. 119, 824 S.E.2d 894 (2019), affirming an Opinion and Award entered on 27 February 2018 by the North Carolina Industrial Commission. On 11 June 2019, the Supreme Court allowed plaintiff's petition for discretionary review. Heard in the Supreme Court on 6 January 2020.

*The Sumwalt Law Firm, by Vernon Sumwalt, for plaintiff-appellant.*

*Cranfill Sumner & Hartzog, LLP, by Roy G. Pettigrew, for defendant-appellees.*

HUDSON, Justice.

Pursuant to plaintiff's petition for discretionary review, we review the decision of the Court of Appeals, which affirmed the 27 February 2018 Opinion and Award of the North Carolina Industrial Commission (the Commission). The Commission found that the uninsured/underinsured motorist (UIM) proceeds that plaintiff received on behalf of her husband's estate through the settlement of a South Carolina wrongful death lawsuit were subject to defendants' subrogation lien under

N.C.G.S. § 97-10.2. We conclude that, by an endorsement to the UIM policy covering the vehicle that decedent was driving when he was killed, South Carolina insurance law applies, and it bars subrogation of UIM proceeds. S.C. Code § 38-77-160 (2015). Therefore, the UIM proceeds that plaintiff recovered from the wrongful death lawsuit may not be used to satisfy defendants' workers' compensation lien under N.C.G.S. § 97-10.2. Accordingly, we reverse and remand for further proceedings not inconsistent with this opinion.[1]

Factual and Procedural Background

On 16 May 2012, Robert Lee Walker (decedent), plaintiff's husband and an employee of defendant K&W Cafeterias (K&W), was involved in a motor vehicle accident with a third-party in Dillon, South Carolina. Decedent died as a result of his injuries. The vehicle that decedent was driving was owned by K&W, a North Carolina corporation headquartered in Winston-Salem, North Carolina.

Prior to the occurrence of the accident in which Mr. Walker died, the vehicle insurance policy applicable here was modified by an endorsement, pertinent parts of which are quoted below:

> THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
>
> SOUTH CAROLINA UNDERINSURED MOTORISTS COVERAGE
>
> For a covered "auto" licensed or principally garaged in, or "garage operations" conducted in South Carolina, this endorsement modifies insurance provided under the following:
>
> BUSINESS AUTO COVERAGE FORM
> GARAGE COVERAGE FORM
> MOTOR CARRIER COVERAGE FORM
> TRUCKERS COVERAGE FORM
>
> With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

1. Because of this holding, we need not—and do not—reach the issue of whether the Commission erred in ordering that any workers' compensation lien could be satisfied by distributing UIM proceeds held for wrongful death beneficiaries who never received workers' compensation benefits.

> A. Coverage
>
> 1. We will pay in accordance with the South Carolina Underinsured Motorists Law all sums the "insured" is legally entitled to recover as damages from the owner or driver of an "underinsured motor vehicle."
>
> . . . .
>
> E. Changes In Conditions
>
> . . . .
>
> 5. The following provision is added:
>
> CONFORMITY TO STATUTE
>
> This endorsement is intended to be in full conformity with the South Carolina Insurance Laws. If any provision of this endorsement conflicts with that law, it is changed to comply with the law.

Decedent's widow, Gwendolyn Dianette Walker, filed a workers' compensation claim with the North Carolina Industrial Commission (the Commission) for medical expenses and death benefits resulting from decedent's death under N.C.G.S. § 97-38–40. On 7 January 2013, the Commission entered a Consent Opinion and Award ordering defendants to pay $333,763 in workers' compensation benefits to plaintiff.[2]

In 2014, plaintiff, as representative of decedent's estate, filed a new and separate civil action in South Carolina—a wrongful death case seeking damages from the driver of the motor vehicle (the third-party) who was at fault in the accident that resulted in Mr. Walker's death. In 2016, plaintiff and the third-party reached a settlement agreement, according to which plaintiff recovered a total of $962,500 on behalf of decedent's estate. The recovery included: (1) $50,000 in liability benefits from the third-party's insurer; (2) $12,500 in personal UIM proceeds from plaintiff's and decedent's own personal UIM policy; and (3) $900,000 in UIM proceeds from a commercial UIM policy that K&W purchased with its automobile insurance carrier.

On 21 March 2016, Liberty Mutual Insurance Co.—the workers' compensation insurance carrier for K&W and co-defendant in this

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2. Because all of the decedent's children were adults at the time of his death, under the statute, only the widow was entitled to the death benefit. N.C.G.S. § 97-39; N.C.G.S. § 97-2(12) (" 'Child,' 'grandchild,' 'brother,' and 'sister' include only persons who at the time of the death of the deceased employee are under 18 years of age.").

case—filed a request for a hearing with the North Carolina Industrial Commission in which it sought repayment of the workers' compensation death benefits it had paid to plaintiff beginning in 2013, claiming a lien under N.C.G.S. § 97-10.2 on the UIM proceeds that she recovered from the South Carolina wrongful death settlement in 2016.

On 30 March 2016, plaintiff filed a declaratory judgment action against defendants in South Carolina, asserting that S.C. Code § 38-77-160 precluded subrogation and assignment to defendants of the UIM proceeds that plaintiff had been awarded in the settlement. On 2 May 2016, defendants removed the action to the United States District Court for the District of South Carolina on the basis of diversity jurisdiction. The United States District Court ultimately abstained from hearing the declaratory judgment action.

Meanwhile, on 13 June 2016, plaintiff filed a motion in the North Carolina Industrial Commission to stay all proceedings on defendants' subrogation claim there, pending the result of the federal litigation. Plaintiff's motion was denied on 28 June 2016. Plaintiff then filed a motion to reconsider, which the Commission denied on 18 July 2016. Plaintiff appealed and filed another motion for stay. Plaintiff's appeal was heard by a Deputy Commissioner.

In its 10 July 2017 Opinion and Award, the Deputy Commissioner denied plaintiff's motion to stay the proceedings and ordered the distribution of plaintiff's entire recovery from the South Carolina wrongful death settlement with the at-fault driver (the third-party recovery). The Deputy Commissioner concluded that defendants were entitled to subrogation under N.C.G.S. § 97-10.2(f)(1)(c), (h), and ordered that defendants be reimbursed out of the third-party recovery for the $333,763 in workers' compensation benefits that they had paid to Mrs. Walker under the 7 January 2013 Consent Opinion and Award.

Plaintiff appealed the 10 July 2017 Opinion and Award to the Full Commission, which affirmed the Deputy Commissioner's decision. Plaintiff then appealed to the Court of Appeals.

The Court of Appeals affirmed, holding in pertinent part that "[t]he Full Commission correctly concluded Defendants could assert a subrogation lien for workers' compensation benefits paid to Plaintiff on the UIM policy proceeds obtained by Plaintiff in the South Carolina wrongful death action." *Walker v. K&W Cafeterias*, 264 N.C. App. 119, 133, 824 S.E.2d 894, 904 (N.C. Ct. App. 2019). As explained below, we conclude that defendants may not satisfy their workers' compensation lien by collecting from plaintiff's recovery of UIM proceeds in her South

Carolina wrongful death settlement. Accordingly, we reverse the decision of the Court of Appeals.

Analysis

First, we emphasize that this case is not plaintiff's workers' compensation claim. That claim was fully resolved in 2013 when death benefits were paid to plaintiff under the Workers' Compensation Act due to Mr. Walker's work-related death. Instead, here we review what should happen to over $900,000 that was paid to plaintiff in the South Carolina wrongful death settlement with the at-fault driver. That settlement was reached in 2016, and to date, the money remains in the trust account of plaintiff's attorneys.

Because the 2012 workers' compensation case was brought in North Carolina, Liberty Mutual sought to have the Commission order plaintiff to reimburse the workers' compensation benefits she had been paid with the as-yet-undistributed recovery she received in her South Carolina wrongful death settlement. Although the Commission and the Court of Appeals concluded that Liberty Mutual could be reimbursed with plaintiff's wrongful death UIM proceeds, we disagree.

For the reasons below, we conclude that the South Carolina UIM policy—a contract to which defendants are party and according to which the wrongful death settlement proceeds were paid—controls the outcome here. That policy requires the application of South Carolina law to the payment of UIM proceeds. Under South Carolina UIM law, an insurer is barred, without exception, from seeking to be reimbursed with UIM proceeds for benefits it has previously paid. S.C. Code § 38-77-160 ("Benefits paid pursuant to this section are not subject to subrogation and assignment."). Accordingly, we reverse the decision of the Court of Appeals and remand to the Commission for proceedings not inconsistent with this opinion.

This case presents a single issue of law, i.e., a conclusion of law by the Commission, which we review de novo. N.C.G.S. § 97-86 ("The award of the Industrial Commission . . . shall be conclusive and binding as to all questions of fact; but either party to the dispute may, within 30 days . . . appeal from the decision of the Commission . . . for errors of law . . . . The procedure for the appeal shall be as provided by the rules of appellate procedure.").

We must determine whether to apply North Carolina or South Carolina law to the attempted subrogation of plaintiff's wrongful death settlement UIM proceeds. The Court of Appeals analyzed this question

as an abstract choice of law issue and concluded that North Carolina law applies. *See Walker*, 264 N.C. App. at 131, 824 S.E.2d at 902–03 (discussing *Anglin v. Dunbar Armored, Inc.*, 226 N.C. App. 203, 742 S.E.2d 205 (2013)). We do not agree with the conclusion that this case presents a choice of law issue; instead we conclude that this issue is properly analyzed under contract law interpreting a choice-of-law clause. As we are basing our decision on contractual terms rather than legal principles related to choice of law, we need not—and do not—go beyond the contract as modified by its endorsement; by the explicit terms of that contract, the UIM proceeds are paid and governed by South Carolina law.

The dissent maintains that plaintiff's stipulation in 2012 to the jurisdiction of the Commission over her workers' compensation claim carries significance here. As noted above, this case is not the workers' compensation claim, but involves the settlement proceeds paid under a UIM policy to settle a civil action filed in South Carolina against the at-fault driver. Here, in the proceedings before the Commission, the parties' stipulations included the following:

> 1. . . . However, Plaintiff disputes if the Industrial Commission has personal or *in rem* jurisdiction to exercise authority over underinsured motorist ("UIM") proceeds paid under a South Carolina UIM policy . . . and whether those proceeds can be attached to satisfy Defendant's subrogation interest under N.C.[G.S.] § 97-10.2.
>
> 2. All parties are subject to and bound by the provisions of the North Carolina Workers' Compensation Act, N.C.[G.S.] § 97-1 *et seq.* ("the Act"), except to the extent that Plaintiff contends the Industrial Commission's jurisdiction might be limited because of the circumstances expressed in paragraph 1.

Unlike the stipulations entered in the workers' compensation claim, the ones above, which are included in the Full Commission's 2017 Opinion and Award, specifically reserve the arguments plaintiff raises here.

Defendants argue that the commercial UIM policy purchased by K&W is not a South Carolina UIM policy. Specifically, they point out that the parties stipulated before the Commission that the commercial UIM policy was purchased and entered into in North Carolina. Defendants argue that this fact is dispositive because, under N.C.G.S. § 58-3-1, an insurance policy is "deemed to be made" in North Carolina if it is the state where "applications for [the policy] are taken." N.C.G.S. § 58-3-1 (2019).

More significantly, defendants' argument overlooks the effect of the endorsement that was added to the commercial UIM policy on 7 July 2011, titled "South Carolina Underinsured Motorist Coverage." Specifically, the endorsement states that it "changes the policy."[3] The endorsement also states that it "is intended to be in full conformity with the South Carolina Insurance Laws" and that "[i]f any provision of this endorsement conflicts with that law, it is changed to comply with the law." Further, the endorsement states that "[the insurance carrier] will pay in accordance with the South Carolina Underinsured Motorists Law." The clear intent and effect of this endorsement was to provide for the application of South Carolina law to all UIM payments under the policy.

Furthermore, the vehicle operated by decedent at the time of the accident fell within the categories of vehicles for which the policy endorsement intended to apply South Carolina law. The endorsement modified the insurance policy for "a covered 'auto' licensed or principally garaged in" South Carolina. As found by the Commission in the 10 July 2017 Opinion and Award, the vehicle decedent was driving at the time of the accident was registered, garaged, and driven in South Carolina. These factors, and the fact that the policy endorsement explicitly provided as a matter of contract that South Carolina UIM law would apply to payments made under the commercial UIM policy, demonstrate that South Carolina law should apply here. Accordingly, we hold that the endorsement requires South Carolina UIM law to apply here.[4]

The applicable South Carolina statutes include the following:

> All contracts of insurance on property, lives, or interests in this State are considered to be made in the State . . . and are subject to the laws of this State.

S.C. Code § 38-61-10 (2015).

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3. Even under North Carolina insurance law, an endorsement like this one that "changes the contract" becomes part of that contract and is treated as such. *See e.g.*, *Scottsdale Ins. Co v. Travelers Indem. Co.*, 152 N.C. App. 231, 234, 566 S.E.2d 748, (2002) (treating the endorsement as part of the contract for the purposes of construing ambiguity in favor of the insured).

4. The dissent suggests that the intent of the North Carolina General Assembly in its Workers' Compensation Act controls the distribution of the UIM proceeds in the South Carolina civil case. However, K&W purchased the UIM policy and specifically agreed therein that any such payments be covered by South Carolina law. Because we conclude that the UIM payments here are governed by South Carolina law under the terms of the policy contract, we conclude that the intent of the North Carolina General Assembly does not control.

> Additional uninsured motorist coverage; underinsured motorist coverage. Automobile insurance carriers shall offer, at the option of the insured, uninsured motorist coverage [and] underinsured motorist coverage, up to the limits of the insured liability coverage. . . . Benefits paid pursuant to this section are not subject to subrogation and assignment.

S. C. Code § 38-77-160.

By its plain language, S.C. Code § 38-77-160 prohibits subrogation of UIM payments like those paid to plaintiff in her wrongful death settlement. Accordingly, having concluded that South Carolina law applies to proceeds paid under Liberty Mutual's UIM insurance policy, defendants' subrogation lien under N.C.G.S. § 97-10.2 cannot be satisfied by the UIM proceeds that plaintiff received as part of the wrongful death settlement.

The dissent here proposes, without explanation or authority, that applying South Carolina law as required by the contract would allow for "double recovery." There can be no double recovery in these circumstances, where Mrs. Walker was awarded workers' compensation death benefits, a limited statutory remedy designed to pay some part of lost wages, medical and funeral expenses only. The UIM proceeds, limited by statute to one million dollars, are also provided by law as a limited remedy to give at least some recovery to the victims of an underinsured at-fault driver. Neither remedy (nor the two combined) purports to fully compensate Mrs. Walker or her six grown children for their losses due to Mr. Walker's death, let alone to exceed any actual damages they have suffered. Moreover, if defendants here were permitted to recover more than $300,000 out of the UIM proceeds, the grown children (who were not eligible to receive the workers' compensation benefits) would be deprived in significant part of even that limited remedy. We see no indication of a double recovery here.

## Conclusion

Because we conclude that South Carolina law applies and prohibits the subrogation of the UIM proceeds paid on account of decedent's death, we reverse and remand to the Commission for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice NEWBY dissenting.

This case asks whether a plaintiff who seeks benefits under the North Carolina Workers' Compensation Act (the Act) subjects herself to North Carolina's accompanying remedial laws, including those concerning subrogation. Under the General Assembly's carefully crafted statutory scheme, when a plaintiff chooses to file for benefits under the Act, the plaintiff also accepts the accompanying provisions regarding subrogation. Plaintiff had the option to proceed under either North Carolina or South Carolina's workers' compensation acts; plaintiff chose the more generous North Carolina Act. In her initial proceeding to obtain benefits under North Carolina's Act, plaintiff stipulated that she was "subject to and bound by the provisions of the North Carolina Workers' Compensation Act" and that "[t]he North Carolina Industrial Commission has jurisdiction over the parties and the subject matter involved in this case." Having availed herself of the benefits under the Act, she is also bound by the terms of North Carolina's remedial laws, including those allowing an employer to subrogate recoveries from third-parties which prevent double recoveries. Because plaintiff received a separate third-party recovery after defendants had provided benefits under the Act, defendants are entitled to proceed under the Act to seek subrogation of those proceeds. As such, the Court of Appeals properly affirmed the Industrial Commission's holding that plaintiff's wrongful death proceeds were subject to subrogation.

To reach its outcome, the majority, however, mischaracterizes the issue here and relies solely on what it terms as contract law and South Carolina insurance law. The majority ignores that plaintiff chose to file for workers' compensation in North Carolina and, as such, subjected herself to all aspects of the Act. The majority allows a plaintiff to choose the best parts of the Act, permitting plaintiff to obtain the full benefits of the Act without being subject to the accompanying subrogation provisions designed to prevent double recovery. By doing so, the majority essentially rewrites the North Carolina Workers' Compensation Act by deleting the comprehensive nature of its provisions. The majority ultimately concludes that so long as there is a rider to the insurance policy applying a state's law that prohibits subrogation, a plaintiff who has an accident outside of North Carolina but files for benefits in North Carolina may be eligible for double recovery.[1] Because plaintiff chose to

1. Moreover, the full ramifications of the majority decision are unclear given that there are numerous companies located in North Carolina that do business in other states and have similar riders on their insurance policies conforming the policies to the laws of the other states. The majority's holding will certainly have a significant impact on the insurance premiums that North Carolina companies pay.

proceed under North Carolina Workers' Compensation Act, she is bound by the subrogation provision of N.C.G.S. § 97-10.2(f) (2019). As the Court of Appeals held, the proceeds from the separate third-party recovery she obtained are subject to subrogation by the employer. Accordingly, I respectfully dissent.

Decedent, a South Carolina resident, was killed in a vehicular accident in South Carolina, driving a truck owned by his employer, K&W Cafeterias, Inc., a North Carolina corporation. A third party caused the accident. K&W had insured the truck under a blanket vehicular insurance policy purchased and entered into within North Carolina. Because K&W conducted business in South Carolina, the policy contained a required endorsement providing the coverage to be in conformity with "South Carolina Insurance Laws."[2]

The deceased employee's widow (plaintiff), a South Carolina resident, could have pursued workers' compensation benefits under North Carolina or South Carolina law, because the deceased was employed by a North Carolina corporation. On 21 August 2012, plaintiff decided to file for death benefits under North Carolina's Workers' Compensation Act. As a part of plaintiff's initial action seeking death benefits under the Act, the parties stipulated the following:

> 1. The date of the admittedly compensable injury that is the subject of this claim is May 16, 2012. On that date, Employee-Plaintiff died as the result of a motor vehicle accident arising out of and in the course of his employment with Defendant-Employer.
>
> 2. At all relevant times, the parties hereto were subject to and bound by the provisions of the North Carolina Workers' Compensation Act.
>
> . . . .
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> 6. The North Carolina Industrial Commission has jurisdiction over the parties and the subject matter involved in this case.

Based on the stipulations and other evidence, the Industrial Commission entered an order requiring defendants to pay plaintiff a total of $333,763 in benefits.

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2. K&W, doing business in multiple states, had multiple endorsements in its UIM policy, including endorsements or financial responsibility identification cards for Florida, West Virginia, and Virginia.

On 26 August 2014, after accepting benefits under the North Carolina Workers' Compensation Act, plaintiff, the appointed representative of decedent's estate, filed a wrongful death and survival action in South Carolina against the at-fault driver and his father. In March 2016, about a year and a half after plaintiff filed the action, the parties settled the lawsuit, from which plaintiff received $962,500 (the third-party settlement). The settlement consisted of (1) $50,000 in liability benefits from the at-fault driver's insurer under a South Carolina insurance policy; (2) $12,500 from the underinsured motorist (UIM) coverage of plaintiff and decedent's own personal vehicle from their automobile insurance carrier; and (3) $900,000 in commercial UIM coverage from employer K&W's automobile insurance carrier pursuant to their commercial UIM coverage for the vehicle decedent was driving when the accident occurred. Throughout the proceeding, plaintiff has conceded that the $50,000 in benefits provided from the at-fault driver's insurer through a South Carolina insurance policy is subject to subrogation under both North Carolina law and South Carolina law.

On 21 March 2016, defendants filed the appropriate form with the North Carolina Industrial Commission for a subrogation lien of $333,763 against the $962,500 that plaintiff had received from the third-party settlement. Defendants proceeded under the relevant portion of the Act that allows a defendant to be subrogated against any recovery. Plaintiff had initially stipulated that she was subject to the North Carolina Industrial Commission's jurisdiction when she filed to receive benefits. However, after receiving full benefits, when defendants filed for subrogation, plaintiff for the first time disputed whether the Industrial Commission had jurisdiction over the UIM policy proceeds, and whether those proceeds were subject to subrogation under N.C.G.S. § 97-10.2.[3] On 10 July 2017, the deputy commissioner ruled in defendants' favor, finding that plaintiff must satisfy defendants' $333,763 subrogation lien from the $962,500 third-party settlement.

Plaintiff then appealed to the full Industrial Commission, which ultimately held that defendants were entitled to a subrogation lien of the entire third-party settlement proceeds, "not just [plaintiff's] share of the Third-Party Recovery." The Commission reasoned that "[p]laintiff voluntarily triggered the Commission's jurisdiction by filing a claim for benefits under the Act and obtaining a final award of

3. The majority does not discuss the stipulations entered into initially by the parties and seems to confuse those stipulations with the stipulations made later when plaintiff was contesting defendants' subrogation rights.

benefits via the Consent Opinion and Award, in which [p]laintiff explicitly acknowledged the applicability of the Act and the jurisdiction of the Commission." Moreover, because plaintiff was seeking relief in North Carolina, where she willingly chose to file for benefits under the Act, and because N.C.G.S. § 97-10.2 is remedial in nature, the Commission concluded as a matter of law that the statute allowed defendants to seek subrogation of the relevant portion of the wrongful death proceeds. Essentially, plaintiff's choice to subject herself to the benefits of the Act also warranted the application of the relevant procedural subrogation provision as provided by the North Carolina legislature.

The Court of Appeals upheld the full Commission's decision, holding that defendants were entitled to a lien against the third-party settlement proceeds. *Walker v. K&W Cafeterias*, 824 S.E.2d 894, 904 (N.C. Ct. App. 2019). The Court of Appeals reasoned, *inter alia*, that regardless of whether the UIM policy was a South Carolina policy, plaintiff had chosen North Carolina as the forum state in which to file for benefits, and thus North Carolina law would apply as the law of the forum state. *Id.* at 903–04. This rationale is consistent with *Anglin v. Dunbar*, which reaffirmed that remedial rights are determined by the law of the forum state. *Id.* (citing *Anglin v. Dunbar Armored, Inc.*, 226 N.C. App. 203, 204–05, 209–10, 824 S.E.2d 894, 206–07, 209 (2013)). As such, the Court of Appeals in this case concluded that defendants were entitled to seek subrogation of the wrongful death proceeds. *Id.* at 904.

The question presented here is whether the General Assembly intended for someone who receives benefits under the Act to be bound by its remedial provisions. "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).

The North Carolina legislature has chosen to provide generous compensation for injured workers and their heirs through the North Carolina Workers' Compensation Act. "[T]he purpose of the North Carolina Workers' Compensation Act is not only to provide a swift and certain remedy to an injured worker, but is also to ensure a limited and determinate liability for employers." *Estate of Bullock v. C.C. Mangum Co.*, 188 N.C. App. 518, 522, 655 S.E.2d 869, 872 (2008) (citing *Barnhardt v. Cab Co.*, 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966)).

Notably, the Act is comprehensive. Given the fact that the Act provides extensive and generous benefits to individuals, the legislature has balanced an employer's duty to provide compensation with its right to subrogate those benefits where an individual or estate receives a second, separate recovery for the same injury. "The legislative intent behind the Workers' Compensation Act is not to provide an employee with a windfall of a recovery from both the employer and the third-party tortfeasor." *Id.* (citing *Radzisz v. Harley Davidson of Metrolina*, 346 N.C. 84, 89, 484 S.E.2d 556, 569 (1997)). Thus, section 97-10.2 provides that an employer may obtain a subrogation lien, to the extent of the amount of benefits paid, against certain third-party recovery amounts. The statute sets forth that:

> (f)(1) . . . if an award final in nature in favor of the employee has been entered by the Industrial Commission, *then any amount obtained by any person by settlement with*, *judgment against*, or otherwise from the third party by reason of such injury or death *shall* be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:
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> . . . .
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> c. Third to the reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.
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> . . . .
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> (h) *In any . . . settlement with the third party*, *every party to the claim for compensation shall have a lien to the extent of his interes*t under (f) hereof upon any payment made by the third party by reason of such injury or death . . . and such lien may be enforced *against any person receiving such funds.*

N.C.G.S. § 97-10.2 (emphases added).

Whether this statute applies here also depends on if section 97-10.2 is substantive or remedial. *Lex loci*, or the "law of the jurisdiction in which the transaction occurred or circumstances arose on which the litigation is based," governs substantive laws. *Cook v. Lowe's Home Centers*, *Inc.*, 209 N.C. App. 364, 366, 704 S.E.2d 567, 569 (2011) (citing *Charnock v. Taylor*, 223 N.C. 360, 361, 26 S.E.2d 911, 913 (1943)).

Alternatively, *lex fori*, or "the law of the forum in which the remedy is sought," governs when the statute at issue is remedial. *Id.*

"Where a lien is intended to protect the interests of those who supply the benefit of assurance that any work-related injury will be compensated, it is remedial in nature." *Id.* at 367, 704 S.E.2d at 570. Because N.C.G.S. § 97-10.2(f), like N.C.G.S. § 97-10.2(j), "is remedial in nature and remedial rights are determined by the law of the forum," *Anglin*, 226 N.C. App. at 209, 742 S.E.2d at 209 (cleaned up) (citation omitted), North Carolina law applies.

Here plaintiff chose to pursue workers' compensation benefits in North Carolina instead of pursuing benefits in her home state, which was also the location of the accident. As a part of her initial filing with the Industrial Commission seeking benefits under the Act, plaintiff explicitly stipulated that she was "subject to and bound by the provisions of the North Carolina Workers' Compensation Act" and that "the North Carolina Industrial Commission had jurisdiction over the parties and the subject matter involved in this case." Thus, plaintiff subjected herself to North Carolina jurisdiction by initially filing for benefits in North Carolina. In order to receive employer provided benefits under the Act, plaintiff necessarily consented to the application of North Carolina's remedial laws, as North Carolina is the forum state in this dispute.

Because N.C.G.S § 97-10.2(f) is remedial in nature, and because plaintiff consented to the application of North Carolina's remedial laws when she initially filed to receive benefits under the Act, plaintiff is bound by N.C.G.S § 97-10.2. Plaintiff chose to file for benefits in North Carolina, under the Act which provides generous benefits, but those benefits are also balanced by the corresponding subrogation provisions. On the other hand, South Carolina does not allow subrogation of UIM proceeds, but that balances the more limited benefits that it provides through its own workers' compensation act. Had plaintiff wanted the benefit of South Carolina's policy which prevents subrogation, she should have, and could have, filed for workers' compensation benefits in South Carolina. Simply put, the General Assembly did not intend for a plaintiff to choose to subject herself to North Carolina's jurisdiction to receive benefits, but reject North Carolina's jurisdiction when it comes to the remedial aspects of North Carolina's Workers' Compensation scheme, including an employer's ability to subrogate any proceeds that a plaintiff or estate receives from a third-party.

The majority concludes that plaintiff did not stipulate to the application of North Carolina law to the UIM proceeds since she did not

stipulate to this fact in the full Industrial Commission proceeding. In doing so, the majority ignores that plaintiff chose the forum state by filing for benefits under the Act, and by stipulating to the application of North Carolina's jurisdiction at that point, which results in the application of North Carolina remedial laws. The majority instead treats this case in a vacuum as one solely involving an insurance contract interpreting a choice-of-law clause. The majority also fails to acknowledge the comprehensive nature of the North Carolina Workers' Compensation Act, allowing a plaintiff to choose only the best portions of the Act.

Moreover, though the application is not entirely clear, it seems the majority's analysis will result on one hand in a North Carolina resident who has an accident in South Carolina achieving a double recovery by receiving workers' compensation benefits without subrogation. On the other hand, a North Carolina resident who has an accident in North Carolina would not achieve a double recovery as he would be subject to the subrogation statutes, even when both parties choose to file for benefits in North Carolina. Surely the North Carolina legislature did not intend to provide this windfall recovery to some individuals while limiting the recovery for others. The intent of the North Carolina legislature is relevant where a plaintiff subjects herself to benefits under the Act by filing in North Carolina, despite the majority's contention to the contrary.[4]

Plaintiff's policy and the rider here cannot be viewed in a vacuum as presenting only a question of contract law as the majority contends. By filing for benefits under the Act, plaintiff is bound by North Carolina's clearly established statutory provisions allowing subrogation of any third-party proceeds. N.C.G.S. § 97-10.2(f)(1), (h). The decision of the Court of Appeals upholding the decision of the Industrial Commission should be affirmed. I respectfully dissent.

4. The majority contends that since the recovering parties under workers' compensation and the UIM policy may be different, some may be deprived of recovery through subrogation under North Carolina law. This is a policy determination appropriately made by the legislature.

**IN RE D.A.A.R.**

[375 N.C. 269 (2020)]

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| IN RE D.A.A.R. AND S.A.L.R. | ) | Guilford County |

No. 224A20

ORDER

Respondent-Appellant Father's Motion to Dismiss his appeal is Allowed. Costs associated with this appeal shall be taxed as set forth in the mandate following issuance of an opinion in this matter.

By order of the Court in conference, this the 15th day of July 2020.

s/Davis, J.
For the Court

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

AMY L. FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy L. Funderburk
Clerk, Supreme Court of
North Carolina

**IN RE G.G.M.**

[375 N.C. 270 (2020)]

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| IN THE MATTER OF G.G.M. | ) | |
| | ) | |
| | ) | CABARRUS COUNTY |
| IN THE MATTER OF S.M. | ) | |
| | ) | |

No. 248A20 & 249A20

ORDER

On 9 June 2020, respondent-father moved for consolidation of *In re: G.G.M.* (248A20) and *In re: S.M.* (249A20). Pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure these motions are allowed. The cases are consolidated for all purposes including oral argument if the cases are argued. The parties will henceforth make their filings under file number 248A20 with a combined caption showing both file numbers and these cases also shall be calendared under file number 248A20.

By Order of this Court in Conference, this 10th 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 10th day of June, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
~~Assistant~~ Clerk

**STATE v. CLARK**

[375 N.C. 271 (2020)]

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| STATE OF NORTH CAROLINA | ) | |
| | ) | |
| v. | ) | Pitt County |
| | ) | |
| JAMES CLAYTON CLARK, JR. | ) | |

No. 286A20

ORDER

Defendant's petition for discretionary review of additional issues is denied with respect to Issue No. I and allowed with respect to Issue Nos. II and III.

Accordingly, the new brief of the Defendant shall be filed with this Court not more than 30 days from the date of certification of this order.

Therefore the case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 15(g)(2).

By order of the Court in conference, this the 12th day of August 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 August 2020.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
Clerk, Supreme Court of
North Carolina

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| STATE OF NORTH CAROLINA | ) | |
| v. | ) | Clay County |
| JOHN D. GRAHAM | ) | |

No. 155P20

ORDER

Defendant's petition for discretionary review is decided as follows: Allowed as to Issue No. II and denied as to Issue No. I.

Accordingly, the new brief of the Defendant shall be filed with this Court not more than 30 days from the date of certification of this order.

Therefore the case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 15(g)(2).

By order of the Court in conference, this the 12th day of August 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 August 2020.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
Clerk, Supreme Court of
North Carolina

**STATE v. HEWITT**

[375 N.C. 273 (2020)]

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| STATE OF NORTH CAROLINA | ) | |
| v. | ) | Catawba County |
| EVERETTE PORSHAU HEWITT | ) | |

No. 230P18

SPECIAL ORDER

Defendant's motion to amend the petition for discretionary review is allowed. The State's motion to dismiss the appeal is allowed and the motion to amend the notice of appeal is dismissed as moot. Defendant's petition for discretionary review is allowed as to Issues I and II for the limited purpose of remanding to the Court of Appeals for reconsideration in light of *State v. Hobbs*, 841 S.E.2d 492 (N.C. 2020).

By order of the Court in Conference, this the 12th day of August, 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 August, 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

**STATE v. OLDROYD**

[375 N.C. 274 (2020)]

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| STATE OF NORTH CAROLINA | ) | |
| | ) | |
| v. | ) | From Yadkin County |
| | ) | |
| MARC PETERSON OLDROYD | ) | |

No. 260A20

SPECIAL ORDER

The Motion to Withdraw as Counsel Based on Defendant-Appellee's Request filed herein on 3 August 2020 by Emily Holmes Davis, Assistant Appellate Defender and Glenn Gerding, Appellate Defender, Attorneys for Defendant is denied without prejudice to defendant's right to make a timely further showing of good cause for the relief sought whether on the record or in an *ex parte* motion by the Appellate Defender as permitted by Rule 3.5 of the Indigent Defense Services Rules.

By order of the Court in Conference, this the 5th day of August, 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 August, 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
Clerk, Supreme Court of
North Carolina

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

14 AUGUST 2020

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| 15P20 | Bettylou DeMarco v. Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System, Carolinas Physicians Network, Inc. d/b/a Cabarrus Family Medicine, P.A., and Cabarrus Family Medicine-Harrisburg, Carolinas Medical Center-Northeast d/b/a Northeast Women's Health & Obstetrics | 1. Defs' Notice of Appeal Based Upon a Constitutional Question<br>2. Defs' PDR Under N.C.G.S. § 7A-31 | 1. Dismissed *ex mero motu*<br>2. Denied |
| 52P20 | State v. Chelsea Joanna Collier | 1. Def's Notice of Appeal Based Upon a Constitutional Question<br>2. Def's PDR Under N.C.G.S. § 7A-31<br>3. State's Motion to Dismiss Appeal | 1. ---<br>2. Denied<br>3. Allowed |
| 54A19-3 | State v. Rogelio Albino Diaz-Tomas | 1. Def's Motion for Temporary Stay<br>2. Def's Petition for Writ of Supersedeas<br>3. Def's Notice of Appeal Based Upon a Dissent<br>4. Def's PDR as to Additional Issues<br>5. Def's Conditional Petition for Writ of Certiorari to Review Order of the COA<br>6. Def's Conditional Petition for Writ of Certiorari to Review Decision of District Court, Wake County<br>7. Def's Conditional Petition for Writ of Mandamus<br>8. Def's Motion to Expedite the Consideration of Defendant's Matters<br>9. Def's Motion to Proceed *In Forma Pauperis*<br>10. Def's Motion to Take Judicial Notice<br>11. Def's Motion for Leave to Amend Notice of Appeal<br>12. Def's Motion for Summary Reversal<br>13. Def's Motion to Supplement Record on Appeal | 1. Allowed **04/21/2020**<br>2. Allowed **06/03/2020**<br>3. ---<br>4.<br>5.<br>6.<br>7.<br>8.<br>9.<br>10.<br>11.<br>12.<br>13. |

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

14 AUGUST 2020

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| | | 14. Def's Motion to Consolidate Diaz-Tomas and Nunez Matters | 14. Allowed **06/30/2020** |
| | | 15. Def's Motion to Clarify the Extent of Supersedeas Order | 15. |
| | | 16. Def's Motion in the Alternative to Hold Certiorari and Mandamus Petitions in Abeyance | 16. |
| | | 17. Def's Motion to File Memorandum of Additional Authority | 17. Dismissed **07/08/2020** |
| 63P20 | The Trustee for Tradewinds Airlines, Inc., Tradewinds Holdings, Inc., and Coreolis Holdings, Inc. v. Soros Fund Management LLC, and C-S Aviation Services, Inc. | Plts' PDR Under N.C.G.S. § 7A-31 | Denied |
| 69P18-4 | State v. Nell Monette Baldwin | Def's Pro Se Petition for Writ of Habeas Corpus | Denied **07/10/2020**<br>**Beasley, C.J., recused**<br>**Morgan, J., recused** |
| 72P17-5 | State v. Lequan Fox | Def's Pro Se Motion for Writ of Prohibition | Denied **06/30/2020** |
| 73A20 | State v. Molly Martens Corbett and Thomas Michael Martens | 1. State's Motion for Temporary Stay | 1. Allowed **02/24/2020** |
| | | 2. State's Petition for Writ of Supersedeas | 2. Allowed **03/11/2020** |
| | | 3. State's Notice of Appeal Based Upon a Dissent | 3. --- |
| | | 4. Defs' Motion to Strike the State's Proposed Scope of Review | 4. Denied |
| | | 5. Defs' Motion to Limit the Scope of Review to the Issues Set Out in the Dissent | 5. Denied |
| | | 6. Defs' Motion to Amend the 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 | 6. Denied |
| | | 7. State's Petition for Writ of Certiorari to Review Decision of the COA | 7. Dismissed as moot |

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

14 AUGUST 2020

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| | | 8. State's Motion for Extension of Time to File Brief<br>9. State's Motion to Strike Portions of Defendant Molly Martens Corbett's New Brief<br>10. Def's (Molly Martens Corbett) Conditional Motion for Leave to Amend Citations in New Brief | 8. Allowed **03/20/2020**<br>9. Denied<br>10. Dismissed as moot<br>**Davis, J., recused** |
| 84P20 | State v. Tyrone Judea Hall, III | Def's PDR Under N.C.G.S. § 7A-31 | Denied |
| 91A20 | In the Matter of I.R.M.B. | Respondent-Father's Motion to File Amended Brief | Allowed **07/10/2020** |
| 98P20 | Randy Watterson v. North Carolina Department of Public Safety | Plt's Pro Se Petition for Writ of Certiorari to Review Order of the COA | Denied |
| 116P20 | Matthew Wagner, Lianne Lichstrahl, Brad Henke, and Victoria Siravo v. City of Charlotte | 1. Plts' Notice of Appeal Based Upon a Constitutional Question<br>2. Plts' PDR Under N.C.G.S. § 7A-31<br>3. Def's Motion to Dismiss Appeal | 1. ---<br>2. Denied<br>3. Allowed |
| 117P20 | Margaret Ann Light v. Venkat L. Prasad, M.D., and UNC Physicians Network, L.L.C. d/b/a Rex Family Practice of Wakefield, Fan Dong, P.A., and Fastmed Urgent Care, P.C. | Plt's PDR Under N.C.G.S. § 7A-31 | Denied<br>**Newby, J., recused** |
| 119PA18 | State v. Christopher B. Smith | 1. Def's Motion for Appropriate Relief<br>2. State's Motion for Extension of Time to File Response to Motion for Appropriate Relief<br>3. State's Motion for Extension of Time to File Appellee Brief<br>4. Def's Motion for Judicial Notice | 1. Denied<br>2. Allowed **07/19/2019**<br>3. Allowed **07/19/2019**<br>4. Allowed |
| 127A20 | In the Matter of H.A.J. and B.N.J. | Respondent-Mother's Motion to Amend the Record on Appeal | Allowed **06/05/2020** |

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

14 AUGUST 2020

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| 132P20 | Shahla Rezvani, individually and Parsi Corporation, a North Carolina Corporation v. Elizabeth Carnes, and Timothy Carnes | Defs' PDR Under N.C.G.S. § 7A-31 | Denied |
| 138P20 | State v. Gregory Alan Wheeling, Jr. | 1. Def's Notice of Appeal Based Upon a Constitutional Question<br>2. Def's PDR Under N.C.G.S. § 7A-31<br>3. State's Motion to Dismiss Appeal<br>4. Def's Motion for Leave to Amend Notice of Appeal and PDR | 1. ---<br>2. Denied<br>3. Allowed<br>4. Allowed |
| 139P20 | State v. Jamar Mexia Davis | Def's PDR Under N.C.G.S. § 7A-31 | Denied<br>**Davis, J., recused** |
| 142PA18 | DTH Media Corporation; Capitol Broadcasting Company, Inc., The Charlotte Observer Publishing Company; 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 | 1. Defs' Motion for Extension of Time to Respond to Petition for Writ of Mandamus and Motion in the Alternative for Order to Appear and Show Cause<br>2. Plaintiff-Appellees' Petition for Writ of Mandamus<br>3. Plaintiff-Appellees' Motion in the Alternative for Order to Appear and Show Cause<br>4. Plts' Motion to Withdraw Petition for Writ of Mandamus and Motion in the Alternative for Order to Appear and Show Cause | 1. Allowed up to and Including 27 July 2020 **07/17/2020**<br>2. ---<br>3. ---<br>4. Allowed **08/11/2020** |
| 151PA18 | State v. Ramar Dion Benjamin Crump | State's Motion to Reschedule Oral Argument | Allowed **07/15/2020** |
| 155P20 | State v. John D. Graham | 1. Def's Motion for Temporary Stay<br>2. Def's Petition for Writ of Supersedeas<br>3. Def's PDR Under N.C.G.S. § 7A-31 | 1. Allowed **04/03/2020**<br>2. Allowed<br>3. Special Order |

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

14 AUGUST 2020

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| 159A20 | In the Matter of L.D.D. | 1. Respondent-Father's Motion to Deem Proposed Record on Appeal Timely Served<br>2. Respondent-Father's Motion to Dismiss Motion | 1. ---<br>2. Allowed |
| 164P20-2 | State v. Wilmer de Jesus Cruz | 1. Def's Petition for Writ of Mandamus<br>2. Def's Motion to Withdraw Mandamus Petition | 1. ---<br>2. Allowed **07/16/2020** |
| 173P20 | State v. Andre Lamar Dixon | Def's PDR Under N.C.G.S. § 7A-31 | Denied |
| 184A19 | In the Matter of N.D.A. | Respondent-Father's Motion Requesting Permission to Disseminate his Brief | Allowed **07/14/2020** |
| 190A20 | Gay v. Saber Healthcare Group, L.L.C., et al. | 1. Defs' Notice of Appeal Based Upon a Dissent<br>2. The North Carolina Advocates for Justice's Motion for Leave to File Amicus Brief | 1. ---<br>2. Allowed **07/08/2020** |
| 202P20 | State v. Devanda Carlet Boone | 1. Def's PDR Under N.C.G.S. § 7A-31<br>2. State's Motion to Deem Response to PDR Timely Filed | 1. Denied<br>2. Allowed |
| 210P20 | State v. Quamaine Lee Massey | 1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Anson County<br>2. Def's Pro Se Motion to Proceed *In Forma Pauperis*<br>3. Def's Pro Se Motion to Appoint Counsel | 1. Dismissed<br>2. Allowed<br>3. Dismissed as moot |
| 211P20 | State v. Gregory Richardson | 1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County<br>2. Def's Pro Se Motion to Proceed *In Forma Pauperis*<br>3. Def's Pro Se Motion to Appoint Counsel | 1. Dismissed<br>2. Allowed<br>3. Dismissed as moot |
| 212P20 | State v. Ismael Santiago Rivera | Def's Pro Se PDR Under N.C.G.S. § 7A-31 | Denied |
| 215P20 | In the Matter of C.R.R., M.N.H. | 1. Respondent-Mother's Pro Se Motion for En Banc Rehearing<br>2. Petitioner's Motion to Release Filings by Mother | 1. Dismissed<br>2. Allowed **07/08/2020** |

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

14 AUGUST 2020

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| 216A20 | Cummings v. Carroll, et al. | 1. Defs' (Brooke Elizabeth Rudd-Gaglie f/k/a Brooke Elizabeth Rudd, Margaret Rudd & Associates, Inc., and James C. Goodman) Notice of Appeal Based Upon a Dissent | 1. --- |
| | | 2. Defs' PDR Under N.C.G.S. § 7A-31 | 2. |
| | | 3. Defs' (Robert Patton Carroll and DHR Sales Corps d/b/a ReMax Community Brokers) Notice of Appeal Based Upon a Dissent | 3. --- |
| | | 4. Defs' (Berkeley Investors, LLC and George C. Bell) Motion to Stay Briefing Schedule and Set Briefing Deadlines | 4. Allowed **06/18/2020** |
| 217A19 | In the Matter of E.J.B., R.S.B. | Petitioner's Motion to Dismiss Appeal | Denied<br>**Davis, J., recused** |
| 223P20 | State v. James Albert Hayner | 1. Def's Notice of Appeal Based Upon a Constitutional Question | 1. --- |
| | | 2. Def's PDR Under N.C.G.S. § 7A-31 | 2. Denied |
| | | 3. Def's Petition for Writ of Certiorari to Review Decision of the COA | 3. Denied |
| | | 4. State's Motion to Dismiss Appeal | 4. Allowed |
| 224A20 | In the Matter of D.A.A.R. and S.A.L.R. | Respondent-Father's Motion to Dismiss Appeal | Special Order **07/15/2020** |
| 225A20 | State v. Robert Prince | 1. State's Motion for Temporary Stay | 1. Allowed **05/26/2020** |
| | | 2. State's Petition for Writ of Supersedeas | 2. Allowed **06/10/2020** |
| | | 3. State's Notice of Appeal Based Upon a Dissent | 3. --- |
| 230P18 | State v. Everette Porshau Hewitt | 1. Def's Notice of Appeal Based Upon a Constitutional Question | 1. Special Order |
| | | 2. Def's PDR Under N.C.G.S. § 7A-31 | 2. Special Order |
| | | 3. State's Motion to Dismiss Appeal | 3. Special Order |
| | | 4. Def's Motion to Amend Notice of Appeal | 4. Special Order |
| | | 5. Def's Motion to Amend PDR | 5. Special Order |

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

14 AUGUST 2020

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| 230A20 | In the Matter of B.T.J. | 1. Petitioner's Motion to Withdraw as Counsel<br><br>2. Petitioner's Motion to Substitute Counsel | 1. Allowed **07/14/2020**<br><br>2. Allowed **07/14/2020** |
| 233A19 | In the Matter of A.B.C. | 1. Respondent-Mother's Motion Requesting Permission to Disseminate her Brief<br><br>2. Petitioner's Motion to Dismiss Appeal | 1. Allowed **07/14/2020**<br><br>2. Denied **07/17/2020** |
| 233A20 | State v. Johnathan Ricks | 1. State's Motion for Temporary Stay<br><br>2. State's Petition for Writ of Supersedeas<br><br>3. State's Notice of Appeal Based Upon a Dissent | 1. Allowed **05/27/2020**<br><br>2. Allowed **06/10/2020**<br><br>3. --- |
| 234P20 | State v. Kelvin Alphonso Alexander | Def's PDR Under N.C.G.S. § 7A-31 | Allowed |
| 246P20 | State v. Dontae Nobles | Def's Pro Se Motion to be Released | Dismissed **07/10/2020** |
| 248A20 | In the Matter of G.G.M. | Respondent-Father's Motion to Consolidate Appeals | Special Order **06/10/2020** |
| 249A20 | In the Matter of S.M. | Respondent-Father's Motion to Consolidate Appeals | Special Order **06/10/2020** |
| 251P20 | State v. Pedro Reyes | Def's Pro Se Motion for Discretionary Review of Denial of Discovery and Legal Principles | Dismissed |
| 254P18-4 | State v. Jimmy A. Sevilla-Briones | 1. Def's Pro Se Motion for Demonstrations of Exhaust of State Remedies<br><br>2. Def's Pro Se Motion to Appoint Counsel | 1. Denied **07/09/2020**<br><br>2. Dismissed as moot **07/09/2020** |
| 256P20 | State v. Perry L. Pitts | 1. Def's Notice of Appeal Based Upon a Constitutional Question<br><br>2. Def's PDR Under N.C.G.S. § 7A-31<br><br>3. State's Motion for Extension of Time to Respond to Notice of Appeal and PDR<br><br>4. State's Motion to Dismiss Appeal | 1.<br><br>2.<br><br>3. Allowed **06/16/2020**<br><br>4. |

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

14 AUGUST 2020

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| 258P20 | State v. Kevin Jamal Haqq | 1. Def's Pro Se Motion for Appropriate Relief<br>2. Def's Pro Se Motion to Proceed *In Forma Pauperis*<br>3. Def's Pro Se Motion to Appoint Counsel | 1. Dismissed<br>2. Allowed<br>3. Dismissed as moot |
| 260A20 | State v. Marc Peterson Oldroyd | 1. State's Motion for Temporary Stay<br>2. State's Petition for Writ of Supersedeas<br>3. State's Notice of Appeal Based Upon a Dissent<br>4. Def's Motion to Withdraw as Counsel and Direct Appellate Defender to Assign Different Counsel | 1. Allowed **06/05/2020**<br>2. Allowed **06/24/2020**<br>3. ---<br>4. Special Order **08/05/2020** |
| 262A20 | In the Matter of J.E., F.E., D.E. | 1. Petitioner's Motion to Withdraw as Counsel<br>2. Petitioner's Motion to Substitute Counsel | 1. Allowed **07/14/2020**<br>2. Allowed **07/14/2020** |
| 265P15-2 | State v. Walter Timothy Gause | Def's Pro Se Petition for Writ of Habeas Corpus | Denied **07/16/2020** |
| 274P15-7 | State v. Robert K. Stewart | Def's Pro Se Motion to Recuse | Dismissed |
| 274P20 | State v. Donavan Richardson | Def's PDR Under N.C.G.S. § 7A-31 | Denied |
| 277P20 | State v. James Edsal Baker | 1. Def's Motion for Temporary Stay<br>2. Def's Petition for Writ of Supersedeas<br>3. Def's PDR Under N.C.G.S. § 7A-31 | 1. Allowed **06/19/2020**<br>2.<br>3. |
| 278P20 | State v. Thomas Clinton Judd, Jr. | Def's Pro Se Motion for Relief | Dismissed **06/26/2020** |
| 279A20 | State v. Demon Hamer | 1. Def's Motion for Temporary Stay<br>2. Def's Petition for Writ of Supersedeas<br>3. Def's Notice of Appeal Based Upon a Dissent | 1. Allowed **06/22/2020**<br>2. Allowed **07/14/2020**<br>3. --- |
| 284P20 | State v. Jeremy Wade Dew | Def's PDR Under N.C.G.S. § 7A-31 | Allowed |

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

14 AUGUST 2020

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| 286A20 | State v. James Clayton Clark, Jr. | 1. Def's Notice of Appeal Based Upon a Dissent<br><br>2. Def's PDR as to Additional Issues | 1. ---<br><br>2. Special Order |
| 287P20 | Topping v. Meyers, et al. | 1. Def's Notice of Appeal Based Upon a Constitutional Question<br><br>2. Def's PDR Under N.C.G.S. § 7A-31<br><br>3. Plt's Motion for Extension of Time to Respond to PDR and Notice of Appeal<br><br>4. Plt's Motion for Extension of Time to Respond to PDR and Notice of Appeal<br><br>5. Plt's Motion to Dismiss Appeal | 1.<br><br>2.<br><br>3. Denied **06/26/2020**<br><br>4. Allowed **07/01/2020**<br><br>5. |
| 297P20 | State v. Kenneth M. Flippin | Def's Pro Se Motion for Release | Denied **06/25/2020** |
| 299P20 | State v. Divine Wheeler | Def's Pro Se Motion for Speedy Trial | Dismissed **06/29/2020** |
| 300P20 | State v. Mark Bumphus, Jr. | Def's Pro Se Petition for Writ of Mandamus | Denied |
| 301P16-4 | State v. Michael Anthony Taylor | 1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA<br><br>2. Def's Pro Se Motion to Proceed *In Forma Pauperis* | 1. Denied<br><br>2. Allowed |
| 305P17-2 | State v. William Jesse Buchanan | 1. Def's Pro Se PDR Under N.C.G.S. § 7A-31<br><br>2. Def's Pro Se Motion to Proceed *In Forma Pauperis*<br><br>3. Def's Pro Se Motion to Appoint Counsel | 1. Denied<br><br>2. Allowed<br><br>3. Dismissed as moot<br><br>**Davis, J., recused** |
| 305P20 | In the Matter of Frank Anonymous | Plt's Pro Se Motion to Nullify Emergency Orders, Give Power Back to People of NC | Dismissed **07/02/2020** |
| 306A20 | Sound Rivers, Inc., et al. v. N.C. Department of Environmental Quality, et al. | 1. Petitioners' Notice of Appeal Based Upon a Dissent<br><br>2. Respondent-Intervenor's PDR Under N.C.G.S. § 7A-31<br><br>3. Joint Motion to Extend Time and Set Briefing Schedule | 1. ---<br><br>2.<br><br>3. Allowed **07/27/2020** |

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

14 AUGUST 2020

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| 314PA20 | N.C. Bowling Proprietors Association, Inc. v. Roy A. Cooper, III | 1. Def's Motion for Temporary Stay<br><br>2. Plts' Motion to Dismiss Appeal<br><br>3. Def's Petition in the Alternative for Writ of Certiorari to Review Order of Superior Court, Wake County<br><br>4. Def's Petition for Writ of Supersedeas<br><br>5. Joint Motion to Set Briefing Deadlines | 1. Allowed **07/14/2020**<br><br>2 . Dismissed as moot **07/14/2020**<br><br>3. Allowed **07/14/2020**<br><br>4. Allowed **07/21/2020**<br><br>5. Allowed **07/15/2020** |
| 317P19 | In the Matter of Phillip Entzminger, Assistant District Attorney Prosecutorial District 3A | 1. Respondent's Motion for Temporary Stay<br><br>2. Respondent's Petition for Writ of Supersedeas<br><br>3. Respondent's PDR Under N.C.G.S. § 7A-31 | 1. Allowed **08/15/2019** Dissolved **08/12/2020**<br><br>2. Denied<br><br>3. Denied |
| 319P20 | Adrian D. Murray v. Global Tel Link and N.C. Department of Public Safety | Plt's Pro Se Petition for Writ of Mandamus | Dismissed **07/14/2020** |
| 323P20 | State v. Lance Marshall | Def's Pro Se Motion for Case Review | Denied |
| 328P20 | State of North Carolina, et al. v. Stratton | Petitioner's Pro Se Emergency Petition for Writ of Certiorari to Review Order of the COA | Denied **07/20/2020** |
| 330A19-2 | State v. Jesse James Tucker | 1. State's Motion for Temporary Stay<br><br>2. State's Petition for Writ of Supersedeas<br><br>3. Def's Motion to Dissolve Temporary Stay<br><br>4. Def's Motion to Dismiss Petition for Writ of Supersedeas<br><br>5. State's PDR Under N.C.G.S. § 7A-31 | 1. Allowed **07/02/2020**<br><br>2. Denied **07/08/2020**<br><br>3. Allowed **07/08/2020**<br><br>4. Dismissed as moot **07/08/2020**<br><br>5. |

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

14 AUGUST 2020

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| 335P20 | Tony Ray Simmons, Jr. v. John Lee Wiles | 1. Def's Motion for Temporary Stay<br>2. Def's Petition for Writ of Supersedeas<br>3. Def's PDR Under N.C.G.S. § 7A-31 | 1. Allowed **07/22/2020**<br>2.<br>3. |
| 341P20 | State v. Tymik Daijon Lasenburg | 1. Def's Petition for Writ of Certiorari to Review Order of the COA<br>2. Def's Petition for Writ of Certiorari to Review Decision of District Court, Wake County<br>3. Def's Petition for Writ of Habeas Corpus<br>4. Def's Petition for Writ of Mandamus | 1.<br>2.<br>3. Denied **07/28/2020**<br>4. |
| 342P20 | State v. Robert Dontrel Dickerson, Jr. | Def's Pro Se Motion for Appeal for Writ of Habeas Corpus | Denied **07/30/2020** |
| 343A20 | In the Matter of M.S., W.S., E.S. | 1. Respondent-Mother's Motion to Deem Proposed Record on Appeal Timely Filed<br>2. Respondent-Mother's Motion to Replace Pages 397 and 398 in Record on Appeal | 1. Allowed **07/30/2020**<br>2. Allowed **08/11/2020** |
| 349P20 | State v. Clorey Eugene France | 1. Def's Pro Se Motion for Temporary Stay<br>2. Def's Pro Se Petition for Writ of Supersedeas<br>3. Def's Pro Se Motion for Immediate Release<br>4. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA | 1. Denied **08/06/2020**<br>2. Denied **08/06/2020**<br>3. Denied **08/06/2020**<br>4. Denied **08/06/2020** |
| 354P20 | State v. Tracy Wright Hakes | 1. Def's Pro Se Motion to Drop Charges<br>2. Def's Pro Se Motion to Drop Detainer | 1. Dismissed **08/10/2020**<br>2. Dismissed **08/10/2020** |
| 370P04-17 | State v. Anthony Leon Hoover | Def's Pro Se Petition for Writ of Habeas Corpus | Denied **06/05/2020**<br>**Hudson, J., recused** |

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

14 AUGUST 2020

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| 370P04-18 | State v. Anthony Leon Hoover | Def's Pro Se Motion for Mandatory Injunction Mandamus Mandate | Dismissed **07/07/2020**<br><br>**Hudson, J., recused** |
| 382P19 | Wymon Griffin v. Ashley Place Apartments | 1. Plt's Pro Se Motion for Notice of Appeal Based Upon a Substantial Constitutional Question<br><br>2. Plt's Pro Se Motion for PDR Under N.C.G.S. § 7A-31<br><br>3. Plt's Pro Se Motion to Amend PDR and Notice of Appeal<br><br>4. Def's Motion for Christopher J. Loebsack to Withdraw as Counsel<br><br>5. Def's Motion for Substitution of Counsel within Firm<br><br>6. Plt's Pro Se Motion to Strike the Notice of Appearance and Motion for Substitution of Counsel within Firm<br><br>7. Plt's Pro Se Motion to Strike Response to PDR and Motion to Dismiss Appeal<br><br>8. Def's Motion to Strike the 18 October Motion and to Sanction Plaintiff for Its Filing<br><br>9. Plt's Pro Se Motion to Strike Unauthorized Pleadings<br><br>10. Plt's Pro Se Motion to Amend the Memorandum Filed October 18, 2019 in Support of PDR and Notice of Appeal Served and Dated October 4, 2019<br><br>11. Plt's Pro Se Motion to Strike Response in Opposition to Motion to Amend<br><br>12. Plt's Pro Se Motion for Extension of Time to File New Brief | 1. Dismissed<br><br>2. Dismissed<br><br>3. Dismissed as moot<br><br>4. Dismissed as moot<br><br>5. Dismissed as moot<br><br>6. Dismissed as moot<br><br>7. Dismissed as moot<br><br>8. Dismissed as moot<br><br>9. Dismissed as moot<br><br>10. Dismissed as moot<br><br>11. Dismissed as moot<br><br>12. Dismissed as moot |
| 416P15-2 | State v. Nijel Ramsey Lee | Def's Pro Se Motion for Notice of Appeal | Denied **08/03/2020** |
| 422P19 | State v. Terrell David Thomas | 1. Def's PDR Under N.C.G.S. § 7A-31<br><br>2. State's Conditional PDR Under N.C.G.S. § 7A-31 | 1. Denied<br><br>2. Dismissed as moot |
| 442P19 | State v. Gabriel James Gamez | Def's PDR Under N.C.G.S. § 7A-31 | Denied |

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

14 AUGUST 2020

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| 468P19 | North Carolina Insurance Guaranty Association v. Weathersfield Management, LLC, f/k/a Accuforce Staffing Services, LLC, f/k/a Accuforce Smart Solutions, LLC | Def's PDR Under N.C.G.S. § 7A-31 | Denied |
| 471P19 | State v. Dallas Jay Worley | Def's PDR Under N.C.G.S. § 7A-31 | Denied |

THE ESTATE OF ANTHONY LAWRENCE SAVINO
v.
THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, a North Carolina Hospital Authority, d/b/a CAROLINAS HEALTHCARE SYSTEM and CMC-NORTHEAST

No. 18PA19

Filed 25 September 2020

**1. Damages and Remedies—pain and suffering—evidentiary burden—medical malpractice**

In a medical malpractice action against a hospital that treated plaintiff for chest pain, the trial court properly denied the hospital's motion for a directed verdict on pain and suffering damages because plaintiff sufficiently proved those damages where a cardiologist testified that plaintiff "more likely than not" suffered further chest pain at home before dying of a heart attack. Although there was no direct evidence to supplement this testimony and other evidence at trial contradicted it, plaintiff did not need direct evidence to prove damages and, under the applicable standard of review, any contradictory evidence had to be disregarded on appeal.

**2. Medical Malpractice—pleading—administrative and medical negligence—arising from same facts—not separate claims**

In a medical malpractice case where a hospital was found liable for plaintiff's death, the hospital was not entitled to a new trial on grounds that plaintiff's estate failed to plead administrative negligence as a separate claim from medical negligence in its complaint. An amendment to N.C.G.S. § 90-21.11—which broadened the definition of "medical malpractice action" to include breaches of administrative duties to patients that arise from the same set of facts as traditional, clinical malpractice claims—did not create a new cause of action but simply reclassified administrative negligence claims as medical malpractice actions instead of as general negligence cases. Thus, plaintiff was not required to plead administrative negligence as a separate claim and, instead, properly pleaded it as one of multiple theories underlying an overarching medical negligence claim.

**3. Medical Malpractice—contributory negligence—not a defense—reckless conduct by hospital**

In a medical malpractice case against a hospital that treated plaintiff for chest pain, where plaintiff—who did not report to hospital staff that emergency medical services had given him medication in the ambulance—died of a heart attack shortly after returning to his

home, the trial court properly granted plaintiff's motion for a directed verdict on the hospital's contributory negligence claim. The jury's unchallenged finding that the hospital's conduct in providing medical care to plaintiff was "in reckless disregard of the rights and safety of others" legally wiped out any contributory negligence defense.

Justice NEWBY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of the unanimous decision of the Court of Appeals, 262 N.C. App. 526, 822 S.E.2d 565 (2018), reversing in part, and vacating in part, a judgment entered 8 December 2016 and orders entered 19 January 2017 by Judge Julia Lynn Gullett in Superior Court, Cabarrus County. On 9 May 2019 the Supreme Court allowed both plaintiff's petition for discretionary review and defendant's conditional petition for discretionary review. Heard in the Supreme Court on 7 January 2020.

*Zaytoun Ballew & Taylor, PLLC, by Matthew D. Ballew, Robert E. Zaytoun and John R. Taylor; and Brown Moore & Associates, PLLC, by R. Kent Brown, Jon R. Moore, Paige L. Pahlke, for plaintiff.*

*Bradley Arant Boult Cummings, LLP, by Robert R. Marcus, Brian Rowlson and Jonathan Schulz; and Horack Talley Pharr & Lowndes, PA, by Kimberly Sullivan, for defendant.*

*Patterson Harkavy, LLP, by Burton Craige, Trisha S. Pande, and Narendra K. Ghosh, for North Carolina Advocates for Justice, amicus curiae.*

HUDSON, Justice.

Pursuant to plaintiff's petition for discretionary review, we address whether the Court of Appeals erred by reversing the trial court's denial of defendant's motion for a directed verdict on pain and suffering damages. We also allowed review of plaintiff's additional issue per North Carolina Rule of Appellate Procedure 15(d): whether the Court of Appeals erred in holding that plaintiff failed to properly plead administrative negligence under N.C.G.S. § 90-21.11(2)(b). In addition, we allowed defendant's conditional petition for discretionary review of two issues: (1) whether defendant was entitled to a new trial because it was prejudiced by the intertwining of plaintiff's evidence and the trial court's instruction

to the jury on medical negligence and administrative negligence; and (2) whether the trial court erred by granting plaintiff's motion for a directed verdict on contributory negligence.

We modify and affirm in part, and reverse in part, the decision of the Court of Appeals because we conclude that (1) the trial court did not err by denying defendant's motion for a directed verdict on pain and suffering damages; (2) plaintiff was not required to plead a claim for administrative negligence separate from medical negligence; (3) defendant is not entitled to a new trial; and (4) the trial court did not err by granting plaintiff's motion for a directed verdict on contributory negligence.

Factual and Procedural Background

Just after 1:30 p.m. on 30 April 2012, Cabarrus County EMS was dispatched to the residence of Anthony Lawrence Savino. When EMS arrived, Mr. Savino was complaining of chest pain that was radiating down both of his arms and causing tingling and numbness. EMS checked his blood pressure and other vital signs in his residence before taking him into the ambulance. In the ambulance, EMS personnel performed an electrocardiogram which showed a normal sinus rhythm; this indicated that Mr. Savino was not currently having a heart attack. EMS gave him an I.V., four baby aspirin, and sublingual nitroglycerin, and notified CMC-Northeast that they were bringing him in as a chest pain patient.

On the way to the hospital, EMT Kimberly Allred prepared a document called an "EMS snapshot," which provides a quick summary of the care that EMS provided to a patient; the snapshot is usually left with the intake nurse at the hospital. In the snapshot, EMT Allred included Mr. Savino's demographics, vitals, and a description of the care provided to Mr. Savino en route to the hospital, including the medications he was given. Plaintiff alleges that this snapshot and the information it contained was never given nor communicated to his treating physician.

A few hours after arriving in the emergency room, Mr. Savino was discharged. Later that evening, his wife found him unresponsive in their home after he suffered a heart attack. Mr. Savino could not be resuscitated by EMS and was pronounced dead on the scene.

On 23 April 2014, Mr. Savino's Estate (plaintiff) filed a Complaint for Medical Negligence (the 2014 Complaint) against The Charlotte-Mecklenburg Hospital Authority, Carolinas Healthcare System, CMC-Northeast, the attending emergency physician, and the attending physician's practice. Defendants responded by filing an answer to the complaint. Then, on 2 January 2016, plaintiff filed a motion for leave to

amend the 2014 Complaint in light of documents produced by defendant and depositions taken after the production of the documents. Plaintiff asserted that the 2014 Complaint provided defendants with sufficient notice of its negligence allegations and that plaintiff was seeking to file an Amended Complaint "out of an abundance of caution." But on 12 January 2016, plaintiff withdrew the motion for leave to amend the complaint. On 19 January 2016, plaintiff filed a notice of voluntary dismissal of all claims against all parties, but without prejudice to re-file against defendants.

Plaintiff filed another "Complaint for Medical Negligence," (the 2016 Complaint) naming only The Charlotte-Mecklenburg Hospital Authority, Carolinas Healthcare System, and CMC-Northeast (collectively, "defendant"), on 1 February 2016. Defendant filed its answer on 5 April 2016.

During a hearing on pre-trial motions, plaintiff and defendant disputed whether the case involved two *theories* of medical negligence or two separate *claims* of medical and administrative negligence. Plaintiff argued that the 2016 Complaint contained both allegations that defendant did not meet the standard of care in "the delivery and provision of medical care" and allegations that defendant "failed to comply with its corporate duty or administrative duty." Plaintiff argued that both of these theories were part of the same medical negligence claim under N.C.G.S. § 90-21.11(2) (2011). Defendant argued, however, that only the first theory of medical negligence was alleged in the 2016 Complaint and then proceeded to object throughout the trial that plaintiff had not pled a separate administrative negligence claim.

The case was tried to the jury from 24 October 2016 through 15 November 2016. Plaintiff's theory of negligence at trial rested on the "hand-off" between EMS and CMC-Northeast which resulted in neither the EMS snapshot, nor the information contained within it—including Mr. Savino's chief complaint of chest pain and the fact that he was treated with aspirin and nitroglycerin—being given or communicated to his treating physician.

At the close of plaintiff's evidence, defendant moved for a directed verdict on two grounds: (1) the evidence was insufficient to support plaintiff's medical negligence claims; and (2) plaintiff failed to properly plead its claim that defendant was negligent in its monitoring and supervision.[1] The trial court denied the motion. Defendant renewed the

1. In the alternative, defendant argued that even if plaintiff had properly pled the negligent monitoring and supervision claim, that claim was time-barred because that allegation was not in the original 2014 Complaint.

motion for a directed verdict at the close of all evidence, and the trial court again denied it.

On 15 November 2016, the jury returned verdicts finding that decedent's death was caused by defendant's (1) negligence; and (2) negligent performance of administrative duties. The jury awarded plaintiff $6,130,000 in total damages: $680,000 in economic damages and $5,500,000 in non-economic damages. The trial court entered judgment in these amounts. Following the entry of judgment, the trial court entered another order determining that plaintiff was entitled to recover (1) $15,571.53 from defendant in costs; and (2) $417,847.15 in pre- and post-judgment interest.

On 16 December 2016, defendant filed a motion for either judgment notwithstanding the verdict (JNOV) or for a new trial. The trial court denied the motions in orders filed on 19 January 2017. Defendant appealed.

The Court of Appeals reversed in part and vacated in part the orders of the trial court; it also granted a new trial in part. *Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth.*, 262 N.C. App. 526, 822 S.E.2d 565 (2018). First, the Court of Appeals held that the testimony of plaintiff's expert was insufficient to support the jury's award for pain and suffering. *Id.* at 557, 822 S.E.2d at 586. As a result—and because the jury's verdict did not allow the court to determine which portion of the non-economic damages consisted of the pain and suffering damages—the Court of Appeals remanded for a new trial on non-economic damages. Second, the Court of Appeals held that plaintiff did not sufficiently plead "administrative negligence." *Id.* at 534, 822 S.E.2d at 572. Specifically, it concluded that the allegations in the 2016 Complaint "were not sufficient to put defendant on notice of a claim of administrative negligence" and thus, "the trial court erred in allowing plaintiff to proceed on an administrative negligence theory in the medical malpractice action." *Id.* at 541, 822 S.E.2d at 576. However, the Court of Appeals held that the jury's verdict was not tainted by plaintiff being allowed to proceed on the administrative negligence theory, and thus that no new trial was required on this issue. *Id.* at 549–50, 822 S.E.2d at 581. Finally, the Court of Appeals held that the trial court did not err in granting a directed verdict to plaintiff on the issue of contributory negligence because Mr. Savino did not have "an affirmative duty to report that EMS gave him medication in the ambulance." *Id.* at 558–559, 822 S.E.2d at 586.

For the reasons discussed herein, we modify and affirm in part, and reverse in part, the decision of the Court of Appeals.

Analysis

On the issues presented by plaintiff, we conclude that (1) the Court of Appeals erred by reversing the trial court's denial of defendant's motion for a directed verdict on pain and suffering damages; and (2) plaintiff properly pled a medical negligence claim, but did not allege a separate claim for administrative negligence. On the issues presented by defendant, we conclude that (1) defendant is not entitled to a new trial; and (2) the trial court did not err by granting plaintiff's motion for a directed verdict on contributory negligence.

I. Standard of Review

The standard of review for a motion for directed verdict and a motion for judgment notwithstanding the verdict (JNOV) is the same. *Green v. Freeman*, 367 N.C. 136, 140, 749 S.E.2d 262, 267 (2013) (citing *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 323, 411 S.E.2d 133, 138 (1991)). Accordingly, we must determine "whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Id.* at 140, 749 S.E.2d at 267 (quoting *Davis*, 330 N.C. at 322, 411 S.E.2d at 138). "If 'there is evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for [JNOV] should be denied.' " *Id.* at 140–41, 749 S.E.2d at 267 (quoting *Abels v. Renfro Corp.*, 335 N.C. 209, 215, 436 S.E.2d 822, 825 (1993)). Because the question of whether a party is entitled to a motion for directed verdict or JNOV is one of law, our review is de novo. *Id.* at 141,749 S.E.2d at 267 (citing *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); *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 720, 693 S.E.2d 640, 643 (2009)).

II. Pain and Suffering Damages

**[1]** First, we address the single issue raised in plaintiff's petition for discretionary review: the Court of Appeals' reversal of the trial court order denying defendant's motion for a directed verdict on pain and suffering damages. Because we conclude that plaintiff's expert's testimony presented sufficient evidence of pain and suffering, we hold the trial court did not err, and we reverse the Court of Appeals.

The legal standard for proof of damages is well-established. "Damages must be proved to a reasonable level of certainty, and may not be based on pure conjecture." *DiDonato v. Wortman*, 320 N.C. 423, 431, 358 S.E.2d 489, 493 (1987) (citing *Norwood v. Carter*, 242 N.C. 152, 156, 87 S.E.2d 2, 5 (1955)).

At trial, plaintiff offered testimony from several experts. Dr. Selwyn, an expert cardiologist, testified about Mr. Savino's pain and suffering earlier in the day of 30 April 2012 prior to his death as follows: "[H]e presented with a fairly typical picture of chest pain radiating to the stomach, up into the neck, to the hands, which went away with nitroglycerin." Dr. Selwyn then testified that Mr. Savino "more likely than not . . . would have got chest pain again" before his death.

This expert opinion, based on an analysis of decedent's symptoms and medical records, is precisely the kind of opinion that triers of fact rely on to help them "understand the evidence or to determine a fact in issue." N.C.R.E. 702(a) (2019). This review of decedent's symptoms was not "based on pure conjecture" but provided evidence of decedent's pain and suffering "to a reasonable level of certainty" for the jury to consider. *DiDonato*, 320 N.C. at 431, 358 S.E.2d at 493.

Although the Court of Appeals acknowledged that "testimony that something 'is more likely than not' is generally sufficient proof that something occurred," it concluded that such testimony was not sufficient here. *Savino*, 262 N.C. App. at 557, 822 S.E.2d at 585. This conclusion was in error. Although the Court of Appeals correctly noted that "it [wa]s not [its] job to reweigh the evidence," it nonetheless proceeded to reweigh the evidence by concluding that the testimony of plaintiff's expert "standing alone" was insufficient to prove damages because (1) there was "ample other evidence . . . that plaintiff may not have experienced any further chest pain"; and (2) plaintiff's expert "testified that there was 'no direct evidence' of chest pain following decedent's discharge from the emergency department." *Id.*

The Court of Appeals' reasoning was erroneous for two reasons. First, its weighing of plaintiff's expert's testimony against other evidence that decedent may not have experienced further chest pain contradicts our well-established standard of review of trial court decisions on directed verdicts, which requires appellate courts to disregard contradictory evidence. *See Bowen v. Gardner*, 275 N.C. 363, 366, 168 S.E.2d 47, 49 (1969) (requiring the movant's contradictory evidence to be disregarded when considering a motion for nonsuit); *see also Northern Nat. Life Ins. Co. v. Lacy J. Miller Mach. Co., Inc.*, 311 N.C. 62, 69, 316 S.E.2d 256, 261 (1984) ("A verdict may never be directed when there is conflicting evidence on contested issues of fact.").

Second, the Court of Appeals erred in apparently requiring plaintiff's expert to present "direct evidence" of chest pain. *Savino*, 262 N.C. App. at 557, 822 S.E.2d at 585. The evidentiary standard for damages requires

only proof "to a reasonable level of certainty." *DiDonato*, 320 N.C. at 431, 358 S.E.2d at 493 (citing *Norwood*, 242 N.C. at 156, 87 S.E.2d at 5). Competent opinion testimony, like Dr. Selwyn's, that "more likely than not" Mr. Savino would have experienced pain before his death, satisfies that standard. Furthermore, direct evidence is not required because circumstantial evidence can satisfy the reasonable probability standard. *See Snow v. Duke Power Co.*, 297 N.C. 591, 597, 256 S.E.2d 227, 231–32 (1979) ("[C]ircumstantial evidence [may be] sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts.").

Accordingly, we conclude that the trial court did not err in denying defendant's motion for a directed verdict on plaintiff's pain and suffering damages. As a result, we reverse the Court of Appeals' holding on this issue, and we reverse its decision to remand this case to the trial court for a new trial on non-economic damages.

III. Administrative Negligence

**[2]** Next, we consider defendant's argument that administrative negligence constituted a separate claim that plaintiff failed to properly plead.

Defendant contends that plaintiff was required to plead administrative negligence as a separate claim from medical negligence because in a 2011 amendment to N.C.G.S. § 90-21.11, "the legislature created a distinct cause of action for administrative negligence that must be separately and specifically pled." Defendant argues that because plaintiff "failed to plead a claim for administrative negligence," it was error for the trial court to deny defendant's motion for JNOV. Because we conclude that the 2011 amendment to N.C.G.S. § 90-21.11 did not create a new cause of action or a new pleading requirement for a medical negligence claim like this one, we do not agree that plaintiff was required to plead a separate claim for administrative negligence here. We further conclude that plaintiff did properly plead breaches of administrative duties as a theory underlying the overall claim of medical negligence.

In 2011, the General Assembly amended N.C.G.S. § 90-21.11 to broaden the definition of "medical malpractice action" to include breaches of "administrative or corporate duties to the patient" that arise from the same set of facts as a traditional "professional services" medical malpractice claim. Act of July 25, 2011, S.L. 2011-400 § 5, 2011 N.C. Sess. Laws, 1712, 1714. Specifically, the amendment added the following subsection to the definition of "Medical malpractice action" in N.C.G.S. § 90-21.11(2):

> (b) A civil action against a hospital, a nursing home licensed under Chapter 131E of the General Statutes, or an adult care home licensed under Chapter 131D of the General Statutes for damages for personal injury or death, when the civil action (i) alleges a breach of administrative or corporate duties to the patient, including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision and (ii) arises from the same facts or circumstances as a claim under sub-subdivision a. of this subdivision.

It appears from contemporaneous committee reports and session laws, as well as subsequent analysis by the UNC School of Government, that the purpose of this specific part of a more comprehensive medical liability reform bill was to require that lawsuits which seek recovery for negligence in operating a hospital, nursing home, or adult care home, be treated as "medical malpractice" claims rather than ordinary negligence claims. *See* UNC School of Government, *Bill Summaries: S33 (2011-2012 Session)*, *Summary date: Apr 19 2011*, Legislative Reporting Service, https://lrs.sog.unc.edu/bill-summaries-lookup/S/33/2011-2012%20Session/S33 ("Adds a section amending GS 90-21.11 to clarify definitions for health care provider and medical malpractice action; applies to causes of action arising on or after October 1, 2011."); Act of July 25, 2011, S.L. 2011-400 § 5 (providing the overall context of the reform legislation); Ann M. Anderson, *Rule 9(j) of the Rules of Civil Procedure: Special Pleading in Medical Malpractice Claims*, North Carolina Superior Court Judges' Benchbook (March 2014) (discussing how the amendment recategorizes some administrative negligence claims arising out of the same facts and circumstances as a medical negligence claim). Prior to this amendment, such administrative or corporate negligence claims were often treated as ordinary negligence claims. Anderson, at 4 (citing *Estate of Ray v. Forgy*, 227 N.C. App. 24, 31, 744 S.E.2d 468, 472 (2013) (claim against hospital for failure to monitor and oversee credentialing of physician treated as ordinary negligence); *Estate of Waters v. Jarman*, 144 N.C. App. 98, 103, 547 S.E.2d 142, 145 (2011) (common law corporate negligence claim against a hospital treated as ordinary negligence)). Since the 2011 amendment, claims of administrative negligence against hospitals, nursing homes, or adult care homes that arise from the same facts and circumstances as a claim for furnishing or failing to furnish professional health services have been classified as medical malpractice suits, and thus are required to adhere to the much more detailed requirements of North Carolina

Civil Procedure Rule 9(j) than claims for ordinary negligence.[2] Thus, we agree with the Court of Appeals that the legislature did not "intend[] to create a new cause of action by the 2011 amendment, but rather intended to re-classify administrative negligence claims against a hospital as a medical malpractice action so that they must meet the pleading requirements of a medical malpractice action rather than under a general negligence theory." *Savino*, 262 N.C. App. at 536, 822 S.E.2d at 573.

Therefore, to the extent that defendant's arguments presuppose that plaintiff was required to separately allege a claim for administrative negligence, we do not agree. Plaintiff brought suit against defendant alleging medical negligence, and the 2011 amendment to N.C.G.S. § 90-21.11 had no effect on medical negligence claims like plaintiff's.

In general, a complaint is required to contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." N.C. R. Civ. P. 8. (2019). We have interpreted this language as establishing a "notice pleading" standard. *U.S. Bank Nat'l Ass'n v. Pinkey*, 369 N.C. 723, 728, 800 S.E.2d 412, 416 (2017). Accordingly, "the complaint 'is adequate if it gives sufficient notice of the claim asserted "to enable the [defendant] to answer and prepare for trial . . . and to show the type of case brought." ' " *Id.* at 728, 800 S.E.2d at 416 (quoting *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 165 (1970)). "While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim . . . ." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988) (citing *Stanback v. Stanback*, 297 N.C. 181, 204, 254 S.E.2d 611, 626 (1979)).

The action began with plaintiff's filing of the 2016 Complaint after it voluntarily dismissed its 2014 Complaint. In the 2016 Complaint, titled "Complaint for Medical Negligence," plaintiff alleged that defendant was negligent in its failure to

> a. [T]imely and adequately assess, diagnose, monitor, and treat the conditions of Plaintiff's Decedent so as to render appropriate medical diagnosis and treatment of his symptoms;

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2. Claims of administrative negligence against hospitals, nursing homes, or adult care homes that *do not* arise from the same facts and circumstances as a claim for furnishing or failing to furnish professional health services may still be subject to the common law requirements of ordinary negligence.

b. [P]roperly advise Plaintiff's Decedent of additional medical and pharmaceutical courses that were appropriate and should have been considered, utilized, and employed to treat Plaintiff's Decedent's medical condition prior to discharge;

c. [T]imely obtain, utilize and employ proper, complete and thorough diagnostic procedures in the delivery of appropriate medical care to Plaintiff's Decedent;

d. [E]xercise due care, caution and circumspection in the diagnosis of the problems presented by Plaintiff's Decedent;

e. [E]xercise due care, caution and circumspection in the delivery of medical and nursing care to Plaintiff's Decedent;

f. [A]dequately evaluate Plaintiff's Decedent response/lack of response to treatment and report findings;

g. [F]ollow accepted standards of medical care in the delivery of care to Plaintiff's Decedent;

h. [U]se their best judgment in the care and treatment of Plaintiff's Decedent;

i. [E]xercise reasonable care and diligence in the application of his/her/their knowledge and skill to Plaintiff's Decedent care;

j. [R]ecognize, appreciate and/or react to the medical status of Plaintiff's Decedent and to initiate timely and appropriate intervention, including but not limited to medical testing, physical examination and/or appropriate medical consultation;

k. . . .

l. [P]rovide health care in accordance with the standards of practice among members of the same health care professions with similar training and experience situated in the same or similar communities at the time the health care was rendered to Plaintiff's Decedent.

These alleged acts of negligence in the 2016 Complaint all relate to the "performance of medical . . . or other health care" by "health care

provider[s]" working in CMC-Northeast. N.C.G.S. § 90-21.11(2)(a) (2011). As a result, the allegations state a claim for medical negligence.

As part of its case to prove medical negligence, plaintiff presented evidence at trial on the applicable standard of care. This evidence included documents defendant had previously submitted as part of an application to gain accreditation as a Chest Pain Center. Plaintiff also offered expert testimony that the policies and protocols within the Chest Pain Center application documents were consistent with the standard of care applicable to Mr. Savino's clinical care in defendant's emergency department. To the extent plaintiff argued that the hospital violated the applicable standard of care by failing to implement or follow appropriate health care policies and protocols as outlined in these documents, we agree with the Court of Appeals that this argument was directly relevant to the medical negligence claim. *Savino*, 262 N.C. App. at 554, 822 S.E.2d at 583 ("[E]vidence of the defendant's policies and protocols, or its purported policies and protocols, is certainly relevant and properly considered alongside expert testimony to establish the standard of care for medical negligence.").

Furthermore, the complaint provided defendant with sufficient notice of the fact that plaintiff intended to use the policies and protocols from the Chest Pain Center application documents as part of its claim for medical negligence. Specifically, plaintiff alleged in the 2016 Complaint that defendant had submitted an application for "accreditation as a Chest Pain Center and was approved for such accreditation at the time of the events complained of." The complaint also included allegations that as part of the Chest Pain Center application, defendant attested that "it employed certain protocols, clinical practice guidelines, and procedures in the care of patients presenting with chest pain complaints" replicating "the existing standards of practice for medical providers and hospitals in the same care profession with similar training and experience situated in similar communities with similar resources at the time of the events giving rise to this cause of action." Plaintiff then alleged that defendant failed to "[p]rovide health care in accordance with the standards of practice among members of the same health care professions with similar training and experience situated in the same or similar communities at the time the health care was rendered to Plaintiff's Decedent." These allegations were "sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." N.C. R. Civ. P. 8(a)(1).

We agree with the Court of Appeals that plaintiff did not plead a separate claim for administrative negligence.[3] *See* 262 N.C. App. at 534, 822 S.E.2d at 572. But plaintiff was not required to do so. Rather, plaintiff used multiple theories, including some administrative failures, to argue a single cause of action: medical negligence. Therefore, the trial court did not err by denying defendant's motion for JNOV and defendant is not entitled to a new trial.[4] We modify and affirm the decision of the Court of Appeals as to this issue.

IV. Contributory Negligence

**[3]** Finally, we address the issue of contributory negligence raised in defendant's conditional petition for discretional review. We conclude that the trial court did not err in granting plaintiff's motion for a directed verdict on defendant's claim of contributory negligence.

As we have previously explained, "gross negligence is a higher degree of negligence than ordinary negligence, and [ ] wilful and wanton and reckless conduct is still a higher degree of negligence or a greater degree of negligence than the negligence of gross negligence, so much so that in the wilful, wanton, and reckless conduct, the matter of contributory negligence, which might otherwise be interposed as a defense, is wiped out." *Crow v. Ballard*, 263 N.C. 475, 477, 139 S.E.2d 624, 626 (1965).

Here, the jury found that defendant's conduct in providing medical care to Mr. Savino was "in reckless disregard of the rights and safety of others." Defendant did not challenge this finding. Accordingly, defendant's "reckless conduct . . . wipe[s] out" any alleged defense of contributory negligence. *Crow*, 263 N.C. at 477, 139 S.E.2d at 626.

Conclusion

We modify and affirm in part, and reverse in part, the decision of the Court of Appeals because we conclude that (1) the trial court did

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3. Because we conclude that plaintiff was not required to plead a separate administrative negligence claim under N.C.G.S. § 90-21.11(2), we need not address defendant's argument that such a claim was time-barred.

4. We do not address the Court of Appeals' holding about the effect of the intertwining of medical and administrative negligence because we conclude the trial court did not err in denying defendant's motion for JNOV, and therefore do not reach the issue of prejudice. However, we do note that section (2)(b) requires that to be classified as medical malpractice, alleged administrative shortcomings must arise from the same facts or circumstances underpinning the medical negligence.

not err by denying defendant's motion for a directed verdict on pain and suffering damages; (2) plaintiff was not required to plead a separate claim for administrative negligence; (3) defendant is not entitled to a new trial; and (4) the trial court did not err by granting plaintiff's motion for a directed verdict on contributory negligence. Because we reverse the Court of Appeals, and thereby uphold the trial court, on the issue of damages for pain and suffering we need not remand to the trial court for a new trial on non-economic damages.

MODIFIED AND AFFIRMED IN PART; REVERSED IN PART.

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

Justice NEWBY dissenting.

This medical malpractice action involved a three-and-a-half-week trial. During trial, plaintiff pursued two negligence claims, one for medical negligence and one for administrative negligence. The trial court allowed evidence of and gave jury instructions on both distinct claims of negligence. Both claims were explicitly presented to the jury on the jury verdict form. The administrative negligence claim was neither pled nor properly presented to the jury. Because the trial court admitted a significant amount of extraneous evidence and comingled the jury instructions on medical negligence and administrative negligence, and because the jury clearly found that defendant was guilty of administrative negligence, defendant was prejudiced by the process and should be granted a new trial.

To avoid having to concede that the administrative negligence claim was not properly pled here, the majority judicially restructures medical negligence claims, asserting that administrative negligence is merely a theory underlying medical care negligence. It holds that a plaintiff need not plead a separate claim for administrative negligence. The majority altogether ignores the relevant statutory text and the intent of the General Assembly. In amending the medical malpractice statute in 2011, the General Assembly did not intend to combine these two distinct types of negligence but simply meant to subject both medical care and administrative negligence claims to the same heightened pleading requirement. The majority allows all the evidence relating to the administrative negligence claim to be considered by the jury to determine if medical care negligence occurred here. Because evidence of administrative

negligence and the corresponding jury instructions irredeemably tainted the jury verdict, a new trial is warranted.[1] I respectfully dissent.

Defendant in this case does not dispute that plaintiff properly pled a claim for medical care negligence. In defendant's view, the only claim for medical care negligence actually pled and pursued at trial was whether the admitting nurse failed to relay to the doctor that decedent received nitroglycerin from the EMTs, and, if so, whether that failure to relay the information violated the applicable standard of care. Ultimately, because the doctor allegedly did not know that the decedent had received nitroglycerin and his lab work was normal, the decedent was released but died later that evening.

On 23 April 2014, plaintiff filed an initial "Complaint for Medical Negligence" (2014 Complaint). On 6 January 2016, plaintiff moved for leave to amend the 2014 complaint. In the motion, plaintiff contemplated adding a claim for administrative negligence, citing, *inter alia*, defendant's failure to train, monitor, and supervise employees as well as failure to implement or enforce protocol, policies, and procedures. Nonetheless, plaintiff withdrew the motion and, on 19 January 2016, filed a notice of voluntary dismissal without prejudice to refile against defendant only. Thereafter, on 1 February 2016, plaintiff refiled a "Complaint for Medical Negligence" against defendant (2016 Complaint). In the 2016 Complaint, plaintiff did not include the administrative negligence allegations it asserted in its earlier motion; it simply added a few factual allegations about defendant's status as a Chest Pain Center and its application for accreditation.[2]

Before trial, defendant objected to the administrative negligence claim being presented, noting that the complaint alleged only medical care negligence. The trial court denied defendant's motion in limine to exclude evidence related to administrative negligence.

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1. Because I would conclude that a new trial is warranted, both issues of pain and suffering and contributory negligence would be dependent on the evidence presented at that new trial. Therefore, I do not address those issues in this dissenting opinion.

2. The majority states that it need not address defendant's arguments that such a claim was time barred since under its reasoning, plaintiff did not need to plead a separate claim for administrative negligence. In its analysis, however, the majority relies on the 2016 Complaint, which cites evidence of Chest Pain Management Center protocols and procedures, which plaintiff presented for the first time in the 2016 Complaint. Even if administrative negligence were merely a theory underlying medical negligence, as the majority proposes, it seems the statute of limitations would be implicated to bar that theory since the theory and the allegations were raised for the first time in the 2016 Complaint.

The case proceeded to trial, which occurred over a three-and-a-half-week period. Plaintiff presented evidence of defendant's alleged medical care negligence, highlighting the nurse's purported failure to communicate that the decedent had received nitroglycerin in the ambulance. Plaintiff also presented a significant amount of evidence related to defendant's alleged administrative negligence. This evidence focused on defendant's failure to properly train medical providers and to implement certain policies, procedures, and protocols that, in plaintiff's view, would have ensured that the proper information was communicated to the ER Physician. In doing so, plaintiff introduced evidence about the credentials required for defendant to become a licensed Chest Pain Center, the application requirements and what the hospital had submitted in its application, and the policies to be implemented. On several occasions, plaintiff highlighted defendant's failure to implement and ensure that the hospital was abiding by Chest Pain Center protocols stated in the application. Plaintiff presented this as amounting to negligence in the application process. Moreover, plaintiff's evidence reiterated that hospital employees were unaware of the risk stratification protocol set forth in the Chest Pain Center application. Under part of plaintiff's theory at trial, had defendant implemented and abided by these protocols, defendant could have saved the decedent's life.

Numerous times during the proceeding, defendant objected that administrative negligence was not properly before the jury since it was not pled in the original 2014 Complaint, nor could it be considered based on the 2016 Complaint because it was time barred. The trial court denied defendant's motions.

During the jury charge conference, defendant objected to the jury instructions, arguing that they improperly presented claims for administrative negligence and comingled administrative negligence with medical care negligence. Nonetheless, the trial court instructed the jury that it could find defendant liable if it found, *inter alia*, that any of the contentions below were true:

> With respect to the first issue in this case, the plaintiff contends and the defendant denies that the defendant was negligent in one or more of the following ways. The first contention is that the hospital did not use its best judgment in the treatment and care of its patient in that the defendant did not adequately *implement* [emphasis added] and/or follow protocols, processes, procedures and/or policies for the evaluation and management of

> chest pain patients in the emergency room on April 30th of 2012, in accordance with the standard of care.
>
> . . . .
>
> The third contention is that the hospital did not use reasonable care and diligence in the application of its knowledge and skill to its patient's care in that Carolinas Healthcare System did not adequately *implement* [emphasis added] and/or follow the protocols, processes, procedures and/or policies for the evaluation and management of chest pain patients in the emergency room or emergency department on April 30th of 2012.
>
> . . . .
>
> The fifth contention is that the hospital did not provide health care in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances at the time the health care was rendered, and that the defendant did not adequately *implement* [emphasis added] and/or follow the protocols, processes, procedures and/or policies in place in the emergency department on April 30th of 2012.

Despite the trial court's failure to separate administrative negligence from medical negligence in its instructions, the jury verdict sheet recognized medical and administrative negligence as two separate issues, first asking the jury whether decedent's "death [was] caused by the negligence of defendant," and then asking whether decedent's "death [was] caused by the defendant's negligent performance of administrative duties." On 15 November 2016, the jury returned its verdict finding defendant liable for both administrative and medical negligence. The jury awarded $680,000 in economic damages and $5,500,000 in non-economic damages, amounting to a single sum of $6,130,000 in total damages.

Defendant moved for judgment notwithstanding the verdict or for a new trial. In its motion, defendant argued in part that the trial court erroneously comingled the jury instructions on administrative and medical negligence, which ultimately confused the jury and unfairly prejudiced defendant. The trial court denied defendant's motion.

The determinative issue should be whether plaintiff properly pled a claim for administrative negligence, which should be answered in the negative. Based on this answer, the question then becomes what

the appropriate remedy is when, in the course of an almost four week trial, evidence of an improperly pled claim is admitted, the jury charge is inaccurate because it comingles both negligence claims, and the jury verdict sheet is wrong because it asks in part whether defendant was liable for administrative negligence. In short, this Court should ask whether the comingling and intertwining of administrative negligence throughout the trial impacted the jury verdict so as to prejudice defendant and entitle defendant to a new trial. Because administrative and medical negligence were inextricably intertwined in the evidence and instructions here, defendant was prejudiced and there should be a new trial untainted by the evidence of administrative negligence and the accompanying improper jury instruction.

In its analysis, the majority fails to follow the intent of the legislature in amending the statute in 2011. Instead, the majority collapses administrative and medical care negligence into a single negligence claim. This reasoning turns on its head the intent of the General Assembly, which was not to combine the two types of negligence, but to require the same heightened pleading standard for an administrative negligence claim that previously existed for a medical care negligence claim.

Prior to 2011, a claimant with an allegation of medical negligence in the rendering of care for medical services and an allegation of medical negligence arising from administrative negligence had two separate pleading standards. While medical care negligence was subject to the heightened pleading requirements of Rule 9(j) of the North Carolina Rules of Civil Procedure, a claim for medical administrative negligence was subject to the ordinary, non-heightened pleading requirements. Thus, prior to 2011, a medical malpractice action was defined only as a medical care negligence claim, i.e., "a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider." N.C.G.S. § 90-21.11 (2009).

In 2011, however, while keeping a separate claim for medical care negligence, the North Carolina General Assembly changed the definition of "medical malpractice" to also include a claim for administrative negligence. *See* Act of July 25, 2011, S.L. 2011-400 § 5, 2011 N.C. Sess. Laws, 1712, 1714. The legislature did not intend to combine or blend medical and administrative negligence claims into one claim but simply meant to subject claims of both types of negligence to the same stringent 9(j) pleading standard. Thus, under the current statute, a claim of medical malpractice can arise from medical care or administrative responsibilities:

> a. A civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.
>
> b. A civil action against a hospital, a [licensed] nursing home . . . , or a[ licensed] adult care home . . . for damages for personal injury or death, when the civil action (i) alleges a breach of administrative or corporate duties to the patient, including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision and (ii) arises from the same facts or circumstances as a claim under sub-subdivision a. of this subdivision.

N.C.G.S. § 90-21.11(2) (2019).

Consistent with the way the legislature framed both separate claims as recognized in section 90-21.11(2), case law has recognized that there are "two kinds of [corporate hospital negligence] claims: (1) those relating to negligence in clinical care provided by the hospital directly to the patient, and (2) those relating to the negligence in the administration or management of the hospital." *Estate of Ray ex rel. Ray v. Forgy*, 227 N.C. App. 24, 29, 744 S.E.2d 468, 471 (2013) (quoting *Estate of Waters v. Jarman*, 144 N.C. App. 98, 101, 547 S.E.2d 142, 144, *disc. rev. denied*, 354 N.C. 68, 533 S.E.2d 213 (2001)).

Plaintiff failed to plead administrative negligence in its 2014 Complaint and its 2016 Complaint, despite plaintiff's seeming intent to add a claim for administrative negligence when it filed its motion to amend on 6 January 2016. Notably, because medical and administrative negligence are two separate claims, they must be pled separately and proved independently. Because plaintiff failed to plead administrative negligence here, evidence of administrative negligence should not have been admitted at trial and the jury should not have been instructed on the claim.

Because administrative negligence was not properly pled, the question becomes whether evidence of the improperly considered administrative negligence claim, and the corresponding instructions from the trial court, tainted the jury verdict in a way that prejudiced defendant, warranting a new trial. Here a new trial is warranted because it appears the jury based its decision to find defendant liable for medical care negligence on the improperly admitted evidence pertaining to administrative negligence. Further, the instructions blended the two claims.

Error in the jury instructions or uncertainty in the jury verdict warrants a new trial in several situations. When it is unclear "upon what theory or under which part of the [jury] charge the verdict was based, and therefore error in any one of the instructions . . . may have influenced the jury," defendant is entitled to a new trial. *Morrow v. Southern Ry. Co.*, 147 N.C. 623, 629, 61 S.E. 621, 623 (1908). Also, when a "trial judge inadvertently omit[s] . . . sufficiently definite instructions to guide the [ jury] to an intelligent determination of the question," a new trial is warranted. *Kee v. Dillingham*, 229 N.C. 262, 266, 49 S.E.2d 510, 512 (1948); *see also Robertson v. Stanley*, 285 N.C. 561, 569, 206 S.E.2d 190, 196 (1974) (stating that where issues are "inextricably interwoven" within the case, suggesting that the jury awarded damages on an improper ground, a new trial on all issues should be granted); *Hoaglin v. Western Union Telegraph Co.*, 161 N.C. 390, 398–99, 77 S.E. 417, 421 (1913) ("If we could separate the two [jury instructions], because we knew with certainty that the jury were not influenced by the error, we would do so, but it is impossible, as the correct and incorrect instructions have together passed into the verdict which is indivisible. A new trial is the only remedy for the error.").

Therefore, when an appellate court is reviewing a claim

> [o]n appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if "it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed . . . ." The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. "Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury."

*Boykin v. Kim*, 174 N.C. App 278, 286, 620 S.E.2d 707, 713 (2005) (first citing and then quoting *Jones v. Satterfield Dev. Co.*, 16 N.C. App. 80, 86–87, 191 S.E.2d 435, 439, 440, *cert. denied*, 282 N.C. 304, 192 S.E.2d 194 (1972); then citing and then quoting *Robinson v. Seaboard Sys. R.R.*, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917, *disc. rev. denied*, 321 N.C. 474, 364 S.E.2d 924 (1988)).

Defendant submits that the medical negligence claim properly before this Court asked whether the admitting nurse failed to communicate that decedent received nitroglycerin in the ambulance, and if so,

whether that failure to communicate this information constituted a violation of the applicable standard of care. The administrative negligence claim presented at trial, however, focused on whether proper procedural safeguards were designed and implemented to prevent this type of communication failure.

The trial court admitted evidence of the admitting nurse's failure to communicate the applicable information, which would relate to plaintiff's properly pled medical negligence claim. The trial court also allowed into evidence testimony and exhibits related to plaintiff's administrative negligence claim, however. At trial, plaintiff introduced a significant amount of evidence about the credentials required for defendant to become a licensed Chest Pain Center, the application requirements, and the policies to be set forth by the hospital in compliance with the Chest Pain Center application requirements. Plaintiff's evidence highlighted defendant's failure to ensure that the hospital was implementing Chest Pain Center protocols and the representations defendant made in its application. Moreover, testimony about individuals who were unaware of the risk stratification protocol stated in the Chest Pain Center application documents was repeated multiple times throughout trial.

Despite the differences in these claims, the evidence at trial was not separated in a way that the jury could discern which evidence pertained to defendant's alleged liability for medical negligence and which evidence pertained to defendant's alleged liability for administrative negligence. Therefore, the jury was led to believe that it could find decedent's death was caused by either or both medical and administrative negligence, regardless of which evidence supported which claim. Certainly plaintiff's closing argument asserted both kinds of negligence.

Moreover, the jury instructions failed to distinguish between the two different types of negligence. Despite asking the jury on the verdict sheet to separately answer whether defendant was liable for medical negligence and administrative negligence, the trial court's instructions wholly failed to distinguish between the two types of negligence. Instead, the jury instructions inextricably comingled medical and administrative negligence so the jury likely believed it could find defendant liable for medical negligence based on evidence of administrative negligence. Thus, the evidence related to administrative negligence and the trial court's failure to separate out the claims in the instructions together created a Gordian Knot, rendering it impossible to determine on which evidence or instruction the jury found defendant liable. Given the uncertainty about the premise of the jury's verdict, defendant has met its burden to show that the improper evidence and resulting comingled

instructions likely misled the jury. Under our precedent, certainly it was unclear "upon what theory or under which part of the [jury] charge the verdict was based," meaning defendant is entitled to a new trial. *Morrow*, 147 N.C. at 629, 61 S.E. at 623.

The majority ignores the question of whether plaintiff properly pled administrative negligence. Instead of asking whether evidence related to administrative negligence tainted the verdict, the majority asserts that plaintiff need not plead a separate claim for administrative negligence because all of plaintiff's evidence about defendant's breach of administrative duties amounted to "a theory underlying the overall claim of medical negligence." It appears that the majority would not require a plaintiff to precisely plead either medical or administrative negligence; under the majority's rationale, so long as a party pursuing a medical malpractice claim meets 9(j) pleading requirements generally and states that it is pursuing a medical malpractice claim, that party can present evidence of either or both medical or administrative negligence under its claim by asserting that the evidence relates to a "theory," not a separate claim.

In doing so, the majority ignores that the legislature chose to separate medical and administrative negligence claims when re-categorizing administrative negligence as a type of medical malpractice subject to heightened pleading requirements. *See* N.C.G.S. § 90-21.11 (stating that a medical malpractice action can be based on *either* type of negligence, one being medical negligence and the other being administrative negligence). The legislature chose to require separate 9(j) certification and other heightened requirements for both medical and administrative negligence. Further, the majority's decision to allow a plaintiff to proceed on either type of negligence without distinction undermines the concept of notice pleading.

Notably, it is not the Court's job to redefine medical negligence. Through its holding, the majority nonetheless acts as the legislature, ignores the express language of our General Statutes, and relegates a clearly defined cause of action for administrative negligence into only a theory supporting a claim of medical negligence. This rationale conflicts with the express language of N.C.G.S. § 90-21.11(2). It is certainly unclear how the majority would treat a separate claim for administrative negligence.

Because administrative negligence was not properly pled, it was improper to allow evidence of it and to include it in the jury instructions and verdict sheet. Administrative negligence should not have been

a part of the jury's decision on whether to find defendant liable for medical negligence. The jury instructions failed to separate the claims for administrative and medical negligence, and the evidence at trial failed to distinguish between the claims. Therefore, because the issues are "inextricably interwoven" here, *Robertson*, 285 N.C. at 569, 206 S.E.2d at 196, defendant is entitled to a new trial excluding evidence or instruction on administrative negligence. I respectfully dissent.

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IN THE MATTER OF E.B.

No. 429A19

Filed 25 September 2020

**1. Termination of Parental Rights—grounds for termination—willful abandonment—sufficiency of findings—void permanency planning hearings and orders**

There was insufficient evidence to terminate a father's parental rights on the grounds of willful abandonment where nearly all of the trial court's findings of fact related directly to permanency planning and review hearings that were legally void because no juvenile petition was ever filed (pursuant to N.C.G.S. § 7B-402(a) and 403(a)). The father's failure to attend these hearings and comply with the resulting void orders could not support termination of his parental rights; furthermore, the father made ongoing efforts before and throughout the determinative time period to obtain custody of his child—even though the trial court and the county department of social services lacked the authority to keep the child out of his custody.

**2. Termination of Parental Rights—grounds for termination—neglect—sufficiency of findings—void permanency planning hearings and orders**

There was insufficient evidence to terminate a father's parental rights on the grounds of neglect where nearly all of the trial court's findings of fact related directly to permanency planning and review hearings that were legally void because no juvenile petition was ever filed (pursuant to N.C.G.S. § 7B-402(a) and 403(a)). There was no evidence that the father had neglected the child (who had never been in his custody) or that he would neglect her if she were in his care; rather, the evidence showed that the father was successfully caring for three other minor children. Findings related to the

father's history of marijuana use and the loss of his job and housing were also insufficient to support the conclusion that the father was likely to neglect the child in the future.

**3. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—sufficiency of findings—no removal**

There was insufficient evidence to terminate a father's parental rights on the grounds of failure to make reasonable progress where no petition was ever filed to adjudicate the child abused, dependent, or neglected and no trial court with appropriate jurisdiction ever entered an order removing the child from the father's custody. The Supreme Court rejected the argument that the father's voluntary out-of-home family services agreement identified the "conditions" that "led to the removal" of the child and that his failure to comply with the agreement constituted grounds for termination under N.C.G.S. § 7B-1111(a)(2).

Justice NEWBY concurring in result only.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 834 S.E.2d 169 (N.C. Ct. App. 2019), affirming an order terminating respondent-father's parental rights entered on 30 November 2018 by Judge Kevin Eddinger, in District Court, Rowan County. Heard in the Supreme Court on 17 June 2020.

*Jane R. Thompson for petitioner-appellee Rowan County Department of Social Services.*

*Jeffrey L. Miller, for respondent-appellant father.*

EARLS, Justice.

Respondent-father appeals from the Court of Appeals' affirmance of the trial court's order terminating parental rights to his minor child, E.B. (Ella).[1] Between 12 May 2016 and 25 January 2018, the trial court conducted six permanency planning and review hearings and entered six orders imposing numerous conditions that respondent was required to satisfy prior to obtaining custody of Ella. However, as petitioners

1. We will refer to E.B. throughout the remainder of this opinion by the pseudonym "Ella" for ease of reading and to protect the privacy of the juvenile.

conceded before the Court of Appeals, the trial court lacked jurisdiction to conduct the permanency planning and review hearings under N.C.G.S. § 7B-200 because the Rowan County Department of Social Services (DSS) "failed to file a proper juvenile petition consistent with the requirements of N.C.[G.S.] §§ 7B-402(a) and 403(a), and thus no juvenile abuse, neglect, or dependency action was ever commenced." *In re E.B.*, 834 S.E.2d 169, 172 (N.C. Ct. App. 2019). Indeed, Ella was never adjudicated to be an abused, neglected or dependent child. Her father indicated his desire to have custody of her and to care for her from the day he learned of her birth.

On 30 November 2018, the trial court entered an order terminating respondent's parental rights on the grounds of neglect, failure to make reasonable progress, and willful abandonment. The Court of Appeals affirmed the trial court's termination order on the willful abandonment ground. *Id.* at 175. Judge Hampson dissented. Judge Hampson would have held that because the facts supporting the grounds for termination as adjudicated by the trial court were "inextricably intertwined" with the concededly invalid permanency planning and review hearings, the trial court failed to prove grounds for termination by "clear, cogent, and convincing evidence." *Id.* (Hampson, J., dissenting).

We substantially agree with Judge Hampson and hold today that petitioners have failed to prove by clear, cogent, and convincing evidence that respondent willfully abandoned his child. We also hold that petitioners have failed to prove that any other ground existed to terminate respondent's parental rights. Accordingly, we reverse.

Standard of Review

"A trial court is authorized to order the termination of parental rights based on an adjudication of one or more statutory grounds." *In re J.A.E.W.*, 846 S.E.2d 268, 271 (N.C. 2020). "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. N.C.G.S. § 7B-1109(e), (f) (2019)." *Id.*

The trial court found three separate grounds for terminating respondent's parental rights: (1) neglect, pursuant to N.C.G.S. § 7B-1111(a)(1); (2) failure to make reasonable progress, pursuant to N.C.G.S. § 7B-1111(a)(2); and (3) willful abandonment, pursuant to N.C.G.S. § 7B-1111(a)(7). We review a trial court's adjudication under N.C.G.S. § 7B-1109 "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the

conclusion of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984). 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).

Background

Ella was born on 18 February 2016. The next day, Ella's mother relinquished her parental rights, placing Ella in nonsecure custody with DSS. By relinquishing her parental rights, Ella's mother agreed to the "transfer of legal and physical custody of the minor to the agency for the purposes of adoption." N.C.G.S. § 48-3-703(a)(5) (2019). As an exercise of that custodial authority, DSS placed Ella in foster care.

Ella's mother informed DSS that she believed respondent was Ella's biological father. Sometime thereafter, DSS informed respondent that he had been named by Ella's mother as the putative biological father of a newborn. When DSS contacted respondent, he reported that he was "excited" to be Ella's father. He agreed to submit to a paternity test. Even before paternity was confirmed, respondent expressed his desire to be a parent to Ella. However, until respondent was confirmed as Ella's biological parent, DSS possessed sole legal custody of Ella. *See* N.C.G.S. § 48-3-601, -705.

On 23 March 2016, before the results of the paternity tests were known, respondent voluntarily entered into an out-of-home family services agreement with DSS. Respondent stated that he wanted to do "whatever [DSS said] was necessary." Because he was working and had his own home, he believed the reunification process "would just go over smoothly and my daughter would be released." On 19 April 2016, a paternity test confirmed that respondent was Ella's biological father.

Between 12 May 2016 and 25 January 2018, the trial court conducted six permanency planning and review hearings. After each hearing, the court entered an order imposing numerous requirements on respondent before he could be reunified with Ella. These requirements incorporated the recommendations DSS made in the out-of-home family services agreement. After the first five hearings, the trial court concluded that Ella's "primary permanent plan shall be reunification with [respondent], with a secondary plan of guardianship to a relative or a court approved caretaker." After the final hearing, the trial court changed the primary plan to "adoption, with a secondary plan of reunification."

DSS never filed a petition seeking to have the trial court adjudicate Ella an abused, neglected, or dependent juvenile pursuant to N.C.G.S. §§ 7B-402(a) and - 403(a). Thus, the trial court lacked subject-matter

jurisdiction to conduct permanency planning and review hearings, and its orders lacked the force of law. *See In re T.R.P.*, 360 N.C. 588, 593, 636 S.E.2d 787, 792 (2006) ("A trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition.").

When Ella was born, respondent was helping to raise three of his own juvenile children. Within months, respondent became his children's sole caregiver. Still, as soon as he learned about Ella, respondent expressed his desire to eventually take Ella into his custody and care. Respondent immediately began visitation with Ella. He brought her age-appropriate snacks, cleaned her, and bonded healthily with his daughter. After DSS raised concerns about his living situation, respondent relocated to a new apartment. He submitted to three drug screens, two of which were negative and one inconclusive. He completed parenting classes to improve his ability to care for an infant.

Respondent also named his sister, who lived in California, as a potential relative placement option, although he was initially reluctant to request that DSS place Ella with her because she lived so far away. In April 2016, respondent asked DSS to initiate an Interstate Compact on the Placement of Children (ICPC) review process, and respondent's sister agreed to serve as Ella's guardian. After the North Carolina ICPC office misplaced the initial request, causing a months-long delay, respondent's sister called DSS to request an expedited home study to facilitate quicker ICPC approval. She visited with Ella on three occasions during her trips to North Carolina. Anticipating that she would promptly begin caring for Ella, respondent's sister purchased a crib; when the ICPC process was delayed, respondent's sister removed the crib and replaced it with a "princess bed." Ultimately, respondent's sister became a licensed foster parent and was assessed and approved to assume custody of Ella through the ICPC review process. In order to meet the ICPC's requirements, respondent's sister completed parenting courses, became CPR certified, and moved her entire family out of their home into one that would be safer for Ella because it did not have a pool. The ICPC report noted that respondent's sister possessed "considerable insight into the effects that separation and loss can have on children from her own experiences" in the foster care system.

Although respondent never disclaimed his intent to eventually assume custody of Ella, he also struggled to fully address the issues that he and DSS had identified in the voluntary out-of-home family services agreement. Respondent did not complete the recommended domestic

violence or substance abuse counseling. Respondent refused to consent to ongoing drug screens, and his social media history suggested that he may have been continuing to use marijuana. He was assaulted by three men who broke into his home while his children were present, causing him to be hospitalized for a dislocated jaw and stab wounds. He was evicted and lost his job. DSS reported that his home was cluttered and dirty. He had extended periods of inconsistent visitation with Ella, which respondent attributed to his lack of a driver's license, his injuries, and a death in the family. Eventually, respondent informed DSS that he was not interested in continuing to engage in parenting services and that he only wanted to maintain visitation with Ella. It is undisputed that respondent did not fully comply with all of the terms of the trial court's orders.

Respondent's final in-person visit with Ella occurred on 5 September 2017. On 22 January 2018, respondent moved to California. Respondent did not inform DSS of his impending move and did not immediately provide them with an address where he could be reached. On 10 April 2018, DSS filed a petition to terminate respondent's parental rights, alleging grounds of neglect, failure to make reasonable progress, willful abandonment, and failure to pay child support. Respondent did not communicate with Ella following his move to California until after DSS initiated termination proceedings.

## Analysis

We begin by noting that DSS's and the trial court's actions repeatedly infringed upon respondent's constitutional parental rights. "[T]he government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody or where the parent's conduct is inconsistent with his or her constitutionally protected status." *Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001) (citations omitted). Immediately upon learning that he was Ella's biological father, respondent expressed his intent to parent Ella, an intent that he never disavowed. Until DSS filed a petition to terminate respondent's parental rights, DSS did not seek a judicial order establishing that respondent was "unfit to have custody" of Ella or that his "conduct [was] inconsistent with his . . . constitutionally protected status" as a parent. *Id.* Thus, as a biological father who had "seize[d] the opportunity to become involved as a parent in his child's life," *Owenby v. Young*, 357 N.C. 142, 146, 579 S.E.2d 264, 267 (2003), respondent enjoyed a constitutionally protected right to the "custody, care, and nurture" of his child. *Petersen v. Rogers*, 337 N.C. 397, 402, 445 S.E.2d 901, 904 (1994). The constitutional parental right is, of course, not absolute. *See, e.g.*, *In*

*re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019). It is, however, a " 'fundamental liberty interest' which warrants due process protection." *In re Montgomery*, 311 N.C. 101, 106, 316 S.E.2d 246, 250 (1984) (quoting *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982)).

The trial court substantially interfered with respondent's "constitutionally protected paramount right" to the "custody, care, and control" of his child. *Owenby v. Young*, 357 N.C. at 148, 579 S.E.2d at 268. On 17 May 2017, respondent, through counsel, informed the trial court that he "loves his daughter [Ella] and desires for her to be placed with him, or, alternatively . . . if the child is not placed with Respondent Father, he respectfully requests the child to be placed with his sister . . . immediately." At that point in time, neither the trial court nor DSS possessed the legal authority to thwart respondent's wishes. If DSS had concerns about releasing Ella into respondent's custody, the way to address those concerns was by filing a petition to adjudicate Ella an abused, neglected, or dependent child, or by filling a petition to terminate respondent's parental rights. *See* N.C.G.S. § 7B-200, -904, -906.1. DSS's failure to file such a petition deprived the trial court of the legal authority to demand that respondent demonstrate his parenting abilities to the trial court's own satisfaction prior to taking Ella into his own custody, care, and control. It also deprived the trial court of the legal authority to dictate when, where, and how frequently respondent would be permitted to interact with his child. These requirements and restrictions had no binding legal effect, but the trial court treated them as preconditions respondent needed to satisfy, and parameters he needed to comply with, in order to exercise his constitutional parental rights.

The trial court ultimately concluded that the conditions imposed upon respondent's relationship with Ella served Ella's best interests, and its decision to reject respondent's demand to assume custody of his child or have her placed with his sister flowed from a commitment to ensuring a safe, nurturing, and loving environment for Ella. However, the trial court did not have the authority to act on its own views of what served Ella's best interests without first finding grounds to displace respondent's constitutional parental rights to make such decisions. *See Owenby v. Young*, 357 N.C. at 144, 579 S.E.2d at 266 (The "Due Process Clause of the Fourteenth Amendment ensures that the government does not impermissibly infringe upon a natural parent's paramount right to custody solely to obtain a better result for the child"); *see also Troxel v. Granville*, 530 U.S. 57, 73–74 (2000) ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a

'better' decision could be made.").[2] Until the trial court entered an order granting custody of Ella to DSS and taking custody away from her father on some legally cognizable ground, DSS and the trial court's desire to further Ella's best interests, however well-intentioned, provided no justification for interfering with respondent's exercise of his constitutional prerogatives as Ella's parent.

Notwithstanding its prior lack of jurisdiction to conduct permanency planning and review hearings, the trial court did possess jurisdiction over DSS's petition to terminate respondent's parental rights under N.C.G.S. § 7B-1101. A court's jurisdiction to adjudicate a termination petition does not depend on the existence of an underlying abuse, neglect, and dependency proceeding. N.C.G.S. § 7B-1101 ("The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion."). DSS had standing to seek termination of respondent's parental rights because Ella's mother had relinquished her own parental rights and transferred legal custody of Ella to the agency. N.C.G.S. § 7B-1103(a)(4).

Still, the trial court's errors in conducting unauthorized permanency planning and review hearings are significant in examining its subsequent order terminating respondent's parental rights. Because the trial court acted without subject matter jurisdiction during the permanency planning process, the hearings it conducted and orders it entered were "void ab initio." *In re T.R.P.*, 360 N.C. 588, 588, 636 S.E.2d 787, 789 (2006). A trial court cannot determine a party's rights based on facts established in or arising from a legally void judicial proceeding. *See Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956) ("A void judgment is, in legal effect, no judgment. No rights are acquired or divested by it. It neither binds nor bars any one, and all proceedings founded upon it are worthless.").

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2. Restrictions on the State's authority to interfere with a fit parent's exercise of their parental rights are not merely technical requirements. In the child welfare context, these statutory and constitutional protections help mitigate the risk that parents will lose custody of their children if public officials disagree with their approach to childrearing or because of racial, religious, gender, sexual orientation, or other biases. In cases such as this one, the potential for these biases, whether explicit or unconscious, to interfere with the proper disposition of a custody dispute underscores the importance of according due respect to a parent's constitutional and statutory rights. *See, e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 762–63 (1982) (explaining that "[b]ecause parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias").

If the trial court made findings sufficient to prove grounds for termination based on facts that were independent from the invalid permanency planning and review hearings, then the mere fact that those invalid proceedings occurred would not preclude the trial court from also concluding that termination was warranted. However, facts inextricably intertwined with a legally void proceeding are necessarily insufficient to prove grounds for termination by clear, cogent, and convincing evidence. Reviewing the record against this backdrop and evidentiary standard, we hold that the trial court failed to find sufficient facts independent from the legally void permanency planning and review hearings to prove any of the three alleged grounds for terminating respondent's parental rights.

*a. Willful Abandonment*

**[1]** The Court of Appeals affirmed the trial court's termination order by concluding that DSS had supplied sufficient evidence to prove willful abandonment. Accordingly, we address this ground first.

N.C.G.S. § 7B-1111(a)(7) provides for termination of parental rights where "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." "[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) (internal quotations omitted). "[W]hether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *Id.* (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 276, 346 S.E.2d 511, 514 (1986)). At the adjudicatory stage, the petitioner bears the burden of proving willful abandonment by clear, cogent, and convincing evidence. *In re N.D.A.*, 373 N.C. at 74, 833 S.E.2d at 771.

To establish willful abandonment, the trial court must find evidence of conduct that is more serious than inconsistent attention to parental duties or less than ideal parenting practices. The trial court must instead find evidence that the parent deliberately eschewed his or her parental responsibilities in their entirety. *See In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997). Abandonment requires "purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to the child." *In re A.G.D.*, 374 N.C. 317, 319, 841 S.E.2d 238, 240 (2020) (cleaned up).

Almost all of the trial court's findings of fact in this case directly relate to the legally void permanency planning and review hearings, focusing mostly on respondent's alleged failures to comply with all of the conditions imposed by the trial court's orders. The Court of Appeals appropriately jettisons these facts, but then relies almost exclusively upon respondent's failure to attend permanency planning hearings and scheduled visitations with Ella, mostly after his relocation to California, in finding that respondent willfully abandoned his child.[3] *In re E.B.*, 834 S.E.2d 169, 174–75 (N.C. Ct. App. 2019).

Respondent's decision to relocate to California must be assessed in the context of his ongoing efforts to take custody of Ella and bring her to California or to place Ella in the custody of his sister who lived in that state. As respondent stated at trial, his plan "was always for reunification. Once I had my daughter back home with me, I had plans to move to California and . . . she was supposed to come with us." In light of this express intent, respondent's actions do not "manifest a willful determination" to abandon his parental duties. When respondent relocated, his sister was awaiting approval under the ICPC to take custody of Ella.[4] Respondent had already informed DSS that he intended "to allow [his] sister to handle the situation," which the trial court recognized "refer[ed] to Ella's care and placement." In this context, respondent's actions indicated an intent to let his sister complete the ICPC process and assume custody of Ella, not an intent to abandon Ella to DSS. The Court of Appeals has previously held, and we agree, that conduct that is "subject

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3. The Court of Appeals also cited respondent's failure to personally attend a single child support hearing in January 2018. While failure to pay appropriate child support may be a ground for termination that is independent of an invalid underlying juvenile proceeding, the trial court did not find sufficient evidence proving that ground in the instant case. Further, a single missed child support hearing is, standing alone, insufficient to prove willful abandonment. *See Pratt v. Bishop*, 257 N.C. 486, 501–02, 126 S.E.2d 597, 608 (1962).

4. Because the ICPC review of respondent's sister was not completed until after DSS had filed the termination petition, DSS possessed legal authority to refuse to transfer Ella into respondent's sister's custody. We do not today reach the question of whether, after the trial court found grounds to terminate respondent's parental rights at the adjudicatory stage, the trial court's decision to terminate rather than permit respondent to transfer custody to his sister was an appropriate exercise of its discretion at the dispositional stage. N.C.G.S. § 7B-1110. However, we note that some of the trial court's apparent reasons for disregarding respondent's wish to place Ella in his sister's custody may not be sufficient, standing alone, to justify a refusal to place a child with a parent's desired relative. In particular, the trial court's findings that she possessed "negative attitudes" and made "negative posts on social media . . . towards the DSS and [petitioners]," her frustrations with the delayed ICPC process, and the fact that she authored a blog with a title that contained a sexual innuendo may not have been legally relevant in determining whether placement with respondent's sister was in Ella's best interests.

to other explanations"—in this case, the explanation that respondent had long planned to relocate to California with Ella, based on his belief that he would be able to take Ella with him or place her with his sister—"do[es] not inherently suggest a willful intent to abandon." *In re S.R.G.*, 195 N.C. App. 79, 86, 671 S.E.2d 47, 52 (2009).

Respondent's actions before the "determinative" six-month window are also relevant in interpreting whether his conduct during the window signified willful abandonment. *See In re K.N.K.*, 374 N.C. 50, 55, 839 S.E.2d 735, 739 (2020) (relying on evidence of a parent's "actions both prior to and during the determinative six-month period [to] support a reasonable inference of willfulness for purposes of N.C.G.S. § 7B-1111(a)(7)"). Respondent's ongoing efforts to obtain custody of Ella both before and during the determinative six-month window are simply inconsistent with a finding that he willfully intended to forgo all parental claims and responsibilities.

Other findings that the trial court relies upon cannot support willful abandonment because they are the direct result of the trial court's own interference with respondent's parental rights. The fact that respondent stopped attending permanency planning and review hearings and the fact that he communicated inconsistently with DSS after his move to California both arise directly from the trial court's legally invalid proceedings. Any purported obligation respondent had to attend the trial court's hearings and communicate regularly with DSS was created by proceedings that the trial court lacked subject-matter jurisdiction to conduct. Similarly, respondent's failure to attend visitations with Ella is inextricably intertwined with the fact that the trial court impermissibly precluded him from interacting with Ella in the time and manner that he saw fit, as was his right as her parent. The trial court lacked authority to control respondent's access to his child, and respondent's failure to comport with the trial court's restrictions is insufficient to prove willful abandonment. Further, it is relevant that respondent ceased visitation during the determinative six-month period immediately after a breakdown in his relationship with petitioners, in that there was another possible cause for respondent's inconsistent visitation apart from a willful intent to abandon his child. *Cf. In re Young*, 346 N.C. at 252, 485 S.E.2d at 617 (1997) (considering finding of "the probable hostile relationship between respondent and petitioner's family members who cared for [respondent's child]" relevant in willful abandonment analysis). Respondent's actions, viewed in their appropriate context, do not clear the high threshold necessary to support a finding of willful abandonment. *See id.* at 251, 485 S.E.2d at 617 ("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.") (emphasis added) (citations omitted).

The Court of Appeals makes an unpersuasive distinction between respondent's "failures to comply with *the terms* of the void Permanency Planning Orders" and his alleged "failure *to attend* those proceedings [which] is nevertheless illustrative of Respondent-Father having willfully determined to forgo his parental duties." *In re E.B.*, 834 S.E.2d at 174 n.5. Regardless, respondent's failure to personally appear at the trial court's hearings did not forfeit his ongoing claim that he should be reunified with his child. Nor did it withdraw his request to place Ella with his sister. In these circumstances, and given that respondent never disavowed his intent to assume custody of Ella or place her with his sister, his failure to attend permanency planning and review hearings is insufficient to prove a willful intent to abandon his child.

Petitioners' reliance on *In re A.L.*, 245 N.C. App. 55, 781 S.E.2d 860 (2016), is similarly misplaced. While the mere existence of legally void proceedings does not preclude a trial court from subsequently entering an order terminating parental rights, a trial court may only terminate a parent's rights when the petitioners have proven grounds for termination based on facts that are independent from the circumstances created by the legally void underlying proceedings. We hold that in this case, petitioners have failed to meet their burden to prove willful abandonment by clear, cogent, and convincing evidence that is not inextricably intertwined with the legally void permanency planning and review hearings.

Because petitioners need only prove a single ground for termination under N.C.G.S. § 7B-1111, we address the other two grounds the trial court found in terminating respondent's parental rights.[5]

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5. This case is not appropriate for remand for further factual findings because our responsibility under all three grounds for removal is to determine first, whether the evidence in the case supports the trial court's findings of fact, and then second, whether those findings support the trial court's conclusions of law. *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984). Where, as here, we conclude that the record evidence cannot support the necessary findings, there is no justification for a remand for further factual findings. Reversal is also appropriate because there are no material factual disputes relevant to this Court's holding that the evidence does not support termination on any of the grounds alleged by petitioners. *Cf*, *IMT, Inc. v. City of Lumberton*, 366 N.C. 456, 463, 738 S.E.2d 156, 160 (2013) (appropriate to resolve the substantive claim rather than remand the case where the facts are undisputed).

*b. Neglect*

**[2]** A trial court may terminate the parental rights of a parent who "has abused or neglected the juvenile." N.C.G.S § 7B-1111(a)(1) (2019). 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). When, as in this case, the juvenile "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).

Petitioners have failed to prove either that respondent previously neglected Ella or that there is a likelihood that he will neglect her in the future. Respondent has never had physical custody of Ella, and she has never been adjudicated a neglected child. Since shortly after Ella's birth, respondent has continuously been the sole caretaker for his three other minor children, none of whom have been adjudicated neglected. While these facts are not necessarily dispositive, together they impose upon the petitioners a burden that they have failed to carry. *See In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984) (holding that even a prior adjudication of neglect is not enough, on its own, to prove neglect in a termination proceeding).

The trial court's relevant findings of fact pertaining to this ground all relate to evidence developed during the legally invalid permanency planning and review hearings and flow from the assessments, recommendations and requirements imposed as part of that process. There is no evidence that respondent *actually* neglected Ella, and no basis to infer that he would have done so if Ella had been in his care, especially given that respondent was, at that same time, successfully caring for three other minor children.

The record was also devoid of any facts supporting a conclusion that respondent was likely to neglect Ella in the future. The only relevant findings pertaining to likelihood of future neglect are that "[t]he history of [respondent] since [Ella] was born suggests that marijuana use, unstable housing, changing employment and conflicts raised by his lifestyle will continue to be issues for him," that respondent "is not in a position to care for [Ella] due to his lack of responsible decision making, substance abuse issues, parenting struggles, and lack of overall stability," and that those issues are "barriers to a safe reunification with" Ella. From these facts, the trial court draws its conclusion

that respondent "has not corrected the risk factors within his life that would allow him to appropriately and successfully parent [Ella], pursuant to N.C.G.S. § 7B-1111(a)(1)."

These findings are insufficient to support the conclusion that respondent is likely to neglect Ella in the future. *Cf. In re K.N.*, 373 N.C. 274, 282, 837 S.E.2d 861, 867 (insufficient evidence to prove likelihood of future neglect where juvenile had previously been adjudicated neglected and removed from home, parent was incarcerated, and evidence indicated parent had not fully complied with legally valid case plan). The trial court fails to analyze how these facts[6] connect with the specific determinative question of respondent's future likelihood of neglecting Ella. *Id.* at 283, 837 S.E.2d at 867–68 (holding 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*") (emphasis added). Further, the trial court fails to examine the "considerable change in conditions" in respondent's life that "had occurred by the time of the termination proceeding." *In re Young*, 346 N.C. at 250, 485 S.E.2d at 616. Notably, in addition to respondent's progress addressing at least some of the "risk factors" he had previously identified to DSS, respondent had also identified his sister as an appropriate alternative guardian for Ella.

Because petitioners have failed to prove that respondent previously neglected Ella and that he was likely to neglect Ella again in the future, Section 7B-1111(a)(1) does not support termination of respondent's parental rights.

*c. Failure to Make Reasonable Progress*

**[3]** A trial court may terminate the parental rights of a parent who "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). Here, there must be a "nexus between the components of the court-approved case plan with which [respondent] failed to comply and the conditions which led to [the juvenile's]

6. Some of the facts relied upon by the trial court are contested (for example, respondent denies marijuana use during the relevant time period), some are subjective value judgments (the assertion of "conflicts raised by his lifestyle"), and some are circumstances that respondent shares with many other parents nationwide who will never neglect their children ("unstable housing" and "changing employment"). Hence, their probative value is questionable in any event.

removal from the parental home." *In re B.O.A.*, 372 N.C. 372, 385, 831 S.E.2d 305, 314 (2019). A parent is required to make "reasonable progress . . . in correcting *those conditions which led to the removal of the juvenile*." N.C.G.S.§ 7B-1111(a)(2) (2019). Petitioners essentially contend that respondent's voluntary out-of-home family services agreement both identifies the "conditions" which "led to the removal" of Ella from his home (e.g., DSS's refusal to allow respondent to assume custody of Ella) and the benchmark against which the trial court could evaluate his "progress." They argue that respondent's failure to make reasonable progress towards addressing the risk factors outlined in his voluntary out-of-home family services agreement provides sufficient factual evidence to terminate his parental rights.

We reject the argument that failure to comply with a voluntary out-of-home family services agreement constitutes grounds for termination under § 7B-1111(a)(2). It is settled law that "removal" as used within § 7B-1111(a)(2) only occurs when a court acting with appropriate jurisdiction enters an order placing a child into the custody of someone other than the child's parents. *In re J.S.*, 374 N.C. 811, 845 S.E.2d 66, 71 (2020) ("[A]n 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.") (emphasis added) (cleaned up); *see also In re Pierce*, 356 N.C. 68, 73, 565 S.E.2d 81, 85 (2002) (determining that a child was removed within the meaning of § 7B-1111(a)(2) "when the trial court awarded custody of the child to DSS, and she was placed in foster care"). As the Court of Appeals has correctly held, permitting this ground to apply to voluntary separations would unnecessarily subject parents to the risk of termination even when their "reasons" for transferring custody of their child do not "implicate the child welfare concerns of the State." *In re A.C.F.*, 176 N.C. App. at 525, 626 S.E.2d at 733. Further, such a broad interpretation of § 7B–1111(a)(2) may cause parents to avoid voluntarily seeking out much-needed assistance from DSS for fear of permanently losing their parental rights. Because DSS never filed a petition to adjudicate Ella abused, dependent, or neglected, no legally valid order ever "removed" Ella from respondent's custody. Therefore, Section 7B-1111(a)(2) does not support termination of respondent's parental rights.

## Conclusion

Petitioners bear the burden of proving that grounds exist for terminating respondent's parental rights, based on facts that arise independently from the legally void permanency planning proceedings. As we

hold that petitioners have failed to meet this burden, we reverse the Court of Appeals decision.

REVERSED.

Justice NEWBY concurring in result only.

I agree with the majority that because no abuse, neglect, or dependency petition was filed, the trial court lacked jurisdiction to conduct the initial permanency planning and review hearings here, and that the trial court's findings that were not based on the void orders and proceedings are insufficient to support the termination of respondent's parental rights. Accordingly, the matter should be remanded to the trial court. In its analysis, the majority improperly finds facts in this case, which is a job reserved for the trial court, and addresses issues unnecessary to resolve this matter, rendering much of the discussion dicta. Thus, I concur in the result only.

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IN THE MATTER OF J.A.M.

No. 7PA17-3

Filed 25 September 2020

**Termination of Parental Rights—no-merit brief—pro se arguments—neglect**

The trial court's termination of a mother's parental rights on the grounds of neglect was affirmed where counsel filed a no-merit brief and the mother filed a pro se brief. The Supreme Court addressed the mother's pro se arguments, concluding that her challenge to the children's initial removal was foreclosed by an earlier appellate decision in the matter; her allegations of corruption, misconduct, and bias had no support in the record; and her argument that she did nothing wrong and that children cannot be removed just because they have witnessed domestic violence lacked any legal or factual basis. 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 an order entered on 20 May 2019 by Judge Elizabeth T. Trosch in District Court, Mecklenburg County. This matter was calendared for argument in the

Supreme Court on 29 July 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

*Marc S. Gentile, Associate County Attorney, for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services Division.*

*Matthew D. Wunsche, GAL Appellate Counsel, for appellee Guardian ad Litem.*

*Richard Croutharmel for respondent-appellant mother.*

HUDSON, Justice.

Respondent appeals from an order entered by Judge Elizabeth T. Trosch in District Court, Mecklenburg County, on 20 May 2019 terminating her parental rights in J.A.M., a girl born in January 2016.[1] Respondent's counsel has filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure, and respondent has filed her own written arguments as permitted by that rule. Because we conclude that the issues raised by respondent and her counsel are meritless, we affirm.

On 29 February 2016, soon after J.A.M.'s birth, the Mecklenburg County Department of Social Services, Youth and Family Services Division (YFS), filed a juvenile petition alleging that the infant child was neglected due to the serious domestic violence histories of both parents. With regard to respondent, the juvenile petition alleged that she "had a child receive life[-]threatening injuries while in her care in the past and [had] her rights terminated to six other children." The juvenile petition further noted that "[b]oth parents refused to sign a Safety Assessment, stating that [respondent] does not trust anyone with YFS."

In a prior decision in this case, we summarized respondent's history with YFS in Mecklenburg County as follows:

> Respondent[ ] has a significant history of involvement with YFS extending back to 2007 relating to children

1. The trial court previously terminated the parental rights of J.A.M.'s father, who is not a party to this appeal. The testimony presented in this case was incorrect to the extent that it states that the father's parental rights in J.A.M. were terminated on 31 March 2016. The father's parental rights were actually terminated on 14 November 2016.

born prior to J.A.M. . . . [R]espondent[ ] has a long history of violent relationships with the fathers of her previous six children, during which her children "not only witnessed domestic violence, but were caught in the middle of physical altercations." Furthermore, during this period, she repeatedly declined services from YFS and "continued to deny, minimize and avoid talking about incidences of violence." All of this resulted in her three oldest children first entering the custody of YFS on 24 February 2010.

The most serious incident occurred in June 2012 when respondent[ ] was in a relationship with E.G. Sr., the father of her child E.G. Jr., a relationship that—like prior relationships between respondent[ ] and other men—had a component of domestic violence. Respondent[ ] had recently represented to the court that "her relationship with E.G. Sr. was over" and stated that she "realized that the relationship with E.G. Sr. was bad for her children"; however, she quickly invited E.G. Sr. back into her home. Following another domestic violence incident between respondent[ ] and E.G. Sr., E.G. Jr. "was placed in an incredibly unsafe situation sleeping on the sofa with E.G. Sr." for the night, which resulted in E.G. Jr. suffering severe, life-threatening injuries, including multiple skull fractures, at the hands of E.G. Sr. The next morning, respondent[ ] "observed E.G. Jr.'s swollen head, his failure to respond, and his failure to open his eyes or move his limbs," but she did not dial 911 for over two hours. Following this incident, respondent[ ]'s children re-entered the custody of YFS. Afterwards, she refused to acknowledge E.G. Jr.'s "significant special needs" that resulted from his injuries, maintaining that "there was nothing wrong with him" and "stating that he did not need all the services that were being recommended for him." Respondent[ ] proceeded to have another child with E.G. Sr. when he was out on bond for charges of felony child abuse.

In response to respondent[ ]'s failure to protect E.G. Jr., as well as her other children, her parental rights to the six children she had at the time were terminated in an order filed on 21 April 2014 by Judge [Louis A.] Trosch. The 2014 termination order was based largely on the court's finding that she had "not taken any steps to change

> the pattern of domestic violence and lack of stability for the children since 2007."

*In re J.A.M.* (*J.A.M. II*), 372 N.C. 1, 2–3, 822 S.E.2d 693, 695 (2019) (cleaned up).

Judge Louis A. Trosch[2] held a hearing on YFS's juvenile petition on 30 March 2016 and entered an order the same day adjudicating J.A.M. a neglected juvenile and ordering that reunification efforts with respondent were not required based on the trial court's previous termination of her parental rights in J.A.M.'s six siblings. As part of the adjudication and disposition order, the trial court maintained J.A.M. in YFS custody and awarded respondent one hour of supervised visitation semiweekly.

Respondent appealed the 30 March 2016 adjudication and disposition order. While her appeal was pending, the trial court continued to conduct permanency planning hearings. In an order entered on 12 April 2016, Judge Louis Trosch suspended respondent's visitation with J.A.M., reaffirmed that efforts for reunification with respondent were not required, and ordered YFS to file for termination of respondent's parental rights within sixty days. YFS filed a motion to terminate respondent's parental rights in J.A.M. on 10 May 2016 (TPR motion). The TPR motion was held in abeyance pending the outcome of respondent's appeal from the initial adjudication and disposition order.[3]

In an opinion filed on 20 December 2016, the North Carolina Court of Appeals reversed the adjudication and disposition order holding that the evidence and the trial court's findings of fact did not support the trial court's adjudication of neglect. *In re J.A.M.*, 251 N.C. App. 114, 120, 795 S.E.2d 262, 266 (2016), *rev'd per curiam*, *In re J.A.M.* (*J.A.M. I*), 370 N.C. 464, 809 S.E.2d 579 (2018). YFS and the guardian *ad litem* (GAL) filed a joint petition for discretionary review in this Court on 6 January 2017, which we allowed by order entered on 8 June 2017.

On 11 January 2017, following the Court of Appeals' decision reversing the trial court's order adjudicating J.A.M. to be a neglected juvenile, respondent filed a motion to reinstate her supervised visitation privileges. Judge Elizabeth Trosch granted the motion, awarding respondent

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2. Judge Louis A. Trosch and Judge Elizabeth T. Trosch are both district court judges in Mecklenburg County. Because both judges entered orders in this matter, they are referred to by their first and last names.

3 On 2 September 2016, YFS filed a motion to terminate the parental rights of J.A.M.'s father. The trial court held a hearing on the motion on 31 October 2016 and terminated the father's parental rights in an order entered on 14 November 2016.

one hour of supervised visitation with J.A.M. biweekly and authorizing YFS to expand respondent's supervised visitation privileges.

After we granted discretionary review in *J.A.M. I*, Judge Elizabeth Trosch again suspended respondent's visitation in a permanency planning hearing order entered on 22 August 2017 finding that respondent

> has begun to visit with the juvenile but has engaged in no other service[s] related to domestic violence, mental health, parenting or substance abuse. [Respondent] is currently pregnant and refuses to provide any information related to the father of that child. [Respondent] has chosen to take no action since the Court of Appeals decision to demonstrate she understands the impact that domestic violence has on a child . . . and has shown no evidence of changed behavior.

Respondent appealed the trial court's order, but the Court of Appeals dismissed her appeal, holding that the trial court's order was interlocutory, and denied her petition for writ of certiorari. *In re J.M.*, 259 N.C. App. 250, 812 S.E.2d 413 (2018) (unpublished).

On discretionary review in *J.A.M. I*, this Court reversed the Court of Appeals' decision reversing the 30 March 2016 adjudication and disposition order and remanded "for reconsideration and for proper application of the standard of review." 370 N.C. at 467, 809 S.E.2d at 581. On remand, a divided panel of the Court of Appeals affirmed the trial court's order. *In re J.A.M.*, 259 N.C. App. 810, 817, 816 S.E.2d 901, 905 (2018), *aff'd*, 372 N.C. 1, 822 S.E.2d 693 (2019). Respondent appealed to this Court.

In *J.A.M. II*, we affirmed the Court of Appeals' decision in an opinion filed on 1 February 2019. 372 N.C. at 11, 822 S.E.2d at 700. We held the trial court's findings of fact supported the trial court's conclusion that J.A.M. was a neglected juvenile based on the substantial risk of harm she faced in respondent's care.

> Combined with the lengthy record from her past cases, the findings that respondent[ ] believed she did not need any services from YFS, had opted not to directly confront her romantic partner's prior domestic violence history, and continued to minimize the role her own prior decisions played in the harm her older children had suffered all support a conclusion that respondent[ ] had not made sufficient progress in recognizing domestic violence warning signs, in accurately assessing poor decisions

> from the past, or in identifying helpful resources. It was proper for the trial court to then reach the conclusion that respondent[ ] had not developed the skills necessary to avoid placing J.A.M. in a living situation in which she would suffer harm.

*Id*. at 10–11, 822 S.E.2d at 699.

Following our decision in *J.A.M. II*, YFS provided notice of a hearing on the TPR motion. Respondent filed a motion for Judge Elizabeth Trosch's recusal on the ground that she had conducted multiple permanency planning hearings in the case since January 2017 and had maintained a primary permanent plan of adoption for J.A.M. based on her assessment of the child's best interests.[4] Inasmuch as Judge Elizabeth Trosch had "already formed an opinion that termination [of respondent's parental rights was] in the child's best interest[s]," respondent argued that her recusal was required by the Due Process Clause of the Fourteenth Amendment as well as Canon 3C(1) of the North Carolina Code of Judicial Conduct. Judge Elizabeth Trosch denied respondent's motion to recuse in a written order entered on 14 March 2019, finding as follows:

> 4. The practice in Mecklenburg County and others across this state is that the same judge will hear matters regarding the same family. It is known colloquially as "one judge-one family." Thus, it is common practice for the same judge to hear both an underlying juvenile court matter with a family and then also hear a Termination of Parental Rights (TPR) proceeding involving that same family.
>
> 5. This one judge-one family practice has not been found by the appellate courts to be inappropriate or to prejudice litigants or to violate the Constitutional rights of the litigants.
>
> 6. A juvenile court judge hearing a TPR proceeding is presumed to set aside any incompetent evidence and to decide the matter solely based upon the record evidence presented during the proceeding.

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4. Respondent also erroneously claimed that Judge Elizabeth Trosch entered the 2014 order terminating her parental rights to her six older children and thus "has independent knowledge about an allegation [made] by YFS" in the TPR motion. The record actually shows that Judge Louis Trosch entered the prior termination order.

7. [Respondent] has not demonstrated that she will be prejudiced by the undersigned remaining as the judge of record.

Judge Elizabeth Trosch heard the TPR motion on 8 April 2019. Respondent was represented by counsel but did not attend the hearing. Counsel for respondent offered no evidence but cross-examined YFS's witness, objected to the introduction of the GAL's report at disposition, and made closing arguments at each stage of the hearing.

Judge Elizabeth Trosch entered an "Order Terminating Parental Rights of Respondent Mother" (termination order) on 20 May 2019. In adjudicating grounds for termination under N.C.G.S. 7B-1111(a)(1), Judge Elizabeth Trosch concluded that respondent had previously neglected J.A.M. "and there remains a high probability of the repetition of neglect." *See* N.C.G.S. 7B-1111(a)(1) (2019). Judge Elizabeth Trosch also adjudicated grounds for terminating respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(9) in that "respondent . . . had her parental rights to six other children terminated involuntarily by a court of competent jurisdiction and she further lacks the ability or willingness to establish a safe home" for J.A.M. *See* N.C.G.S. 7B-1111(a)(9). Upon written findings addressing the dispositional factors in N.C.G.S. § 7B-1110(a), Judge Elizabeth Trosch further concluded that terminating respondent's parental rights is in J.A.M.'s best interests. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent filed a notice of appeal from the termination order.

Counsel for respondent has filed a no-merit brief on her behalf pursuant to N.C. R. App. P. 3.1(e). Counsel has advised respondent of her right to file *pro se* written arguments on her own behalf and provided her with the documents necessary to do so. Respondent has submitted *pro se* arguments to this Court, which we consider below.

Respondent first denies neglecting J.A.M. and claims that YFS "has been using [her] past to take [her children] away and to keep them from [her]." Respondent asserts that "it is an illegal and an unconstitutional practice for [YFS] to remove children because they witness domestic violence" and that YFS violated her rights under the Fourteenth Amendment by removing J.A.M. from her care without probable cause.

As respondent's arguments challenge J.A.M.'s initial removal by YFS and her adjudication as a neglected juvenile on 30 March 2016, we conclude that her arguments are foreclosed by our decision affirming the trial court's adjudication and disposition order in *J.A.M. II*, 372 N.C. at 11,

822 S.E.2d at 700. Our decision in *J.A.M. II* constitutes "the law of the case" and is binding as to the issues decided therein. *Shores v. Rabon*, 253 N.C. 428, 429, 117 S.E.2d 1, 2 (1960) (per curiam). Accordingly, we overrule respondent's arguments insofar as they concern the trial court's prior adjudication of neglect.

Respondent next accuses YFS and the "Trosch Judges" of bias, alleging that YFS relied on perjured testimony and fraudulent documents to prevail in the proceedings against her. She notes that YFS failed to report at the termination hearing that she is successfully raising her eighth child in South Carolina without incident. Respondent states that she refused to cooperate with YFS because YFS rewards its social workers with financial bonuses and promotions if they successfully terminate a parent's parental rights. She refused to identify the father of her eighth child in order to keep the child out of YFS custody. Respondent declined to sign a case plan because "a case plan is essentially a plea of guilty" and she "did nothing wrong."

Respondent's allegations of corruption, misconduct, and bias find no support in the record. Respondent points to no evidence that YFS employees committed perjury or tendered forged documents to the trial court, or that they received bonuses or promotions for terminating respondent's parental rights in her children. Nor does respondent show that YFS withheld evidence favorable to respondent from the trial court, let alone that YFS had an affirmative duty to present such evidence. We note that respondent was afforded the opportunity to present evidence at the termination hearing and chose not to do so.

Respondent also fails to show any circumstances giving rise to a reasonable perception of judicial bias against her. As Judge Elizabeth Trosch pointed out, it is the practice in North Carolina for one judge to preside over a juvenile case throughout the life of the case. This is known as the "one judge, one family" policy. *See In re M.A.I.B.K.*, 184 N.C. App. 218, 225–26, 645 S.E.2d 881, 886 (2007). Rather than showing a bias, this practice reflects a central policy of the state. As shown on the North Carolina Judicial Branch's website, a "major goal of family court is to consolidate and assign a family's legal issues before a single district court judge or team of judges." *Family Court*, North Carolina Judicial Branch, https://www.nccourts.gov/courts/family-court (last visited Sept. 4, 2020). These judges are experienced in family law matters and receive specialized training so that family courts can produce "more timely, consistent, and thoughtful outcomes." *Id.*

Accordingly, the mere fact that Judge Elizabeth Trosch presided at earlier permanency planning hearings and determined that a permanent plan of adoption was in J.A.M.'s best interests did not require her to recuse herself from the termination hearing. *See, e.g.*, *In re Z.V.A.*, 373 N.C. 207, 215, 835 S.E.2d 425, 431 (2019) ("If the bias alleged here were to be deemed to exist . . . and ultimately to require recusal, then the illogical consequence would follow that a district court would not ever be able to preside over a termination hearing after it had previously set the permanent plan for a juvenile as a plan that would imply or be compatible with termination . . . ."); *In re Faircloth*, 153 N.C. App. 565, 570-71, 571 S.E.2d 65, 69 (2002) ("[K]nowledge of evidentiary facts gained by a trial judge from an earlier proceeding does not require disqualification. Furthermore, we reject any contention that [the judge] should be disqualified because he earlier adjudicated the four children abused and neglected." (citations omitted)).

Finally, we find respondent's insistence that she "did nothing wrong" and her insistence that "it is an illegal and an unconstitutional practice for [YFS] to remove children because they witness domestic violence" to be consistent with Judge Elizabeth Trosch's finding that respondent made no meaningful effort or progress toward resolving the substantial risk posed to J.A.M. by respondent's lengthy history of relationships involving domestic violence. *See generally In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 241 (2006) (upholding "the [trial] court's conclusion that [the child's] exposure to domestic violence rendered him a neglected juvenile"). Moreover, the evidence and Judge Elizabeth Trosch's findings show that respondent refused to engage in "services to ameliorate the substantial risk of domestic violence" or to maintain contact with YFS even at the cost of having no contact with J.A.M. since mid-2017. Respondent's arguments thus have no legal or factual basis.

We also independently review issues identified by respondent's counsel in a no-merit brief filed pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. *See In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). Counsel has identified three issues that could arguably support an appeal, while also explaining why he believes those issues lack merit. The issues presented by counsel are (1) whether Judge Elizabeth Trosch erred by denying respondent's motion for Judge Elizabeth Trosch to recuse herself; (2) whether the termination order contained sufficient findings based on clear, cogent, and convincing evidence to establish the existence of statutory grounds for terminating respondent's parental rights; and (3) whether Judge Elizabeth Trosch

abused her discretion by concluding that it was in J.A.M.'s best interests that respondent's parental rights be terminated.

Having carefully considered the issues identified in the no-merit brief in light of the entire record, we conclude that (1) Judge Elizabeth Trosch did not err in denying respondent's motion for Judge Elizabeth Trosch to recuse herself; (2) the termination order contains sufficient findings based on clear, cogent, and convincing evidence to establish the existence of a statutory ground of neglect under N.C.G.S. § 7B-1111(a)(1) for terminating respondent's parental rights, *see* N.C.G.S. § 7B-1109(f) (2019);[5] and (3) Judge Elizabeth Trosch did not abuse her discretion by concluding that it was in J.A.M.'s best interests that respondent's parental rights be terminated. Accordingly, we affirm the trial court's termination order.

AFFIRMED.

5. Because we determine that the termination order contains sufficient findings based on clear, cogent, and convincing evidence to establish the existence of a statutory ground of neglect under N.C.G.S. § 7B-1111(a)(1), we do not address whether additional grounds for termination exist under subsection (a)(9). *See In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 53-54 (2019) ("[W]here the trial court finds multiple grounds on which to base a termination of parental rights, and 'an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds.' " (quoting *In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005))).

**IN RE J.D.C.H.**

[375 N.C. 335 (2020)]

IN THE MATTER OF J.D.C.H., J.L.C.H.

No. 401A19

Filed 25 September 2020

**Termination of Parental Rights—grounds—willful abandonment—findings of fact—conclusions of law**

The trial court properly terminated a father's parental rights to his two children on the ground of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where for two and a half years, including the six months before the termination petition was filed, the father made only one attempt to see his children and did not provide them any emotional, material, or financial support. Clear, cogent, and convincing evidence supported enough of the findings of fact to support termination, and the trial court properly considered the father's conduct outside the determinative six-month window when evaluating his credibility and intentions. Importantly, the father's single attempt to visit his children did not undermine the court's ultimate finding and conclusion that he willfully abandoned his children.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 27 June 2019 by Judge Wayne S. Boyette in District Court, Nash County. This matter was calendared for argument in the Supreme Court on 29 July 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 for petitioner-appellee mother.*

*No brief for appellee Guardian ad Litem.*

*Richard Croutharmel for respondent-appellant father.*

HUDSON, Justice.

Respondent appeals from the trial court's order terminating his parental rights to J.D.C.H. (Jed) and J.L.C.H. (Joel)[1] on the ground of willful abandonment. We affirm.

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

## I. Factual Background and Procedural History

Petitioner and respondent were involved in an on-again, off-again relationship from 2010 through 2014 but never married. Joel was born in July 2011, and Jed was born in May 2015. The parents ended their romantic involvement in 2014, shortly after petitioner found out she was pregnant with Jed. Respondent is also the father of three other children with different women.

Respondent was initially involved in helping provide care for Joel after his birth. He regularly called to check on Joel and was a "good dad" when he was around. After Jed was born, however, respondent's involvement became more sporadic. In the year after Jed's birth, respondent saw the children on only a few occasions. He continued to call to check on the children, but his contact became progressively less frequent, and he last spoke with the children in September 2016. Jed never had an overnight visit with respondent.

In July 2016, respondent had a four-hour unsupervised visit with the children at their paternal grandmother's home. At that visit, petitioner and respondent agreed that respondent could see the children every other weekend if he would pay petitioner $200.00 per month in child support. However, respondent never paid any child support and did not ask to see the children after that visit. At the time of the termination hearing on 30 May 2019, respondent had not seen the children since the July 2016 visit.

Petitioner met her now husband, Mr. H., and they married in December 2016. In March 2017, petitioner contacted respondent about changing the children's last names to also include that of Mr. H., and respondent consented to the name change. Respondent signed the paperwork but did not show up at the courthouse to bring his identification card, despite petitioner telling respondent that she would bring Joel to the courthouse with her so that petitioner could visit with him. Petitioner nonetheless was able to effectuate the name changes despite respondent's absence.

Respondent was incarcerated from October 2018 to 14 December 2018. The day he was released, respondent called petitioner and asked to see the children and stated that he wanted to resume his relationship with them. Petitioner denied respondent's request to see the children.

On 31 December 2018, petitioner filed petitions to terminate respondent's parental rights in both children, alleging the grounds of willful failure to pay a reasonable portion of the cost of the children's care and

willful abandonment. N.C.G.S. § 7B-1111(a)(3), (7) (2019). Respondent filed a pro se, handwritten response to the petitions on 27 February 2019, and his attorney filed an answer to the petitions on 16 April 2019. At the 30 May 2019 termination hearing, the cases were consolidated for hearing and petitioner voluntarily dismissed the ground of willful failure to pay a reasonable portion of the cost of the children's care. On 27 June 2019, the trial court entered an order concluding that grounds existed to terminate respondent's parental rights based on willful abandonment and that termination was in the children's best interests. Accordingly, the trial court terminated respondent's parental rights. Respondent appealed.

## II. Analysis

Our Juvenile Code provides for a two-stage process for terminating parental rights. 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(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 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.' " *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)). "Unchallenged findings are deemed to be supported by the evidence and are 'binding on appeal.' " *In re K.N.K.*, 374 N.C. 50, 53, 839 S.E.2d 735, 738 (2020) (quoting *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) (citation omitted). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. at 19, 832 S.E.2d at 695 (citation omitted).

Respondent contends that the trial court erred by terminating his parental rights on the ground of willful abandonment. Specifically, he challenges several of the trial court's findings of fact and argues that the

findings and record evidence do not support the conclusion that he willfully abandoned the children. We disagree.

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. Bisho*p, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962) (citation omitted). "The willfulness of a parent's actions is a question of fact for the trial court." *In re K.N.K.*, 374 N.C. at 53, 839 S.E.2d at 738 (citing *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608). "[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).

Here, the determinative six-month period is from 30 June 2018 to 31 December 2018. In support of its conclusion that grounds existed to terminate respondent's parental rights based on willful abandonment, the trial court made the following relevant findings of fact:

> 22. The last face to face contact and visit the Respondent had with either Juvenile was on July 23, 2016, and lasted approximately four (4) hours. The Respondent has not been in the presence of either Juvenile for over two and one-half (2½) years and has not made any serious or sincere effort to participate in either Juvenile's life during those two and one-half (2½) years.
>
> 23. The last communication of any kind the Respondent had with the Petitioner to inquire about the welfare of the Juveniles was on September 22, 2016, with the exception of one text, Facebook message, or email request to visit in December of 2018, which was rebuffed by the Petitioner.
>
> 24. Since September 22, 2016, the Respondent has failed to communicate with the Juveniles, with the exception of the abovesaid request to visit in December of 2018, has

not sent any letters to the Juveniles, has failed to call the Juveniles, has failed to provide any emotional, material or financial support to the Juveniles and has failed in any manner to perform his duties as a parent to the Juveniles. The Court does not consider any attempts by the Respondent's mother inquiring as to the welfare of the Juveniles as attributable to the Respondent himself for the purposes of this action.

25. The Respondent has failed to provide any consistent financial or material support for the use and benefit of the Juveniles since their birth.

26. The Respondent, as a natural father of both Juveniles, has willfully abandoned the Juveniles for at least six (6) consecutive months immediately preceding the filing of these Petitions for Termination of Parental Rights pursuant to the provisions of [N.C.G.S.] § 7B-1111(7).

27. The Respondent contends that his failure to visit with both Juveniles, to have any contact with them, or to attempt to have any contact with them was due to his lack of finances, lack of transportation, lack of his maturity level, and resistance of the Petitioner. The [trial c]ourt finds, however, by clear, cogent and convincing evidence that the actions and omissions of the Respondent constitute conduct by him manifesting a willful intent to forego all parental duties and obligations and to relinquish all his parental claims to both Juveniles.

28. The Respondent has not been prohibited from contacting the Juveniles due to sickness, incarceration, or any other valid reason.

29. The Respondent's actions and/or omissions and failures to act for the two and one-half (2½) years prior to the filing of the Petitions, are wholly inconsistent with his stated desire to maintain custody or a relationship with the Juveniles.

30. The Respondent's actions and/or omissions and failures to act for the two and one-half (2½) years prior to the filing of the Petitions, constitute willful neglect and a refusal to perform the natural and legal obligations of parental care and support.

31. For the two and one-half (2½) years prior to the filing of the Petitions, the Respondent withheld from the Juveniles his presence, his love, and his care; and further, willfully neglected to provide support and maintenance to the Petitioner for the use and benefit of the Juveniles.

32. The Respondent testified he loved both Juveniles. While the [trial c]ourt does not doubt the Respondent's love for the Juveniles, the [trial c]ourt finds that the welfare and best interest of the Juveniles are paramount to the parental love felt by the Respondent and that because of the Respondent's demonstrated neglect of his parental duties and obligations the Respondents' feelings of parental love must yield to the welfare and best interest of the Juveniles.

33. The [trial c]ourt specifically finds that from July of 2016 until the filing o[f] the Petition the Respondent willfully abandoned both Juveniles and withdrew and withheld from them his support and love, and failed to take reasonable efforts to force contact with the Juveniles.

34. The Respondent failed to take legal action, whether with an attorney or on his own, to force contact with the Juveniles. The Respondent never attempted to force contact with the Juveniles in any manner, even though the Respondent earned a decent wage working at various places of employment where he was paid between $300.00 and $450.00 per week "in cash" and supported other children by other women. Further, the Respondent testified that he opened a checking account and purchased a camper for the mother of another of his biological children during a time when he contributed no financial support to the Petitioner for the use and benefit of the Juveniles.

35. The Respondent demonstrated through his testimony that, although he had the ability and intelligence to understand his parental obligations to the Juveniles, he willfully failed to fulfill those parental obligations, stating "I wasn't being responsible."

36. Even after he was served with the Petitions in these cases, the Respondent failed to demonstrate through his actions, other than filing the *pro se* response, a desire to support the Juveniles financially and emotionally, and failed to take any action to force contact with them.

37. The Petitioner testified that the main reason for initiating the Termination of Parental Rights was that the Petitioner did not want the Respondent to obtain custody of the minor children in the event of her death.

38. The paternal grandmother testified that she attempted to contact the Petitioner regarding the welfare of the children in the 2 ½ years prior to filing the Petition and the paternal grandmother further testified that she had a contact telephone number during this time and that she was certain that the Respondent Father also had access and knowledge of the Petitioner's telephone number during this time period.

39. Termination of the Respondent's parental rights is in the best interest and welfare of both Juveniles.

40. The best interests of the Juveniles will be served by granting the Petitioner the relief requested in her Petitions to Terminate Parental Rights filed in 18 JT 64 and 18 JT 65.

41. In making its decision, the [trial c]ourt has considered both the conduct of the Respondent in the six (6) months immediately preceding the filing of the Petitions in this matter and the conduct of the Respondent from the date of the filing of the Petitions to the date of the hearing.

*A. Challenged Findings of Fact*

On appeal, respondent challenges several of the trial court's findings of fact as unsupported or irrelevant. He first challenges as unsupported by the evidence the last sentence of finding of fact 22, which states that he "has not made any serious or sincere effort to participate in either Juvenile's life" over the past two and one-half years. Respondent argues that his December 2018 phone call to petitioner asking to visit with the children was "a sincere effort at reestablishing his relationship with his children[,]" which was made during the relevant period. Although respondent's request to see the children when he phoned petitioner may have been sincere, we find no error in the trial court's finding that this one unsuccessful attempt to set up visitation in over two years did not demonstrate a "serious or sincere effort" by respondent to reestablish his relationship with the children.

Respondent next challenges finding of fact 23. First, he contends that the finding mischaracterizes the nature of his contact with petitioner in December 2018. Respondent argues that both he and petitioner

testified that the contact was made by telephone. We agree that the evidence showed respondent's contact with petitioner in December 2018 was by telephone. Therefore, to the extent the finding of fact indicates that the contact was through text, email, or social media, that portion of the finding is unsupported by the evidence, and we will disregard that portion. *See In re B.C.B.*, 374 N.C. 32, 35, 839 S.E.2d 748, 751 (2020) (stating that the findings of fact must be supported by clear, cogent, and convincing evidence). However, any inaccuracy as to the means of contact has no bearing on the substance of this finding—that is, that respondent contacted petitioner only once during the determinative period. Respondent also argues that finding of fact 23 fails to acknowledge his second attempt to contact petitioner through social media in January 2019. However, because this contact fell outside the relevant period for adjudicating the ground of willful abandonment, any possible error in the trial court's failure to address this point in its findings is harmless. *See In re K.N.K.*, 374 N.C. at 56, 839 S.E.2d at 740 ("[A]ny error in these findings is harmless and had no impact on the court's adjudication because they occurred . . . after the petition was filed and well outside the determinative time period.").

Respondent next contends finding of fact 26, which states that respondent willfully abandoned the children within the meaning of N.C.G.S. § 7B-1111(a)(7), is actually a conclusion of law because it requires the application of legal principles and "decides ultimate issues in the case." We agree that finding of fact 26 is not an evidentiary finding of fact, but we determine that it is an ultimate finding. "[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. at 76, 833 S.E.2d at 772–73 (quoting *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491, 81 L. Ed. 755, 762 (1937)); *see also In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) ("Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts." (citation omitted)). Regardless of how this finding is classified, "that classification decision does not alter the fact that the trial court's determination concerning the extent to which a parent's parental rights in a child are subject to termination on the basis of a particular ground must have sufficient support in the trial court's factual findings." *In re N.D.A.*, 373 N.C. at 76–77, 833 S.E.2d at 773. As a result, we address respondent's challenge in our discussion regarding whether the trial court erred by concluding that respondent's parental rights were subject to termination based on willful abandonment.

Respondent next "denies" findings of fact 27, 30, 31, and 33. His challenge to these findings rests solely on his one phone call to petitioner two weeks before the petitions were filed. Respondent concedes that had petitioner "filed her TPR petitions before that telephone call, [he] would have no argument here." He argues, however, that because that one telephone call "came first," was "unprompted," and showed his "attempt to reestablish his relationship with his children," he did not "abandon[ ] *all* parental duties and claims to his children" nor "willfully neglect[ ] to provide support and maintenance to Petitioner." (Emphasis in original.) We are not persuaded by this argument. One attempted contact during the six-month determinative period does not preclude a finding that respondent withheld his love and affection from the children and willfully abandoned them. *See Pratt*, 257 N.C. at 502–03, 126 S.E.2d at 609 (rejecting the respondent-father's argument that his one visit during the determinative six-month period refuted a finding of willful abandonment); *see also In re B.S.O.*, 234 N.C. App. 706, 713, 760 S.E.2d 59, 65 (2014) (affirming a termination order based on willful abandonment where the father made only one phone call to the children and their mother during the determinative six-month period).

Respondent next "denies as irrelevant" finding of fact 36 on the basis that it refers to his conduct outside of the determinative six-month period. Respondent argues that a "trial court has no authority to consider a parent's post-TPR petition actions when determining whether to terminate parental rights under [N.C.G.S.] § 7B-1111(a)(7)." We do not agree. The trial court's finding regarding respondent's actions after the termination petition was filed is not "irrelevant" because the trial court "may consider a parent's conduct outside the six-month window *in evaluating a parent's credibility and intentions*." *In re C.B.C.*, 373 N.C. at 22–23, 832 S.E.2d at 697 (emphasis in original) (quoting *In re D.M.O.*, 250 N.C. App. 570, 573, 794 S.E.2d 858, 861 (2016)). Thus, the trial court could consider respondent's conduct after the filing of the termination petition to determine the sincerity and intent of his conduct during the relevant six-month period. Respondent has not challenged the evidentiary support for this finding and it is thus binding on appeal.

Respondent similarly "denies as irrelevant" the portion of finding of fact 41 that indicates the trial court considered both his conduct during the determinative six-month period and his conduct after the filing of the termination petition in reaching its decision. For the reasons we rejected respondent's challenge to finding of fact 36, we also reject this argument.

Finally, respondent challenges findings of fact 32, 39, and 40. Finding of fact 32 states that "[w]hile the [trial c]ourt does not doubt the Respondent's love for the Juveniles, . . . [Respondent's] feelings of parental love must yield to the welfare and best interest of the Juveniles." In findings of fact 39 and 40, the trial court found that termination of respondent's parental rights was in the children's best interests. Respondent argues that the "trial court cannot consider best interests until Petitioner first establishes at least one . . . ground [for termination], which she failed to do." However, because the trial court found that petitioner proved by clear, cogent, and convincing evidence that at least one ground to terminate respondent's parental rights existed—that respondent willfully abandoned the children—the trial court was therefore required to make dispositional findings about whether termination was in the children's best interests. *In re D.L.W.*, 368 N.C. at 842, 788 S.E.2d at 167; N.C.G.S. § 7B-1110. In any event, these findings were not necessary to support the trial court's adjudication of the ground of willful abandonment, and since respondent does not challenge the trial court's dispositional determination, we need not address them. *See In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58–59 (stating that in reviewing a trial court's adjudication of grounds for termination, we review only those findings necessary to support the trial court's conclusion that grounds existed).

*B. Grounds to Terminate Parental Rights*

Respondent next contends that the evidence and the trial court's findings of fact do not support its conclusion that he willfully abandoned the children. Respondent acknowledges his admission at the hearing "that he had not been a good father before [the] 14 December 2018 telephone call to Petitioner" but argues that his actions did not amount to willful abandonment as defined in N.C.G.S. § 7B-1111(a)(7). We disagree.

The trial court's findings of fact demonstrate that except for respondent's one unsuccessful phone call requesting to see the children, he made no other attempt to contact petitioner or to reestablish a relationship with the children during the six-month determinative period or for nearly two years preceding that period. The trial court found that respondent did not send any letters to the children, did not call the children, and did not provide any emotional, material, or financial support to the children. The trial court also found that respondent "demonstrated through his testimony that, although he had the ability and intelligence to understand his parental obligations to the [children], he willfully failed to fulfill those parental obligations, stating 'I wasn't being responsible.' "

Respondent acknowledges that he had no other contact with petitioner during the relevant six-month period but claims that his single phone call is sufficient to demonstrate that he did not intend to forgo all parental duties and did not willfully abandon the children. For a parent's actions to constitute willful abandonment, however, "it is not necessary that a parent absent himself continuously from the child for the specified six months, nor even that he cease to feel any concern for its interest." *Pratt*, 257 N.C. at 503, 126 S.E.2d at 609. "[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." *Id.* at 501, 126 S.E.2d at 608 (citation omitted).

The trial court's findings of fact demonstrate that respondent willfully withheld his love, care, and affection from the children and that his conduct during the determinative six-month period constituted willful abandonment. Respondent's one unsuccessful request to visit the children during the six-months immediately preceding the filing of the termination petition does not undermine the trial court's ultimate finding and conclusion that respondent willfully abandoned the children. *See Pratt*, 257 N.C. at 502, 126 S.E.2d at 609; *see also In re B.S.O.*, 234 N.C. App. at 713, 760 S.E.2d at 65 ("In light of respondent-father's single phone call to respondent-mother and his children during the six months immediately preceding [the filing of the termination petition], the [trial] court did not err in finding that he willfully abandoned the children."); *In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982) (affirming termination where "except for an abandoned attempt to negotiate visitation and support, [the respondent-father] 'made no other significant attempts to establish a relationship with [the child] or obtain rights of visitation with [the child]' "). Accordingly, we hold the trial court did not err by terminating respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(7).

## III. Conclusion

Respondent challenges several of the trial court's findings of fact and its conclusion of law that respondent willfully abandoned Joel and Jed. Except for a portion of finding of fact 23, we conclude that the trial court's findings of fact are supported by clear, cogent, and convincing evidence, and we further hold that the findings of fact support the trial court's conclusion that respondent willfully abandoned the children. Respondent did not challenge the trial court's dispositional determination that termination was in the children's best interests. Therefore, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

**IN RE L.M.M.**

[375 N.C. 346 (2020)]

IN THE MATTER OF L.M.M.

No. 21A20

Filed 25 September 2020

**Termination of Parental Rights—grounds for termination—willful abandonment—lack of contact and show of affection**

The trial court's findings in a proceeding to terminate a mother's parental rights were supported by evidence and in turn supported the court's conclusion that the mother willfully abandoned her child. Although the mother was incarcerated during the determinative six-month period, she was not barred by court order from contacting her son and took no steps to communicate with him through several possible relatives, nor did she show any affection or concern toward him.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 27 September 2019 by Judge David V. Byrd in District Court, Wilkes County. This matter was calendared in the Supreme Court on 27 August 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.

*Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Daniel S. Johnson, for petitioner-appellee.*

*Robert W. Ewing for respondent-appellant.*

DAVIS, Justice.

In this case, we consider whether the trial court erred by terminating the parental rights of respondent-mother to her son "Larry."[1] Because we conclude that the evidence and the trial court's findings of fact support the conclusion that respondent willfully abandoned Larry within the meaning of N.C.G.S. § 7B-1111(a)(7), we affirm.

1. A pseudonym is used throughout this opinion to protect the identity of the juvenile.

## Factual and Procedural Background

Larry was born in November 2016 and spent the first year of his life in respondent's care and custody. Petitioner is respondent's second cousin and a lifelong resident of Wilkes County, North Carolina. Petitioner attended the same church as respondent and saw respondent with Larry each week during services. Petitioner also spent time with Larry at her grandmother's house in Hays, North Carolina, when respondent was living nearby.

Petitioner lost touch with respondent at some point in 2017. In November 2017, petitioner contacted respondent on Facebook and learned that she had moved to Asheville with Larry. Respondent told petitioner that she was unemployed, out of money, and alternating between staying at a friend's house and sleeping in her car. Respondent confessed that she was unable to take care of Larry and asked petitioner to keep him for "a few months" until respondent "got back on her feet."

After conferring with her then-husband,[2] petitioner agreed to take Larry on the condition that respondent permanently sign over her parental rights regarding him to petitioner. Respondent initially reiterated her desire for a temporary arrangement but ultimately agreed to surrender Larry to petitioner on a permanent basis.

On 8 November 2017,[3] petitioner drove to the Greyhound bus station in Asheville to take Larry from respondent. At petitioner's request, respondent signed a document that purported to give petitioner permanent parental rights to Larry. A family friend notarized the document in the parties' presence. Petitioner then brought Larry back to live with her. A few weeks later, respondent contacted petitioner on Facebook to check on Larry and asked for a picture of him. Respondent also asked for money. Petitioner sent respondent a photograph of Larry but refused to wire her any money.

Respondent also phoned petitioner to ask if she would pay respondent's cell phone bill. Petitioner's mother paid respondent's phone bill for a brief period of time so that petitioner and respondent would be able to contact each other.

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2. Petitioner testified that she and her husband separated on 24 November 2017 and later divorced on 13 August 2019.

3. Although the trial court's order lists the date as 17 November 2017, the hearing testimony reflects a date of 8 November 2017.

After respondent sent her a second request for money on 21 November 2017, petitioner blocked respondent on Facebook. Petitioner maintained the same phone number thereafter but did not hear from respondent or make any attempt to contact her after 21 November 2017. Respondent was incarcerated during 2018 and remained in custody at the time of the termination hearing.

On 18 January 2019, after initiating adoption proceedings, petitioner filed a petition to terminate respondent's parental rights to Larry. Respondent filed a response in opposition to the petition. The trial court held a hearing on 14 August 2019 and entered an order terminating respondent's parental rights to Larry on 27 September 2019. Respondent gave timely notice of appeal from the order.[4]

**Analysis**

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). 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(e), (f). If the trial court finds the existence of one or more grounds to terminate the respondent's parental rights, the matter proceeds to the dispositional stage where the court must determine whether terminating the parent's rights is in the juvenile's best interests. N.C.G.S. § 7B-1110(a).

Respondent does not contest the trial court's dispositional determination that it was in Larry's best interests to terminate her parental rights. Accordingly, the sole issue before us is whether the trial court correctly determined that one or more grounds existed to terminate her parental rights under N.C.G.S. § 7B-1111.

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 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). 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).

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4. Although the trial court's order also terminated the parental rights of Larry's father, he is not a party to this appeal.

The trial court concluded that petitioner had established three statutory grounds for terminating respondent's parental rights, including that respondent had "willfully abandoned" Larry pursuant to N.C.G.S. § 7B-1111(a)(7). It is well established that an adjudication of any single ground for termination under N.C.G.S. § 7B-1111(a) will suffice to support a trial court's order terminating parental rights. *See, e.g.*, *In re C.B.C.*, 373 N.C. at 23, 832 S.E.2d at 697. Therefore, if we uphold any one of the three statutory grounds adjudicated by the trial court, we need not review the remaining grounds. *Id.*; *In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 53 (2019).

Subsection 7B-1111(a)(7) allows for the termination of parental rights where the 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). The determinative time period in this case is the six-month period between 18 July 2018 and 18 January 2019, the date petitioner filed her petition. We have held that "the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions" during the six months at issue. *In re C.B.C.*, 373 N.C. at 22, 832 S.E.2d at 697 (emphasis removed) (citation omitted).

As used in N.C.G.S. § 7B-1111(a)(7), abandonment requires a "purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to the child." *In re A.G.D.*, 374 N.C. 317, 319, 841 S.E.2d 238, 240 (2020) (cleaned up). The willful intent element "is an integral part of abandonment" and is determined according to the evidence before the trial court. *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). This Court has repeatedly held that "if a parent withholds that parent's presence, love, care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *In re A.L.S.*, 374 N.C. 515, 519, 843 S.E.2d 89, 92 (2020) (cleaned up).

In her brief, respondent challenges several of the trial court's findings of fact as unsupported by clear, cogent, and convincing evidence and disputes the trial court's conclusion of law that respondent willfully abandoned Larry. We address her contentions in turn.

## I. Findings of Fact

In addition to recounting the circumstances of how Larry came into petitioner's care in November 2017, the trial court made the following

pertinent findings of fact regarding its adjudication of willful abandonment under N.C.G.S. § 7B-1111(a)(7):

> 13. Apart from the Facebook messenger text [in November 2017], the Respondent-Mother has had no other contact with the Petitioner regarding the minor child. She has sent some requests for money to the Petitioner. The Petitioner's mother paid a cell phone bill for the Respondent-Mother so the Respondent-Mother could be contacted if needed.
>
> . . . .
>
> 15. Neither parent has provided any financial support for the minor child.
>
> . . . .
>
> 17. Each of the Respondents are currently incarcerated . . . . The Respondent-Mother has a projected release date in December 2019.
>
> 18. Neither parent has provided any type of gifts, cards, or other customary tokens of affection for the minor child since he has been in the custody of the Petitioner. Neither parent has ever taken any action as would have been available to them while in custody.
>
> 19. During the six months immediately preceding the filing of the petition to terminate their parental rights, neither Respondent had any contact with the minor child. During the six months immediately preceding the filing of the petition, neither respondent provided any financial support for the minor child.
>
> 20. Neither Respondent has performed any of the natural and legal obligations of support and maintenance for the minor child since he has been in the custody of the Petitioner. . . .
>
> . . . .
>
> 22. Although the Petitioner blocked the Respondent-Mother on Facebook, she did not block her access by phone and Respondent-Mother also could communicate with her family members.

Respondent initially contests the portion of Finding of Fact 13 providing that she contacted petitioner about Larry on Facebook on just one

occasion in November 2017, contending that she in fact contacted petitioner several times that month. In her testimony, petitioner described two instances in November 2017 when respondent sent her Facebook messages about Larry. In the first message, respondent asked how Larry was doing and—after petitioner declined her request for money—requested a picture of him. Upon receiving the picture, respondent sent petitioner a message saying, "Sweet, little baby," and "Love y'all." On 21 November 2017, the day after her second request for money, respondent sent petitioner a message asking whether Larry "had a good birthday[.]" When petitioner replied in the affirmative, respondent sent a message saying "good." Although petitioner also received "a couple [of phone] calls" from respondent during this period, she testified that one of the calls concerned "a cell phone bill [respondent] wanted paid," and that she could not recall the subject of the second call. To the extent that Finding of Fact 13 undercounts the number of messages respondent sent to petitioner about Larry in November 2017, we conclude the discrepancy is harmless because the messages were exchanged "well outside the determinative [six-month] time period." *In re K.N.K.*, 374 N.C. 50, 56, 839 S.E.2d 735, 740 (2020).

Respondent next challenges the portions of Finding of Fact 18 stating that she failed to provide "tokens of affection" or take other "available" actions to show Larry affection while she was incarcerated. She contends that petitioner offered no evidence "on the issue of whether [respondent] could obtain gifts or other customary tokens of affection [for Larry] while she was in prison."

The trial court's finding is supported by testimony detailing the communications between respondent and petitioner. Petitioner's testimony supports the finding that respondent did not contact petitioner about Larry after 21 November 2017 and never provided Larry with any sign of her affection after placing him in petitioner's care. The evidence presented at the adjudicatory stage of the hearing does not reveal precisely when in 2018 respondent became incarcerated. However, the fact that respondent never exhibited affection to Larry after November 2017 necessarily supports a finding that she did not do so during her incarceration.

We have made clear that "[a]lthough 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. at 19–20, 832 S.E.2d at 695; *see also In re E.H.P.*, 372 N.C. at 394, 831 S.E.2d at 53 ("[T]he fact that respondent was incarcerated for almost the entirety of the six-month period preceding the filing of the termination petition does not preclude

a finding of willful abandonment under N.C.G.S. § 7B-1111(a)(7).”). Contrary to respondent’s characterization of Finding of Fact 18, the trial court did not find that she had the ability to send Larry “gifts, cards, or other customary tokens of affection” while incarcerated. Rather, the court found that respondent had not taken “*any action* [emphasis added] as would have been available to [her]” while incarcerated so as to demonstrate interest in or affection toward Larry.

The evidence before the trial court showed that respondent was in possession of petitioner’s phone number and had other shared relatives in Wilkes County through whom respondent could have attempted to communicate with Larry, including respondent’s own mother as well as petitioner’s mother and grandmother. Petitioner testified that she spoke to respondent’s mother “regularly” and had “never been advised” of any attempt by respondent to contact her about Larry. Based on this evidence, the trial court reasonably inferred that respondent had some means available to display familial affection for Larry despite the circumstance of her incarceration. *See In re A.G.D.*, 374 N.C. 317, 327, 841 S.E.2d 238, 244 (2020) (“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.”).

## II. Conclusions of Law

Respondent also argues that the trial court’s findings that she did not contact Larry or provide financial support for the child during the determinative six-month period—even if accurate—do not support the court’s conclusion that she *willfully* abandoned the child. Respondent contends that the trial court’s findings fail to account for petitioner’s unwillingness to allow her to have contact with Larry after November 2017. She further asserts that the court heard no evidence that she had the ability to provide financial support for Larry while she was incarcerated. Respondent argues that the evidence showed “[her] lack of contact and financial support was **not** a willful act on her part.”

This Court previously addressed a similar willful abandonment issue involving an incarcerated parent in *In re A.G.D.* In that case, we reviewed an adjudication of willful abandonment that was made where the evidence showed that the respondent-father was incarcerated, divorced from the children’s mother, and subject to a court order “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." 374 N.C. at 318, 841 S.E.2d at 239. Despite the obvious impediments faced by the respondent-father, we held that the trial court's findings nevertheless demonstrated his willful abandonment of the children:

> 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[.]

*Id.* at 324, 841 S.E.2d at 242–43. Based on our determination that "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," we affirmed the order terminating his parental rights pursuant to N.C.G.S. § 7B-1111(a)(7). *Id.* at 327, 841 S.E.2d at 244.

Here, as in *In re A.G.D.*, respondent's complete failure to show any interest in Larry after November 2017—particularly during the six months between 18 July 2018 and 18 January 2019—supports the trial court's conclusion that she acted willfully in abandoning the child. Unlike the respondent-father in *In re A.G.D.*, respondent was not subject to a court order that overrode her custodial rights as Larry's mother or otherwise barred her from contacting her child. Although petitioner blocked respondent on Facebook, respondent was not precluded from contacting petitioner by phone or contacting other relatives, including her own mother, in order to convey her concern and affection for Larry. *See In re A.L.S.*, 374 N.C. at 522, 843 S.E.2d at 94 (holding that the "[r]espondent-mother's failure to even attempt any form of contact or communication with [the child] gives rise to an inference that she acted willfully in abdicating her parental role, notwithstanding any personal

animus between her and [the child's custodians]"); *In re A.G.D.*, 374 N.C. at 325, 841 S.E.2d at 243 (noting that the "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.").

Respondent also cites the evidence that she initially asked petitioner to accept a temporary caretaking role for Larry in November 2017—thereby resisting petitioner's demand that she "[s]ign him over to [petitioner] permanently"—as proof that she did not willfully abandon the child. The trial court's findings account for the fact that respondent "initially wanted a temporary" arrangement for Larry "but later agreed for the Petitioner to have the child permanently." Although the court was free to consider the circumstances under which respondent placed Larry in petitioner's care, those circumstances represented respondent's intentions in November 2017 rather than during the six-month period relevant to an adjudication under N.C.G.S. § 7B-1111(a)(7). *See In re K.N.K.*, 374 N.C. at 56, 839 S.E.2d at 740. The weight to be assigned to respondent's conduct during this earlier period was a matter left to the trial court's discretion as fact-finder. *See In re C.B.C.*, 373 N.C. at 23, 832 S.E.2d at 697 ("[W]hile the court may consider respondent's prior efforts in seeking a relationship with [the child] . . . , respondent's prior actions will not preclude a finding that he willfully abandoned [the child] pursuant to N.C.G.S. § 7B-1111(a)(7) if he did nothing to maintain or establish a relationship with [her] during the determinative six-month period.").

Finally, while we agree with respondent that the trial court received no evidence of her ability to support Larry financially, there is no indication that the court based its adjudication on this lack of financial support. *See generally Pratt*, 257 N.C. at 501–02, 126 S.E.2d at 608 ("[A] mere failure of the parent of a minor child in the custody of a third person to contribute to its support does not in and of itself constitute abandonment. Explanations could be made which would be inconsistent with a wil[l]ful intent to abandon."); *see also In re K.N.K.*, 374 N.C. at 54 n.3, 839 S.E.2d at 738 n.3 (concluding the trial court "would have reached the same conclusion about respondent's willful abandonment of" the child even without the finding that he contributed nothing toward her support and maintenance). Although the court found that "[n]either parent has provided any financial support for the minor child[,]" the significance of this finding is to exclude the possibility that respondent demonstrated her concern for Larry financially—rather than through the personal contact and displays of affection contemplated in cases such as *In re A.D.G.*

Because the evidence and the trial court's findings show respondent undertook no action "whatsoever to express love, affection, and parental concern for the child[ ] during the relevant six-month period," we hold that the trial court did not err by determining that grounds existed under N.C.G.S. § 7B-1111(a)(7) to terminate respondent's parental rights. In light of our holding, we need not review the trial court's two additional grounds for termination. *In re C.B.C.*, 373 N.C. at 23, 832 S.E.2d at 697.

**Conclusion**

For the reasons stated above, we affirm the trial court's 27 September 2019 order terminating respondent's parental rights.

AFFIRMED.

Justice EARLS, dissenting.

In order to terminate respondent-mother Cathy's parental rights to her son Larry under N.C.G.S. § 7B-1111(a)(7), the trial court needed to find by clear, cogent, and convincing evidence that the parent "willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." At trial, the burden was not on Cathy to prove that she did not willfully abandon Larry; the burden was on the petitioner, Karen, to prove that Cathy did. *See In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984). The trial court's findings make clear that Karen has failed to meet this burden. The trial court also concluded that Karen proved two other grounds to terminate Cathy's parental rights, neglect and prior termination of the parent's rights as to other children, while rejecting a fourth alleged ground of incapability that will continue for the foreseeable future. Because the evidence was not sufficient to show neglect, and no factual findings were made concerning Cathy's ability or willingness to establish a safe home, I would reverse the trial court's order and remand for further factual findings on the question of whether the evidence in this case was sufficient to conclude that Cathy was unable or unwilling to establish a safe home.

Larry was born on 18 November 2016 and lived with Cathy for almost a year. On 8 November 2017, Cathy asked Karen to temporarily care for Larry. In addition to the pleadings, the only other evidence before the trial court at the adjudicatory stage of the hearing in this private termination proceeding was Karen's testimony. Karen's testimony regarding Cathy's request highlights that, faced with homelessness and no income, Cathy concluded that Larry needed better care than she was

able to provide to her child at that moment in her life. Karen testified to the discussion she had with Cathy, explaining:

> When she asked me if I wanted to do it just until she got back on her feet, I sent back that I could not do that, it would not be fair. She then said, "Well, how about I do this temporarily, and then if I'm not back on my feet in this amount of time, you'll then have full rights." And I then again declined that.

Karen then testified that:

> I printed some online [sic] because I needed to know—I did not want anything to be said that I may have took him while she might have been under the influence or that I may have paid for him or just stole him or anything like that. So yes, I did find some things online. A notary went with me. My mom's friend went with us and notarized everything that was signed. And she was also read— it was dark, so my mom read it out to her, and she signed it.

The paper signed by Cathy that evening was not made a part of the record. The trial court's finding states only that Cathy "later agreed for the Petitioner to have the child permanently." However, Karen's testimony on that point is not at all clear. In addition to the statement above, Karen's only other testimony is that:

> Q. You asked [Cathy] if she would be willing to relinquish her parental rights?
>
> A. Sign him over to me permanently is exactly what I said.
>
> Q. What did [Cathy] tell you?
>
> A. When I sent that, she was actually away from the phone. One of her friends responded and said that she was not there, but they would let her know. So then about an hour after, she responded and said, "Could I give a temporary order, and then if I don't have everything finished or if I don't have everything back in line within a certain amount of time, you would then take rights to him?" And I said, "I'm sorry, you know, I would need full rights when I picked him up."
>
> Q. What did [Cathy] tell you?

> A. She then agreed. She said that was what was best for him and that she could not provide for him and that— I'm trying to think back. I'm so sorry. I'm nervous. She then said that the only thing she wanted is she wanted him to know about her.

Whatever Cathy might have understood from a text message about what "sign him over to me permanently" meant, and whatever the piece of paper she signed actually stated, the trial court's ultimate conclusion concerning the events of 17 November 2017[1] was *not* that they evidenced willful abandonment or neglect on Cathy's part. Instead, the trial court found that Cathy's decision was a reasonable childcare arrangement sought out under difficult circumstances. The trial court explained:

> I agree with the argument that the mother placing the child with the Petitioner, that was, in my view, an appropriate childcare arrangement that she reached out and made. I know [respondent-father "Greg"]—there's no evidence that he directly entered into that. *However, the Court will rule that that ground has not been met for either.*

[emphasis added].

Karen testified that she and Cathy had telephone conversations and exchanged further Facebook messages over the next few weeks. Karen stated that at some time in "the latter part of 2018" she became aware that Cathy was incarcerated, and that Cathy would be incarcerated for all of 2019 up to the date of the hearing on 14 August 2019. Karen also admitted that she blocked Cathy from being able to message her on Facebook:

> Q. Do you try to— is [Cathy] blocked from you?
>
> A. I can still see her things. I actually have every one that we every (sic) sent on my phone.
>
> Q. But you haven't blocked her from sending you messages on Facebook?
>
> A. Yeah, I blocked her. I did. That was after I got the request for Moneygram and when I had— there was no other— but my number, she's not blocked from that. She can always reach out to me by phone.

---

1. There is a discrepancy between the trial testimony about when this occurred and the trial court's finding of fact. The finding of fact states this occurred on November 17, 2017.

Q. Cell phone?

A. Yes. She's not blocked from anything except for Facebook. And that was only because, when I make posts about him, I didn't want her to be able to see pictures of him or things that we do in our lives. But my phone is still available.

The termination petition was filed on 18 January 2019 and the summons was addressed to Cathy at the N.C. Correctional Institute for Women in Raleigh. Thus, Karen needed to present clear and cogent evidence that Cathy "willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition" during the six-month period between 18 July 2018 and 18 January 2019. Cathy was incarcerated during the "determinative period" preceding the termination proceeding. "A parent's incarceration may be relevant to the determination of whether parental rights should be terminated, but our precedents are quite clear—and remain in full force—that incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re K.N.*, 373 N.C. 274, 282, 837 S.E.2d 861, 867 (2020) (cleaned up). Accordingly, the burden was on Karen to prove that, "upon an analysis of the relevant facts and circumstances," Cathy willfully abandoned Larry. *Id.* at 283, 837 S.E.2d at 867–68.

The evidence the trial court relies upon does not support such a finding. Karen's testimony, supplemented by no other evidence besides the pleadings, simply does not prove that Cathy willfully abandoned Larry. All the Court could know based on Karen's testimony is that Karen did not hear from Cathy during the determinative period and that, for some unspecified part of that time, Cathy was incarcerated. Karen's testimony does not prove whether or not Cathy took steps to maintain a connection with her child given the opportunities available to her during her incarceration.

In the circumstances of this case, absent any other indications of Cathy's intent to abandon her son, the mere lack of *actual* contact by an incarcerated parent whose location was known to the petitioner is not the same thing as evidence that the parent did not *attempt* to make contact, as this exchange illustrates:

Q. Have you yourself had tried to contact her at all?

A. No, sir.

Q. And are you aware that she's tried to contact, if not you, other people in your family to get a hold of you?

A. No, sir.

Q. Okay.

A. And I did speak to her mom regularly, and I've never been advised of that at all.

This testimony proves *either* that Cathy did not make any attempt to contact Karen in order to maintain a connection with Larry, *or* that she attempted to contact Karen but was unsuccessful in her efforts. The former would be evidence that could prove willful abandonment but the latter, standing alone as it was in this case, could not. The absence of evidence is not the same thing as clear, cogent, and convincing evidence to prove a fact. *See In re Moore*, 306 N.C. 394, 403–04, 293 S.E.2d 127, 132 (1982) ("G.S. 7A-289.30(e) provides, *inter alia*, that in an adjudicatory hearing on a petition to terminate parental rights the court shall find the facts and 'all findings of fact shall be based on clear, cogent, and convincing evidence.' ") Here, based on Karen's evidence, the trial court *could not know what Cathy did or did not do while in custody during the determinative six-month period.* The testimony only established that if Cathy did make the efforts the majority identifies as necessary for an incarcerated parent to make to demonstrate a lack of willful abandonment, namely "showing interest in [the] child's welfare by whatever means available," those efforts were unsuccessful.

At the dispositional stage of the hearing, after the trial court had found grounds to terminate Cathy's parental rights, Cathy testified that she attempted to contact Karen whenever she had access to Wi-Fi. Cathy attempted to contact Karen by Facebook Messenger, but Karen informed Cathy that she was blocking Cathy on Facebook because she had obtained custody of Larry and, as Karen testified, she "didn't want her to be able to see pictures of him or things that we do in our lives," or as Cathy testified, "[Karen] didn't want no drama or nothing to be said." Cathy also testified that she attempted to contact Karen and Larry by text messaging. Cathy testified that she wrote her mother, aunt, and grandmother in an attempt to contact Larry, to find out how he was doing, and to obtain pictures of him. Cathy testified that she also sent birthday, Christmas, and Easter cards to Larry through her mother, cards that she believed had been given to Karen.

This evidence was not presented at the adjudication stage. It is true that even it if had been presented, the trial court was free to make its own determination that Cathy's testimony was not credible. The fundamental point is that without evidence of what Cathy did or did not

do, especially while she was in custody, the trial court could not merely assume that Cathy willfully abandoned her son.

Karen's testimony did not "prove" what Cathy did or did not do. The burden to prove willful abandonment requires evidence of the parent's intent. In this context, "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." *In re K.R.C.*, 374 N.C. 849, 860, 845 S.E.2d 56, 63 (N.C. 2020) (quoting *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962)). The trial court's factual findings do not support the legal conclusion that Cathy willfully abandoned her son, only that she was unable to get in touch with her son's caregiver while she was incarcerated. Under N.C.G.S. § 7B-1111(a)(7), that is a crucial distinction.

The allocation of the burden to petitioners to affirmatively prove by clear, cogent, and convincing evidence that termination is warranted is no mere technicality. Until termination was ordered, respondent enjoyed a "constitutionally protected paramount right" to the "custody, care, and control" of her child. *Owenby v. Young*, 357 N.C. 142, 148, 579 S.E.2d 264, 268 (2003). Because there are "few forms of state action [that] are both so severe and so irreversible" as terminating parental rights, the United States Supreme Court has long held that petitioners must carry the "elevated burden of proof" that termination is warranted by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745, 759 (1982). Cases like this one "involving the State's authority to sever permanently a parent-child bond demands the close consideration the Court has long required when a family association so undeniably important is at stake." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116–17 (1996). The judiciary must be "mindful of the gravity of the sanction imposed on" a mother when her parental rights are terminated and accord all due respect to the substantive and procedural protections the law affords to even imperfect parents. *Id.* Before undertaking action that is "irretrievably destructive of the most fundamental family relationship," *id.* at 121, the trial court must find facts proving *respondent's* alleged lack of efforts to maintain a connection with her child, not simply facts attesting to *the petitioner's* experience and perception of her interactions with respondent.

Likewise, the factual findings in this case are insufficient to support the conclusion that Larry was a neglected child. It is well established that "[a] finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997) (citing *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984)).

Moreover, a juvenile cannot be adjudicated as neglected solely based upon previous Department of Social Services involvement relating to other children. *See In re J.A.M.*, 372 N.C. 1, 9, 822 S.E.2d 693, 698. (2019). To support a conclusion that a juvenile does not receive proper care, the findings of fact must show current circumstances that present a risk to the juvenile. Where the child is not presently in the parent's custody, the trial court must make findings of fact that the parent previously neglected the child in order to reach the conclusion that the child is a neglected juvenile under N.C.G.S. § 7B-1111(a)(1). *See 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)).

In this case, as the trial court observed, Cathy recognized when she was unable to provide for Larry and sought an appropriate alternative childcare arrangement, placing Larry with Karen. Karen's testimony was that Larry was healthy; there was no evidence that he suffered malnutrition, adverse health conditions or other issues while he was in Cathy's care. The evidence in this case does not establish past neglect. A trial court should not imply that a parent has neglected her child simply because she recognizes the difficulties attendant in her own circumstances and seeks to ameliorate their harmful consequences. To find neglect in this case treats the mother who takes definitive action to further her child's interests in desperate circumstances no differently from the mother who does not or cannot. The respondent's protective actions do not support the inference that she neglected her child under N.C.G.S. § 7B-1111(a)(1).

The trial court's error with regard to the third ground, prior termination of the parent's rights as to other children under N.C.G.S. § 7B-1111(a)(9), is readily apparent from the trial transcript and the trial court's order. The statute provides that the court may terminate the parental rights upon a finding that "[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). Here, the court made the first requisite finding for this ground—that respondent's parental rights had been terminated "with respect to another child"—but completely omitted any consideration of the second requisite finding that respondent lacked the ability or willingness to establish a safe home. It seems possible that counsel inadvertently misled the trial court on this point when stating at trial, "Well, I'll be brief. You know, it's kind of cliche. It is what it is as far as the respondents being involuntarily terminated before. It just is a fact, so

that technically is a ground good enough to get us past adjudication." Further, the trial court's conclusion of law in its order terminating parental rights on this ground states only that "[t]he parental rights of both Respondents have been terminated involuntarily by a Court of competent jurisdiction [N.C.G.S. § 7B-1111(a)(9)]." Therefore, where the trial court was operating under a clear misunderstanding of the applicable law on this question and the evidence was insufficient to support other grounds for termination, the case should be remanded for further findings on the question of whether the evidence was sufficient to show that Cathy lacked the present ability or willingness to establish a safe home. It may be that the evidence produced at trial was clear, cogent, and convincing that Cathy does not have the will or the ability to provide a safe home for Larry. However, those are findings that, in these circumstances, should be made in the first instance by the trial court.

For the above stated reasons, I respectfully dissent.

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IN THE MATTER OF S.J.B.

No. 409A19

Filed 25 September 2020

**Termination of Parental Rights—best interests of child—statutory factors—relevance of additional considerations**

The trial court's conclusion that terminating a mother's parental rights to her daughter was in the daughter's best interest was supported by unchallenged findings of fact which addressed the factors in N.C.G.S. § 7B-1110(a), including the child's relationship with her mother, grandmother, and brother. The trial court did not err by excluding findings of fact on other issues where there were no conflicts in the evidence for the court to resolve.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 24 July 2019 by Judge Andrea F. Dray in District Court, Buncombe County. This matter was calendared for argument in the Supreme Court on 29 July 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.

*Hanna Frost Honeycutt for petitioner-appellee Buncombe County Department of Health and Human Services.*

*Jackson M. Pitts for Guardian ad Litem.*

*David A. Perez for respondent-appellant mother.*

BEASLEY, Chief Justice.

Respondent, the mother of S.J.B. (Susan)[1], appeals from the trial court's 24 July 2019 order terminating her parental rights. The issue before the Court is whether the trial court abused its discretion in finding and concluding that it was in Susan's best interest to terminate respondent's parental rights. We hold the trial court did not abuse its discretion and affirm the trial court's order.

On 24 October 2017, the Buncombe County Department of Social Services (DSS) received a child protective services report alleging neglect. After a two-month investigation, DSS filed a petition alleging Susan was a neglected and dependent juvenile. DSS alleged respondent: (1) was suffering from untreated mental health conditions that kept her from being able to get out of bed; (2) was resistant to receiving treatment for her mental health issues; (3) refused a higher level of mental health treatment for Susan's half-brother, Eric, because she did not want people coming into her home; (4) took Eric off of his prescribed mental health medication, which led to behavioral issues at school; (5) neglected Eric's dental needs; (6) had a history of substance abuse; (7) was on probation for driving while impaired; (8) refused to work with DSS to create a full case plan; (9) refused to submit to hair follicle tests for illicit substances; (10) refused to allow Eric and Susan to submit to a hair follicle test to determine if they had been exposed to illegal substances; (11) failed to submit to a Comprehensive Clinical Assessment (CCA); (12) was impaired during an unannounced home visit; (13) had illicit drugs and drug paraphernalia in her home; and (14) had been arrested and charged with felony possession of heroin, possession of a Schedule IV controlled substance, possession of drug paraphernalia, and child abuse.

DSS obtained non-secure custody of Susan and Eric and placed them in foster care, but Eric was ultimately returned to his father's

1. Pseudonyms are used throughout the opinion for ease of reading and to protect the juvenile's identity.

custody.[2] Respondent's mother was approved as a placement for Susan on 20 February 2018. In early March 2018, DSS received reports alleging drug use by Susan's grandmother while Susan was residing in the home. On 13 March 2018 Susan's grandmother admitted that, if tested at that time, she would test positive for multiple illicit substances, and multiple people had smoked crack cocaine in the home while Susan was asleep in her bedroom. Based on these statements, DSS removed Susan from her grandmother's home and placed her with her original foster parents.

After a hearing on 4 April 2018, the trial court entered an order on 10 May 2018 adjudicating Susan to be a neglected and dependent juvenile. The court continued custody of Susan with DSS and granted respondent supervised visitation with Susan for one hour each week. The court also ordered respondent to, in part: (1) complete a CCA and follow all recommendations; (2) engage in medication management; (3) complete random drug screens within twenty-four hours of request; (4) engage in a parenting program and exhibit appropriate discipline and parenting during visits with Susan; (5) obtain stable housing; (6) address pending criminal charges and accumulate no additional charges; and (7) complete "SOAR Court" intake and engage in treatment if deemed appropriate.

After a 5 June 2018 hearing, the trial court entered an initial permanency planning and review order on 23 July 2018. The court found respondent had not made any efforts to complete a CCA or to address her mental health needs. She had submitted to an initial hair follicle drug screen but did not complete her last requested drug screen and had not engaged in any programs to assist her in her sobriety. Respondent still had pending criminal charges, had not been cooperative with DSS, and was homeless and unwilling to utilize shelters. The court continued custody of Susan with DSS and set Susan's primary permanent plan as reunification, with a secondary permanent plan of adoption.

The trial court conducted a subsequent permanency planning and review hearing on 28 September 2018 and entered its order from that hearing on 24 October 2018. The court found respondent completed a CCA on 17 July 2018 but had not followed through with most of the recommendations from the assessment. She continued to refuse to complete requested drug screens and did not report substance abuse as an issue when she completed her CCA. Respondent was consistent with

2. Susan and Eric have different biological fathers. The identity of Susan's father is unknown.

attending visitations but struggled with exhibiting appropriate behavior during them. She had been living with Susan's grandmother and had obtained a job. The court continued Susan's primary and secondary permanent plans as reunification and adoption and ordered DSS to complete any steps necessary to finalize the plans.

A third permanency planning and review hearing was set for 9 January 2019, but in early January 2019, respondent overdosed on Fentanyl and entered an inpatient treatment detox and rehabilitation program after she was released from the hospital. The trial court continued the hearing until February by order entered 10 January 2019 because respondent was in inpatient treatment. Respondent, however, failed to complete the program and was discharged. In its order from the continued hearing, the trial court set the primary permanent plan for Susan as adoption and the secondary permanent plan as reunification.

Subsequently, DSS filed a petition to terminate parental rights on 28 January 2019, alleging grounds as to respondent of neglect, willful failure to correct the conditions that led to Susan's removal from her home, and failure to pay a reasonable portion of the cost of Susan's care while Susan was in DSS custody. *See* N.C.G.S. § 7B-1111(a)(1)–(3) (2019). After a hearing on 12 July 2019, the trial court entered an order terminating respondent's parental rights on 24 July 2019.[3] The court concluded all three grounds alleged by DSS existed to terminate respondent's parental rights and that termination of her parental rights was in Susan's best interests. Respondent appealed the trial court's order terminating her parental rights, arguing that the trial court abused its discretion in concluding that terminating respondent's rights was in Susan's best interest. We disagree.

Termination of parental rights proceedings consist of two stages: adjudication and disposition. 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 must prove by "clear, cogent, and convincing evidence" that one or more grounds for termination exist under section 7B-1111(a) of our General Statutes. N.C.G.S. § 7B-1109(e), (f) (2019). If the petitioner proves at least one ground for termination 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

3. The order also terminated the parental rights of Susan's unknown father.

S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110)). In making the best interest determination,

> 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. "We review this decision on an abuse of discretion standard[.]" *In re L.M.T.*, 367 N.C. 165, 171, 752 S.E.2d 453, 457 (2013). "An '[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

The trial court made the following findings of fact addressing each of the factors in section 7B-1110(a):

> 2. The minor child is five years old.
>
> 3. The minor child has been placed in her current foster home since June 1, 2018.
>
> 4. The minor child is strongly bonded with [her] foster parents and identifies them as her parents. The relationship is stable, predictable and loving.
>
> 5. The minor child is strongly bonded with the other children in the home.
>
> 6. The minor child has a half sibling in Florida. The foster parents have made two trips with the minor child to visit her half sibling and facilitate weekly face time communication.

> 7. The foster parents have a strong relationship with the maternal grandmother. They have invited her to extracurricular events for the minor child.
>
> 8. The foster parents have expressed their desire to adopt the minor child.
>
> 9. The minor child has an inconsistent and diminishing bond with the respondent mother. The minor child has expressed worries about returning to the care of respondent mother.
>
> . . .
>
> 11. The maternal grandmother previously had placement of the minor child, but the minor child was removed from the maternal grandmother's home after another member of the maternal grandmother's household was abusing drugs. The [c]ourt in the underlying juvenile case has not reconsidered placement in the maternal grandmother's household. The maternal grandmother has not attended court previous to this hearing to request placement.
>
> 12. The likelihood of adoption is high.
>
> 13. The minor child's permanent plan is adoption and, therefore, the parental rights of the respondent mother . . . must be terminated in order to accomplish that plan.
>
> 14. The only barrier to adoption is termination of parental rights.

Respondent does not challenge these findings, and they are thus 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) (holding that unchallenged findings of fact made at the adjudicatory stage are binding on appeal)).

Instead, respondent argues that the trial court did not make several findings of fact regarding evidence at the hearing she believes the court should have considered in determining Susan's best interests. She contends the court should have made findings regarding: (1) her future plan to enter a residential twelve-month drug rehabilitation program; (2) the potential for Susan to reside with her after she completed three to six months of the rehabilitation program; (3) Susan's relationship with her half-brother, Eric, and whether that relationship would continue if she were adopted; and (4) Susan's bond with her maternal grandmother and

her potential placement with her grandmother. She further argues the trial court's lack of dispositional findings regarding these circumstances show that it failed to properly weigh the competing goals of preserving Susan's ties to her biological family and achieving permanence for Susan through severing those ties in favor of adoption. *See In re A.U.D.*, 373 N.C. 3, 11–12, 832 S.E.2d 698, 703–04 (2019). These arguments are misplaced.

Respondent does not identify any conflict in the evidence that would require the trial court to make specific findings addressing the factual basis for her arguments. We have held,

> [a]lthough 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." "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."

*In re C.J.C.*, 374 N.C. 42, 48, 839 S.E.2d 742, 747 (2020) (quoting *In re A.R.A.*, 373 N.C. 190, 199, 835 S.E.2d 417, 424 (2019)); *see also In re S.D.C.*, 373 N.C. 285, 290, 837 S.E.2d 854, 858 (2020) (holding the same when considering any "relevant consideration" pursuant to N.C.G.S. § 7B-1110(a)(6)).

Respondent testified she had "looked into" attending a year-long drug rehabilitation program that may have allowed Susan to live with her after three to six months of participation in the program. Respondent's mere intention to participate in a drug rehabilitation program, however, had very limited relevance to Susan's best interests, particularly given that respondent's rights were terminated, in part, because of respondent's history of relapse and failure to complete drug rehabilitation programs.

Respondent's argument that the trial court did not make findings regarding Susan's bond with her maternal grandmother and her potential placement with her grandmother is likewise without merit. It was uncontested that Susan had a bond with her grandmother, and her grandmother believed that bond to be strong. The grandmother also testified she was in a different emotional position than when Susan was removed from her care, was able to set boundaries, had cut ties with the sister whose cocaine use led to Susan's removal from her care, and was financially able to take care of Susan. Nevertheless, the trial court found that while the foster parents have a strong relationship with the grandmother, the grandmother had not previously appeared in court to request that Susan be placed with her.

Likewise, the trial court considered Susan's relationship with Eric. It was also uncontested that Susan had a bond with her half-brother. The court found that Susan's foster parents had taken two trips to Florida to allow Susan to spend time with Eric and continued weekly face time communication.

The trial court's unchallenged findings show it considered Susan's bond with Eric and her maternal grandmother and her maternal grandmother's potential as a possible placement option for Susan in making its best interest determination. Thus, while Susan's foster parents could potentially cease contact with Susan's grandmother and half-brother after the adoption is complete, it is the province of the trial court to weigh the evidence before it and "this Court lacks the authority to reweigh the evidence that was before the trial court." *In re A.U.D.*, 373 N.C. at 12, 832 S.E.2d at 704. Thus, we hold the trial court made sufficient dispositional findings regarding Susan's bond with her maternal grandmother and half-brother in light of the evidence before it.

The trial court's dispositional findings show it considered the relevant statutory criteria of N.C.G.S. § 7B-1110(a) and that the court weighed the competing goals of preserving Susan's ties to her biological family and achieving permanence for Susan through adoption. This Court is satisfied with the trial court's conclusion that termination of respondent's rights was in Susan's best interest. Therefore, we affirm the trial court's order terminating her parental rights.

AFFIRMED.

**IN RE Z.K.**

[375 N.C. 370 (2020)]

IN THE MATTER OF Z.K.

No. 476A19

Filed 25 September 2020

**Termination of Parental Rights—no-merit brief—neglect, willful failure to make reasonable progress, and dependency—substance abuse and domestic violence**

The trial court's termination of a mother's parental rights on the grounds of neglect, willful failure to make reasonable progress, and dependency was affirmed where her 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 an order entered on 3 October 2019 by Judge Susan M. Dotson-Smith in District Court, Buncombe County. This matter was calendared for argument in the Supreme Court on 27 August 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 for petitioner-appellee Buncombe County Department of Health and Human Services.*

*Amanda S. Hawkins for appellee Guardian ad Litem.*

*Peter Wood for respondent-appellant mother.*

EARLS, Justice.

Respondent-mother appeals from the trial court's 3 October 2019 order terminating her parental rights to the minor child Z.K. (Zena).[1] Counsel for respondent-mother has filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude the issues identified by counsel in respondent-mother's brief are without merit and therefore affirm the trial court's termination order.

On 11 June 2017, the Buncombe County Department of Health and Human Services (DHHS) received a Child Protective Services (CPS)

1. The minor child Z.K. will be referred to throughout this opinion as "Zena," which is a pseudonym used to protect the identity of the juvenile and for ease of reading.

report concerning Zena. The report alleged that while respondent-mother and Zena were visiting respondent-mother's boyfriend M.K., who was then thought to be Zena's father, M.K. assaulted respondent-mother by hitting her in the face and breaking a chain that was around her neck while he was holding Zena. At the time, M.K. was allegedly under the influence of an unknown substance and alcohol. Madison County law enforcement officers responded to a report of a domestic violence incident. One of the officers stated that "a female ran out [of the home] and stated that [M.K.] was inside holding [Zena] like 'a hostage situation,' " and respondent-mother claimed that M.K. had "body-slammed her." Officers observed M.K. acting aggressively and issuing threats and took him into custody. Officers stated that they were familiar with M.K. due to prior incidents of domestic violence and alcohol consumption, and they claimed he was a violent and reckless person and dangerous for Zena to be around. Respondent-mother agreed to enter into a safety plan which included seeking a restraining order against M.K. and pursuing custody of Zena. Respondent-mother initiated proceedings to obtain a domestic violence protective order against M.K., but the matter was discontinued after she failed to appear in court.

On 9 September 2017, DHHS received another CPS report. This report alleged that Zena's maternal grandmother was locked in her bedroom because respondent-mother was acting aggressively and that the maternal grandmother was afraid of respondent-mother. Respondent-mother was banging on the maternal grandmother's door, and Zena was left in the living room unsupervised. Upon investigation of the report, DHHS learned that respondent-mother was involuntarily committed that day and also learned that respondent-mother had tested positive for methamphetamine, fentanyl, and marijuana. Zena was taken to the home of her maternal aunt, who found three baggies in Zena's diaper which appeared to contain drugs.

Zena was placed in a temporary placement on 10 September 2017, but two days later the placement family reported to DHHS that they could no longer provide care for Zena. On 12 September 2017, DHHS filed a juvenile petition alleging that Zena was a neglected and dependent juvenile. DHHS noted in the juvenile petition that respondent-mother had a lengthy CPS history with DHHS regarding her other children. DHHS obtained nonsecure custody of Zena and placed her in foster care.

Following a hearing held on 22 November 2017, Zena was adjudicated a neglected and dependent juvenile in an order entered on 10 January 2018. Respondent-mother was ordered to complete a substance abuse assessment and to follow all recommendations, obtain a comprehensive

clinical assessment and follow all recommendations, continue to engage in individual counseling and follow all recommendations of her counselor, find and maintain safe and suitable housing, and submit to random drug screens. The trial court further noted that M.K. had been excluded as Zena's father by DNA testing and ordered respondent-mother to identify a putative father. Respondent-mother was granted visitation with Zena. The trial court ordered that Zena remain in her current foster home placement.

On 9 February 2018, the trial court entered an initial permanency planning and review order. The trial court established a primary permanent plan of reunification with a secondary permanent plan of guardianship. In a subsequent permanency planning and review order, the trial court changed the primary permanent plan to adoption with a secondary permanent plan of reunification. In compliance with the trial court's adjudication and disposition order, respondent-mother identified a putative father, J.R., and the trial court ordered him to undergo DNA testing. J.R., however, never appeared before the trial court or responded to DHHS's inquiries.

Additionally, D.S., who was respondent-mother's husband when Zena was born, was named Zena's legal father. D.S. took a DNA test which excluded him as Zena's biological father, and he relinquished his parental rights on 26 April 2019. Since paternity was never established, Zena's biological father remained unknown throughout the case.

On 4 December 2018, DHHS filed a petition to terminate respondent-mother's parental rights on the grounds of neglect, willful failure to make reasonable progress, failure to pay support, and dependency. N.C.G.S. § 7B-1111(a)(1)–(3), (6) (2019). On 3 October 2019, the trial court entered an order in which it determined that grounds existed to terminate respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (6) and further concluded that it was in Zena's best interests that respondent-mother's parental rights be terminated. Accordingly, the trial court terminated respondent-mother's parental rights and respondent-mother appealed.

Counsel for respondent-mother has filed a no-merit brief on his client's behalf under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. Counsel advised respondent-mother of her right to file *pro se* written arguments on her own behalf and provided her with the documents necessary to do so. Respondent-mother has not submitted written arguments to this Court.

We independently review issues identified by counsel 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). Respondent-mother's counsel identified the issues that could arguably support an appeal in this case and also explained why, based on a careful review of the record, these issues lacked merit. The trial court's conclusion that there was past neglect and a probability of future neglect was well supported by evidence in the record, including respondent-mother's failure to complete most of the requirements of her case plan. Whether the respondent-mother's failure to comply with her case plan was willful is not relevant to establish this ground for termination. When determining whether a child is neglected, the circumstances and conditions surrounding the child are what matters, not the fault or culpability of the parent. *See In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984).

The other grounds found by the trial court to support termination of respondent-mother's parental rights are also supported by evidence in the record. Respondent-mother's failure to complete her case plan also supports the conclusion that she willfully left her child in foster care or a placement outside the home for over twelve months without making reasonable progress in correcting the circumstances that led to the removal of the child. *See In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93 (2004). Here, there was clear, cogent, and convincing evidence that respondent-mother failed to comply with substance abuse treatment and mental health treatment and to address domestic violence issues, all of which was sufficient to demonstrate her lack of reasonable progress. Finally, the trial court did not abuse its discretion by deciding that termination of respondent-mother's parental rights was in the child's best interests. N.C.G.S. § 7B-1110(a) (2019). All six factors required by the statute were examined by the trial court, and the findings were supported by evidence at the hearing.

Considering the entire record and reviewing the issues identified in the no-merit brief, we conclude that the 3 October 2019 order is supported by clear, cogent, and convincing evidence and is based on proper legal grounds. Accordingly, we affirm the trial court's order terminating respondent-mother's parental rights.

AFFIRMED.

| | | |
|---|---|---|
| NORTH CAROLINA BOWLING PROPRIETORS ASSOCIATION, INC. | ) | |
| v. | ) | From Wake County |
| ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS THE GOVERNOR OF NORTH CAROLINA | ) | |

No. 314PA20

Filed 25 September 2020

**Governor—authority—executive order—restrictions on business activities—superseded—mootness**

Where a prior executive order, which restricted business activities of entertainment facilities, was superseded by another order loosening those restrictions and was no longer in effect, the Supreme Court dismissed as moot an appeal challenging the governor's authority to enforce the prior order.

ORDER

Plaintiff has filed a lawsuit questioning the authority of defendant Governor Roy Cooper to enforce section 8(A) of Executive Order 141 against plaintiff, the North Carolina Bowling Proprietors Association, and its 75 member entertainment facilities. *See* Exec. Order 141, § 8(A) (May 20, 2020). The trial court entered an interlocutory order granting a preliminary injunction on 7 July 2020 (preliminary injunction order). Defendant sought a stay of the order and its review, and this Court allowed both the stay and review. Defendant recently issued an executive order that superseded and replaced the provisions of Executive Order 141 challenged in this case. *See* Exec. Order 163, § 6(8) (Sept. 1, 2020). Executive Order 163 allows bowling centers to resume operations under certain specified safety protocols. *See id.* § 6(8)(b)(i)–(xi). Since the challenged restriction in Executive Order 141 is no longer in effect against plaintiff, we dismiss this appeal as moot, vacate the 7 July 2020 preliminary injunction order, and remand to Superior Court, Wake County.

By order of the Court in Conference, this the 25th day of September, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 25th day of September, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court
of North Carolina

s/Amy L. Funderburk
~~Assistant~~ Clerk

STATE OF NORTH CAROLINA
v.
QUINTEL MARTINEZ AUGUSTINE

No. 130A03-2

Filed 25 September 2020

**Constitutional Law—Racial Justice Act—double jeopardy—ex post facto—review precluded**

For the reasons stated in *State v. Robinson*, 375 N.C. 173 (2020) and *State v. Ramseur*, 374 N.C. 658 (2020), the trial court erred by determining that the repeal of the Racial Justice Act (RJA) voided defendant's motion for appropriate relief from his capital sentence, because the retroactive application of the RJA's repeal violated double jeopardy protections and the constitutional prohibition against ex post facto laws. Review of a prior judgment and commitment, which was entered before the RJA was repealed and which sentenced defendant to life imprisonment without parole, was precluded because it was not appealed by the State and therefore constituted a final judgment. Consequently, the Supreme Court remanded the matter to the trial court to reinstate defendant's sentence of life imprisonment without parole.

Justice DAVIS concurring in result.

Justice NEWBY dissenting.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order dismissing defendant's motion for appropriate relief in which defendant asserted claims under the Racial Justice Act entered on 25 January 2017 by Judge W. Erwin Spainhour in Superior Court, Cumberland County. Heard in the Supreme Court on 26 August 2019.

*Joshua H. Stein, Attorney General, by Danielle Marquis Elder and Jonathan P. Babb, Special Deputy Attorneys General, for the State-appellee.*

*Gretchen M. Engel and James E. Ferguson II for defendant-appellant.*

*Jeremy M. Falcone, Paul F. Khoury, Robert L. Walker, and Madeline J. Cohen for Former State and Federal Prosecutors, amicus curiae.*

*Carlos E. Mahoney, Jin Hee Lee, and W. Kerrel Murray for NAACP Legal Defense and Educational Fund, Inc., amicus curiae.*

*Janet Moore for National Association for Public Defense, amicus curiae.*

*Burton Craige and Bidish Sarma for North Carolina Advocates for Justice, amicus curiae.*

*Grady Jessup for North Carolina Association of Black Lawyers, amicus curiae.*

*Cynthia F. Adcock for North Carolina Council of Churches, amicus curiae.*

*Lisa A. Bakale-Wise and Irving Joyner for North Carolina State Conference of the NAACP, amicus curiae.*

*Professors Robert P. Mosteller & John Charles Boger, amicus curiae.*

*Joseph Blocher for Social Scientists, amicus curiae.*

HUDSON, Justice.

Pursuant to defendant's petition for writ of certiorari, we review whether double jeopardy bars review of the judgment entered in this matter. For the reasons stated in *State v. Robinson (Robinson II)*, No. 411A94-6, 2020 WL 4726680 (N.C. Aug. 14, 2020), we hold that it does. We also conclude for the reasons stated in this Court's decision in *State v. Ramseur*, 374 N.C. 658, 843 S.E.2d 106 (2020), that the retroactive application of the 2012 Amended Racial Justice Act (RJA), and the 2013 repeal of the RJA violates the prohibitions against ex post facto laws contained in both (1) the Federal Constitution, and (2) the North Carolina Constitution as interpreted by our prior decision in *State v. Keith*, 63 N.C. 140, 1869 WL 1378 (1869). Accordingly, we vacate the trial court's order and remand for the reinstatement of defendant's sentence of life imprisonment without parole.

Factual and Procedural Background

The jury returned a verdict finding defendant guilty of first-degree murder on 15 October 2002 in the Superior Court, Cumberland County.

On 22 October 2002, he was sentenced to death. Defendant then appealed as of right to this Court from the judgment sentencing him to death under N.C.G.S. § 7A-27(a). On direct appeal, we found no error in defendant's trial and affirmed his conviction and death sentence. *State v. Augustine (Augustine I)*, 359 N.C. 709, 740, 616 S.E.2d 515, 537 (2005).

On 9 August 2010, defendant filed a motion for appropriate relief (MAR) challenging his death sentence under the RJA in the Superior Court, Cumberland County. At the time that defendant filed his MAR, the RJA prohibited any person from being "subject to or given a sentence of death . . . 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, -2011 (2009)) (repealed 2013). At that time, the RJA allowed defendants to prove that "race was the basis of the decision to seek or impose a death sentence" in their cases if they could present evidence 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.*, § 1, 2009 N.C. Sess. Laws at 1214. To meet this burden of proof, defendants were allowed to offer statistical evidence. *Id.*

Also in August 2010, Marcus Reymond Robinson filed an MAR pursuant to the RJA in the Superior Court, Cumberland County.[1] Robinson's MAR hearing was held before Judge Gregory A. Weeks from 30 January through 15 February 2012. The trial court received evidence for thirteen days from thirteen witnesses, including: (1) Barbara O'Brien, an associate professor at Michigan University College of Law who conducted an empirical study of peremptory strike decisions in capital cases in North Carolina and concluded that race was a significant factor in those decisions in North Carolina, the former Second Judicial Division, and Cumberland County at the time of Robinson's trial; (2) George Woodworth, a professor emeritus of statistics and of public health at the University of Iowa who concurred with Professor O'Brien's testimony; (3) Samuel R. Sommers, an associate professor of psychology at Tufts University who concurred with the testimonies of Professor O'Brien and Professor Woodworth; (4) Bryan Stevenson, a professor of law at the New York University School of Law and the director of the Equal Justice Initiative in Montgomery, Alabama, who testified that he found dramatic evidence of racial bias in jury selection in capital cases in North Carolina

1. Robinson's appeal is the subject of our decision in *State v. Robinson*, No. 411A94-6, 2020 WL 4726680 (N.C. Aug. 14, 2020).

at the time of Robinson's trial; and (5) the Honorable Louis A. Trosch Jr. a district court judge in Mecklenburg County who was previously a public defender in Cumberland County and has trained judges to recognize implicit bias.

After the MAR hearing, the trial court entered an order on 20 April 2020 granting Robinson's MAR. In the 167-page order, the trial court made extensive findings, including that

> [t]he RJA identifies three different categories of racial disparities a defendant may present in order to meet the "significant factor" standard, any of which, standing alone, is sufficient to establish an RJA violation: evidence that death sentences were sought or imposed more frequently upon defendants of one race than others; evidence that death sentences were sought or imposed more frequently on behalf of victims of one race than others; or evidence that race was a significant factor in decisions to exercise peremptory strikes during jury selection. N.C.[G.S.] § 15A-2011(b)(1)–(3). It is the third category, evidence of discrimination in jury selection, that was the subject of the nearly three week long evidentiary hearing held in this case.
>
> In the first case to advance to an evidentiary hearing under the RJA, Robinson introduced a wealth of evidence showing the persistent, pervasive, and distorting role of race in jury selection throughout North Carolina. The evidence, largely unrebutted by the State, requires relief in his case and should serve as a clear signal of the need for reform in capital jury selection proceedings in the future.

The trial court concluded that Robinson was entitled to relief under the RJA as follows: "The [c]ourt . . . concludes that Robinson is entitled to have his sentence of death vacated, and Robinson is resentenced to life imprisonment without the possibility of parole."

On 15 May 2012, following the trial court's decision in Robinson's case, defendant Augustine, Christina Shea Walters,[2] and Tilmon Charles Golphin[3] each filed a Motion for Grant of Sentencing Relief arguing

2. Walters's appeal is the subject of our opinion in *State v. Walters*, No. 548A00-2 (N.C. Sept. 25, 2020).

3. Golphin's appeal is the subject of our opinion in *State v. Golphin*, No. 441A98-4 (N.C. Sept. 25, 2020).

that the evidence that established that Robinson was entitled to relief under the RJA also entitled them to relief in their cases. The State responded and requested that the trial court either (1) deny relief entirely, or (2) order an evidentiary hearing. On 11 June 2012, the trial court scheduled an evidentiary hearing for 23 July 2012.

On 2 July 2012, the General Assembly amended the RJA. An Act to Amend Death Penalty Procedures, S.L. 2012-136, §§ 3–4, 2012 N.C. Sess. Laws 471, 472 [hereinafter Amended RJA]. In the lead-up to defendant's evidentiary hearing, the General Assembly's amendments to the RJA made changes to (1) the burden of proof that defendants were required to meet in order to obtain relief, and (2) the types of evidence that could be used to satisfy that burden of proof. *Id.* Specifically, the Amended RJA allowed relief only if a defendant could demonstrate 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." Amended RJA, § 3, 2012 N.C. Sess. Laws at 472 (emphasis added). This provision of the Amended RJA was narrower than the Original RJA, which also granted relief if a defendant could demonstrate that "race was a significant factor . . . [in] 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 (emphasis added). Further, the Amended RJA defined the relevant time period as "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 472–73. In addition, while the Original RJA allowed defendants to satisfy their burden of proof through statistical evidence, the Amended RJA stated that "[s]tatistical evidence alone is insufficient to establish that race was a significant factor." Amended RJA, § 3, 2012 N.C. Sess. Laws at 472. Finally, the Amended RJA repealed N.C.G.S. § 15A-2011(b)[4] and added N.C.G.S. § 15A-2011(d), which provided that

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4. The Original RJA provided that

> [e]vidence 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.

> [e]vidence 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.

Amended RJA, § 3, 2012 N.C. Sess. Laws at 472. In *Ramseur*, we held that each of these provisions of the Amended RJA constituted impermissible ex post facto laws that could not be applied retroactively. 374 N.C. at 682, 843 S.E.2d at 121.

On 3 July 2012, defendant Augustine, Walters, and Golphin filed amendments to their motions for sentencing relief pursuant to the Amended RJA. On 6 July 2012, the trial court scheduled the evidentiary hearing for 1 October 2012.

The evidentiary hearing on the amended motions was held on 1 October 2012 through 11 October 2012 before Judge Gregory A. Weeks. On 13 December 2012, the trial court entered an order granting the MARs filed by defendant, Walters, and Golphin. In the opening paragraphs of the order, the trial court emphasized that "race was, in fact, a significant factor in the prosecution's use of peremptory strikes during jury selection, and [the trial court] therefore grants Defendants' motions for appropriate relief pursuant to the RJA, vacates their death sentences, and imposes sentences of life imprisonment without possibility of parole" under the Amended RJA. The lengthy order contained numerous findings of fact, including the following:

> 130. Having considered testimony from Coyler, Russ, and Dickson [Cumberland County prosecutors] in conjunction with all of the foregoing evidence, the [c]ourt concludes that their denials that they took race into account in Cumberland County capital cases are

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> (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.

North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1214.

> unpersuasive and not credible. Their contention that they selected capital juries in a race-neutral fashion does not withstand scrutiny and is severely undercut by all of the evidence to the contrary. The evidence of Coyler's race-conscious "Jury Strikes" notes in *Augustine*, Coyler and Dickson's conduct in the *Burmeister* and *Wright* cases, Russ' use of a prosecutorial "cheat sheet" to respond to *Batson* objections, and the many case examples of disparate treatment by these three prosecutors, together, constitute powerful, substantive evidence that these Cumberland County prosecutors regularly took race into account in capital jury selection and discriminated against African-American citizens.
>
> 131. Finally, this [c]ourt would be remiss were it to fail to acknowledge the difficulties involved in reaching these determinations. Coyler, Russ, and Dickson each represented the State in Cumberland County for over two decades. During that time—as judges testified in this proceeding—these prosecutors gained reputations for good character and integrity. The [c]ourt first notes that its conclusion that unconscious biases likely operated in their strike decisions does not impugn the prosecutors' character. The [c]ourt additionally finds that there is no evidence that any of these prosecutors acted with racial animus towards any minority venire member. To the extent that the actions of these prosecutors were informed by purposeful bias, the [c]ourt finds that such bias falls within the category of "rational bias," and was motivated by the prosecutors' desire to zealously prosecute the defendants, rather than racial animosity.

In the final conclusion of law, the trial court stated that

> [i]n view of the foregoing, the [c]ourt finally concludes based upon a preponderance of the evidence that race was a significant factor in decisions to seek or impose Defendants' death sentences at the time those sentences were sought or imposed. Defendants' judgments were sought or obtained on the basis of race.

As a consequence, the trial court concluded by ordering the following:

> The [c]ourt, having determined that Golphin, Walters, and Augustine are entitled to appropriate relief on their

> RJA jury selection claims, concludes that Defendants are entitled to have their sentences of death vacated, and Golphin, Walters, and Augustine are resentenced to life imprisonment without the possibility of parole.
>
> The [c]ourt reserves ruling on the remaining claims raised in Defendants' RJA motions, including all constitutional claims.

On the same day, the trial court entered a separate Judgment and Commitment, sentencing defendant to life imprisonment without the possibility of parole. The State neither appealed nor otherwise sought review of the separate Judgment. However, the State sought review by this Court of the trial court's decisions granting relief to defendant, Robinson, Walters, and Golphin pursuant to two separate petitions for writ of certiorari. We allowed both petitions.

On 18 December 2015, we issued separate orders addressing the review of the petitions for certiorari. In Robinson's case, this Court vacated the trial court's order granting relief under the RJA and remanded his case to the trial court. *State v. Robinson (Robinson I)*, 368 N.C. 596, 597, 780 S.E.2d 151, 152 (2015). This Court concluded that the trial court erred in granting relief because it abused its discretion by denying the State's third motion to continue the evidentiary hearing on Robinson's MAR. *Id.* at 596, 780 S.E.2d at 151. In a separate order, we vacated the trial court's order granting relief to Augustine, Walters, and Golphin, and remanded the three cases to the trial court as well. *State v. Augustine (Augustine II)*, 368 N.C. 594, 780 S.E.2d 552 (2015). The remand order entered by this Court stated the following:

> After careful review, we conclude that the error recognized in this Court's Order in *State v. Robinson*, [368 N.C. 596, 780 S.E.2d 151 (2015)], infected the trial court's decision, including its use of issue preclusion, in these cases. Accordingly, the trial court's order is vacated. Furthermore, the trial court erred when it joined these three cases for an evidentiary hearing. These cases are therefore remanded to the senior resident superior court judge of Cumberland County for reconsideration of respondents' motions for appropriate relief. *Cf.* Gen. R. Pract. Super. & Dist. Cts. 25(4), 2016 Ann. R. N.C. 22.
>
> We express no opinion on the merits of respondents' motions for appropriate relief at this juncture. On remand, the trial court should address petitioner's constitutional

> and statutory challenges pertaining to the Act. In any new hearings on the merits, the trial court may, in the interest of justice, consider additional statistical studies presented by the parties. The trial court may also, in its discretion, appoint an expert under N.C. R. Evid. 706 to conduct a quantitative and qualitative study, unless such a study has already been commissioned pursuant to this Court's Order in *Robinson*, in which case the trial court may consider that study. If the trial court appoints an expert under Rule 706, the Court hereby orders the Administrative Office of the Courts to make funds available for that purpose.

*Augustine II*, 368 N.C. at 594, 780 S.E.2d at 552–53.

In June 2013—during the pendency of the State's appeals to this Court in *Robinson I* and *Augustine II*—the General Assembly repealed the RJA.[5] This repeal came after we allowed the State's petition for writ of certiorari in *Robinson I* on 11 April 2013, but before we allowed the State's petition for writ of certiorari in *Augustine II* on 3 October 2013. The repeal applied retroactively to any MAR filed before the repeal's effective date. Act of June 13, 2013, S.L. 2013-154, § 5.(d), 2013 N.C. Sess. Laws 368, 372. However, the repeal's savings clause exempted from the repeal all cases in which there was

> a court order resentencing a petitioner to life imprisonment without parole pursuant to the provisions of Article 101 of Chapter 15A of the General Statutes prior to the effective date of this act *if the order is affirmed upon appellate review and becomes a final Order* issued by a court of competent jurisdiction.

*Id.* (emphasis added). Conversely, the savings clause specifically made the repeal's retroactivity provision

> applicable in any case where a court resentenced a petitioner to life imprisonment without parole pursuant to the provisions of Article 101 of Chapter 15A of the General Statutes prior to the effective date of this act, *and the Order is vacated upon appellate review* by a court of competent jurisdiction.

*Id.* (emphasis added).

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5. Act of June 13, 2013, S.L. 2013-154, § 5.(a), 2013 N.C. Sess. Laws. 368, 372.

On remand from our orders in *Robinson I* and *Augustine II*, the trial court held a single hearing for the four defendants' cases; the hearing was not scheduled as an evidentiary hearing, and no evidence was taken. Prior to the hearing, all counsel were notified that the trial court had ordered that the hearing would only involve arguments on the following single question of law:

> Did the enactment into law of Senate Bill 306, Session Law 2013-14, on 19 June 2013, specifically Sections 5. (a), (b) and (d) therein, render void the Motions for Appropriate Relief filed by the defendants Augustine, Walter[s], Golphin and Robinson pursuant to the provisions of Article 101 of the General Statutes of North Carolina?

After the hearing, the trial court dismissed the MARs filed by all defendants concluding that they were voided by the repeal of the RJA. Defendant Augustine filed a petition for writ of certiorari requesting review of the trial court's ruling on 30 May 2017. We allowed the petition on 1 March 2018.

Analysis

For the reasons stated in this Court's decision in *Robinson II*, "the retroactivity provision of the RJA Repeal violates the double jeopardy protections of the North Carolina Constitution." 2020 WL 4726680, at *12. Furthermore, the judgment entered by the trial court sentencing defendant Augustine to life imprisonment without the possibility of parole was and is a final judgment. Therefore, double jeopardy bars further review. *Id.* In addition, for the reasons stated in *Ramseur*, we conclude that the retroactive application of the RJA repeal violates the prohibitions against ex post facto laws contained in both (1) the United States Constitution, and (2) the North Carolina Constitution as interpreted by our prior opinion in *Keith*, 63 N.C. 140, 1869 WL 1378. *Ramseur*, 374 N.C. at 658–83, 843 S.E.2d at 106–22. Accordingly, we vacate the trial court's order ruling that the repeal of the RJA voided defendant's MAR and remand to the Superior Court, Cumberland County, for the reinstatement of defendant's sentence of life imprisonment without parole.

VACATED AND REMANDED.

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

Justice DAVIS concurring in result.

For the reasons stated in Justice Ervin's concurring opinions in *State v. Golphin*, No. 441A98-4 (N.C. Sept. 25, 2020), and *State v. Walters*, No. 548A00-2 (N.C. Sept. 25, 2020), I concur in the result only.

Justice NEWBY dissenting.

For the reasons stated in my dissenting opinions in *State v. Robinson*, No. 411A94-6, 2020 WL 4726680 (N.C. Aug. 14, 2020), and *State v. Ramseur*, 374 N.C. 658, 843 S.E.2d 106 (2020), I respectfully dissent.

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STATE OF NORTH CAROLINA
v.
TERRAINE SANCHEZ BYERS

No. 69A06-4

Filed 25 September 2020

**Criminal Law—appointment of counsel—post-conviction DNA testing—materiality requirement**

In a case of first impression, defendant's pro se motion for post-conviction DNA testing did not entitle him to the appointment of counsel under N.C.G.S. § 15A-269(c) because he failed to meet his burden of showing DNA testing "may be" material to his claim of wrongful conviction. Although the burden of showing materiality is more relaxed under subsection (c) than it is under subsection (a)—requiring a defendant to show DNA testing "is material" to his defense—the legal meaning of "materiality" remains the same under both sections. Thus, where defendant needed to show a reasonable probability that the testing would have resulted in a different verdict, he failed to do so by providing no more than vague and conclusory statements accusing the State of falsifying evidence against him.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 263 N.C. App. 231, 822 S.E.2d 746 (2018), reversing an order entered on 3 August 2017 by Judge W. Robert Bell in

Superior Court, Mecklenburg County. Heard in the Supreme Court on 19 November 2019.

*Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellant.*

*Glenn Gerding, Appellate Defender, by Wyatt Orsbon, Assistant Appellate Defender, for defendant-appellee.*

MORGAN, Justice.

This matter mandates our consideration of the requirements which a pro se defendant who seeks postconviction testing of deoxyribonucleic acid (DNA) evidence derived from biological material must fulfill in order to qualify for appointed counsel to assist such a defendant in an effort to obtain this type of scientific evaluation as provided in section 15A-269 of the General Statutes of North Carolina. While this Court has previously addressed the burden that a defendant must satisfy in order to obtain DNA testing after being found guilty of criminal activity, this case presents to us an issue of first impression with regard to the standard which a defendant must meet for the appointment of an attorney by a trial court under N.C.G.S. § 15A-269 to aid in the defendant's efforts to obtain the postconviction DNA testing. In undertaking the inquiry here, we conclude that defendant Terraine Sanchez Byers has failed to fulfill the requirements which the identified statute has established. Accordingly, this Court reverses the decision rendered below by the Court of Appeals.

## *I. The Trial Phase*

Defendant was convicted of first-degree murder and first-degree burglary on 3 March 2004. These convictions arose from the 22 November 2001 stabbing death of Shanvell Burke, a person with whom defendant had a romantic relationship before Burke ended it. On that autumnal night in Charlotte, North Carolina, Burke was in her apartment watching television with an individual named Reginald Williams. Williams testified at trial that he and Burke heard a loud crash at the back door of the apartment. When Burke went to see what had caused the sound, Williams heard her yell "Terraine, stop." This development prompted Williams to leave the apartment immediately and to find someone to contact law enforcement for assistance. Williams explained in his testimony that he fled from Burke's residence because she had allowed him to hear a recorded telephone message that defendant had left for

Burke in which defendant said that "when he found out who [was dating Burke], he was gonna kill them." Williams also related at trial that Burke had told him that "she was afraid [defendant] was going to do something to hurt her bad." Evidence presented at trial tended to show that local law enforcement officers were already familiar with Burke's home because after she had terminated her romantic relationship with defendant, Burke had called upon law enforcement for help on multiple occasions due to her fear of defendant. On one such occasion, Burke reported that defendant had struck her in the face and on her head while stating that he was going to kill her, and then defendant brandished a knife toward Burke's aunt, who was also present. Another emergency call by Burke to law enforcement involved her account that defendant had thrown bricks at Burke's apartment window.

In response to the emergency call to law enforcement in light of the circumstances which were occurring on 22 November 2001, the Charlotte-Mecklenburg Police Department arrived at Burke's apartment to discover defendant leaving the apartment through a broken window of the door. Defendant, who was described by officers as nervous and profusely sweating, told the officers that Burke was inside her home and had been injured. Defendant attempted to flee, but officers quickly apprehended and arrested him. Defendant had a deep laceration on his left hand.

Upon entering Burke's apartment, officers discovered her body lying in a pool of blood. Burke was already deceased due to the infliction of eleven stab wounds which she had suffered. A knife handle with a broken blade was recovered by investigating officers. One of the officers who responded to the 22 November 2001 emergency call identified Burke based upon his response to an emergency call at her residence eleven days earlier. On a prior date, Burke had reported to the officer that defendant had returned to Burke's apartment to harass her immediately after being released from custody on a domestic violence charge. Several days later, the same officer responded to another call at Burke's apartment at which time Burke again reported harassment by defendant, who Burke said she feared was going to physically assault her.

During the investigation of Burke's death, fingernail scrapings from defendant's hands, a bloodstain from a cushion on Burke's couch, a swab from the handle and a swab from the blade of the broken knife found inside Burke's apartment on the night of 22 November 2001, and various other bloodstains throughout the apartment were analyzed by the Charlotte-Mecklenburg Police Department Crime Laboratory. The DNA obtained from these sources matched either defendant, Burke, or

both of them. Additionally, one of Burke's neighbors testified that she saw defendant near Burke's apartment about 8:00 p.m. on the night that Burke was killed.

Defendant stipulated during trial that the blood found on the shirt that he was wearing at the time of his arrest was Burke's. Defendant offered no evidence at trial. Upon being found guilty by a jury of the offenses of first-degree murder and first-degree burglary, defendant was sentenced to life imprisonment without parole for the murder conviction and a term of 77–102 months in prison for the burglary conviction, which would be served consecutive to the life imprisonment for murder. Upon defendant's appeal, the Court of Appeals upheld the judgments entered upon defendant's convictions and denied defendant's post-trial pro se motion for appropriate relief. *See State v. Byers* (*Byers I*), 175 N.C. App. 280, 623 S.E.2d 357, *disc. rev. denied*, 360 N.C. 485, 631 S.E.2d 135 (2006).

*II. Defendant's Request for Postconviction DNA Testing*

On 31 July 2017, defendant filed a pro se motion in the trial court for postconviction DNA testing pursuant to N.C.G.S. § 15A-269 in which he asserted that: (1) defendant was on the other side of town waiting for a bus at the time that the attack on Burke occurred; (2) one of the State's witnesses at trial testified that she saw defendant getting on the 9:00 p.m. city bus on the night that Burke was killed; (3) a private investigator swore in an affidavit that defendant could not have arrived at Burke's apartment prior to the 22 November 2001 emergency call; (4) defendant had gone to Burke's apartment on the night of her death, and when he arrived, defendant noticed that the back door was "smashed in"; (5) defendant went inside Burke's apartment to investigate; and (6) defendant was then attacked by a man in a plaid jacket who escaped from the apartment before police officers arrived. In his motion, defendant stated that his struggle with the man in the plaid jacket would explain the presence of defendant's DNA throughout Burke's apartment and asserted that DNA testing of defendant's and Burke's previously untested clothing could reveal the identity of the actual perpetrator, noting that the State's DNA expert witness had reported, but not testified to, the presence of human blood in various locations in Burke's apartment that did not match the blood of either defendant or Burke. Defendant requested that the items of clothing be preserved and that an inventory of the evidence be prepared. Defendant also asked for the appointment of counsel to assist defendant in his postconviction DNA-testing process pursuant to N.C.G.S. § 15A-269(c).

Section 15A-269 of the General Statutes of North Carolina provides, in pertinent part, the following:

> (a) A defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing . . . if the biological evidence meets all of the following conditions:
>
> (1) Is material to the defendant's defense.
>
> (2) Is related to the investigation or prosecution that resulted in the judgment.
>
> (3) Meets either of the following conditions:
>
> a. It was not DNA tested previously.
>
> b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.
>
> (b) The court shall grant the motion for DNA testing . . . upon its determination that:
>
> (1) The conditions set forth in subdivisions (1), (2), and (3) of subsection (a) of this section have been met;
>
> (2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant; and
>
> (3) The defendant has signed a sworn affidavit of innocence.
>
> . . . .
>
> (c) . . . [T]he court shall appoint counsel for the person who brings a motion under this section if that person is indigent. If the petitioner has filed pro se, the court shall appoint counsel for the petitioner . . . upon a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction.

N.C.G.S. § 15A-269(a), (b), (c) (2019).

On 3 August 2017, the Superior Court, Mecklenburg County, entered an order denying defendant's motion for postconviction DNA testing on the grounds that "the evidence of his guilt is overwhelming" and that defendant has "failed to show how conducting additional DNA testing is material to his defense." Defendant appealed the trial court's order denying his motion to the Court of Appeals.

*III. The Court of Appeals Decision*

In the Court of Appeals, defendant argued that the trial court erred by denying his motion (1) before "obtaining and reviewing the statutorily required inventory of evidence" sought to be tested and (2) before appointing counsel to assist defendant upon showing in his motion that he was indigent and "the testing may be material to his defense." *State v. Byers (Byers II)*, 263 N.C. App. 231, 234, 822 S.E.2d 746, 748 (2018). The majority of the Court of Appeals panel reversed the trial court's order denying defendant's motion. *Id.* at 243, 822 S.E.2d at 753. Although the lower appellate court saw no error in the trial court's determination of defendant's motion prior to ordering the requested inventory of evidence, the majority concluded that defendant sufficiently pleaded the materiality of his requested postconviction DNA testing so as to be entitled to the appointment of counsel in order to assist him in obtaining the testing. *Id.*

With regard to the issue of materiality, the majority noted that "[t]he level of materiality required under subsection (a)(1) to support a motion for post-conviction DNA testing has been frequently litigated and has been a high bar for *pro se* litigants." *Id.* at 240, 822 S.E.2d at 751 (citing, *inter alia*, *State v. Lane*, 370 N.C. 508, 809 S.E.2d 568 (2018)). In *Lane*, this Court stated that in order to obtain postconviction DNA *testing*, DNA evidence is considered to be material when

> there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. The determination of materiality must be made in the context of the entire record and hinges upon whether the evidence would have affected the jury's deliberations.

*Lane*, 370 N.C. at 519, 809 S.E.2d at 575. In applying our guidance in *Lane* to the instant case, the Court of Appeals majority acknowledged the substantial evidence of defendant's guilt but further opined that "[t]he weight of the evidence indicating guilt must be weighed against the probative value of the possible DNA evidence. Our Supreme Court has found DNA [evidence] to be 'highly probative of the identity of the

victim's killer.' " *Byers*, 263 N.C. App. at 242, 822 S.E.2d at 753 (quoting *State v. Daughtry*, 340 N.C. 488, 512, 459 S.E.2d 747, 759 (1995)). In the present case, the lower appellate court's majority then observed the following:

> In enacting N.C.G.S. § 15A-269, our General Assembly created a potential method of relief for wrongly incarcerated individuals. To interpret the materiality standard in such a way as to make that relief unattainable would defeat that legislative purpose. *See Burgess v. Your House of Raleigh*, 326 N.C. 205, 216, 388 S.E.2d 134, 140 (1990) ("[A] statute must be construed, if possible, so as to give effect to every provision, it being presumed that the Legislature did not intend any of the statute's provisions to be surplusage."). A recent dissent in an opinion in [the Court of Appeals] highlighted the position in which our previous interpretation of materiality has placed *pro se* defendants, stating "we are requiring indigent defendants to meet this illusory burden of materiality, with no guidance or examples of what actually constitutes materiality. *Under our case law, therefore, it would be difficult for even an experienced criminal defense attorney to plead these petitions correctly.*" *State v. Sayre*, . . . 803 S.E.2d 699 (2017) (unpublished) (Murphy, J., dissenting)[,] *aff'd per curiam*, [371] N.C. [468], 818 S.E.2d 282 (2018). We hold Defendant in the present case has satisfied this difficult burden.

*Id.* at 242–43, 822 S.E.2d at 753 (first alteration in original) (second emphasis added). With this reasoning, the Court of Appeals reversed the trial court's order and remanded for the entry of an order appointing counsel to assist defendant in the proceeding in which defendant would attempt to establish the level of materiality required to obtain DNA testing. *Id.* at 243, 822 S.E.2d at 753.

In the view of the dissenting judge on the Court of Appeals panel, defendant did *not* sufficiently establish that he was entitled to the appointment of counsel to assist him in obtaining postconviction DNA testing. *Id.* at 243, 822 S.E.2d at 753 (Arrowood, J., dissenting). The dissenting judge noted that under the pertinent statute, the movant "has the burden of proving by a preponderance of the evidence every fact essential to support the motion for postconviction DNA testing, which includes the facts necessary to establish materiality," *Id.* at 244, 822 S.E.2d at 754 (quoting *Lane*, 370 N.C. at 518, 809 S.E.2d at 574), and then concluded that

> in light of the overwhelming evidence of defendant's guilt and dearth of evidence pointing to a second perpetrator, defendant did not meet his burden to prove by a preponderance of the evidence every fact necessary to establish materiality, and the trial evidence was sufficient to dictate the trial court's ultimate conclusion on materiality, as in *Lane*.

*Id.* at 248, 822 S.E.2d at 756. Accordingly, the dissenting judge would have held that "the trial court did not err by denying defendant's motion for DNA testing because the allegations in his motion were not sufficient to establish that he was entitled to the appointment of counsel." *Id.* at 243, 822 S.E.2d at 753. In light of this position, the dissenting judge deemed it unnecessary to address the issue of the trial court's ruling before having obtained and reviewed the inventory of evidence. *Id.* at 248, 822 S.E.2d at 756.

On 15 January 2019, the State filed a notice of appeal on the basis of the Court of Appeals dissent, along with a motion for a temporary stay and a petition for writ of supersedeas. We allowed the petition for writ of supersedeas on 16 January 2019. The appeal was heard in the Supreme Court on 19 November 2019.

*IV. Analysis*

The primary question presented in this appeal dictates that we set forth the threshold level which a pro se defendant must reach through a sufficient allegation of facts so as to establish materiality as required by N.C.G.S. § 15A-269(c) in order *to be appointed counsel* to assist the defendant upon defendant's showing in the pro se motion that the postconviction DNA testing may be material to defendant's claim of wrongful conviction.

The materiality of evidence in a criminal case was addressed by the Supreme Court of the United States in the opinion which it rendered in *Brady v. Maryland*, 373 U.S. 83 (1963). In identifying "where the evidence is material either to guilt or to punishment," the nation's highest tribunal determined that evidence is material if it is "evidence . . . which, if made available [to an accused], would tend to exculpate him or reduce the penalty." *Id.* at 87–88. Citing *Brady*, in *Lane* we expressly (1) recognized "the similarities in the *Brady* materiality standard and the standard contained in N.C.G.S. § 15A-269(b)(2)"; (2) noted that in the context of a defendant's request for postconviction DNA testing, "this Court has explained that 'material' means 'there is a reasonable probability that, had the evidence been disclosed to the defense, the

result of the proceeding would have been different' "; and (3) reaffirmed that "[t]he determination of materiality must be made 'in the context of the entire record' and hinges upon whether the evidence would have affected the jury's deliberations." *Lane*, 370 N.C. at 519, 809 S.E.2d at 575 (citations omitted). This Court has construed the term "reasonable probability" to mean "a probability sufficient to undermine confidence in the outcome." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (quoting *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)); *see also United States v. Bagley*, 473 U.S. 667, 682 (1985). We have applied this interpretation of the standard of reasonable probability in cases that invoked the evaluation of the materiality of evidence under *Brady*. *See Lane*, 370 N.C. at 519, 809 S.E.2d at 575; *State v. Tirado*, 358 N.C. 551, 599 S.E.2d 515 (2004); *State v. Kilpatrick*, 343 N.C. 466, 471 S.E.2d 624 (1996). The moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion for postconviction DNA testing, which includes the facts necessary to establish materiality. *Lane*, 370 N.C. at 518, 809 S.E.2d at 574.

Pursuant to N.C.G.S. § 15A-269(a), one of the three necessary criteria that must be satisfied in a defendant's motion before a trial court for postconviction DNA testing is that the biological evidence is material to the defendant's defense. Another requirement of the statute is that the biological evidence was not "DNA tested" previously, or that it was tested previously "but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results." N.C.G.S. § 15A-269(a)(3). In defendant's pro se motion for postconviction DNA testing in the present case, defendant averred that his clothing was not subjected to DNA testing and that a couch cushion and the upper handrail of a stairway were subjected to DNA testing "but retesting the items outside of law enforcement agencies will have a reasonable probability of contradicting prior test results." Defendant also averred the following:

> The ability to conduct the requested DNA testing is material to the Defendant's defense on actual innocence and to show another commit [sic] the crime for which he is wrongly convicted. Also, it shows the victim's blood was never on the defendant which would be consistent with him not being the perpetrator. See Defendant's MAR Argument and exhibits. THE DNA IS NEEDED AND NECESSARY TO PROVE THAT THE D.A. FABRICATED THE BLOOD ON THE DEFENDANT'S CLOTHES.

(Emphasis in original.) Pursuant to N.C.G.S. § 15A-269(b), the trial court shall grant the motion for postconviction DNA testing upon its determination (1) that all of the conditions of N.C.G.S. § 15A-269(a) have been met[1]; (2) that if the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant; and (3) that the defendant has signed a sworn affidavit of innocence.

In applying the pertinent statutory law and case law to the present case, we conclude that defendant has failed to prove by a preponderance of the evidence every fact essential to support his motion for postconviction DNA testing, has failed to establish that the biological evidence is material to his defense, has failed to meet the condition that the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results regarding previous DNA testing of some items, and has failed to demonstrate that there exists a reasonable probability that the verdict would have been more favorable to him if the DNA testing being requested had been conducted on the evidence.

As this Court said in *Lane*, a defendant has the burden as the moving party under N.C.G.S. § 15A-269(a) to prove by a preponderance of the evidence every fact essential to support the motion for postconviction DNA testing, including the facts necessary to establish materiality. In the current case, defendant has fallen short of these requirements. Instead of offering proof of facts which he contends satisfactorily show that he has satisfied the standard for postconviction DNA testing, defendant merely offers conclusory and vague statements without evidentiary foundation, which culminate in an unsupported accusation that the State falsified evidence in order to convict him. This circumstance serves to further reveal the lack of evidence which defendant has identified as being material to his defense in order to comport with N.C.G.S. § 15A-269(a) and the cited case law.

The specific issue which this Court is charged to resolve regarding defendant's qualification for the appointment of counsel in the instant case to assist his efforts, upon defendant's pro se motion filed in the trial court, to obtain postconviction DNA testing, is governed by subsection (c) of N.C.G.S. § 15A-269 and is also premised upon defendant's ability

1. The existence of the only unmentioned condition of N.C.G.S. § 15A-269(a)—that the biological evidence is related to the investigation or prosecution that resulted in the judgment—is not in dispute.

to demonstrate the materiality of the DNA testing, as the language of N.C.G.S. § 15A-269(c) establishes that there must be "a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction." In defendant's capacity as the petitioning party who makes the pro se motion before the trial court under N.C.G.S. § 15A-269(a) for the performance of postconviction DNA testing upon a requirement to meet one of several mandated conditions that the testing *is* material to the defendant's defense, he has the burden to show under N.C.G.S. § 15A-269(c) that the DNA testing *may* be material to defendant's claim of wrongful conviction in order for the trial court to grant defendant's request for the appointment of counsel to assist defendant in the postconviction DNA testing process.

In this case of first impression, we discern that the Legislature's use of the phrase "*is* material to the defendant's defense" in N.C.G.S. § 15A-269(a) and its employment of the terminology in § 15A-269(c) "*may* be material to the petitioner's claim of wrongful conviction"—each with regard to the depiction of the postconviction DNA testing at issue—would appear to relax the standard to be met by a defendant in order to qualify for the appointment of counsel to assist in the attainment of postconviction DNA testing under subsection (c), as compared to an apparent heightened standard for a defendant to meet in order to achieve postconviction DNA testing under subsection (a). To this end, we recognize the soundness of the approach of the Court of Appeals majority in this case as shown in its observation: "In enacting N.C.G.S. § 15A-269, our General Assembly created a potential method of relief for wrongly incarcerated individuals. To interpret the materiality standard in such a way as to make that relief unattainable would defeat that legislative purpose." *Byers*, 263 N.C. App. at 242, 822 S.E.2d at 753. However, the majority of the court below went on to deem this well-founded beginning point of analysis regarding legislative intent to compel it to determine, in light of its description of a defendant's statutory requirement of proof under N.C.G.S. § 15A-269 as "this illusory burden of materiality," to "hold Defendant in the present case has satisfied this difficult burden." *Id.* at 243, 822 S.E. 2d at 753. Contrary to the manner in which the Court of Appeals majority has chosen to couch the statutory burden established in N.C.G.S. § 15A-269 which a defendant must satisfy in order to show the materiality of postconviction DNA testing, we do not subscribe to such a conclusion that disharmony exists in this matter between the legislative intent undergirding N.C.G.S. § 15A-269 and this Court's consistent interpretation of the term "material" for application in N.C.G.S. § § 15A-269(a) and (c).

It is important to note, in light of the higher standard that a defendant must satisfy to show that postconviction DNA testing "*is* material to the defendant's defense" under N.C.G.S. § 15A-269(a) in order to obtain *testing* as compared to the lower standard that a defendant must satisfy to show that postconviction DNA testing "*may* be material to the petitioner's claim of wrongful conviction" under N.C.G.S. § 15A-269(c) in order to obtain *court-appointed counsel*, that the term "material" maintains the same definition in subsections (a) and (c) that this Court has attributed to it in our cited case decisions. The major consequentiality inherent in the term "material" itself is neither heightened in N.C.G.S. § 15A-269(a) nor relaxed in N.C.G.S. § 15A-269(c) by virtue of an alteration in the term's legal meaning; rather, it is the modifying word "is" preceding the term "material" in subsection (a) and the modifying word "may" prior to the term "material" in subsection (c) which create the difference in the levels of proof to be met by a defendant.

In utilizing this Court's construction of the term "material" in our *Lane*, *Tirado*, and *Kilpatrick* decisions—all of which addressed the evaluation of materiality of evidence under the rubric of the approach to the subject by the Supreme Court of the United States as enunciated in *Brady*—we conclude that defendant has not made the prescribed "showing that the DNA testing may be material to the petitioner's claim of wrongful conviction" as required for the appointment of counsel by the trial court under N.C.G.S. § 15A-269(c). Here, in his effort to obtain the appointment of counsel by the trial court, defendant has not sufficiently shown that the postconviction DNA testing may tend to exculpate him because there is not a *reasonable probability* that, had the evidence been disclosed to the defense, the result of the proceeding may have been different, in the context of the entire record and hinging upon whether the evidence may have affected the jury's deliberations, as to petitioner's claim of wrongful conviction. We therefore agree with the analysis employed by the dissenting view in the Court of Appeals in the current case which led to its conclusion that "no reasonable probability exists under the facts of this case that a jury would fail to convict defendant and . . . the trial court did not err by concluding defendant failed to establish materiality." *Byers*, 263 N.C. App. at 248, 822 S.E.2d at 756. This scrutiny was rooted in the dissent's observations, which we find persuasive, that

> . . . in light of the overwhelming evidence of defendant's guilt and dearth of evidence pointing to a second perpetrator, defendant did not meet his burden to prove by a preponderance of the evidence every fact necessary to establish materiality, and the trial evidence was sufficient

> to dictate the trial court's ultimate conclusion on materiality, as in *Lane*.

*Id.*

Indeed, while this Court has defined the term "material" found in N.C.G.S. § 15A-269(a) to mean that there is a reasonable probability that had the evidence been disclosed to the defense the result of the proceeding would have been different, and is a definition which we find to be appropriate to adopt for the term "material" in N.C.G.S. § 15A-269(c) in order to promote applicability and consistency within the statute, it is the weighty volume of evidence offered against defendant at trial that exacerbates the lack of evidence offered by defendant both at his trial and after his trial which reinforces the inadequacy of defendant's effort to show that postconviction DNA testing is material to his defense; that there is a reasonable probability that had the evidence been disclosed to the defense the result of defendant's trial would have been different; and that DNA testing may be material to the petitioner's claim of wrongful conviction so as to qualify defendant here for the appointment of counsel. At trial, the State introduced evidence which tended to show, *inter alia*, that (1) on the night that Burke died after suffering multiple stab wounds, Williams heard Burke yell "Terraine, stop" after Williams and Burke heard a loud crash at the back door of her apartment as they watched television at the residence, after which Burke went to the area of the noise to determine the cause of it; (2) defendant Terraine Byers and Burke had been involved with each other in a romantic relationship which Burke had ended; (3) Burke had allowed Williams to hear a recorded telephone message that defendant had left for Burke in which defendant threatened to kill the man defendant believed was currently dating Burke; (4) Burke had told Williams that she was afraid that defendant "was going to do something to hurt her bad"; (5) one of Burke's neighbors had seen defendant near Burke's apartment on the night that Burke was killed; (6) upon arriving at Burke's apartment after receiving the emergency call, officers saw defendant, who was nervous and profusely sweating, leaving the apartment through a broken window of the back door; (7) defendant told the officers that Burke was inside the apartment and was injured; (8) defendant attempted to flee, but he was arrested; (9) defendant had a deep laceration on his left hand; (10) upon entering the apartment, officers found Burke lying in a pool of blood; (11) after terminating her romantic relationship with defendant, Burke had called upon law enforcement for help on multiple occasions due to her fear of defendant; (12) an occasion transpired on which defendant struck Burke in the face and on the head while stating that he would kill her and then brandished a knife toward Burke's aunt;

(13) there were several incidents of domestic violence involving defendant and his interaction with Burke; (14) a mixture of DNA from Burke and defendant was determined to exist from defendant's fingernail scrapings; (15) DNA which matched defendant was determined to exist in a bloodstain on an upper handrail of a stairway and in a bloodstain on a couch cushion in Burke's apartment; and (16) DNA which matched Burke was determined to exist in bloodstains obtained from a knife and its blade which had been located inside Burke's apartment. Additionally, defendant stipulated that the blood which covered the shirt that he was wearing at the time of his arrest was Burke's blood. Juxtaposed against the wealth and strength of the evidence introduced by the State was the dearth of evidence from defendant, who did not present any evidence at trial.

The total absence of any production of evidentiary proof by defendant at his trial or in his subsequent motion for postconviction DNA testing under N.C.G.S. § 15A-269 readily leads to the conclusion that defendant has not satisfied his burden of proving by a preponderance of the evidence every fact essential to support his motion for postconviction DNA testing, which includes the facts necessary to establish that the biological evidence is material to his defense as required by subsection (a) of the statute. This deficiency likewise prompts the resulting determination that there is not a reasonable probability that postconviction DNA testing of the biological evidence that was not tested previously, or the biological evidence that was tested previously, will provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results, as also contemplated by N.C.G.S. § 15A-269(a). Similarly, as mentioned in N.C.G.S. § 15A-269(b), there does not exist a reasonable probability that the verdict would have been more favorable to defendant if the DNA testing being requested had been conducted on the evidence or, as addressed by us in cases such as *Lane*, *Tirado*, and *Kilpatrick*, had the evidence been disclosed to the defense. These inadequacies are inextricably intertwined with the parallel insufficient showing by defendant, even under the less stringent standard embodied in N.C.G.S. § 15A-269(c), that the postconviction DNA testing may be material to defendant's claim of wrongful conviction with regard to his ability to obtain the appointment of counsel by the trial court to assist defendant with his pro se request to achieve postconviction DNA testing.

As stated by the Supreme Court of the United States in *Brady* and as applied by this Court to the instant case, while evidence is material when, if made available to an accused, it would tend to exculpate the defendant or to reduce the penalty, defendant here is not in such a position.

In considering whether the evidence for which defendant fails to demonstrate materiality would have affected the jury's deliberations and in assessing the context of the entire record pursuant to the direction provided by the Supreme Court of the United States in *Bagley* and which we embraced in *Allen*, we do not discern that there is a probability sufficient to undermine confidence in the outcome upon our determination that the trial court did not err in finding that the evidence of defendant's guilt "is overwhelming" and in concluding that defendant has "failed to show how conducting additional DNA testing is material to his defense." Similarly, defendant has failed to show in his pro se motion for postconviction DNA testing that such testing may be material to his claim of wrongful conviction in order to qualify for the appointment of counsel by the court.

In *Lane*, we concluded, despite the defendant's contentions that the requested postconviction DNA testing was material to his defense, that the overwhelming evidence of defendant's guilt presented at trial and the dearth of evidence at trial pointing to a second perpetrator, along with the unlikely prospect that DNA testing of the biological evidence at issue would establish that a third party was involved in the crimes charged, together created an insurmountable hurdle to the success of the defendant's materiality argument. 370 N.C. at 520, 809 S.E.2d at 576. We adopt this analysis, as we find it to be directly applicable to the facts and circumstances of the present case in determining defendant's failure to satisfy the reduced burden of proof to qualify for the appointment of counsel to assist defendant's efforts to obtain postconviction DNA testing upon a showing that the DNA testing may be material to defendant's claim of wrongful conviction. Defendant here fails to meet the required condition of N.C.G.S. § 15A-269(a) in his petition that postconviction DNA testing of the biological evidence is material to his defense, and he also fails to satisfy his lesser burden to show under N.C.G.S. § 15A-269(c) that DNA testing may be material to his claim of wrongful conviction. Therefore, pursuant to the operation of the statute, defendant does not satisfy the necessary conditions to obtain the appointment of counsel under N.C.G.S. § 15A-269(c).

### *V. Conclusion*

Based upon the foregoing reasons, we reverse the decision of the Court of Appeals and reinstate the order of the trial court.

REVERSED.

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

**STATE v. COLLINGTON**

[375 N.C. 401 (2020)]

STATE OF NORTH CAROLINA
v.
JEFFREY TRYON COLLINGTON

No. 290PA15-2

Filed 25 September 2020

**Constitutional Law—effective assistance of counsel—appellate counsel—citation of authority—reasonableness**

On appeal from a conviction for possession of a firearm by a felon, obtained after a jury was instructed on multiple theories of possession (actual versus acting in concert) but where the verdict sheet did not identify which theory the jury relied on, appellate counsel's failure to cite to a line of cases was not objectively unreasonable where the primary case, *State v. Pakulski*, 319 N.C. 562 (1987), was decided using a different standard of review and therefore had little precedential value. Moreover, appellate counsel did present the relevant argument—that where the jury was presented with multiple theories of guilt, one of which was erroneous, the error had a probable impact on the verdict—albeit by citing different authority. Therefore, counsel's performance was not constitutionally defective.

Justice ERVIN concurring.

Justice NEWBY joins in this concurring opinion.

Justice EARLS dissenting.

Justice DAVIS 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, 259 N.C. App. 127, 814 S.E.2d 874 (2018), affirming an order granting defendant's motion for appropriate relief entered on 3 April 2017 by Judge Mark E. Powell in Superior Court, Transylvania County. Heard in the Supreme Court on 18 November 2019.

*Joshua H. Stein*, *Attorney General*, *by Teresa M. Postell*, *Assistant Attorney General*, *for the State-appellant.*

*North Carolina Prisoner Legal Services*, *Inc.*, *by Christopher J. Heaney*, *for defendant-appellee.*

BEASLEY, Chief Justice.

In this case, we must determine whether appellate counsel's failure to cite a particular case or line of cases amounted to constitutionally ineffective assistance of counsel. Because the facts present in the line of cases the Court of Appeals would have had appellate counsel cite are distinguishable from those of this case, that precedent does not govern the instant case and appellate counsel's failure to rely thereon is objectively reasonable.

**Facts and Procedural History**

The State's primary witness, Christopher Hoskins, testified that he went to the recording studio of Dade Sapp to "hang out" on the evening of 1 October 2012. Shortly after his arrival, two men identified by Hoskins as defendant and Clarence Featherstone entered the studio and demanded to speak with someone named "Tony." Defendant asked Hoskins if he was Tony and pointed a gun at Hoskins when Hoskins answered that he was not. Hoskins testified that defendant and Featherstone beat him up, went through his pockets and removed approximately $900 in cash, and left the studio. At trial, Hoskins identified the gun that was reportedly wielded by defendant as belonging to Sapp.

Defendant's testimony differed greatly from that of Hoskins. Defendant testified that he and Featherstone went to the studio that evening but that the purpose of the visit was for Featherstone to purchase oxycodone from Hoskins. An argument ensued over the amount paid for the oxycodone, which resulted in a fistfight between Hoskins, defendant, and Featherstone. Defendant testified the following:

> Sapp had set the whole deal up, and he had tried to cross us all up. He had taken warrants out on us for robbing his studio, when he had set up this whole ordeal. . . . He told the cops that we came in and robbed his studio. But that's not what happened. He set up a drug deal and got half of the pills that were purchased, or at least somewhere near . . . I did admit that I got in a physical altercation after he tried to retaliate for the rest of his money.

Defendant also testified that he never possessed a gun during the altercation. Rather, defendant testified that later in the evening, he and Featherstone met Sapp in a McDonald's parking lot. There, Sapp gave the gun to Featherstone and asked him to hold onto it because according to defendant, Sapp "was scared due to the fact [that] he had gave the detectives and Mr. Hoskins a story about [how] he couldn't locate his

gun." Defendant testified that he did not know what Featherstone did with the gun after the interaction.

Defendant was indicted for robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, possession of a firearm by a felon, and being a habitual felon. The indictment charging defendant with possession of a firearm by a felon stated that defendant "did have in [his] control a black handgun, which is a firearm" and that defendant had previously been convicted of a felony. Without objection by defendant, the trial court instructed the jury that

> [f]or a person to be guilty of a crime it is not necessary that he personally do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit the crime of robbery with a dangerous weapon and/or possession of a firearm by a felon, each of them, if actually or constructively present, is not only guilty of that crime if the other person commits the crime but [is] also guilty of any other crime committed by the other in pursuance of the common purpose to commit robbery with a dangerous weapon and/or possession of a firearm by a felon, or as a natural or probable consequence thereof.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant acting either by himself or acting together [with] . . . Featherstone with a common purpose to commit the crime of robbery with a dangerous weapon and/or possession of a firearm by a felon, each of them if actually or constructively present, is guilty of robbery with a dangerous weapon and/or possession of a firearm by [a] felon.

With respect to the specific charge of possession of a firearm by a felon, the trial court instructed the jury on the following:

> The defendant has been charged with possessing a firearm after having been convicted of a felony. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.
>
> First, that on April 20, 2006, in the Superior Court Criminal Session of Transylvania County the defendant was convicted by pleading guilty to the felony of possession with the intent to sell and deliver cocaine that was

> committed on October 26, 2005, in violation of the laws of the State of North Carolina.
>
> And second, that thereafter the defendant possessed a firearm.
>
> If you find from the evidence beyond a reasonable doubt that the defendant was convicted of a felony in the Superior Court of Transylvania County, State of North Carolina, on April 10, 2006, and that the defendant thereafter possessed a firearm, it would be your duty to return a verdict of guilty.
>
> If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

The jury found defendant guilty of possession of a firearm by a felon and being a habitual felon. He was not found guilty of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. The verdict sheet did not indicate whether the jury convicted defendant of possession of a firearm by a felon under a theory of actual possession or under a theory of acting in concert. Defendant was sentenced to 86 to 115 months imprisonment.

Defendant appealed the conviction, contending that the trial court committed plain error by instructing the jury on the acting in concert theory with respect to the charge of possession of a firearm by a felon. Defendant specifically argued that the jury instruction impermissibly allowed the jury to convict him of possession of a firearm by a felon based on testimony that Featherstone received a gun from Sapp in the McDonald's parking lot. In a unanimous, unpublished decision, the Court of Appeals held that defendant had not established that the trial court committed plain error in instructing the jury on the acting in concert theory for the charge of possession of a firearm by a felon. *State v. Collington* (*Collington I*), No. COA14-1244, 2015 WL 4081786, at *4 (N.C. Ct. App. 2015) (unpublished). The Court of Appeals opined that although the jury did not believe that defendant robbed Hoskins, both defendant and Hoskins testified that they engaged in a physical altercation; therefore, the jury reasonably could have believed that defendant was in possession of Sapp's gun at the time. *Id.*

Finally, the Court of Appeals observed that defendant had not presented an argument under *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987), "which held that a trial court commits plain error when it

instructs a jury on disjunctive theories of a crime," one of which was erroneous, and it cannot be discerned from the record the theory upon which the jury relied. *Id.* Noting that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant," the Court of Appeals concluded that defendant had not sufficiently demonstrated plain error. *Id.* (first quoting *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005); then citing *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012)). Defendant filed a petition for discretionary review, which this Court denied on 24 September 2015.

After the Court of Appeals' decision in *Collington I*, defendant filed a motion for appropriate relief in the trial court alleging ineffective assistance of appellate counsel. Specifically, defendant argued that had his appellate counsel made the proper argument under *Pakulski*, a reasonable probability exists that defendant would have received a new trial on appeal. The trial court denied defendant's motion for appropriate relief on 13 October 2016, stating that "the Court of Appeals found that no plain error was established in the trial . . . even assuming . . . an acting in concert instruction was improper." Defendant petitioned the Court of Appeals for writ of certiorari. The Court of Appeals entered an order allowing the petition for writ of certiorari, vacating the trial court's order denying defendant's motion for appropriate relief, and remanding the case to the trial court to enter an appropriate order. The Court of Appeals reasoned that "the trial court utilized the incorrect legal standard in assessing defendant's ineffective assistance of appellate counsel claim." On remand, the trial court entered an order granting the motion for appropriate relief, vacating defendant's conviction, and awarding defendant a new trial. The State proceeded to file a motion in the Court of Appeals to temporarily stay the trial court's order, a petition for writ of supersedeas, and a petition for writ of certiorari seeking review of the trial court's order. On 2 May 2017, the Court of Appeals allowed the State's motion for a temporary stay. On 17 May 2017, the Court of Appeals allowed the State's petition for writ of certiorari and petition for writ of supersedeas. On 17 April 2018, in a unanimous, published decision, the Court of Appeals affirmed the trial court's order, holding that defendant's appellate counsel was constitutionally ineffective for failing to make arguments under *Pakulski*. *State v. Collington* (*Collington II)*, 259 N.C. App. 127, 141, 814 S.E.2d 874, 885 (2018) ("[H]ad appellate counsel proffered the arguments under *Pakulski*, defendant would have secured a new trial upon simply demonstrating that the acting in concert instruction was given in error.") The State petitioned this Court for discretionary review, which we allowed on 5 December 2018.

**Discussion**

This Court reviews opinions of the Court of Appeals for errors of law. *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994). To prove ineffective assistance of counsel, a defendant must satisfy the following two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's error [was] so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (emphasis omitted) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). The proper standard for effective attorney performance is that of objectively reasonable assistance. *Id.* at 561–62, 324 S.E.2d at 248 ("When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness."). The reviewing court "must indulge a strong presumption that counsel's conduct falls within the broad range of what is reasonable assistance," *State v. Fisher*, 318 N.C. 512, 532, 350 S.E.2d 334, 346 (1986), and "strive to 'eliminate the distorting effects of hindsight,' " *State v. Augustine*, 359 N.C. 709, 719, 616 S.E.2d 515, 524 (2005) (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065).

The Court of Appeals concluded that appellate counsel was ineffective for failing to cite *Pakulski*. We disagree for two reasons. First, the opinion in *Pakulski* employed a standard of review different from the standard of review applicable in the instant case. Second, defendant's appellate counsel did, in fact, make the arguments he should have made, albeit by reference to different authority.

The standard of review for alleged instructional errors depends on whether the defendant preserved the error for appeal by raising an objection in the trial court. N.C. R. App. P. 10(a)(1), (4). Where the defendant fails to preserve the issue, he faces a greater burden on appeal. In *Lawrence*, the defendant was convicted of several offenses, including conspiracy to commit robbery with a dangerous weapon. 365 N.C. at 510, 723 S.E.2d at 329.

> [I]n its charge on conspiracy to commit robbery with a dangerous weapon, the trial court correctly instructed that robbery with a dangerous weapon is the taking of property from a person 'while using a firearm,' but erroneously omitted the element that the weapon must have been used to endanger or threaten the life of the victim.

*Id.* Because the defendant did not object to the jury instruction at trial, we applied the plain error standard of review. *Id.* at 512, 723 S.E.2d at 330 ("Because the plain error standard of review imposes a heavier burden on the defendant than the harmless error standard, it is to the defendant's advantage to object at trial and thereby preserve the error for harmless error review."). Under the more exacting standard of plain error review, we concluded that despite the acknowledged instructional error, the defendant had not met the burden of proving "that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* at 518, 723 S.E.2d at 334 (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

In this case, the Court of Appeals' decision appears to be based on a misidentification of the standard of review applied in *Pakulski*. The confusion is understandable. Admittedly, our opinion in *Pakulski* lacks clarity. The Court does not explicitly state which standard of review the Court applied. Nor does the Court explicitly state whether the defendant objected to the jury instructions at trial—the fact on which the identity of the applicable standard of review turns.

In *Pakulski*, the trial court instructed the jury on the felony-murder rule based on two predicate felonies, only one of which was legally supported by the evidence. *Pakulski*, 319 N.C. at 564, 356 S.E.2d at 321. The entirety of the discussion relevant to this issue is contained in a single, short section that reads, in relevant part, that

> [w]here the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted, and we cannot discern from the record the theory upon which the jury relied, this Court will not assume that the jury based its verdict on the theory for which it received a proper instruction. Instead, we resolve the ambiguity in favor of the defendant.

*Id.* at 574, 356 S.E.2d at 326.

Although we failed to explicitly state it in our opinion, it appears that we applied the harmless error standard of review in *Pakulski*. First,

we noted that the State asked the Court to hold that the trial court's error was harmless. *Id.* at 574, 356 S.E.2d at 326 ("The State contends *that error in submitting the breaking or entering felony is harmless* because the jury could have based its verdict solely on the robbery felony." (Emphasis added.)). If we had believed at the time that the State had misidentified the standard of review, it seems reasonable to assume that we would have noted that fact.[1]

This Court's failure to clearly state the standard of review in *Pakulski* has been rectified by subsequent decisions, which have made clear that the *Pakulski* rule applies when the issue is properly preserved on appeal. As such, the distinction between the standard of review to be applied to preserved issues and that which should be applied to unpreserved issues was born not in *Pakulski*, but in the case law that followed. Secondly, in view of the fact that the defendants 'moved to dismiss on the grounds that there was insufficient evidence to permit the court to charge the jury on a theory of felony murder,' *Pakulski*, 319 N.C. at 571, 356 S.E.2d at 325, it is clear that the issue of the sufficiency of the evidence to support an instruction permitting the jury to find the defendants guilty of felony murder on any theory was brought to the trial court's attention in advance of the delivery of the trial court's

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1. In fact, we did note a misidentification of the standard of review applicable to a different issue in *Pakulski*, as follows:

> The State requests that we review this assignment of error under the plain error rule, inasmuch as the omission was not called to the court's attention prior to jury deliberations. However, based on our reading of the record, it appears that defense counsel complied with the spirit of [Rule 10(a)(4)] of the North Carolina Rule of Appellate Procedure], which in pertinent part provides:
>
> > No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection . . . . An exception to the failure to give particular instructions to the jury . . . shall identify the omitted instruction . . . by setting out its substance immediately following the instructions given . . . .
>
> It is clear from the record that the defendant requested an instruction on impeaching a witness with a prior inconsistent statement. Therefore, our review consists of a determination of whether the court erred in failing to give the requested instruction and, if so, whether there is a reasonable possibility that had the error not been committed, a different result would have been reached.

*State v. Pakulski*, 319 N.C. 562, 574–75, 356 S.E.2d 319, 327 (1987) (second through fifth alterations in original) (quoting N.C. R. App. P. 10(a)(4)).

jury instructions, thereby serving the purpose of the contemporaneous objection now required by N.C. R. App. P. 10(a)(2). In *State v. Maddux*, 371 N.C. 558, 563, 819 S.E.2d 367, 370 (2018), we reaffirmed that the plain error standard applies in cases involving unpreserved jury instruction issues. There, the trial court erroneously instructed the jury that the defendant could be found guilty either through a theory of individual guilt or a theory of aiding and abetting. The defendant did not object to the jury instructions at trial, and the jury convicted the defendant using a general verdict sheet. Thus, the record did not reflect whether the conviction was based on a theory of individual guilt or a theory of aiding and abetting. *Id.* at 562, 819 S.E.2d at 370. We concluded that the defendant had not met his burden of proving plain error, and we rejected defendant's argument that *Pakulski* should govern our decision.

> [D]efendant argues that we cannot uphold his conviction even though there is ample evidence of his individual guilt because we have held that reversible error occurs when a jury is presented with alternative theories of guilt when (1) one of the theories is not supported by the evidence, and (2) it is unclear upon which theory the jury convicted defendant. . . . *This rule, however, is not applicable to plain error cases, such as this one, in which the error complained of is not preserved.* As such, we need not address the substance of this argument.

*Id.* at 567 n.11, 819 S.E.2d at 373 n.11 (emphasis added).

In *State v. Malachi*, 371 N.C. 719, 821 S.E.2d 407 (2018), we again referred to *Pakulski* as a harmless error case. *See id.* at 733 n.5, 821 S.E.2d at 418 n.5 ("This Court did discuss the *harmless error* issue in *Pakulski*, in which the State sought a finding of non-prejudice on the grounds that 'the jury could have based its verdict solely on the robbery felony.' " (emphasis added) (quoting *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326)). We also made clear in *Malachi* that *Pakulski* did not create a rule of per se reversible error in all cases involving disjunctive jury instructions. *Id.* at 726, 821 S.E.2d at 413. Thus, neither the plain error standard of review nor the harmless error standard of review will automatically entitle a defendant to a new trial as a matter of law. *See also State v. Boyd*, 366 N.C. 548, 742 S.E.2d 798 (2013) (reversing a decision of the Court of Appeals on the basis of a dissent that concluded that the defendant had failed to establish that the trial court's decision to allow the jury to consider whether the defendant was guilty of second degree kidnaping on the basis of a theory not supported by the evidence did not constitute plain error given the existence of "overwhelming" evidence

tending to support other theories of guilt). Rather, each case must be resolved under the appropriate standard of review.

Confusion over *Pakulski* notwithstanding, this Court's precedent demonstrates that unpreserved issues related to jury instructions are reviewed under a plain error standard, while preserved issues are reviewed under a harmless error standard. *See*, *e.g.*, *State v. Mumma*, 372 N.C. 226, 241, 827 S.E.2d 288, 298 (2019) ("As a result of defendant's failure to object to the delivery of an 'aggressor' instruction to the jury before the trial court, defendant is only entitled to argue that the delivery of the 'aggressor' instruction constituted plain error."); *Malachi*, 371 N.C. at 719, 821 S.E.2d at 407 (holding that the trial court's error was subject to the harmless error standard of review where the defendant lodged an objection at trial); *State v. Juarez*, 369 N.C. 351, 357–58, 794 S.E.2d 293, 299 (2016) ("Because defendant did not object to the instruction as given at trial, we consider whether this instruction constitutes plain error."); *State v. Galaviz-Torres*, 368 N.C. 44, 772 S.E.2d 434 (2015) (applying the plain error standard of review where the defendant's trial counsel did not object to any of the trial court's instructions); *State v. Petersilie*, 334 N.C. 169, 432 S.E.2d 832 (1993) (applying the harmless error standard of review where the trial court, despite the defendant's objection, incorrectly instructed the jury regarding one of two possible theories upon which the defendant could be convicted).

The fundamental purpose of such a rule is to incentivize the parties to make timely objections so that the trial court may resolve the issue in real time. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (holding that the test for the plain error standard of review places a heavier burden upon the defendant because the defendant could have prevented any error by making a timely objection). However, "[p]lain error review allows appellate courts to alleviate the potential harshness of preservation rules," *Lawrence*, 365 N.C. at 514, 723 S.E.2d at 332, by allowing appellate courts to "take notice of errors for which no objection or exception had been made when 'the errors [were] obvious, or if they otherwise seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings,' " *id.* at 515, 723 S.E.2d at 332 (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392 (1936)). This distinction is codified in our Rules of Appellate Procedure and has been supported by decades of this Court's precedent. *See* N.C. R. App. P. 10(a)(4)[2] ("In criminal cases, an issue that was not preserved by objection noted at

2. Since this Court's holding in *Lawrence*, the Rules of Appellate Procedure have been revised such that Rule 10(b)(2) is now codified as Rule 10(a)(4) ("Plain Error").

trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

> The purpose of [Rule 10(a)(4)] is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial. Indeed, even when the "plain error" rule is applied, "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court."

*Lawrence*, 365 N.C. at 517, 723 S.E.2d at 333 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S. Ct. 1730, 1736, 52 L. Ed. 2d 203, 212 (1977)). Considering the extensive precedent of this Court and the important interests promoted by clear rules related to issue preservation, we see no reason to create a subset of cases in which an unpreserved issue relating to jury instructions qualifies for harmless error review.

Here, defendant did not object at trial to the trial court's jury instructions. The issue, therefore, was not properly preserved for appeal and could be reviewed only for plain error. Because today the standard of review applied in *Pakulski* applies only to preserved issues, it would have had little precedential value in the instant case, and appellate counsel's failure to cite it was not objectively unreasonable.

Furthermore, appellate counsel's arguments were appropriate for plain error review. Appellate counsel argued that the trial court committed plain error by instructing the jury that defendant would be guilty if he had acted in concert to commit the offense of possession of a firearm by a felon. Quoting *Lawrence*, appellate counsel argued that "the plain error prejudice standard is not insufficiency of the evidence, but is whether 'the error had a probable impact on the jury verdict.' " Appellate counsel argued that the error did in fact have a probable impact on the jury's verdict by demonstrating the probability that the jury found defendant guilty merely for accompanying Featherstone when Featherstone acquired the firearm from Sapp. Ultimately, appellate counsel argued that the jury was presented with multiple theories of guilt, one of which was erroneous, and that the error "had a probable impact on the jury's finding that the defendant was guilty." *See Lawrence*, 365 N.C. at 518,

723 S.E.2d at 334. This was the appropriate argument and employed the correct standard of review.

It is important to note that the underlying issue of whether the trial court committed reversible error is not before this Court. The issue brought before the Court is whether defendant's appellate counsel was ineffective for failing to cite to the *Pakulski* line of cases. We make no determination as to whether the trial court erred by instructing the jury on the acting in concert theory of guilt for the possession of a firearm by a felon charge, as that is not the issue before us. Our task today is merely to determine whether appellate counsel was constitutionally ineffective. Even assuming *arguendo* that the trial court committed plain error, we cannot fault appellate counsel for the Court of Appeals' failure to so hold.

Accordingly, we hold that defendant failed to prove that his appellate counsel's conduct "fell below an objective standard of reasonableness." *Braswell*, 312 N.C. at 561–62, 324 S.E.2d at 248.[3] We reverse the decision of the Court of Appeals to the contrary.

REVERSED.

Justice ERVIN, concurring.

I agree with the Court's interpretation of our earlier decision in *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987), and the Court's determination that defendant has failed to demonstrate that the representation that he received from his appellate counsel "fell below an objective standard of reasonableness," *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984)), in spite of the fact that defendant's appellate counsel did not cite *Pakulski* when defendant's appeal was initially decided by the Court of Appeals and join the Court's opinion for that reason. I am, however, concerned that the Court's opinion can be read to suggest that a defendant cannot, regardless of the state of the evidentiary record, be convicted of possession of a firearm by a felon based upon the theory of acting in concert and write

3. Because defendant fails to demonstrate the deficiency of appellate counsel's performance we need not and do not address the prejudice prong of the ineffective assistance of counsel analysis. *See State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985); *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069 (1984) ("[T]here is no reason for a court deciding an ineffective assistance claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one.").

separately in an attempt to make sure that our decision does not create any unnecessary confusion with respect to this issue.

In his initial appeal to the Court of Appeals, defendant contended that the trial court committed plain error by instructing the jury that it could convict defendant of possession of a firearm by a felon on the basis of the acting in concert doctrine. More specifically, defendant asserted that the trial court had committed plain error by "allow[ing] the jury to find [defendant] guilty of possession of a firearm by a convicted felon for Featherstone's possession of the Glock pistol which [defendant] testified Sapp handed to Featherstone at the McDonald's later that night after whatever had occurred at the recording studio." In its initial, unpublished decision in this case, the Court of Appeals determined that, in light of defendant's concession that there was sufficient evidence to permit the jury to find defendant guilty of possession of a firearm by a convicted felon on the basis of actual or constructive possession, "[d]efendant has not established plain error in the present case, even assuming *arguendo* that the trial court erred by instructing the jury on an acting in concert theory for the charge of possession of a firearm by a convicted felon," *State v. Collington*, No. COA14-1244, 2015 WL 4081786, at *8 (July 7, 2015) (*Collington I*) (citing *State v. Diaz*, 155 N.C. App. 307, 314, 575 S.E.2d 523, 528 (2002)), while noting that "[d]efendant ha[d] not presented [that Court] with any arguments under *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987)." *Id.* at *9.

In the aftermath of the Court of Appeals' decision, defendant filed a motion for appropriate relief in which he alleged that he had received ineffective assistance of counsel on appeal. Defendant argued that, "[a]s a general rule, the acting in concert theory is not applicable to possession offenses," citing *Diaz*, 155 N.C. App. at 314–15, 575 S.E.2d at 528–29 (2002) (stating that "[t]he acting in concert theory is not generally applicable to possession offenses, as it tends to become confused with other theories of guilt"), and *State v. Baize*, 71 N.C. App. 521, 530, 323 S.E.2d 36, 42 (1984) (stating that "[w]e have found no acting in concert case in which the State was allowed to leap, in one single bound, the double hurdles of constructive presence *and* constructive possession"). In defendant's view, while "acting in concert may be instructed properly in cases charging possession of contraband," citing *State v. Diaz*, 317 N.C. 545, 552, 346 S.E.2d 488, 493 (1986), "[f]irearms . . . are not contraband *per se*" and, since "possession of a firearm by a felon [includes] an element personal to defendant–his or her status as a convicted felon–that only the defendant can satisfy," "acting in concert is not a valid theory for the possession of a firearm by a felon charge." As a result, defendant

argued that, "[l]ike *Pakulski*, the present case involves a situation where both valid and invalid instructions were presented to the jury"; that it was impossible to determine whether the jury convicted defendant of possession of a firearm by a felon based upon the theory of actual or constructive possession or the theory of acting in concert; and that, "had [appellate] counsel made an argument pursuant to *Pakulski*, the remedy would have been a new trial." As a result, defendant contended that he was entitled to a new trial.

On 13 October 2016, the trial court entered an order denying defendant's motion for appropriate relief on the grounds "that no actual prejudice ha[d] been shown by the failure of the [d]efendant's appellate counsel to argue *Pakulski*, and that failure now to consider said argument [would] not result in a fundamental miscarriage of justice." On 13 December 2016, defendant filed a petition seeking the issuance of a writ of certiorari in the Court of Appeals authorizing review of the trial court's denial of defendant's motion for appropriate relief. On 29 December 2016, the Court of Appeals entered an order providing, among other things, that it had not held in *Collington I* "that defendant's claim of plain error was meritless irrespective of whether his appellate counsel raised any arguments under [*Pakulski*]" and ordering that this case be remanded "to the trial court to enter an appropriate . . . order pursuant to N.C.G.S. § 15A-1420(c)(7). On 3 April 2017, the trial court entered an order granting defendant's motion for appropriate relief and awarding defendant a new trial in which it concluded, in pertinent part, that:

> (2) The jury was incorrectly instructed on the theory of acting in concert but correctly instructed on actual and constructive possession.
>
> (3) With no way to determine the jury's rationale for its guilty verdict, [d]efendant would have been entitled to a new trial if appellate counsel had made the proper argument pursuant to *Pakulski* on appeal.
>
> (4) A reasonable attorney would have been aware of *Pakulski*, its application to [d]efendant's case, and the remedy of a new trial that it would provide.
>
> (5) Appellate counsel's performance fell below an objective standard of professional reasonableness. While appellate counsel did argue that the instruction on acting in concert was invalid, he did not complete the argument by arguing that because disjunctive jury

> instructions were given, one of which was improper, and there was no finding as to the jury's chosen theory, there was plain error under *Pakulski* and [d]efendant is entitled to a new trial.
>
> (6) But for appellate counsel's error, there is a reasonable probability that the Court of Appeals would have found plain error and granted [d]efendant a new trial.
>
> (7) Defendant received ineffective assistance of counsel in violation of the Sixth Amendment.

On 17 May 2017, the Court of Appeals allowed the State's request for certiorari review of the trial court's order.

In seeking relief from the trial court's order before the Court of Appeals, the State argued that an acting in concert instruction "has never been held to be improper" in cases like this one and that, even if the delivery of the acting in concert instruction in this case was erroneous, the failure of defendant's appellate counsel to advance an argument in reliance upon *Pakulski* did not constitute deficient performance for purposes of the test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In affirming the trial court's order, the Court of Appeals noted that, in *Collington I*, it had been "left to determine" merely "whether '[t]he jury reasonably could have believed that [d]efendant was in [actual or constructive] possession of' a gun from the evidence presented, regardless of the impropriety of the acting in concert instruction." *State v. Collington*, 259 N.C. App. 127, 138, 814 S.E.2d 874, 884 (2018) (*Collington II*) (first and third alteration in original). The Court of Appeals stated that, "had appellate counsel proffered the arguments under *Pakulski* [in *Collington I*], defendant would have secured a new trial upon simply demonstrating that the acting in concert instruction was given in error—plain error would be shown irrespective of the evidence admitted at trial in support of defendant's actual or constructive possession of a firearm." *Id.* at 141, 814 S.E.2d at 885. However, the Court of Appeals pointed out that "[a]ppellate counsel simply argued [in *Collington I*] that the theory of acting in concert is inapplicable to the crime of possession of a firearm by a felon, without proffering any supporting authority as to why such an error would require a new trial." *Id.* at 141, 814 S.E.2d at 886. Had defendant's "appellate counsel . . . argued [in *Collington I*] that plain error was established pursuant to *Pakulski*, . . . [the Court of Appeals] would have, under the direction of *Pakulski*, been required to examine . . . whether the jury instruction on acting in concert was in fact improper." *Id.* at 143, 814 S.E.2d at

887. In addition, the Court of Appeals held that, "given the persuasiveness of defendant's argument that acting in concert is not an appropriate theory upon which to base a conviction of possession of a firearm by a felon, there is a reasonable probability that, had appellate counsel cited *Pakulski* [in *Collington I*], [the Court of Appeals] would have concluded [in that case] that defendant was entitled to a new trial." *Id.* As a result, the record seems to reflect that the substantive premise upon which defendant's ineffective assistance of counsel on appeal claim rested and upon which both the trial court and the Court of Appeals relied in granting defendant's motion for appropriate relief was a determination that defendant could not have been properly convicted of possession of a firearm by a felon on the basis of an acting in concert theory regardless of the state of the evidentiary record.

Although the manner in which the Court has chosen to decide this case rests upon what appears to me to be a correct analysis of the applicable legal principles, I am concerned that certain statements contained in our opinion may create unnecessary confusion in the substantive criminal law of North Carolina. In order to obtain relief on the basis of ineffective assistance of appellate counsel in light of the theory alleged in defendant's motion for appropriate relief, a reviewing court would have to determine that the trial court erred by instructing the jury that it could convict defendant of possession of a firearm by a felon and that the delivery of this instruction constituted plain error. *State v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746, 764, 145 L. Ed. 2d 756, 780 (2000). Although the Court states that "the underlying issue of whether the trial court committed reversible error is not before this Court"; that "[t]he issue brought before the Court is whether defendant's appellate counsel was ineffective for failing to cite to the *Pakulski* line of cases"; and that "[w]e make no determination as to whether the trial court erred by instructing the jury on the acting in concert theory of guilt for the possession of a firearm by a felon charge," both the State and defendant presented arguments to this Court concerning the extent, if any, to which a defendant could lawfully be convicted of possession of a firearm by a felon in the briefs that they submitted for our consideration in this case. For that reason, the issue of whether defendant could have lawfully been convicted of possession of a firearm by a felon on the basis of an acting in concert theory does seem to me to be before us in this case.

Admittedly, neither this Court nor the Court of Appeals has directly held that a defendant can be convicted of possession of a firearm by a felon on the basis of an acting in concert theory. However, given that the Court of Appeals described defendant's argument that "acting in

concert is not an appropriate theory upon which to base a conviction of possession of a firearm" as "persuasive[ ]," *Collington II*, 259 N.C. App. at 143, 814 S.E.2d at 887, I think that it is important to note that both this Court, *see Diaz*, 317 N.C. at 552, 346 S.E.2d at 493 (holding that the record contained sufficient evidence "to support the jury's conclusion that defendant acted in concert with the traffickers to possess or transport in excess of 10,000 pounds of marijuana"), and the Court of Appeals, *see Diaz*, 155 N.C. App. at 314–15, 575 S.E.2d at 528–29 (holding that the trial court did not err by instructing the jury that it could convict defendant of possession of cocaine with the intent to sell or deliver on the basis of an acting in concert theory given that "there was evidence that the defendant had constructive possession *and* was acting in concert"); *State v. Garcia*, 111 N.C. App. 636, 640–41, 433 S.E.2d 187, 189 (1993) (holding that "[t]he evidence was sufficient for the trial court, when considering it in a light most favorable to the State, to find that defendant acted in concert with [another individual] to possess the cocaine"); *State v. Cotton*, 102 N.C. App. 93, 98, 401 S.E.2d 376, 379 (1991) (holding that "the trial court did not err in instructing on acting in concert for the [possession of cocaine with the intent to sell or deliver] offense"), have upheld controlled substance possession convictions on the basis of an acting in concert theory.[1] In addition, this Court held in *State v. Lovelace*, 272 N.C. 496, 498–99, 158 S.E.2d 624, 625 (1968), that the defendant had been properly convicted of possession of implements of housebreaking, with the items in question being a large screwdriver and a hammer, on the basis of evidence tending to show that the defendant and another man "were acting together" and "were attempting to use [the tools] to force entry into the restaurant" even though "the tools were only seen in the hands of [the other man]," suggesting that the doctrine of acting in concert is available to show a defendant's guilt of possessory offenses other than those involving contraband. *See also State v. Golphin*, 352 N.C. 364, 456–58, 533 S.E.2d 168, 228–29 (2000) (finding no error in the trial court's decision to instruct the jury that it could find that the defendant was guilty of possession of a stolen vehicle on the basis of an acting in concert theory in the course of also allowing

1. Although the Court of Appeals awarded appellate relief to the defendants in *State v. Autry*, 101 N.C. App. 245, 254, 399 S.E.2d 357, 363 (1991); *State v. James*, 81 N.C. App. 91, 96–97, 344 S.E.2d 77, 81 (1986); and *Baize*, 71 N.C. App. at 530, 323 S.E.2d at 42, based upon an erroneous use of the acting in concert doctrine, those decisions rested upon a determination that the record before the Court did not contain sufficient information to prove that the individuals in question had engaged in concerted action rather than upon a determination that the doctrine of acting in concert had no application to possessory offenses.

the jury to convict the defendant of robbery with a dangerous weapon and first-degree murder in reliance upon the doctrine of acting in concert).

In apparent recognition of the general availability of the acting in concert doctrine in possession-related cases, defendant argues that "applying acting in concert to possession of a firearm by a felon impermissibly exceeds the plain statutory language that bans possession of a firearm only by a person with a felony conviction," citing *State v. Camp*, 286 N.C. 148, 151, 209 S.E.2d 754, 756 (1974) (stating that "where a statute is intelligible without any additional words, no additional words may be supplied") (citations omitted); N.C.G.S. § 14-415.1(a) (2019) (providing that "[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm"). However, the same statutory language from N.C.G.S. § 14-415.1(a) upon which defendant relies in support of this argument also appears, in essence, in the criminal statutes relating to the unlawful possession of controlled substances, N.C.G.S. § 90-95(a)(1) and (a)(2) (2019) (providing that "it is unlawful for any person" to "possess" or "possess with intent to . . . sell or deliver" "a controlled substance"); the possession of implements of housebreaking, N.C.G.S. § 14-55 (making it unlawful to "be found having in his possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking"); and the possession of a stolen motor vehicle, N.C.G.S. § 14-71.2 (providing that "[a]ny person . . . who has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken" "shall be punished as a Class H felon"). For that reason, I am not persuaded, contrary to the suggestion made in the Court of Appeals' opinion, that the doctrine of acting in concert is not available in cases in which a defendant is charged with possession of a firearm by a felon as long as the State has presented sufficient evidence that the defendant has been previously convicted of a felony and has, acting in concert with another, had a firearm in his possession. Furthermore, I trust that the Court's statement that "[w]e make no determination as to whether the trial court erred by instructing the jury on the acting in concert theory of guilt for the possession of a firearm by a felon charge" will not be understood to cast doubt upon the potential applicability of the doctrine of acting in concert to cases in which a defendant is charged with possession of a firearm by a felon and will be understood to be doing nothing more than expressing the Court's decision to refrain from deciding whether the acting in concert doctrine has any application in this case as a matter of fact.

Justice NEWBY joins in this concurring opinion.

Justice EARLS dissenting.

Mr. Collington's appellate counsel failed to make an argument on appeal that would have entitled him to relief. There is no record evidence to suggest that the oversight was a matter of strategy or consistent with the law as it existed at the time. The Court of Appeals, in two separate opinions, stated that this failure resulted in Mr. Collington's inability to obtain relief on appeal. The majority, however, holds that this was not ineffective assistance of counsel. I disagree, and therefore respectfully dissent.

On 3 April 2017, the Superior Court, Transylvania County, granted Mr. Collington's motion for appropriate relief (MAR), vacating his conviction and ordering a new trial. The Court of Appeals affirmed the trial court's order in a unanimous, published opinion filed on 17 April 2018. *State v. Collington* (*Collington II*), 259 N.C. App. 127, 814 S.E.2d 874 (2018). We allowed the State's petition for discretionary review on 5 December 2018.[1] Given the procedural posture and that neither party has contested the trial court's findings of fact, those facts are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

The trial court made the following findings of fact, from which it concluded that Mr. Collington's appellate counsel had rendered ineffective assistance:

> (1) Defendant Jeffrey Tryon Collington went to trial on charges of possession of firearm by a felon, conspiracy to commit robbery with a dangerous weapon, and robbery with a dangerous weapon. On 5 February 2014, a jury

1. Review of non-capital motions for appropriate relief by this Court is presumably limited to extreme situations. *Compare* N.C.G.S. § 15A-1422(f) (2019) ("Decisions of the Court of Appeals on motions for appropriate relief that embrace matter set forth in G.S. 15A-1415(b) are final and not subject to further review by appeal, certification, writ, motion, or otherwise."); N.C.G.S. § 7A-28 (2019) (same); N.C. R. App. P. 15(a) (prohibiting the filing of a petition for discretionary review of proceedings on motions for appropriate relief); N.C. R. App. P. 21(e) (stating that "the Supreme Court will not entertain . . . petitions for further discretionary review" in non-capital cases of motions for appropriate relief "determined by the Court of Appeals"); *with State v. Todd*, 369 N.C. 707, 710, 799 S.E.2d 834, 837 (2017) (holding that this Court may "exercise its rarely used general supervisory authority" to review otherwise-final Court of Appeals determinations on motions for appropriate relief). It is striking that we should engage such rarely used constitutional authority in a case such as this, where there was no dissent in the Court of Appeals and even the majority suggests that the Court of Appeals' interpretation of our precedent was reasonable. Until recently, the Court of Appeals' interpretation was also the interpretation of this Court. *See State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (applying our decision in *Pakulski* in a case involving plain error review).

found Defendant not guilty of the robbery and conspiracy charges, and guilty of possession of a firearm by a felon. He was sentenced as a habitual felon to a consolidated sentence of 86–115 months.

(2) On the possession of a firearm by a felon charge, the jury was instructed that it could find Defendant guilty under the theories of actual possession, constructive possession, or acting in concert. The verdict sheets did not indicate under which theory the jury convicted Defendant.

(3) On 22 December 2014, appellate counsel filed a brief arguing that 1) the Superior[ ] Court's jury instruction that Defendant would be guilty if he had acted in concert to commit the crime of possession of a firearm by a felon was plain error and 2) [t]he Superior Court's jury instruction that 'If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant . . . acting together with Clarence Featherstone with a common purpose to commit the crime of . . . possession of a firearm by felon, each of them if actually or constructively present, is guilty of possession of a firearm by felon,' was plain error.

(4) Appellate counsel failed to argue that under *State v. Pakulski*, when disjunctive jury instructions are paired with an improper jury instruction, and there is no finding as to the jury's chosen theory, the defendant is entitled to a new trial. *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987).

(5) On 7 July 2015, the Court of Appeals ruled that assuming the acting in concert instruction was improper, that alone does not rise to the level of plain error. As appellate counsel did not raise a *Pakulski* argument, the Court of Appeals was not able to consider it.

(6) Defendant, through appellate counsel, filed a Petition for Discretionary Review to the North Carolina Supreme Court, and it was denied on 24 September 2015.

(7) On 30 March 2016, Defendant filed a Motion for Appropriate Relief on the grounds that he received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution

> because his appellate counsel failed to raise the *Pakulski* argument on appeal that plain error was committed because the trial court instructed the jury on disjunctive theories of a crime, one of which was improper, and the record does not show upon which theory the jury relied. Defendant's MAR was denied on 13 October 2016.
>
> (8) Defendant filed a petition for Writ of Certiorari in the North Carolina Court of Appeals on 13 December 2016. On 29 December 2016, the Court of Appeals issued an order vacating the 13 October 2016 order on Defendant's MAR and remanding the case to the trial court to enter an appropriate dispositional order.

When evaluating whether a defendant received effective assistance of counsel, we conduct a *Strickland* analysis. *State v. McNeill*, 371 N.C. 198, 218, 813 S.E.2d 797, 812 (2018); *see Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). The first step of the analysis is "whether counsel's representation 'fell below an objective standard of reasonableness.' " *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S. Ct. 1473, 1482 (2010) (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064). "[E]ven an isolated error of counsel" may violate the Sixth Amendment right to effective assistance of counsel "if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649 (1986). Where appellate counsel "ha[s] researched the question, but ha[s] determined that the claim [is] unlikely to succeed," *Smith v. Murray*, 477 U.S. 527, 531–32, 106 S. Ct. 2661, 2665 (1986), and therefore does not pursue the claim on appeal, counsel has not rendered ineffective assistance, *id.* at 535–36, 106 S. Ct. at 2667. The important question, however, is whether the decision not to pursue a claim was the result of reasoned judgment or merely an error. *See Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983) ("Neither *Anders* nor any other decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, *as a matter of professional judgment*, decides not to present those points." (Second emphasis added.)). Where "counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them," the first prong of the *Strickland* test has been met. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746, 764 (2000).

The majority provides two reasons for reversing the decision of the Court of Appeals, stating (1) that "defendant's appellate counsel did, in fact, make the arguments he should have made, albeit by reference

to different authority" and (2) that "the opinion in *Pakulski* employed a standard of review different from the standard of review applicable in the instant case." Both statements are inaccurate. First, the majority mischaracterizes the failure of appellate counsel and, in doing so, ignores both the trial court's findings of fact and the statements of the Court of Appeals. Second, the majority misidentifies the standard of review employed in *Pakulski* and, as a result, misstates *Pakulski*'s applicability to this case.[2]

I.

Mr. Collington's appellate counsel provided ineffective assistance by failing to properly identify the error in the jury instruction. The majority states that "[t]he Court of Appeals concluded that appellate counsel was ineffective for failing to cite *Pakulski*." This is incorrect. The trial court's finding on this fact is instructive. It stated the following:

> (4) Appellate counsel failed to argue that under *State v. Pakulski*, when disjunctive jury instructions are paired with an improper jury instruction, and there is no finding as to the jury's chosen theory, the defendant is entitled to a new trial. *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987).

The Court of Appeals decision below is similarly instructive. In describing the argument of Mr. Collington's appellate counsel, the Court of Appeals stated the following:

> Defendant appealed his conviction of possession of a firearm by a felon to this Court, arguing "that the trial court committed plain error by providing the jury with an instruction on acting in concert with respect to the charge of possession of a firearm by a felon." [*State v. Collington* (*Collington I*), No. COA-14-1244, 2015 WL 4081786, at] *7

2. The majority goes to great lengths to explain the importance of distinguishing between plain error review, applied to unpreserved instructional error in criminal cases, and harmless error review, applied to preserved instructional error. The majority even goes so far as to invoke "the extensive precedent of this Court" distinguishing preserved error from unpreserved error to justify its decision. There is no question that, as the majority notes, "unpreserved issues related to jury instructions are reviewed under a plain error standard, while preserved issues are reviewed under a harmless error standard." The difference between the two types of review is not at issue in this case. The rule stated by this Court in *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987) is one of plain error review. As a result, in arguing for *Pakulski*'s applicability to this case, this dissent does not suggest that harmless error review should apply to unpreserved issues.

> [(N.C. Ct. App. 2015) (unpublished)]. Defendant specifically argued "that this instruction impermissibly allowed the jury to convict Defendant of possession of a firearm by a felon based on [his brother]—also a convicted felon—reportedly receiving the gun from Mr. Sapp in a McDonald's parking lot on the evening of 1 October 2012." *Id.*

*Collington II*, 259 N.C. App. at 130, 814 S.E.2d at 879.

While this may seem like a minor point, it is actually very important in the context of this case. The majority attempts to recast the argument that appellate counsel actually made, writing that "appellate counsel argued that the jury was presented with multiple theories of guilt, one of which was erroneous, and that the error 'had a probable impact on the jury's finding that the defendant was guilty.' " This statement is wrong when measured against the trial court's findings of fact and the Court of Appeals decision below. But more importantly, it obfuscates the import of appellate counsel's error. The problem with the jury instruction was not only that the trial court submitted an erroneous instruction to the jury. The instructional error was that an erroneous instruction was paired with a non-erroneous instruction, which allowed the jury to return a guilty verdict in an array of circumstances wider than the law permits.[3] That instructional error is what appellate counsel failed to identify and argue to the Court of Appeals in *Collington I*.

As a result, the majority is incorrect when it states that "defendant's appellate counsel did, in fact, make the arguments he should have made, albeit by reference to different authority." As the Court of Appeals stated, "defendant's appellate counsel did not . . . argue that because it could not be determined from the record whether the jury relied upon the improper or the proper instruction, plain error was established." *Collington II*, 259 N.C. App. at 138, 814 S.E.2d at 883. As the trial court's findings of fact note, "[a]ppellate counsel failed to argue that . . . when disjunctive jury instructions are paired with an improper jury instruction, and there is no finding as to the jury's chosen theory, the defendant is entitled to a new trial."

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3. It is, of course, the inability of an appellate court to determine where in that array of circumstances a jury has situated its verdict when "we cannot discern from the record the theory upon which the jury relied" which leads to *Pakulski*'s rule that "we resolve the ambiguity in favor of the defendant." *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326. The important point, though, is that the problem of appellate review and attendant remedy presented in *Pakulski* is distinct from the identification of the error. The former is, in the majority's view, implicated by the relevant standard of review. The latter, however, is not.

Appellate counsel instead argued, as the trial court notes in its findings of fact, that "the Superior[ ] Court's jury instruction that Defendant would be guilty if he had acted in concert to commit the crime of possession of a firearm by a felon was plain error." The effect of counsel's mistake is apparent in the first Court of Appeals opinion. *See Collington I*, 2015 WL 4081786, at *1–4. Had counsel made the appropriate argument, the Court of Appeals would have first considered the full extent of the instructional error and would have second considered whether the trial court's error "had a probable impact on the jury's finding that the defendant was guilty." *See State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). However, because counsel failed to accurately describe the error, arguing only that a theory of guilt presented to the jury was erroneous, the Court of Appeals instead conducted a sufficiency of the evidence analysis. *See Collington I*, 2015 WL 4081786, at *4 (concluding that there was not plain error because "[t]he jury reasonably could have believed that Defendant was in possession of Mr. Sapp's gun" after noting that defendant conceded in his brief that the evidence was legally sufficient to convict on a proper instruction and discounting any evidence put on by defendant at trial). If counsel had appropriately framed the argument, the Court of Appeals would have reached a different result. The Court of Appeals itself noted this fact, as follows:

> Finally, Defendant has not presented this Court with any arguments under *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987), which held that a trial court commits plain error when it instructs a jury on disjunctive theories of a crime, where one of the theories is improper, and "we cannot discern from the record the theory upon which the jury relied[.]" "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Therefore, Defendant has not met his "burden" of establishing that the trial court committed plain error in the present case. *See Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333.

*Id.* (alteration in original). Given this failure by appellate counsel, the majority's discussion of whether plain error or harmless error review applies is beside the point. Regardless of the appropriate standard of review, appellate counsel failed to correctly identify the error and pursue it on appeal. The record contains no evidence that this mistake resulted from reasoned judgment or that it was a strategic decision. As a result, Mr. Collington received ineffective assistance of appellate counsel, and

there is no basis for this Court to overturn the decisions to the contrary by both the trial court and the Court of Appeals.

II.

The majority is also wrong to assert that *Pakulski* does not apply to this case. The majority describes the analysis of the Court of Appeals as a "misidentification of the standard of review applied in *Pakulski*." However, it is the majority which incorrectly identifies *Pakulski*'s standard of review. In reality, *Pakulski* applied the plain error standard of review and *Pakulski* is applicable to Mr. Collington's case.

The majority writes that "it appears that we applied the harmless error standard of review in *Pakulski*" because the opinion uses the word "harmless" once when describing one of the State's arguments. It is more instructive, I think, to look at the briefs actually filed in that case, as well as the transcripts of the trial court proceedings, which reveal (1) that the instructional error was not preserved and (2) that both the State and defense counsel argued in their briefs that the appropriate standard of review was plain error.

The record in *Pakulski* makes clear that the error in that case was unpreserved, as neither defense counsel objected to any instruction proposed at the charge conference. Instead, defense counsel requested additional instructions and did not object when the felony murder instruction was discussed. The following is the transcript of the trial proceedings in *Pakulski* as they relate to this question. Mr. Buchanan is the prosecutor, Mr. Moody is Pakulski's defense attorney, and Mr. McLean is the attorney for Pakulski's co-defendant:

> COURT: Well– All right. I'm waiting on that bill. I don't have it before me. Now, let's talk about the precharge conference. I think we'd better do it before the arguments. On the murder charge what– First, what does the State say how the case ought to be submitted to the jury?
>
> MR. BUCHANAN: May it please Your Honor, the State is of the opinion that the evidence would support possibly 4 verdicts in the murder case of guilty of murder in the first degree in the perpetration of a felony; two, guilty of first degree murder with malice and premeditation and deliberation; or thirdly, guilty of murder in the perpetration of a felony and with malice and premeditation and deliberation; not guilty.

COURT: Well, it can't be–

MR. BUCHANAN: You asked me.

COURT: Let me ask: Do you think that there was premeditation?

MR. BUCHANAN: Yes, Your Honor, the State does feel that there is sufficient evidence to support such a charge.

COURT: Because of the evidence that Pakulski said that he was going to kill–

MR. BUCHANAN: Yes, Your Honor.

COURT: The evidence also shows that he wasn't looking for him at that time and it was just a chance that he happened to see him.

MR. BUCHANAN: Yes, Your Honor. The State certainly concedes that.

COURT: Let me look at this other bill I didn't have.

(The court examined a document.)

COURT: Well, I think I'll submit it only on the theory of murder in the perpetration of a felony.

MR. BUCHANAN: Yes, Your Honor.

MR. MOODY: Your Honor, might we inquire what would be the underlying felony?

COURT: Well, I think there are two, but actually the felony would be breaking and entering and robbery. I think robbery is of the– Well, they are just so interlocking that–

MR. MOODY: Yes, sir.

COURT: I may submit the breaking and entering. I don't know. Well, I probably will. Now, on the– Well, let me say this before we go any further. Let me give you this. If you'll come up here, let me show you how I'd like you to make the form for the verdict sheet.

. . .

COURT: Anything else you gentlemen want to say about any particular thing concerning the charge? I'll give them

the routine charge on each of those alleged offenses, and if you like I want to inquire now if you want me to instruct the jury concerning the defendants not testifying.

MR. MOODY: Yes, sir. The defendant Pakulski would request that instruction, just a standard instruction on that–

COURT: All right.

MR. MOODY: –as well as an instruction on reasonable doubt and the effect of the immunity granted to Mr. Chambers.

COURT: Yes, sir, I'll do all that. What about you? Do you want me to instruct them on the defendant's failure to testify?

MR. MCLEAN: Yes, sir. I would ask the Court– I believe it's 101.30.

COURT: I don't know what you are talking about.

MR. MCLEAN: It's the effect of the defendant's decision not to testify. That's that pattern instruction.

COURT: Well, I don't have that with me.

MR. MCLEAN: I've got it here, Your Honor. I'll present it to you.

COURT: Well, I don't need it.

MR. MCLEAN: Okay. And also I would ask that the Court instruct–this is called in pattern of jury instruction 105.20, but let me tell you what it's about. It's about prior inconsistent statements. We would ask that this instruction be given based on Mr. Chambers prior–

COURT: Excuse me just a minute. Let me get it down.

MR. MCLEAN: Yes, sir.

COURT: And the accomplice charge would be part of that. All right, now.

MR. MCLEAN: And along that same thing since we've asked for that charge, we were asking in addition or I am to charge impeachment by prior inconsistent statement under–

> COURT: Well, let me see what you've got on that. I know about what I would tell them.
>
> MR. MCLEAN: Yes, sir. It may be the same thing. I'm just wanting to–
>
> COURT: Well, I don't know. I don't have any set–
>
> (Mr. McLean handed the Court a document.)
>
> COURT: Okay. All right.
>
> MR. MCLEAN: And the other that mister–
>
> COURT: If I overlook that, call it to my attention. I don't think I will.
>
> MR. MCLEAN: Yes, sir. Of course, the standard burden of proof and those types of charges we would ask.
>
> COURT: All right, Okay. Does that cover it?
>
> MR. MOODY: Yes, sir, Your Honor. [The discussion continues on other matters.]

Transcript of Record at 1242–48, *Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (No. 256PA85) [hereinafter *Pakulski* Transcript].

Defense counsel also did not object to the instruction when it was given. After closing arguments, the trial court instructed counsel that it would ask if there were any objections to the jury charge after the instructions were given and that any objections would be included in the record at that point. *Pakulski* Transcript at 1339. Defense counsel agreed. *Id.* After giving the instructions to the jury, the trial court asked whether counsel had any objections, and counsel replied that they did not. *Id.* at 1365. The next morning, after the jury left the courtroom to begin their deliberations, the State approached the bench and had a discussion with the trial court, the contents of which were not recorded. *Id.* at 1366. The trial court then stated the following: "Let the record show further that at the conclusion of the charge the defendants make a general objection to the charge." *Id.*[4]

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4. The record in *Pakulski* shows that defense counsel did not object to the felony-murder jury instruction at the charge conference, before the instructions were given, or after the instructions were given. The majority points to a line in the *Pakulski* opinion indicating that defense counsel moved to dismiss on the grounds of insufficient evidence to charge the jury on a theory of felony murder. *See Pakulski*, 319 N.C. at 571, 356 S.E.2d at 325. The majority suggests that this was sufficient to preserve an exception to the jury instruction because it "serv[ed] the purpose of the contemporaneous objection

This Court in *Pakulski* ruled that the felony-murder instruction given to the jury was erroneous and warranted reversal. *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326. The record very clearly indicates that defense counsel in *Pakulski* never objected to the jury instruction at trial that we subsequently ruled was in error.[5] As the majority notes, "unpreserved issues related to jury instructions are reviewed under a plain error standard." This makes *Pakulski* a plain error case. *See State v. Tucker*, 317 N.C. 532, 536, 346 S.E.2d 417, 420 (1986) ("Since defendant failed to object to these instructions at trial, we consequently must consider whether they rise to the level of plain error . . . ."); *see also* N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").[6] The majority is wrong to assert that the Court in *Pakulski* applied the harmless error standard of review.

It does not aid the majority that *Pakulski* is paired with the words "harmless error" in a scant reference thirty-one years[7] after *Pakulski* was issued. In *State v. Maddux*, we stated in a footnote that *Pakulski* did

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now required by N.C. R. App. P. 10(a)(2)." I note that the preservation requirements for exceptions to jury instructions remain substantially unchanged from those in existence at the time *Pakulski* was decided. *Compare* N.C. R. App. P. 10(b)(2), 312 N.C. 814 (1984) (repealed 1989) *with* N.C. R. App. P. 10(a)(2). Indeed, the requirements in effect at the time that *Pakulski* was decided were more onerous, requiring that "an exception to instructions given the jury shall identify the portion in question by setting it within brackets" or making other clear reference in the record on appeal.

5. The trial transcript does indicate that the defendant made a general motion to dismiss at the close of the State's evidence, and another at the close of all evidence. *Pakulski* Transcript at 725, 1249. Both motions were denied. *Id.* at 728, 1249.

6. In fact, the parties in *Pakulski* did "specifically and distinctly contend[]" that "the judicial action questioned . . . amount[ed] to plain error." *See* N.C. R. App. P. 10(a)(4). Both defense counsel and the State argued in their briefs that the appropriate standard for our decision was plain error. Brief for Defendant-Appellant Pakulski at 34, *Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (No. 256PA85) ("On the facts of this case, the instructions on felony murder based on breaking or entering were plainly erroneous."); Brief for State-Appellee at 22, *Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (No. 256PA85) ("Thus, [the trial court's] jury charge appears reviewable only for plain error. See State v. Odom, 307 N.C. 355, 300 S.E. 2d 375 (1983).").

7. The long-standing nature of our decision in *Pakulski*, along with the fact that it seems to have been consistently applied as a plain error case for thirty-one years after its issuance, suggest that the majority's concern about "creat[ing] a subset of cases in which an unpreserved issue relating to jury instructions qualifies for harmless error review" is unfounded.

not apply to the defendant's case because it "is not applicable to plain error cases." 371 N.C. 558, 567 n.11, 819 S.E.2d 367, 373 n.11 (2018). Two months later in *State v. Malachi*, in another footnote, we stated that "[t]his Court did discuss the harmless error issue in *Pakulski*." 371 N.C. 719, 732 n.5, 821 S.E.2d 407, 417 n.5 (2018). These passing references do not, as the majority claims, clarify that *Pakulski* is a harmless error case. Indeed, those two passing references are simply wrong. *See State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (applying *Pakulski* where it does not appear that the defendant objected to the jury instruction at trial); *see generally Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (containing no indication that the defendant specifically objected to any jury instruction). Given that the actual record in *Pakulski* clearly shows that *Pakulski* is a plain error case, the majority should not read it otherwise.[8]

Thus, *Pakulski* is a plain error case, and Mr. Collington is entitled to relief.[9] At trial, according to the trial court's findings of fact, Mr. Collington's jury was instructed with respect to the possession of a firearm by a felon charge "that it could find Defendant guilty under the theories of actual possession, constructive possession, or acting in concert." The jury found him guilty of possession of a firearm by a felon and the "verdict sheets did not indicate under which theory the jury convicted Defendant."

In *Pakulski*, we held:

> Where the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted, and we cannot discern from the record the theory upon which the jury relied, this Court will not assume that the jury based its verdict on the theory for which it received a proper

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8. The majority seems concerned that acknowledging that *Pakulski* is a plain error case, thereby applying its rule to cases of unpreserved error, would apply too lenient a standard of review and undermine "the important interests promoted by clear rules related to issue preservation." Honoring *Pakulski*'s promise would do no such thing. Instead, it would prevent appellate courts from keeping defendants in prison on an impermissible theory of guilt when "we cannot discern from the record the theory upon which the jury relied." *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326. Thus, the rule in *Pakulski* is designed to address precisely the type of "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done" to which the plain error rule is directed. *See State v. Lawrence*, 365 N.C. 506, 516–17, 723 S.E.2d 326, 333 (2012) (emphasis in original) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

9. As discussed in Part I of this dissent, Mr. Collington is entitled to relief even if *Pakulski* were a harmless error case.

> instruction. Instead, we resolve the ambiguity in favor of the defendant.

319 N.C. at 574, 356 S.E.2d at 326. It does not matter if "the jury could have based its verdict solely" on the permissible theory if "the verdict form does not reflect the theory upon which the jury based its finding of guilty." *Id.* Mr. Collington's appellate counsel did not make that argument. For that reason, his appellate counsel was deficient. *See Robbins*, 528 U.S. at 285, 120 S. Ct. at 764 (stating that appellate counsel is deficient where "counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them").

The deficiency is particularly egregious in this case because of the facts. The only evidence presented at trial that Mr. Collington possessed a firearm, either actually or constructively, came from the testimony of Christopher Hoskins. Mr. Hoskins testified that Mr. Collington held a gun while Mr. Collington was robbing him. However, while the jury found Mr. Collington guilty of possession of a firearm by a felon, the jury found him not guilty of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. It seems more likely, then, that the jury found Mr. Collington guilty of possession of a firearm based on his own testimony. During trial, Mr. Collington testified that his brother, Clarence Featherstone, received a gun from Dade Sapp later in the evening. This supports the conclusion that the jury based its verdict on the acting in concert theory rather than on actual or constructive possession.

Mr. Collington's appellate counsel had an obligation to present the argument to the Court of Appeals which would have allowed that court to ensure that Mr. Collington was not convicted of possession of a firearm based on someone else's possession. Because Mr. Collington's counsel did not meet that obligation, Mr. Collington clearly received ineffective assistance of appellate counsel and is entitled to a new trial. I respectfully dissent.

Justice DAVIS joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
TILMON CHARLES GOLPHIN

No. 441A98-4

Filed 25 September 2020

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order dismissing defendant's motion for appropriate relief entered on 25 January 2017 by Judge W. Erwin Spainhour in Superior Court, Cumberland County. Heard in the Supreme Court on 27 August 2019.

*Joshua H. Stein, Attorney General, by Danielle Marquis Elder, Special Deputy Attorney General, and Jonathan P. Babb, Special Deputy Attorney General, for the State-appellee.*

*Jay H. Ferguson and Kenneth J. Rose for defendant-appellant.*

*Jeremy M. Falcone, Paul F. Khoury, Robert L. Walker, and Madeline J. Cohen for Former State and Federal Prosecutors, amici curiae.*

*Carlos E. Mahoney, Jin Hee Lee, and W. Kerrel Murray for NAACP Legal Defense and Educational Fund, Inc., amicus curiae.*

*Janet Moore for National Association for Public Defense, amicus curiae.*

*James E. Williams, Jr., Burton Craige, and Bidish Sarma for North Carolina Advocates for Justice, amicus curiae.*

*Grady Jessup for North Carolina Association of Black Lawyers, amicus curiae.*

*Cynthia F. Adcock for North Carolina Council of Churches, amicus curiae.*

*Lisa A. Bakale-Wise and Irving Joyner for North Carolina State Conference of the NAACP, amicus curiae.*

*Professors Robert P. Mosteller and John Charles Boger, amici curiae.*

*Joseph Blocher, for Social Scientists, amici curiae.*

PER CURIAM.

For the reasons stated in *State v. Robinson*, No. 411A94-6, 2020 WL 4726680 (N.C. Aug. 14, 2020), the decision of the trial court is vacated and this case is remanded to the Superior Court, Cumberland County, for the reinstatement of defendant's sentence of life imprisonment without parole.

VACATED AND REMANDED.

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

Justice ERVIN concurring in the result.

If the Court were addressing for the first time the issue of whether the trial court's order should be reversed and the sentence of life imprisonment imposed upon defendant by Judge Weeks reinstated on double jeopardy and related grounds, I would dissent from that decision and hold, for the reasons stated in my dissenting opinion in *State v. Robinson*, No. 41194-6, 2020WL 4726680 (N.C. Aug. 14, 2020), that the trial court's order should be reversed and this case remanded to the Superior Court, Cumberland County, for a new Racial Justice Act proceeding in accordance with this Court's decision in *State v. Ramseur*, 374 N.C. 658, 843 S.E.2d 106 (2020), and our 2015 order in this case. The decision of the majority in *Robinson* is, however, the law of North Carolina to which I am now bound. For this reason, I concur in the result reached by the Court in this case.

Justice DAVIS joins in this concurring opinion.

Justice NEWBY dissenting.

For the reasons stated in my dissenting opinions in *State v. Robinson*, No. 411A94-6, 2020 WL 4726680 (N.C. Aug. 14, 2020), and *State v. Ramseur*, 374 N.C. 658, 843 S.E.2d 106 (2020), I respectfully dissent.

**STATE v. GREENFIELD**

[375 N.C. 434 (2020)]

STATE OF NORTH CAROLINA
v.
TYLER DEION GREENFIELD

No. 11A19

Filed 25 September 2020

**1. Assault—deadly weapon with intent to kill inflicting serious injury—jury instruction—self-defense—transferred intent—prejudice**

Where defendant—who fired gunshots killing a man and injuring a woman—was convicted of first-degree felony murder and assault with a deadly weapon with intent to kill inflicting serious injury, the trial court erred by declining to give defendant's proposed jury instruction for the assault charge, which stated that any self-defense justification defendant had for shooting the man would have transferred to his unintentional shooting of the woman. Defendant presented sufficient evidence to require this instruction where he testified that the man shot him first and he, fearing for his life, shot back while trying to aim only at the man. Further, because perfect self-defense can be a defense to an underlying felony (in this case, the assault charge) for felony murder, thereby defeating both charges, the trial court's failure to give the self-defense instruction amounted to prejudicial error.

**2. Homicide—first-degree murder—felony murder—premeditation and deliberation—second-degree murder conviction—improper**

On appeal from defendant's convictions for first-degree felony murder, assault with a deadly weapon with intent to kill inflicting serious injury (the underlying felony), and second-degree murder, the Court of Appeals erred by failing to remand all three charges for a new trial where, instead, it remanded for a new trial on the assault charge, vacated the felony murder charge, and remanded for entry of judgment convicting defendant of second-degree murder. Because the trial court erred by failing to instruct the jury on self-defense for the assault charge, its decision to have the jury continue deliberations on first-degree murder based on premeditation and deliberation after accepting a partial verdict on first-degree murder under the felony murder rule could have resulted in an improper conclusion by the jury that defendant was guilty of second-degree murder.

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 262 N.C. App. 631, 822 S.E.2d 477 (2018), vacating judgments entered on 23 February 2017 by Judge Phyllis M. Gorham in Superior Court, New Hanover County, and remanding for a new trial for the assault with a deadly weapon with intent to kill inflicting serious injury charge and for the entry of a judgment convicting defendant of second-degree murder. On 11 June 2019, the Supreme Court allowed the State's petition for discretionary review. Heard in the Supreme Court on 9 March 2020.

*Joshua H. Stein*, *Attorney General*, *by Teresa M. Postell*, *Assistant Attorney General*, *for the State-appellee.*

*Glenn Gerding*, *Appellate Defender*, *by Kathryn L. VandenBerg*, *Assistant Appellate Defender*, *for defendant-appellant.*

HUDSON, Justice.

Here, we review (1) whether the trial court erred by failing to give defendant's proposed jury instructions on self-defense and transferred intent with regard to the charge of assault with a deadly weapon with intent to kill inflicting serious injury against Beth,[1] and (2) whether the trial court's error prejudiced defendant. Because we conclude that defendant was prejudiced by the trial court's failure to give his proposed jury instructions on self-defense and transferred intent in connection with the assault charge, we affirm the decision of the Court of Appeals. However, because we conclude that the proper remedy for this prejudicial error is to remand the case for a new trial on all charges, we affirm in part and reverse in part the decision of the Court of Appeals.

Factual and Procedural Background

On 31 October 2016, a New Hanover County grand jury returned a superseding indictment charging defendant with (1) first-degree murder; (2) attempted first-degree murder; (3) attempted robbery with a

1. We use the pseudonyms "Beth" and "Jon" to refer to the victims in this case, just as the Court of Appeals did in its opinion. *State v. Greenfield*, 262 N.C. App. 631, 634 n.1, 822 S.E.2d 477, 479 n.1 (2018).

dangerous weapon; and (4) assault with a deadly weapon with intent to kill inflicting serious injury.[2] Defendant's trial began on 6 February 2017.

At trial, the evidence showed that on 2 February 2015, defendant arrived with a friend at Jon and Beth's apartment to purchase marijuana from Jon. Subsequent events in the apartment are disputed. However, by the time defendant and his friend left the apartment, Jon was dead and both Beth and defendant had been shot.

Defendant testified that upon arrival he asked to use the bathroom. Defendant testified that he did not notice a safe in Jon's bedroom or the fact that Beth was asleep as he passed through the bedroom on the way to the bathroom. After using the bathroom, defendant returned to the living room where Jon and defendant's friend were talking. While they were talking, defendant picked up a gun that he found on a coffee table. Defendant testified that he picked the gun up off the coffee table because he thought it "looked like something off a movie" and "it looked cool."

According to defendant, Jon noticed that defendant picked up the gun from the coffee table and "started amping at [him]." Specifically, Jon stood up from where he was seated and started acting "crazy" and "aggressive," asking defendant if he was planning to rob him. Then Beth came out of the bedroom holding a gun up to defendant as if "she just had every intention on shooting [defendant]." Defendant testified that he was "scared" and thought that he was "about to die." Defendant pointed the gun that he picked up from the coffee table at Beth after she pointed her gun at him. Defendant then pointed the gun at Jon because he thought he had "to be as tough as possible to get out of th[e] situation." Defendant shouted "[p]ut the gun down or I'm gonna shoot him in the head." Defendant testified that he only made this threat to get Beth to put the gun down so that he could get out of the apartment.

Eventually, Beth put the gun down on the table and defendant tried to run out of the apartment. As he tried to leave, defendant saw Jon pull a gun from behind his back and then defendant felt himself get shot in the side. When he got shot, defendant "felt like [he] was going to die" and thought "it was all over" for him.

Defendant testified that after he was shot, he "just started shooting" and pulled the trigger "as many times as [he could] until [he] got to the door." Defendant stated that he was not aiming at anyone in particular,

2. In this opinion we will refer to this as "the assault" or "the assault charge."

and he was "just . . . shooting and running." However, defendant also testified that he aimed in Jon's direction "as best as [he] could," and that while running he "intentionally" shot at Jon.

At trial, Beth testified for the State. Her account of events inside the apartment diverged from defendant's testimony. Specifically, Beth testified that: Jon's voice got "shaky" after defendant asked to use the bathroom; she did not actually hear defendant use the bathroom; she would have been able to hear defendant use the bathroom from where she was in her and Jon's bedroom; and defendant's path to the bathroom led him right past the safe in the bedroom.

According to Beth, when defendant returned to the living room, she heard his voice become "more aggressive" and Jon's voice become "more shaky and more scared." Beth said that she heard defendant aggressively ask Jon where the guns, money, and drugs were, and then she grabbed a gun located in the bedroom. As she grabbed the gun, a third person that Beth did not recognize entered the apartment carrying a black bag, found Beth in the bedroom, and called out that Beth had a gun. Beth testified that defendant told her to bring the gun into the living room or he would shoot Jon in the face. Beth entered the living room with her gun pointed down to the ground and placed it on the coffee table.

Beth then stepped between Jon and defendant. Jon attempted to push her away from him as he made a move for the gun that she had just placed on the coffee table. She closed her eyes and turned away as shots came at her from defendant's direction. Beth testified that she felt a pain on the left side of her head and that she saw defendant pointing his gun at her as she was closing her eyes. Beth lost consciousness after she was shot. When she regained consciousness, she saw defendant and the third person running out of the apartment. After attempting to get help from a neighbor, Beth called 9-1-1 and reported that she and Jon were shot during an attempted robbery.

Prior to trial, defendant gave notice to the State that he was planning to offer the affirmative defense of self-defense at trial pursuant to N.C.G.S. § 15A-905(c). At the charge conference, defendant asked the trial court to give an instruction on self-defense for all charges and specifically requested an instruction on "the doctrine of transferred intent as [it] relates to self-defense." Defendant wanted the instruction to "capture the idea that an individual . . . lawfully acting in self-defense who accidentally injures another is entitled to the transference of his intent

from his original actions to an innocent bystander." Up until the charge conference, defendant had been referring to the jury instruction as an "accident" instruction, but later explained that he had always intended to request an instruction on self-defense.

Defendant's proposed instruction provided as follows:

> If a defendant, in acting in the lawful exercise of self-defense, injures an innocent bystander while lawfully defending himself, he is excused from criminal liability for any unintentional harm caused to innocent bystanders by his actions in his lawful exercise of self-defense.

The trial court ruled that it would not give defendant's proposed instruction to the jury. Instead, the trial court gave the pattern instruction defining "accident," which provided in pertinent part that

> [a]n injury is accidental if it is unintentional, occurs during the course of lawful conduct, and does not involve culpable negligence. . . . When the defendant asserts the victim's injury was the result of an accident, he is, in effect, denying the existence of those facts which the State must prove beyond a reasonable doubt in order to convict him.

The trial court also gave the following general instruction on transferred intent:

> If the defendant intended to harm one person but instead harmed a different person, the legal effect would be the same as if the defendant had harmed the intended victim.

The trial court also gave a self-defense instruction for first-degree murder under the theory of premeditation and deliberation and its lesser included offenses, but did not give a self-defense instruction for first-degree murder under the felony murder rule or for any underlying felonies, including the assault charge.

The jury ultimately found defendant guilty of first-degree murder based on the felony murder rule with the assault charge as the underlying felony. The jury also found defendant guilty of second-degree murder, but the trial court set that verdict aside. The jury found defendant not guilty of attempted first-degree murder and attempted robbery with a deadly weapon. Defendant appealed.

The Court of Appeals held in pertinent part that the trial court erred by not instructing the jury on self-defense with regard to the assault

charge. *State v. Greenfield*, 262 N.C. App. 631, 642, 822 S.E.2d 477, 485 (2018). Specifically, the Court of Appeals reasoned that based on the evidence at trial, "[d]efendant was entitled to a self-defense instruction on the homicide of Jon and the assault of Beth, but only if the jury determined that those crimes were committed with shots *intended* for Jon." *Id.* at 639, 822 S.E.2d at 483. The Court of Appeals determined that defendant was not entitled to a self-defense instruction for any shots intended for Beth because "[defendant] testified that he did not intend to hit Beth, but that he was only shooting at Jon. Defendant also testified that he was only in imminent fear of being killed by Jon. He testified that Beth had already put down her gun before he returned fire." *Id.* at 639, 822 S.E.2d at 483–84.

The court concluded that the trial court's failure to give a self-defense instruction for the assault of Beth was prejudicial error, reasoning that it did

> not know if the jury determined that the shot that struck Beth was meant for Jon, which may have been legally justified under self-defense, or if it was meant for Beth. . . . And based on transferred intent, he should have been acquitted if the jury believed he was firing at Jon in self-defense.

*Id.* at 642, 822 S.E.2d at 485.

In addition to remanding the case for a new trial on the assault charge, the Court of Appeals vacated the judgment convicting defendant of first-degree murder under the felony murder rule. *Id.* at 643, 822 S.E.2d at 486. The Court of Appeals then remanded the case for the entry of a judgment convicting defendant of second-degree murder, concluding that even though the trial court arrested judgment on that conviction, there was no reversible error as to that verdict because the jury was instructed on self-defense for that charge. *Id.* at 643, 822 S.E.2d at 485–86.

The dissenting judge agreed with the majority's decision to grant a new trial on the assault charge but would have granted a new trial to defendant on all charges because "it [was] not possible to separate the [assault] conviction from the tangled mess of theories and charges." *Id.* at 643, 822 S.E.2d at 486 (Stroud, J., dissenting).

Defendant appealed on the basis of the dissenting opinion. We also allowed the State's petition for discretionary review. Accordingly, we

now analyze (1) whether the Court of Appeals erred by concluding that defendant was prejudiced by the trial court's failure to give his proposed self-defense and transferred-intent instructions on the assault charge; and (2) whether the Court of Appeals erred by failing to order a new trial on all charges. Because we conclude that the failure to give the proposed instructions prejudiced defendant and that he should receive a new trial on all charges, we affirm in part and reverse in part the decision of the Court of Appeals.

## Analysis

### I. Standard of Review

"This Court reviews the decision of the Court of Appeals to determine whether it contains any errors of law." *State v. Golder*, 374 N.C. 238, 244, 839 S.E.2d 782, 787 (2020) (quoting *State v. Melton*, 371 N.C. 750, 756, 821 S.E.2d 424, 428 (2018)); *see* N.C. R. App. P. 16(a). "To resolve whether a defendant is entitled to a requested instruction, we review de novo whether each element of the defense is supported by the evidence, when taken in the light most favorable to defendant." *State v. Mercer*, 373 N.C. 459, 462, 838 S.E.2d 359, 362 (2020) (quoting *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988)). Further, "[w]hether a jury instruction correctly explains the law is reviewable de novo." *Piazza v. Kirkbride*, 372 N.C. 137, 187, 827 S.E.2d 479, 510 (2019).

### II. Defendant's Proposed Instructions

**[1]** We conclude that defendant presented sufficient evidence to require a self-defense instruction on the assault charge for any shot intended for Jon.[3] Accordingly, the trial court erred by not instructing the jury according to defendant's proposed self-defense and transferred-intent instructions.

"[W]here competent evidence of *self-defense* is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case, and the trial judge must give the instruction even absent any specific request by the defendant." *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986) (citations omitted).

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3. Because this conclusion is sufficient to demonstrate the trial court's error, we do not reach the issue of whether defendant was entitled to a self-defense instruction for any shots he intended for Beth.

Perfect self-defense requires that at the time of defendant's use of force

> (1) it appeared to defendant and he believed it to be necessary to kill [or use force against] the [victim] in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

*State v. Harvey*, 372 N.C. 304, 307–08, 828 S.E.2d 481, 483–84 (2019) (quoting *State v. Bush*, 307 N.C. 152, 158–59, 297 S.E.2d 563, 568 (1982)). "In determining whether there was any evidence of self-defense presented, the evidence must be interpreted in the light most favorable to defendant." *State v. Webster*, 324 N.C. 385, 391, 378 S.E.2d 748, 752 (1989) (citing *State v. Gappins*, 320 N.C. 64, 71, 357 S.E.2d 654, 659 (1987)).

According to the doctrine of transferred intent, a defendant "is guilty or innocent exactly as though the fatal act had caused the death of the person intended to be killed. The intent is transferred to the person whose death has been caused." *State v. Dalton*, 178 N.C. 779, 781, 101 S.E. 548, 549 (1919) (citation omitted). In the self-defense context specifically, we have stated that

> [i]f the killing of the person intended to be hit would, under all the circumstances, have been excusable or justifiable on the theory of self-defense, then the unintended killing of a bystander by a random shot fired in the proper and prudent exercise of such self-defense is also excusable or justifiable.

*Id.* at 782, 101 S.E. at 549 (citation omitted).

Here, the evidence presented at trial, when interpreted in the light most favorable to defendant, was sufficient to entitle him to a jury instruction on perfect self-defense for any shot that he intended for Jon.

Specifically, defendant testified that (1) he only picked up the gun from Jon's coffee table because he thought "it looked cool" and "like something off a movie"; (2) when Jon noticed that defendant was holding the gun, Jon got "aggressive" and "crazy"; (3) defendant did not point his gun at anyone until Beth emerged from the bedroom pointing a gun at him; (4) defendant was scared and thought he was about to die when Beth pointed the gun at him, and he thought she had "every intention on shooting [him]"; (5) after Beth put her gun down, defendant ran for the door to exit the apartment; (6) as defendant was leaving, he saw Jon pull a gun and defendant felt a shot to his side; (7) defendant thought that he was going to die; and (8) acting out of fear, defendant resorted to "just shooting and running" while attempting to aim at Jon "as best as [he] could."

Defendant's testimony, taken in the light most favorable to him, entitled him to a jury instruction on perfect self-defense. Defendant's testimony, if believed, would show that (1) he subjectively believed that he was going to die if he did not return fire at Jon; (2) such belief was reasonable given the circumstances; (3) defendant was not the aggressor in that he only picked up the gun because he thought "it looked cool," defendant raised the gun only after Beth pointed a gun at him, and defendant only fired at Jon after Jon shot defendant while he was trying to escape; and (4) defendant did not use excessive force by returning fire at the person he reasonably believed had just shot him.

Further, defendant was entitled to a jury instruction on self-defense through the doctrine of transferred intent for the assault charge based on any injury to Beth. Defendant testified that he "intentionally" shot at Jon after having been shot in the side and thinking that he was about to die. From this testimony, the jury could find that Beth was struck by a bullet intended for Jon that defendant shot in self-defense. Accordingly, in the light most favorable to defendant, he was entitled to have the trial court instruct the jury on self-defense according to his proposed instruction for the assault charge, and the trial court erred by failing to do so.

III. Prejudice

An error is prejudicial 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." N.C.G.S. § 15A-1443(a) (2019).

Although perfect self-defense is not a direct defense to felony murder, it "may be a defense to the underlying felony, which would thereby defeat the felony murder charge." *State v. Juarez*, 369 N.C. 351, 354, 794 S.E.2d 293, 297 (2016) (citing *State v. Richardson*, 341 N.C. 658, 668–69,

462 S.E.2d 492, 499 (1995)). Here, the trial court failed to give any self-defense instruction for the assault charge, which we have already concluded was error because defendant's testimony supported such an instruction. We further conclude that such error was prejudicial because it impaired defendant's ability to present his defense to felony murder, and we see a reasonable possibility that had the jury been given a self-defense instruction, a different result would have been reached at trial.

We also conclude that defendant was prejudiced by the trial court's failure to give his specific, proposed instructions on self-defense and transferred intent for the assault charge. Defendant proposed the following instruction:

> If a defendant, in acting in the lawful exercise of self-defense, injures an innocent bystander while lawfully defending himself, he is excused from criminal liability for any unintentional harm caused to innocent bystanders by his actions in his lawful exercise of self-defense.

This instruction, if given, would have properly informed the jury that if it determined that defendant intentionally shot at Jon in self-defense and unintentionally shot Beth while exercising that right of self-defense, then his self-defense justification for shooting at Jon would have transferred along with the bullet that unintentionally struck Beth. Further, because perfect self-defense can serve as a defense to the underlying felony for felony murder, and thereby defeat the felony murder charge, there is a "reasonable possibility" that if the trial court had given defendant's proposed self-defense and transferred-intent instructions, the jury would have acquitted him of both the assault charge and the felony murder charge for which the assault served as the underlying felony.

The State's argument that defendant was not prejudiced by the trial court's failure to give defendant's proposed self-defense and transferred-intent instructions is not persuasive.

First, the State argues that the trial court's general instruction on transferred intent adequately informed the jury that it could acquit defendant if it determined that defendant unintentionally shot Beth while aiming for Jon in self-defense. But the transferred-intent instruction only informed the jury that defendant's intent to harm would transfer; it did not inform the jury that defendant's lawful exercise of self-defense could transfer. It also seems unlikely that the jury would have understood by this general instruction that defendant's self-defense justification would have transferred to any bullet that unintentionally struck Beth when the trial court gave no self-defense instruction at all for the assault charge.

Second, the State argues that defendant could not have been prejudiced by the trial court's failure to give his proposed instructions because defendant invited any error here by requesting the "accident" instruction that *was* given to the jury on the assault charge. *See* N.C.G.S. § 15A-1443(c) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct."). But defendant's success in obtaining an instruction on the accident defense does not preclude his claim that he was prejudiced by the trial court's failure to also give separate, requested instructions on self-defense and transferred intent.[4] This is especially clear because defendant clarified at the charge conference that he had always been requesting self-defense and transferred-intent instructions, and that he had been using the term "accident" somewhat inartfully to refer to those instructions. When defendant made this clarification, the trial court agreed that the issue had always been about self-defense.

Finally, the State argues that defendant cannot demonstrate prejudice resulting from the trial court's failure to give his proposed instructions because the jury's verdict finding defendant guilty of second-degree murder shows that it did not believe that defendant acted in perfect self-defense. However, as explained below, we conclude that the second-degree murder verdict sheds no light on the jury's deliberations concerning defendant's self-defense claim.

Accordingly, we conclude that defendant was prejudiced by the trial court's failure to give defendant's proposed instructions on self-defense and transferred intent for the assault charge.

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4. There is a clear distinction between a pure accident defense and a self-defense via transferred-intent defense: a pure accident defense negates the elements of assault, whereas a self-defense instruction provides a justification for actions that would otherwise satisfy the elements of the offense. *See* N.C.P.I.—Crim. 307.10 (2019) ("When the defendant asserts that the victim's death was the result of an accident he is, in effect, *denying the existence of those facts which the State must prove* beyond a reasonable doubt in order to convict him." (emphasis added)); *State v. Riddick*, 340 N.C. 338, 341, 457 S.E.2d 728, 730 (1995) (quoting N.C.P.I.—Crim. 307.10 (1986)); *State v. Holland*, 193 N.C. 713, 718, 138 S.E. 8, 10–11 (1927) ("The first law of nature is that of self-defense. The law of this state and elsewhere recognizes this primary impulse and inherent right. One being without fault, in defense of his person, in the exercise of ordinary firmness, has a right to invoke this law and kill his assailant, if he has reasonable ground for believing or apprehending that he is about to suffer death or great or enormous bodily harm at his hands. . . . but there must be reasonable ground for the belief or apprehension—an honest and well-founded belief or apprehension at the time *the homicide is committed*." (emphasis added) (citations omitted)).

IV. Remand Order

**[2]** We conclude that the Court of Appeals erred by remanding this case for the entry of a judgment convicting defendant of second-degree murder. Instead, we remand this case for a new trial on all charges.

The trial court accepted the jury's verdicts finding defendant (1) guilty of first-degree murder under the felony murder rule based upon assault; (2) not guilty of attempted first-degree murder; (3) not guilty of attempted robbery with a deadly weapon; and (4) guilty of assault with a deadly weapon with intent to kill inflicting serious injury. Then, after noticing that the jury failed to mark the verdict sheet under the premeditation and deliberation theory of first-degree murder, the trial court called the members of the jury back into the courtroom and instructed them to continue deliberations on the theory of premeditation and deliberation in the following manner:

> Under Count 1 of the verdict form, there were two first-degree murder charges listed. It appears that you marked one for the first-degree murder under the felony murder rule but nothing was checked under first-degree murder with premeditation and deliberation.
>
> So what I'm going to have y'all do is go back into the jury room and make a decision about the first-degree murder with premeditation and deliberation, because nothing was checked as to that count; do you understand?

Later the trial court provided the following instruction:

> Out of an abundance of caution, I want to make sure you understand that, of course, there were two theories in the first-degree murder. You made a decision under the first theory, felony murder rule. The second theory is first-degree murder with premeditation and deliberation. So there's first-degree murder, second-degree murder, voluntar[y] manslaughter, or not guilty. That's the decision you have to make on that second one. You have those four options; do you understand that?

After hearing this instruction, the jury asked the trial court the following:

> [W]hy [does] it matter[ ] that we address both theories since it's for the same count? Why is there and/or instead of an and in the charge sheet?

In response to the jury's question, the trial court gave the following instruction:

> Ladies and gentlemen, as I instructed you if you read the instructions, the defendant is charged with first-degree murder. The State presented two theories of first-degree murder to you that required different elements to be proven. First-degree murder under the felony murder rule is one way first-degree murder can be proven, the second way is first-degree murder with premeditation and deliberation. So both theories of first-degree murder were presented to you; therefore, you have to—to look at both theories as they're set out in the charge conference and in the charge instructions and on the verdict sheet and make a decision about both theories in this case.

Following this instruction, one juror asked whether the jury's decision on the two theories had to be "congruent" or "together in order to say first-degree felony murder." The trial court responded that the jury "ha[s] to make a decision about both. They have to be consistent."

After the jury finished its second round of deliberations, it returned verdicts finding defendant (1) guilty of first-degree murder under the felony murder rule based upon assault; (2) guilty of second-degree murder; (3) not guilty of attempted first-degree murder; (4) not guilty of attempted robbery with a deadly weapon; and (5) guilty of assault with a deadly weapon with intent to kill inflicting serious injury.

We conclude that the trial court's failure to give any instruction on self-defense pertaining to the assault charge prevented the jury from performing its fundamental task of considering all of the substantial and essential features of the case, which prejudiced defendant.[5] Specifically, the trial court instructed the jury that it had to redeliberate on first-degree murder under the theory of premeditation and deliberation, and the trial court informed the jury that it only had "four options," which were to find defendant guilty of "first-degree murder, second-degree murder, voluntar[y] manslaughter, or not guilty." In so limiting the jury's options, the trial court denied it the ability to fully and properly consider whether defendant was guilty of first-degree murder under the felony murder rule.

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5. *See State v. Sargeant*, 206 N.C. App. 1, 14, 696 S.E.2d 786, 795 (2010) (holding that the trial court "intru[ded] into the province of the jury" when it accepted partial verdicts and sent the jury back to deliberate with incomplete instructions on aspects of first-degree murder).

Further, when asked whether the jury's verdict on first-degree murder under the felony murder rule and its verdict on first-degree murder under the theory of premeditation and deliberation needed to be "congruent," the trial court instructed the jury that the two findings needed to be "consistent." Under that instruction, the jury could have improperly found defendant guilty of second-degree murder because it thought, for example, that although there was no evidence that defendant intended to shoot Jon with premeditation and deliberation—it needed to at least convict him of second-degree murder in order to render a verdict that was "consistent" with the guilty verdict that the trial court had already accepted. Under such a line of reasoning, the jury would not have engaged at all with defendant's claim of perfect self-defense. Moreover, such a decision by the jury would not have been based upon a proper consideration of the elements of the crime of second-degree murder.

The trial court's decision to have the jury continue deliberations on first-degree murder under the theory of premeditation and deliberation after accepting a partial verdict on first-degree murder under the felony murder rule could have resulted in an improper conclusion by the jury that defendant was guilty of second-degree murder. Therefore, we reverse the decision of the Court of Appeals to remand this case for the entry of a judgment convicting defendant of second-degree murder. Instead, we remand for a new trial on all charges.

Conclusion

We conclude that the trial court erred by failing to give defendant's proposed instructions on self-defense and transferred intent for the assault charge, that such error prejudiced defendant, and that the trial court's decision to take a partial verdict on the first-degree murder charge could have resulted in an improper finding by the jury that defendant was guilty of second-degree murder. Accordingly, we affirm in part, reverse in part, and remand this case to the trial court for a new trial on all charges.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Justice NEWBY dissenting.

A criminal defendant is entitled to a fair trial, free from prejudicial error. Here the trial court gave adequate instructions, enabling defendant to present his defense theory to the jury. Defendant argued that he was aiming at Jon and shot Beth by accident. He asserted that his shooting Jon was justified as self-defense, and thus his shooting Beth

was also justified. By its verdict it is clear that the jury considered and rejected defendant's argument. Because the instructions given to the jury allowed the jury to fully consider defendant's defense, his conviction should be upheld. I respectfully dissent.

Following a three-week trial, during which both defendant and the surviving victim testified, the jury heard differing accounts of a drug deal gone wrong that undisputedly resulted in the death of Jon and the serious injury of Beth. While previously having given various accounts, by the time defendant testified he claimed that he shot Jon in self-defense and that Beth was "just in his area" when he was shooting at Jon. It is undisputed that the first person to pick up a gun was defendant and that he was the only one holding a gun when the violent affray began. Likewise, Jon's cell phone undisputedly captured defendant's threats and demands at the time he was holding the gun.

The jury heard evidence that defendant was the initial aggressor and that his actions were intentional, including that he intentionally shot Beth. Defendant entered the home to purchase drugs, picked up a gun and held it in close proximity to Jon, threatened Jon, and threatened to take Jon's life to convince Beth to put her gun down. A recording on Jon's cell phone captured the exchange that occurred after defendant picked up the gun, including defendant's voice demanding "the money" from Jon, threatening to "shoot [Jon] in the head," and demanding that Beth "[b]ring the gun here[, p]ut it down." Beth complied and stood in front of Jon. Beth saw defendant still pointing his gun at her as she closed her eyes.

Beth did not see the gun fire the shots, but she heard two to three shots, smelled gun powder, and felt the bullet strike her. Beth "felt pain on the left side of [her] head" and felt the bullets penetrating her as she went unconscious. When she regained consciousness, she saw her "hair floating around" her and on her arms and felt a pain on the left side of her head. She then saw defendant running out of the home. Following his flight and during the investigation, defendant gave different explanations about how the drug deal at Jon's house had gone wrong and how defendant got shot. Defendant's rendition of the facts varied as to who fired first and who got shot first. By the time defendant testified, he claimed he shot Jon in self-defense and that Beth was "just in his area" when he was shooting at Jon.

At the charge conference, defendant asked for jury instructions on self-defense and transferred intent. He wanted to present to the jury the argument that if he was justified in shooting Jon in self-defense, he

was also justified in shooting Beth accidently. The trial court gave a self-defense instruction and an instruction on accident as well as a general transferred-intent instruction, but did not give the specific transferred-intent instruction requested. Nonetheless, with the jury instructions given, defendant was able to make the jury argument he desired.

Defendant's defense theory was that he fired every shot in self-defense to ward off Jon's aggression and that any shots that hit Beth did so by accident or unintentionally. Defense counsel clearly recapped defendant's theory in his closing argument as follows:

> [Defendant] was acting in self-defense when he pulled the trigger and those bullets came out of the gun firing at [Jon] so he would not die, then it's going to be not guilty the whole way down. Similar principles. Not exactly self-defense but very similar in their nature and application.
>
> . . . .
>
> [I]f you believe [defendant's] story that he wasn't there to rob anybody and that he acted in self-defense, really you don't have any choice in this case, you have to cut this kid loose.
>
> . . . .
>
> [F]or accident . . . . if you guys determine that his shooting at [Jon] was the lawful exercise of self-defense, then the bullets that came out of that gun were done lawfully, and that it would be considered an accident as the definition of the law, not that it was an actual accident, but otherwise lawful conduct is covered under this defense of accident.
>
> It's important this concept is clear, that if you believe that when he pointed that gun—when [defendant] pointed that gun at [Jon], that he did so lawful—that he did so in self-defense, that the fact that those bullets may have hit an innocent bystander, or [Beth], that his belief that he was acting in reasonable—that he was acting in self-defense would be covered under the accident instruction, that lawfully shooting at someone in self-defense covers unintended victims. That's the law, and it's important that you understand it.

The jury found defendant guilty of murder under the felony murder rule, with the underlying felony being the assault on Beth, and of

second-degree murder. The jury verdict could have two meanings, both of which show that the jury rejected defendant's defense. The jury could have believed that defendant intended to shoot Beth. The jury also could have believed that defendant intended to shoot Jon, and hit Beth by accident, but that defendant did not shoot Jon in self-defense.

> It is a well-established principle in this jurisdiction that in reviewing jury instructions for error, they must be considered and reviewed in their entirety. Where the trial court adequately instructs the jury as to the law on every material aspect of the case arising from the evidence and applies the law fairly to variant factual situations presented by the evidence, the charge is sufficient.

*Murrow v. Daniels*, 321 N.C. 494, 497, 364 S.E.2d 392, 395 (1988) (citing *Gregory v. Lynch*, 271 N.C. 198, 203, 155 S.E.2d 488, 492 (1967); then citing *King v. Powell*, 252 N.C. 506, 114 S.E.2d 265 (1960)). Here the jury received instructions that adequately instructed as to the law and on every material aspect of the case arising from the evidence, including defendant's defense theory. Any alleged deficiency in the jury instructions would be harmless.

The trial court instructed the jury on the homicide charges lodged against defendant for the fatal shooting of Jon: first-degree murder based upon malice, premeditation and deliberation, or the felony murder rule; second-degree murder; and voluntary manslaughter. As instructed, first-degree murder and second-degree murder both involve an intentional and unlawful killing with malice. The trial court defined malice to mean "not only hatred, ill will or spite, as it is ordinarily understood, but also . . . a condition of mind which prompts a person to intentionally take the life of another or to intentionally inflict serious bodily harm that proximately results in another person's death without just cause, excuse, or justification." As the trial court instructed,

> to find the defendant guilty of second-degree murder, the State must prove beyond a reasonable doubt that the defendant unlawfully, intentionally and with malice wounded the victim with a deadly weapon proximately causing the victim's death. The State must also prove that the defendant did not act in self-defense, or if the defendant did act in self-defense, the State must prove that the defendant was the aggressor in provoking the fight with intent to kill or inflict serious bodily harm.

Voluntary manslaughter, the last homicide option given to the jury, is an unlawful killing that is still intentional but does not require malice or premeditation and deliberation and instead applies when "the defendant acts in the heat of passion based upon adequate provocation." As stated in the jury instruction, a conviction on voluntary manslaughter may indicate that the jury found that defendant killed in self-defense "but use[d] excessive force under the circumstances or was the aggressor without murderous intent in provoking the fight in which the killing took place." The trial court specifically instructed the jury that "if the State proves beyond a reasonable doubt that the defendant, though otherwise acting in self-defense, was the aggressor, though the defendant had no murderous intent when the defendant entered the fight, the defendant would be guilty of voluntary manslaughter."

Based on defendant's testimony that he shot Jon in self-defense, the trial court instructed the jury on self-defense as to all homicide charges that involved his intent towards Jon as follows:

> The defendant would be excused . . . if, first, the defendant believed it was necessary to kill the victim in order to save the defendant from death or great bodily harm.
>
> And second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary fitness.
>
> In determining the reasonableness of the defendant's belief, you should consider the circumstances as you find them to have existed from the evidence . . . .

The trial court specifically instructed that "[t]he defendant would not be guilty of any murder or manslaughter if the defendant acted in self-defense and if the defendant was not the aggressor in provoking the fight and did not use excessive force under the circumstances."

The trial court then described in detail the definition of "aggressor" for the jury, stating that in order for the jury

> to find the defendant guilty of first-degree murder or second-degree murder, the [S]tate must prove beyond a reasonable doubt, among other things, that the defendant did not act in self-defense or, failing in this, that the defendant was the aggressor with the intent to kill or to inflict serious bodily harm upon the deceased.

The trial court reiterated that, "[i]f the State fails to prove the defendant did not act in self-defense or was the aggressor[,] . . . you may not convict the defendant of either first-degree or second-degree murder." The trial court repeated the jury's option to choose not guilty on all intentional homicide charges if defendant acted in self-defense and was not the aggressor. Defendant still could be convicted of voluntary manslaughter if he, though otherwise acting in self-defense, was the aggressor.

The jury, however, found defendant guilty of second-degree murder, indicating that defendant unlawfully killed Jon with malice and did not act in self-defense. Otherwise, if the jury believed that defendant acted in self-defense, the jury would have chosen not guilty of any murder or voluntary manslaughter.

The jury also found defendant guilty of murder under the felony murder rule. To convict a defendant of first-degree murder on the theory of felony murder, the jury must find, *inter alia*, that the defendant killed the victim while committing or attempting to commit a felony; here the underlying felony was the independent assault on Beth, which the jury found to be assault with a deadly weapon with intent to kill inflicting serious injury. To find defendant guilty of this assault, the jury was instructed that defendant must have "assaulted the victim by intentionally and without justification or excuse shooting [Beth] in the head and arm." This type of assault requires "the specific intent to kill" and includes an attempt to kill the victim by an intentional shot. Within the felony murder rule instruction, the trial court informed the jury that the required intent "may be inferred by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw." Of the assault options, the jury convicted defendant of assault with a deadly weapon with intent to kill inflicting serious injury of Beth even though the jury could have chosen an assault that does not require a specific intent to kill, such as assault with a deadly weapon inflicting serious injury. Since Beth was undisputedly unarmed at the time of the shooting, defendant has no viable self-defense claim against Beth. This assault conviction becomes the underlying basis for murder under the felony murder rule.

Given defendant's testimony that he accidently shot Beth when shooting at Jon because she was "just in his area," at defendant's request, the jury received an "accident" defense instruction on the assault charge. This instruction stated that "[a]n injury is accidental if it is unintentional, occurs during the course of lawful conduct, and does not involve culpable negligence." The accident instruction required the jury to consider whether defendant *unintentionally* shot Beth. As summarized in

defense counsel's jury argument, defendant's theory that he intended to shoot Jon in self-defense and that Beth was simply collateral damage is practically speaking the same argument regardless of whether that claim is categorized as accidently arising out of self-defense or simply an accident.

As the trial court instructed, the State bore the burden to prove "beyond a reasonable doubt that the victim's injury was not accidental." If it did not satisfy that burden of proof, "it would be [the jury's] duty to return a verdict of not guilty." If the jury believed that defendant *unintentionally* shot Beth, it would have found defendant *not* guilty of the intentional assault against Beth, as urged to do by defense counsel during closing argument. The jury was not convinced by the "accident" defense and instead convicted defendant of assault with the specific intent to kill Beth. That verdict indicates that they believed defendant intended to shoot Beth or that defendant's shooting of Jon was unjustified. If the jury believed defendant's theory it would have found him not guilty of all homicide charges and every assault charge. The jury, by finding defendant guilty of both a homicide offense against Jon and the assault against Beth, simply did not believe defendant's theory.

Nonetheless, the majority concludes that the trial court committed prejudicial error when it failed to provide the jury with additional self-defense and transferred-intent instructions for the assault on Beth, and it determines that the jury could have reached a different outcome if given those instructions. In the majority's view, in that different outcome, "perfect self-defense can serve as a defense to the underlying felony for felony murder, and thereby defeat the felony murder charge" and provide "a 'reasonable possibility' that if the trial court had given defendant's proposed self-defense and transferred-intent instructions, the jury would have acquitted him of both the assault charge and the felony murder charge for which the assault served as the underlying felony." In other words, the jury could have concluded that defendant shot Jon in self-defense and that defendant unintentionally shot Beth while defending himself. This argument is essentially the same argument that defendant presented to the jury at trial, which the jury rejected.

Because it appears that defendant was the aggressor, it appears he may not have been entitled to the self-defense instruction at all. The evidence indicates that defendant undisputedly made threats to kill Jon and, when the violence began, defendant was the only one actually holding a gun. Nonetheless, having received the self-defense instruction, the jury rejected defendant's self-defense argument.

The law limits self-defense protection for aggressors, or those who create the deadly situation by their own doing. If a defendant "by his own wrongful act produces a condition of things wherein it becomes necessary for his own safety that he should take life or do serious bodily harm, . . . the law wisely imputes to him his own wrong, and its consequences to the extent that they may and should be considered in determining the grade of offense which but for such acts would never have been occasioned." *State v. Crisp*, 170 N.C. 785, 792, 87 S.E. 511, 515 (1916) (quoting *Reed v. State*, 11 Tex. App. 509, 518 (1882)).

While defendant's testimony was the only substantiation of his claim of self-defense, his testimony at the same time negated that claim. Defendant went into Jon and Beth's home and picked up a gun which caused Jon to ask defendant if defendant was robbing him. Defendant never answered Jon's question and instead threatened to kill Jon. Beth pointed a gun at defendant. Defendant disarmed Beth by threat against Jon. It is undisputed that defendant was the only one holding a gun once Beth disarmed herself. It is only thereafter that the facts come into dispute. Based on defendant's own testimony and the testimony of the surviving victim, the jury heard evidence that defendant was the aggressor and did not act in self-defense. Defendant, based on his testimony, nonetheless received the benefit of the self-defense instruction, and the jury considered defendant's intent toward Jon for every crime. The jury instructions sufficiently captured defendant's essential defense theory, which allowed defense counsel to make his argument to the jury.[1]

The jury considered and discredited the essence of defendant's self-defense theory when it convicted him of second-degree murder instead of voluntary manslaughter. The jury simply decided that defendant intended to harm both victims and was not justified in doing so. Thus, the shot fired at Jon was not "in the proper and prudent exercise of such self-defense" and not "excusable or justifiable." *State v. Dalton*, 178 N.C. 779, 782, 101 S.E. 548, 549 (1919) (quoting 13 R. C. L. tit. Homicide, § 50, 745–46). Any random shot that unintentionally killed an innocent bystander was likewise not "excusable or justifiable." *Id.*

1. Even if the shots fired at Jon unintentionally struck Beth, the trial court's general transferred-intent instruction covers shots defendant fired with either criminal intent towards Jon or shots justified in self-defense. *See State v. Dalton*, 178 N.C. 779, 781–82, 101 S.E. 548, 549 (1919); *id.* at 782, 101 S.E. at 549 (The defendant "is guilty *or innocent* exactly as though the fatal act had caused the death of the person intended to be killed. The intent is transferred to the person whose death has been caused." (quoting 13 R. C. L. tit. Homicide, § 50, 745–46) (emphasis added)). Thus, by definition, transferred intent encapsulates a theory of justification like self-defense as well.

The jury's outcome is supported by the evidence presented and, based on the jury's decisions, additional instructions would not have resulted in a different outcome.

As demonstrated by the verdict, the jury simply was not convinced by defendant's testimony that he only intended to shoot Jon and that he shot Jon in self-defense. The jury's guilty verdict on second-degree murder shows that the jury did not find his self-defense claim credible. Similarly, the jury's finding that defendant assaulted Beth with the intent to kill reflects its view that defendant intended to shoot Beth or that defendant's shooting of Jon was unjustified. The jury considered and rejected defendant's defense. His conviction should be upheld. I respectfully dissent.

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STATE OF NORTH CAROLINA
v.
ANTON THURMAN McALLISTER

No. 221A19

Filed 25 September 2020

**Constitutional Law—effective assistance of counsel—admission of client's guilt—implied—Harbison error**

An implied admission of guilt—just like an express admission—can constitute error under *State v. Harbison*, 315 N.C. 175 (1985), which held that a criminal defendant suffers a per se violation of his constitutional right to effective assistance of counsel when counsel concedes the defendant's guilt to the jury without his prior consent. Therefore, defense counsel's implied admission during closing arguments that defendant was guilty of assault on a female implicated *Harbison*. Counsel's statements implying defendant's guilt were problematic because counsel vouched for the accuracy of defendant's admissions that were in a videotaped statement to the police, gave his personal opinion that there was no justification for defendant's use of force against the victim, and asked the jury to find defendant not guilty of every charged offense except for assault on a female. The matter was remanded for an evidentiary hearing to determine whether defendant knowingly consented in advance to his counsel's implied admission of guilt (and thus whether *Harbison* error existed).

Justice NEWBY dissenting.

Justice ERVIN 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, 265 N.C. App. 309, 827 S.E.2d 538 (2019), finding no error in a judgment entered on 22 August 2016 by Judge Richard S. Gottlieb in Superior Court, Forsyth 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.

*Joshua H. Stein, Attorney General, by Adren L. Harris, Special Deputy Attorney General, for the State-appellee.*

*Joseph P. Lattimore for defendant-appellant.*

DAVIS, Justice.

This Court held in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), that a criminal defendant suffers a per se violation of his constitutional right to effective assistance of counsel when his counsel concedes the defendant's guilt to the jury without his prior consent. In this case, we consider whether *Harbison* error exists when defense counsel impliedly—rather than expressly—admits the defendant's guilt to a charged offense. Based on our determination that the rationale underlying *Harbison* applies equally in such circumstances, we reverse the decision of the Court of Appeals and remand with instructions.

**Factual and Procedural Background**

In January 2015, defendant met a woman named Stephanie Leonard during a group session at Insight, a drug treatment facility in Winston-Salem. Within a week of their introduction, defendant and Leonard began an intimate personal relationship and moved into an apartment together that was paid for by Leonard's mother.

On 16 February 2015, Leonard's mother took Leonard grocery shopping and also gave her $75 to purchase various other items she needed. After returning home at approximately 5:00 p.m., Leonard and defendant consumed a bottle of wine over several hours. Around 9:00 p.m., they decided to walk to a nearby BP gas station to purchase cigarettes. As they approached the gas station, Leonard told defendant that she

wanted to go to a store to purchase another bottle of wine and started walking away from the gas station. Defendant proceeded to curse and yell at Leonard because he realized that she was in possession of additional money and had not informed him of this fact. In an effort to placate defendant, Leonard gave him $20, at which point he struck her in the face and caused her to fall to the ground and lose her wallet. The two of them continued to argue as defendant began hitting her repeatedly in the face because she could not locate her wallet. He then grabbed Leonard by the arm and started pulling her back toward their apartment. Christopher Jackson, the cashier working at the gas station during the altercation, called for assistance from law enforcement officers after he saw that a man had "jerked" a woman outside the store and heard "the sound like of [sic] somebody hitting somebody."

Upon returning to the apartment, defendant shoved Leonard through the doorway and told her to be quiet. After unsuccessfully searching for Leonard's wallet inside the apartment, defendant resumed hitting her. Believing that Leonard was hiding the money on her person, defendant removed her clothes. Leonard later described being dragged and repeatedly struck by defendant, which resulted in her bleeding from her face.

After initially telling defendant that she did not know what had happened to her wallet, Leonard subsequently stated that the wallet might be in the kitchen. As they made their way to the kitchen, Leonard attempted to escape the apartment but was caught by defendant. Defendant then dragged her into the living room at which point he got on top of her and resumed hitting her. He then placed his hand over Leonard's mouth and nose and attempted to suffocate her, at which point Leonard began to fight back by hitting defendant in the face and biting his fingers. Leonard's fingers also went into defendant's mouth, and he bit them. Defendant then attempted to suffocate Leonard with a pillow until she made her body go limp to make him believe that she had lost consciousness.

Shortly thereafter, defendant forced Leonard, whose face and hands were covered in blood, to enter the bathroom. The two of them climbed into the bathtub where defendant washed the blood off of Leonard's body. Upon exiting the bathroom, defendant and Leonard got into bed, and they engaged in sexual intercourse.

On the following day, law enforcement officers from the Winston-Salem Police Department arrived at the apartment to investigate the events that had occurred the previous evening. One of the officers observed injuries to Leonard's hands and face, which he photographed.

He also took pictures of numerous blood stains found throughout the apartment. Later that evening, officers located defendant, who agreed to be taken to the police station for a non-custodial interview concerning an investigation involving a missing moped that was unrelated to his altercation with Leonard.

During the interview, which was videotaped and later played for the jury at defendant's trial, he was asked a number of questions about the incident that had occurred the previous night involving Leonard. Defendant stated that when he and Leonard were outside the gas station, he got "kinda mad" at her for wanting to go to another store because he was cold and wanted to go home. When asked why they never actually entered the gas station, defendant responded that he had become "pissed off" at Leonard for not appropriately communicating with him, which eventually led to him pushing her to the ground. He acknowledged that "[he] was wrong for pushing her." Defendant stated that upon their return to the apartment, Leonard communicated her desire to go back out again to buy wine, which prompted the two of them to begin arguing.

Defendant told officers that he and Leonard then got into a "tussle" during which Leonard "retaliate[ed]" in a "rough" manner. Defendant admitted that he "backhanded her" in the face at one point but that he did not mean to hurt her. Defendant stated that for approximately ten minutes there was "a lot of grabbing and tussling," and that afterwards, the two went into the bathroom to clean Leonard up because she was "spitting blood" as a result of the altercation.

When asked if Leonard had been injured in any way during the incident, defendant responded that the following morning he observed that her bottom lip was swollen from when he had "smacked her in the lip." Defendant added that Leonard had bitten his hand when he "grabbed her in the mouth" and that around this same time he had likewise bitten her hand. Later in the interview, defendant denied having forced Leonard to engage in sexual intercourse but stated the following: "[I]f I smacked [her] ass up, then I smacked [her]; I can take the rap for that." Following the interview, defendant was arrested and taken into custody.

Defendant was indicted on charges of (1) habitual misdemeanor assault—based on the underlying offense of assault on a female,[1] (2)

1. "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, or G.S. 14-34, 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." N.C.G.S. § 14-33.2 (2019).

assault by strangulation, (3) second-degree sexual offense, and (4) second-degree rape. The case came on for trial in Superior Court, Forsyth County, on 15 August 2016.

Prior to opening statements, the State informed the trial court of a potential *Harbison*-related issue regarding defendant's statements to law enforcement officers during his interview, and the following conversation ensued:

> [THE STATE]: The only other thing I would mention, and this would—just in anticipation opening [sic] statement, the defendant did make some admissions in his statement to law enforcement. I don't know if any of that is something that defense counsel is going to address in opening but if so we probably need to have an inquiry regarding—
>
> THE COURT: *Harbison*.
>
> [THE STATE]: Right—admissions prior to.
>
> The trial court then engaged in the following exchange with defense counsel:
>
> THE COURT: Does the defense have any *Harbison* issues?
>
> [DEFENSE COUNSEL]: Not immediately, Your Honor. That's not something I was expecting yet.
>
> THE COURT: Are you expecting to make any comments in your opening with regard to admissions?
>
> [DEFENSE COUNSEL]: Well, Judge, we have a lot to say about how and why he was interrogated which may brush up against—
>
> THE COURT: Well, can you get more specific than that. Because I want to make sure your client understands that the State has the burden to prove each and every element of each claim and if you're going to step into an admission during opening then I need to make sure that he understands that and he's authorized you to do that.
>
> [DEFENSE COUNSEL]: Not in opening, I can stipulate to that.
>
> THE COURT: Well—okay. Let's rereview that when we get back from lunch. . . .

No other discussion of any *Harbison*-related issues occurred on the record during the remainder of the trial. The State presented testimony from Leonard, Leonard's mother, Jackson, four law enforcement officers and two detectives with the Winston-Salem Police Department, two forensic services technicians from the Winston-Salem Police Department and the forensics services squad supervisor, a nurse and a physician's assistant from the Forsyth Medical Center emergency department who treated Leonard's physical injuries, and a nurse from the Forsyth Medical Center who performed a sexual assault examination on Leonard. Defendant did not present any evidence at trial.

During his closing argument, defense counsel referred to defendant's 17 February 2015 videotaped interview with law enforcement officers, which had been entered into evidence by the State and played for the jury during the State's case in chief. Specifically, defense counsel stated the following:

> Now, the [State] went to great length to use the defendant's statements. These are his words, what he said. Well, let's start with the conditions under which he gave those statements. 9:00 at night, surrounded by cops, pulled off the street to make a voluntary statement. He goes in. He starts talking to them about the moped, which was all a ruse as we know, and indicates he's had a few beers but they ask him "you want to talk? Sure I'll talk. I want to help you out any way I can," is what he kept saying. You heard him admit that things got physical. You heard him admit that he did wrong, God knows he did. They got in some sort of scuffle or a tussle or whatever they want to call it, she got hurt, he felt bad, and he expressed that to detectives. Now, they run with his one admission and say "well, then everything Ms. Leonard—everything else Ms. Leonard said must be true." Because he was being honest, they weren't honest with him.

Later in his closing argument, defense counsel stated to the jurors that "you may dislike Mr. McAllister for injuring Ms. Leonard, that may bother you to your core but he, without a lawyer and in front of two detectives, admitted what he did and only what he did. He didn't rape this girl." Defense counsel concluded his closing argument by stating the following:

> I asked you at the beginning [to] make the State prove their case, make them. Have they? Anything but conjecture and

> possibility? All I ask is that you put away any feelings you have about the violence that occurred, look at the evidence and think hard. Can you convict this man of rape and sexual offense, assault by strangulation based on what they showed you? You can't. Please find him not guilty.

On 22 August 2016, the jury returned a verdict finding defendant guilty of assault on a female and not guilty of all other charged offenses. The trial court entered judgment on one count of habitual misdemeanor assault[2] and sentenced defendant to a term of fifteen to twenty-seven months imprisonment.

Defendant failed to give notice of appeal following his conviction. On 11 August 2017, however, he filed a petition for writ of certiorari to the Court of Appeals, which was allowed. At the Court of Appeals, defendant argued that his defense counsel improperly conceded his guilt to the assault on a female charge during closing arguments, thereby resulting in a denial of his constitutional right to effective assistance of counsel pursuant to this Court's decision in *Harbison*.

In a divided opinion, the Court of Appeals majority held that defendant was not denied his right to effective assistance of counsel. *State v. McAllister*, 265 N.C. App. 309, 827 S.E.2d 538 (2019). The majority concluded that where "counsel admits an element of the offense, but does not admit defendant's guilt of the offense, counsel's statements do not violate *Harbison* to show a violation of the defendant's Sixth Amendment rights." *Id.* at 317, 827 S.E.2d at 544.

Judge Arrowood dissented, expressing his belief that defendant had shown a per se violation of his right to effective assistance of counsel when defense counsel elected "to highlight specific evidence that defendant physically injured the alleged victim and argued to the jury that defendant honestly admitted to police what he did." *Id.* at 323, 827 S.E.2d at 547 (Arrowood, J., dissenting). Judge Arrowood further stated his view that "[c]onsidering defense counsel's argument in full, it is evident defense counsel acknowledged defendant's guilt on the assault on a female charge in an attempt to cast doubt on the evidence of the more serious charges." *Id.* On 11 June 2019, defendant filed a notice of appeal based upon the dissent with this Court.[3]

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2. Defendant stipulated prior to trial to the existence of two prior assault convictions

3. Defendant also filed a petition for discretionary review in which he sought review of an additional issue, which was denied by the Court..

**Analysis**

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held that "the right to counsel is the right to the effective assistance of counsel," *id.* at 686 (citation omitted), and announced that in certain contexts "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice," *id.* at 692. In *Harbison*, this Court held that defense counsel's admission of his client's guilt to a charged offense during an argument to the jury—without the client's prior consent—was one such example of an act so likely to be prejudicial that it results in per se reversible error. *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507–08.

In the present appeal, defendant contends that this is precisely what occurred at his trial in that his defense counsel impliedly conceded his guilt to the charge of assault on a female without his prior consent. In order to analyze his argument, we deem it instructive to review in some detail both the *Harbison* decision and other cases from this Court applying the principles set out therein to situations in which a defendant's attorney was alleged to have conceded his client's guilt to a charged offense during his argument to the jury.

In *Harbison*, the defendant was charged with the murder of his ex-girlfriend's boyfriend and the assault of his ex-girlfriend after shooting and severely injuring her. *Harbison*, 315 N.C. at 177, 337 S.E.2d at 505–06. The defendant's theory at trial was that he acted in self-defense in shooting the victims, but during closing arguments, his defense counsel stated the following:

> Ladies and Gentlemen of the Jury, I know some of you and have had dealings with some of you. I know that you want to leave here with a clear conscious [sic] and I want to leave here also with a clear conscious [sic]. I have my opinion as to what happened on that April night, and I don't feel that [the defendant] should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first[-] degree [murder].

*Id.* at 177–78, 337 S.E.2d at 506 (first and second alterations in original). On appeal, the defendant asserted that defense counsel's admission of his guilt and request that the jury find him guilty of manslaughter constituted ineffective assistance of counsel in violation of his Sixth Amendment rights. *Id.* at 178, 337 S.E.2d at 506.

In addressing the defendant's argument, we noted that "[a]lthough this Court still adheres to the application of the *Strickland* test in claims of ineffective assistance of counsel, there exist 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.' " *Id.* at 179, 337 S.E.2d at 507 (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)). We proceeded to hold that "when counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed." *Id.* at 180, 337 S.E.2d at 507.

Our ruling was based largely on the principle that a defendant has an absolute right to plead not guilty—a decision that must be made knowingly and voluntarily by the defendant himself and only after he is made aware of the attendant consequences of doing so. *Id.* We stated that "[w]hen counsel admits his client's guilt without first obtaining the client's consent, . . . [t]he practical effect is the same as if counsel had entered a plea of guilty without the client's consent" and denied his client the right to have his guilt determined by a jury. *Id.* Accordingly, we concluded that "ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Id.* at 180, 337 S.E.2d at 507–08. As a result, we awarded the defendant a new trial. *Id.* at 180–81, 337 S.E.2d at 508.

We reached a similar result in *State v. Matthews*, 358 N.C. 102, 591 S.E.2d 535 (2004). In *Matthews*, the defendant was indicted for, among other things, first-degree murder. During closing arguments, defense counsel stated the following:

> You have a possible verdict of guilty of second-degree murder. And then the third possibility is not guilty. I've been practicing law twenty-four years and I've been in this position many times. And this is probably the first time I've come up in front of the jury and said *you ought not to even consider that last possibility*.
>
> And I'm not up here and I'm not telling you that that's a possibility. I'm not saying you should find Mr. Matthews not guilty. That's very unusual. And it kind of cuts against the grain of a defense lawyer. But I'm telling you in this case you ought not to find him not guilty because he is guilty of something.

*Id.* at 106, 591 S.E.2d at 539. Defense counsel later stated that "[w]hen you look at the evidence . . . you're going to find that he's guilty of second-degree murder." *Id.*

In determining that these statements constituted a per se violation of the defendant's constitutional right to effective assistance of counsel, we held that "[b]ecause the record does not indicate defendant *knew* his attorney was going to concede his guilt to second-degree murder, we must conclude defendant's attorney made this concession without defendant's consent, in violation of *Harbison*." *Id.* at 109, 591 S.E.2d at 540. We therefore concluded that the defendant was entitled to a new trial. *Id.* at 109, 591 S.E.2d at 540–41.

The defendant in *State v. Fisher*, 318 N.C. 512, 350 S.E.2d 334 (1986), was indicted for first-degree murder after stabbing the victim. During closing arguments, defense counsel—during the course of describing the elements of various homicide offenses—stated that "[s]econd[-] degree [murder] is the unlawful killing of a human being with no premeditation and no deliberation but with malice, illwill. You heard [the defendant] testify, there was malice there . . . ." *Id.* at 533, 350 S.E.2d at 346. Defense counsel went on to inform the jury that the verdict sheet would enable it to find defendant not guilty, despite the defendant's presence at the scene of the killing. *Id.*

On appeal from his conviction for first-degree murder, the defendant asserted that he had suffered a violation of his constitutional rights under *Harbison* due to the fact that his defense counsel admitted to the jury that the killing was done with malice. *Id.* at 532, 350 S.E.2d at 346. We held that the case was "factually distinguishable from *Harbison* in that the defendant's counsel never clearly admitted guilt" but rather simply "stated there was malice [and] . . . told the jury that they could find the defendant not guilty." *Id.* at 532–33, 350 S.E.2d at 346.

In *State v. Thomas*, 329 N.C. 423, 407 S.E.2d 141 (1991), the defendant was convicted of first-degree murder and first-degree sexual offense. On appeal, he argued that he suffered from ineffective assistance of counsel because his defense counsel conceded that he participated in the charged sexual act without his permission. During closing arguments, defense counsel stated the following:

> Don't let me mislead you to think that I in any way condone what occurred in the relationship in respect to the sexual assault. . . .
>
> Again, let me tell you that I don't in any way condone what [the defendant] did in that respect . . . .

> In fact, it is illegal to do exactly what Dr. Hudson described to you was done in this case, that is, to insert the telephone receiver into her vagina after she was dead. . . . It is the crime of . . . desecrating the body of the person that is dead.

*Id.* at 441, 407 S.E.2d at 153.

We held that those statements were not an admission of the defendant's guilt as to the sexual offense charge because, "[u]nlike defense counsel in *Harbison*, who admitted his client's guilt and asked the jury to return a verdict of guilty of manslaughter . . . defense counsel here did not admit defendant's guilt to first-degree sexual offense or to any lesser included offense." *Id.* at 442, 407 S.E.2d at 153. We observed that defense counsel had merely informed the jury that the act alleged would only constitute the offense of desecrating a corpse—a crime with which the defendant was not charged. *Id.* at 442, 407 S.E.2d at 153–54.

In *State v. Greene*, 332 N.C. 565, 422 S.E.2d 730 (1992), the defendant was charged with first-degree murder after slapping a child in the head and ultimately killing him. The defendant testified at trial and admitted to slapping the victim but also stated that he did not mean to harm him. *Id.* at 570, 422 S.E.2d at 732. One of the State's witnesses testified that the defendant had told him that he had hit and kicked the child. *Id.* at 573, 422 S.E.2d at 734. During closing argument, defense counsel stated the following:

> [The defendant] didn't have anything to do with me being here. Don't use what I've said and done against him. Wouldn't be right. I've done my best. I've plowed the field. And in my opinion, you probably won't turn him free—find him not guilty. And you very easily, I can see, that that slap was negligent and harder than it ought to have been and at that time, it was reckless disregard, and the judge will charge you on that at the end of those four [sic]— involuntary manslaughter. I don't say you should find that, but I concede—sitting on this jury—but I contend, ladies and gentlemen, there's no premeditation and deliberation.

*Id.* at 570, 422 S.E.2d at 733.

Upon the conclusion of defense counsel's closing argument, the prosecutor approached the bench and expressed his concern that defense counsel's closing argument may have been improper on the grounds that it constituted an admission of guilt without the defendant's

consent. *Id.* The trial court then asked the defendant if he wanted to give his counsel another opportunity to argue that he was innocent of all charges, and the defendant answered affirmatively. *Id.* at 571, 422 S.E.2d at 733. Defense counsel then addressed the jury as follows:

> Now, again, coming to the close, the defendant contends there is no evidence to find him guilty of first[-]degree murder—that is, got to find all six or five—no premeditation, nobody—nothing showing he even, for a blink of a minute, thought about killing somebody. No deliberation going through his mind. Now is the time to kill him. No malice. No hatred. No deliberately, like a baseball bat as they illustrated in other things. No malice. In fact, all love before and after. All love.
>
> As to voluntary manslaughter, no intent down there. No intent to murder. No reckless disregard of life. Again, all love except the blows and the reflex motion, and it was too hard.
>
> But we don't contend—he didn't know it was going to be too hard. I argue and contend that he didn't know it was going to be too hard. He didn't know what he was doing.
>
> Most of us, up before this, didn't know that a slap on the face could kill anybody. I mean, even a young child. Busted his lip, he may.
>
> Now, it's been some people with nursing training and all, I'm sure. Those are not supposed to be a lot of training, but even involuntary manslaughter.
>
> We contend that [the defendant] ought to leave here a free man. . . .

*Id.* The defendant was found guilty of first-degree murder.

The defendant argued on appeal that defense counsel—without his consent—had represented to the jury that it should find him guilty of involuntary manslaughter in violation of *Harbison*. In rejecting his argument, we noted that although counsel told the jury that it could find that the "slap was negligent," that it was "harder than it ought to have been," and that "it was reckless disregard," he ultimately stated "I don't say you should find that." *Id.* at 571–72, 422 S.E.2d 733. We explained that there was no per se constitutional violation because "the argument was that the defendant was innocent of all charges but if he were to be

found guilty of any of the charges it should be involuntary manslaughter because the evidence came closer to proving that crime than any of the other crimes charged." *Id.* at 572, 422 S.E.2d at 733–34. Accordingly, we held that "[t]his is not the equivalent of asking the jury to find the defendant guilty of involuntary manslaughter and the rule of *Harbison* does not apply." *Id.* at 572, 422 S.E.2d at 734. We further stated that "[w]e do not find anything . . . that approaches an admission of guilt" because "[t]he clear and unequivocal argument was that the defendant was innocent of all charges." *Id.*

In *State v. Harvell*, 334 N.C. 356, 432 S.E.2d 125 (1993), the defendant was indicted for first-degree murder and convicted of that offense. He contended on appeal that his defense counsel had improperly told the jury that it should find him guilty of voluntary manslaughter. *Id.* at 361, 432 S.E.2d at 127. During closing arguments, defense counsel argued that the defendant was not guilty of first-degree or second-degree murder and then stated the following: "I submit to you that based upon the evidence presented in terms of a criminal offense, that the one that most closely—or the one that is most closely kind [sic] to this is the offense of voluntary manslaughter, that being there was provocation." *Id.* We held that defense counsel's statements did not constitute *Harbison* error because "defendant's counsel never conceded that the defendant was guilty of any crime" and did not say anything that was "the equivalent of admitting that the defendant was guilty." *Id.* at 361, 432 S.E.2d at 128. Instead, counsel simply stated that if the evidence did tend to show that the defendant had committed a crime, then that crime was voluntary manslaughter. *Id.*

The defendant in *State v. Hinson*, 341 N.C. 66, 459 S.E.2d 261 (1995), was convicted of first-degree murder. He argued on appeal that his defense counsel had conceded his guilt during closing argument by referring to "Mr. Brown"—an individual who had testified that he was with the defendant when the killing took place and had taken a plea deal in exchange for his testimony—as being responsible for the murder, thereby implicating the defendant in the crime. *Id.* at 78, 459 S.E.2d at 268. Specifically, defense counsel stated the following:

> Mr. Brown, when you [sic] going to stand up and take responsibility, Mr. Brown? Mr. Brown wasn't a tool. He was the engine. He was the engine that made everything possible. He is the tool without which [the defendant] could not . . . even have gotten out of his yard. But Mr. Brown's going to be home for Christmas apparently.

*Id.* at 77–78, 459 S.E.2d at 268 (first alteration in original). We held that this case was "wholly distinguishable from *Harbison*" because "nowhere in the record did defense counsel concede that [the] defendant himself committed any crime whatsoever" and that, to the contrary, he maintained throughout the trial that Mr. Brown—rather than the defendant—had killed the victim. *Id.* at 78, 459 S.E.2d at 268.

In *State v. Wiley*, 355 N.C. 592, 565 S.E.2d 22 (2002), the defendant was convicted of first-degree murder and argued on appeal that *Harbison* error had occurred during his defense counsel's opening statement when counsel stated that the defendant was at the scene of the crime and that physical evidence linked him to the scene. *Id.* at 618, 565 S.E.2d at 41. In her opening statement, defense counsel asserted that the identity of the killer and the credibility of the witnesses were the chief issues in the trial. *Id.* Later in her remarks, defense counsel stated the following:

> [DEFENSE COUNSEL:] You will only hear one person testify who was present or anywhere near present at the time that happened, and that person is Alicia Doster. She was fourteen at the time it happened. She was a runaway who stole her mother's car and went to stay in an abandoned house in the neighborhood. It was a house where many of the young kids stayed and hung out. . . .
>
> There's evidence that there was smoking and drinking and some drug use going on at that house. Now, she'll tell you that three people were involved and, you know, that's not disputed. Three people were apparently involved in that. The first one is Alicia Doster, and she has made a deal with the State of North Carolina to testify in this case. . . .
>
> Now, the second person who you'll hear about is [the defendant], and he's sitting in this courtroom today . . . .
>
> Now, there is one [more] person who you won't see here, you won't hear from him, you won't see him, you won't hear anything from him at all, and that is Justin Pallas. And he's not present in the courtroom and he won't offer any testimony at all.
>
> . . . .

> [DEFENSE COUNSEL]: He was present at the time that all of this happened, and Miss Doster will certainly testify to that. . . .
>
> . . . .
>
> You will hear and see plenty of physical evidence, as well. *Not much of this physical evidence will put [the defendant] at the scene of the crime* or at the scene where the automobile was disposed of. There will be no fingerprints on the car that belonged to [the defendant]. You will hear that six cigarette butts were found in the car. Three of those belonged to two different males who were not identified. Don't know who put those cigarettes in the car or when. Don't know whose they were.
>
> . . . .
>
> . . . Nothing else was found in the scene—at the scene that belonged to [the defendant]. None of [the defendant's] fingerprints were found on the alleged murder weapon.

*Id.* at 618–19, 565 S.E.2d at 41–42 (first and third alterations in original) (emphasis added).

In rejecting the defendant's argument based on *Harbison*, we noted that "[a]dmitting a fact is not equivalent to an admission of guilt." *Id.* at 620, 565 S.E.2d at 42 (citing *State v. Strickland*, 346 N.C. 443, 454, 488 S.E.2d 194, 200 (1997)). We further determined that "[a]lthough it is arguable that defense counsel signaled [that] some physical evidence would be presented linking defendant to [the victim's] car, counsel made it clear that such evidence was of dubious validity because its origin was unknown." *Id.* at 619, 565 S.E.2d at 42. Accordingly, we held that "[p]laced in context, [defense counsel's] statements hardly constitute an admission." *Id.*

In *State v. Roache*, 358 N.C. 243, 595 S.E.2d 381 (2004), the defendant was convicted of five counts of first-degree murder. On appeal, he argued that a *Harbison* violation had occurred because during opening statements, his counsel recounted how the defendant had shot another man in the head during the same crime spree that included the killings for which he was on trial. *Id.* at 278, 595 S.E.2d at 404–05. We held that defense counsel's statement was not a per se violation of the defendant's right to effective assistance of counsel. *Id.* at 284, 595 S.E.2d at 408. We noted that "[t]he act in *Harbison* that this Court found merited a new

trial was counsel's admission of legal guilt as to the crime for which the defendant had been indicted and for which the defendant was being tried." *Id.* at 283, 595 S.E.2d at 408. As such, because the shooting referenced by defense counsel in the opening statement "was not at issue in this trial . . . this defendant was not harmed in the same manner as the defendant in *Harbison*." *Id.*

The defendant in *State v. Gainey*, 355 N.C. 73, 558 S.E.2d 463 (2002), was indicted for first-degree murder, first-degree kidnapping, and robbery with a dangerous weapon. While making his opening statement and closing argument to the jury, defense counsel noted the defendant's involvement in the events surrounding the death of the victim and argued that "if he's guilty of anything, he's guilty of accessory after the fact. He's guilty of possession of a stolen vehicle." *Id.* at 93, 558 S.E.2d at 476. On appeal following a conviction on all charges, the defendant argued that he was denied the right to effective assistance of counsel because his defense counsel conceded his guilt without first receiving his express permission to do so. *Id.* at 92, 558 S.E.2d at 476. We held that defense counsel's statements did not rise to the level of *Harbison* error. *Id.* at 93, 558 S.E.2d at 476.

> [A]rgument that the defendant is innocent of all charges, but if he is found guilty of any of the charges it should be of a lesser crime because the evidence came closer to proving that crime than any of the greater crimes charged, is not an admission that the defendant is guilty of anything, and the rule of *Harbison* does not apply.
>
> . . . .
>
> In the present case, defense counsel never conceded that defendant was guilty of any crime. Counsel merely noted defendant's involvement in the events surrounding the death of the victim, arguing that "if he's guilty of anything, he's guilty of accessory after the fact. He's guilty of possession of a stolen vehicle." This was hardly the equivalent of admitting that defendant was guilty of the crime of murder. Defendant has taken defense counsel's statements out of context to form the basis of his claim, and he fails to note the consistent theory of the defense that defendant was not guilty.

*Id.* at 92–93, 558 S.E.2d at 476.

In *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1 (2005), the defendant was convicted of first-degree murder, and on appeal he raised a *Harbison* claim after his defense counsel conceded his guilt to the lesser-included offense of second-degree murder without his prior consent. *Id.* at 694, 617 S.E.2d at 32. During closing arguments, defense counsel stated the following:

> And what I'm telling you folks right now, that right there is enough for you to have reasonable doubt. The fact that you have one expert who is saying [sic] can't form the specific intent to either rob or kill and the [S]tate's own expert comes in and says, I can't rule it out 100 percent, there's your reasonable doubt right there. That's all you need. That's the key to this case. That's all you need. You weigh the evidence out. You make that determination. But right there is all the reasonable doubt you would need in this case.
>
> . . . .
>
> Again, I submit to you, as I think I said earlier, not every homicide is a first[-]degree murder case, and there's plenty of second[-]degree murder cases out there that are a whole lot bloodier and a whole lot more gory and a whole lot more horrific than first[-]degree murder cases. *The only difference is a second[-]degree murder case lacks that specific intent element, and I submit to you that's where we're at in this case, folks.* There is so much going on, there is so much going on in this case. There is plenty of hooks for you to hang your hat on and find reasonable doubt in this case.

*Id.* at 694–95, 617 S.E.2d at 32. We held that the above-quoted statement was "distinguishable from that made by the *Harbison* attorney and does not amount to ineffective assistance" because defense counsel was not conceding guilt, but rather "was arguing to the jury that[ ] without specific intent, the most serious crime for which defendant could be convicted would be second-degree murder." *Id.* at 696, 617 S.E.2d at 33.

Finally, the defendant in *State v. Goss*, 361 N.C. 610, 651 S.E.2d 867 (2007), was convicted of first-degree murder. The sole issue for resolution at trial was whether he was guilty of first-degree or second-degree murder. During closing arguments, defense counsel stated that "[defendant's] statement alone guarantees he'll serve a substantial amount of

time in prison and face the terrible consequences of a *first[-]degree* murder conviction." *Id.* at 622, 651 S.E.2d at 875 (first alteration in original). At the end of the closing argument, defense counsel asked the jury to "return the verdict that the evidence supports, *guilty of second[-]degree murder*." *Id.* at 625, 651 S.E.2d at 876.

The defendant asserted on appeal that his defense counsel's reference to first-degree murder in the initial statement quoted above constituted a concession of his guilt of that crime in violation of *Harbison*. *Id.* at 622–23, 651 S.E.2d at 875. We held that there was no error under *Harbison* because "the only issue even contested at defendant's trial was whether he had committed first-degree or second-degree murder, and trial counsel's entire closing argument was directed toward undercutting the first two theories of first-degree murder advanced by the State." *Id.* at 625, 651 S.E.2d at 876. With regard to defense counsel's assertion that the defendant was guaranteed to suffer the consequences of a *first-degree* murder conviction, we noted that "it appears that [defense counsel's] reference to first-degree murder was accidental and went unnoticed," and we stated that this Court would not "interpret *Harbison* to allow a defendant to seize upon a *lapsus linguae* uttered by trial counsel in order to be awarded a new trial." *Id.*

* * *

Having reviewed this Court's case law applying *Harbison* in the context of concessions of guilt alleged to have been made by defense counsel during closing argument, we must now apply those principles to the present case. Defendant's argument under *Harbison* relates to his attorney's statements to the jury during closing argument that were relevant to the offense of assault on a female—the only one of the four charges for which he was convicted. "The elements of an assault on a female are (1) an assault (2) upon a female person (3) by a male person (4) who is at least eighteen years old." *State v. Wortham*, 318 N.C. 669, 671, 351 S.E.2d 294, 296 (1987) (citing N.C.G.S. § 14-33(b)(2)). The trial court instructed the jury that in order to convict defendant of assault on a female, the State was required to prove that (1) defendant "intentionally assaulted the alleged victim by hitting her"; (2) that "the alleged victim was a female person"; and (3) that the "defendant was a male person at least 18 years of age."

Based on our review of the trial transcript, it is readily apparent that the goal of defense counsel in his closing argument was to rebut the State's evidence in support of the rape, sexual offense, and assault by strangulation charges—offenses that carried penalties significantly

greater than that for the crime of assault on a female. During his closing argument, defense counsel never expressly mentioned the charge of assault on a female but repeatedly addressed the other three charges against defendant. At the conclusion of the closing argument, he asked the jury to find defendant not guilty of the charges of "rape[,] sexual offense, [and] assault by strangulation." Once again, no mention was made by him of the assault on a female charge.

Thus, this is not a case like *Matthews* or *Harbison* itself in which the defendant's attorney expressly asked the jury to find him guilty of a specific charged offense. We agree with defendant, however, that a *Harbison* violation is not limited to such instances and that *Harbison* should instead be applied more broadly so as to also encompass situations in which defense counsel impliedly concedes his client's guilt without prior authorization.

The Court of Appeals reached a similar conclusion in *State v. Spencer*, 218 N.C. App. 267, 720 S.E.2d 901 (2012). In *Spencer*, the defendant was convicted of eluding arrest with a motor vehicle, assault with a deadly weapon on a government official, and resisting a public officer. *Id.* at 267, 720 S.E.2d at 902. The defendant argued on appeal that his defense counsel had conceded his guilt to the charges of resisting a public officer and eluding arrest by making certain admissions to the jury without obtaining his prior consent. *Id.* at 275, 720 S.E.2d at 906. During closing arguments, counsel stated that the defendant "chose to get behind the wheel after drinking, and he chose to run from the police" and that the law enforcement officer "was already out of the way and he just kept on going, kept running from the police." *Id.* The Court of Appeals determined that defense counsel's "statements cannot be construed in any other light than admitting the defendant's guilt." *Id.* at 276, 720 S.E.2d at 906.

We believe that defense counsel's statements here similarly amounted to an implied admission of defendant's guilt of the crime of assault on a female. During the closing argument, counsel stated the following with regard to defendant's videotaped interview: "You heard him admit that things got physical. You heard him admit that he did wrong. God knows he did." Shortly thereafter, he stated with regard to defendant's videotaped interview that defendant was "being honest" with law enforcement officers about his altercation with Leonard. Later in the closing argument, defense counsel stated the following: "Jury, what I'm asking you to do is you may dislike Mr. McAllister for injuring Ms. Leonard, that may bother you to your core but he, without a lawyer and

in front of two detectives, admitted what he did and only what he did." At the conclusion of the closing argument, he stated the following:

> I asked you at the beginning [to] make the State prove their case, make them. Have they? Anything but conjecture and possibility? All I ask is that you put away any feelings you have about the violence that occurred, look at the evidence and think hard. Can you convict this man of rape and sexual offense, assault by strangulation based on what they showed you? You can't. Please find him not guilty.

The above-quoted statements are problematic for several reasons. First, defense counsel attested to the accuracy of the admissions made by defendant in his videotaped statement by informing the jurors that defendant was "being honest." During that interview, defendant admitted—among other things—that he (1) pushed Leonard to the ground outside of the gas station; (2) "backhanded" her in the face; (3) "smacked her in the lip"; (4) "grabbed her in the mouth" and also bit her hand; and (5) "smacked [her] ass up" and that he "can take the rap for that." By representing to the jury that defendant was "being honest" when he made those statements during the interview, defense counsel vouched for their truth, and, as such, there was no reason for the jury to question the validity of any of defendant's admissions.

Second, defendant's attorney not only reminded the jury that defendant had admitted he "did wrong" during the altercation in which Leonard got "hurt," but defense counsel then proceeded to also state his own personal opinion that "God knows he did [wrong]"—thereby implying that there was no justification for defendant's use of force against Leonard. Shortly thereafter, he acknowledged that the jurors might "dislike [defendant] for injuring Ms. Leonard" and that defendant's actions "may bother you to your core." He also referred to the "violence" that had occurred during the altercation.

Finally, at the very end of his closing argument, defense counsel asked the jury to find defendant not guilty of every offense for which he had been charged except for the assault on a female offense. By virtue of defense counsel overtly seeking a not guilty verdict as to the three more serious charges against defendant, yet conspicuously omitting mention of the assault on a female charge—indeed, by not expressly mentioning that charge at all during the entire closing argument—the only logical inference in the eyes of the jury would have been that defense counsel was implicitly conceding defendant's guilt as to that charge.

This Court's post-*Harbison* case law has suggested that a per se violation of a defendant's right to effective assistance of counsel can occur where defense counsel's statements are the functional equivalent of an outright admission of the defendant's guilt as to a charged offense. *See Strickland*, 346 N.C. at 454, 488 S.E.2d at 200 ("Defense counsel's statements were not the equivalent of asking the jury to find defendant guilty of any charge, and therefore, *Harbison* does not control."); *Harvell*, 334 N.C. at 361, 432 S.E.2d at 128 (holding that there was no *Harbison* error where defense counsel's statements were "not the equivalent of admitting that the defendant was guilty of any crime"); *Greene*, 332 N.C. at 572, 422 S.E.2d at 734 ("This is not the equivalent of asking the jury to find the defendant guilty[,] . . . and the rule of *Harbison* does not apply."). Today, we expressly hold that such an implied admission of guilt can, in fact, constitute *Harbison* error.

The Court of Appeals majority applied an overly strict interpretation of *Harbison* here by confining its analysis to (1) whether defense counsel had expressly conceded defendant's guilt of the assault on a female charge; or (2) whether counsel's statements "checked the box" as to each element of the offense.[4] We believe, however, that such an approach reflects too cramped of a construction of *Harbison*. Although an overt admission of the defendant's guilt by counsel is the clearest type of *Harbison* error, it is not the exclusive manner in which a per se violation of the defendant's right to effective assistance of counsel can occur. In cases where—as here—defense counsel's statements to the jury cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense, *Harbison* error exists unless the defendant has previously consented to such a trial strategy. In such cases, the defendant is prejudiced in the same manner and to the same degree as if the admission of guilt had been overtly made. Thus, our decision in this case is faithful to the rationale underlying *Harbison*.

We recognize that on the facts of this case, such a trial strategy may well have been in defendant's best interests given his acquittal of the three most serious charges against him. But that does not change the fact that under *Harbison* and its progeny defense counsel was required to obtain the informed consent of defendant before embarking on such a strategy that implicitly acknowledged to the jury his guilt of a separately charged offense.

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4. For example, the Court of Appeals majority noted that defense counsel did not concede that the age requirement for the offense of assault on a female had been satisfied. However, the age of defendant was not in dispute.

Finally, we emphasize that a finding of *Harbison* error based on an implied concession of guilt should be a rare occurrence. However, the unique circumstances contained in the record before us make this the unusual case in which such a finding is appropriate.

In reaching a different result, the dissent falls into the trap of conflating the *Harbison* issue with the entirely separate issue of whether defense counsel's strategy was effective in terms of obtaining an acquittal on the more serious offenses with which defendant was charged. In so doing, the dissent misses the point. As noted above, the relevant question under *Harbison* is *not* whether conceding defendant's guilt as to the least serious offense was a sound trial strategy. Rather, our inquiry must focus on whether defense counsel admitted defendant's guilt to a charged offense without first obtaining his consent.

The dissent fails in its attempt to characterize defense counsel's statements as a request for the jury to find defendant not guilty of the assault on a female charge. This failure is hardly surprising given that defense counsel—among other things—affirmed the veracity of defendant's statements in his videotaped interview in which he admitted to having engaged in assaultive conduct toward Leonard and then conceded that defendant had acted wrongfully. The unmistakable message sent by defense counsel to the jury was that defendant was, in fact, guilty of the assault on a female charge—a message that was magnified by defense counsel's failure to ask for a not guilty verdict as to that charge as he did for the other three charges. The dissent's interpretation of defense counsel's closing argument is based on a tortured construction of the words used by defendant's attorney—words that could not rationally have been understood by the jury as anything other than a concession of defendant's guilt as to this charge.

Finally, the dissent makes the assertion that as a result of our decision today defense attorneys will be hesitant to engage in the strategy of acknowledging that their client engaged in some form of moral wrongdoing in the hope of both enhancing their own credibility and personalizing the defendant in the eyes of the jury. This reluctance will exist, the dissent predicts, due to a fear that their representation will be deemed to be constitutionally deficient if they employ such an approach. The dissent's concern is misguided, however, as nothing in our decision today precludes such a strategy. But if that tactic includes either an explicit or implicit admission of the defendant's guilt of a charged offense, then prior consent from the defendant must be obtained. It is the defendant—not his attorney—whose liberty is placed at risk as a result of such a strategic decision.

* * *

Having determined that defense counsel impliedly conceded defendant's guilt of the offense of assault on a female, the only remaining issue is whether he did so without defendant's prior consent. The record reflects that before trial, the State advised the trial court of the potential for a *Harbison* issue in light of the statements contained in defendant's videotaped interview. In response, the trial court made a brief inquiry to defense counsel as to whether his opening statement was likely to trigger any *Harbison*-related concerns, noting that defendant's consent would be required before any admissions of guilt could be made to the jury. After defense counsel replied that he would not be making any such admissions during his opening statement, the trial court stated its intention to revisit the issue following the lunch recess. The record does not reveal any further discussion taking place during the remainder of the trial as to the possibility of *Harbison*-related issues arising.

This Court has stated "that an on-the-record exchange between the trial court and the defendant is the preferred method of determining whether the defendant knowingly and voluntarily consented to an admission of guilt during closing argument," but we have also "declined to define such a colloquy as the sole measurement of consent." *State v. Thompson*, 359 N.C. 77, 119–20, 604 S.E.2d 850, 879 (2004) (citing *State v. McDowell*, 329 N.C. 363, 386–87, 407 S.E.2d 200, 213 (1991)). Moreover, we have made clear that the absence of any indication in the record of defendant's consent to his counsel's admissions will not—by itself—lead us to "presume defendant's lack of consent." *State v. Boyd*, 343 N.C. 699, 722, 473 S.E.2d 327, 339 (1996); *see State v. House*, 340 N.C. 187, 196, 456 S.E.2d 292, 297 (1995) ("This Court will not presume from a silent record that defense counsel argued defendant's guilt without defendant's consent.").

As a result, we believe that the appropriate remedy is to remand this case to the Superior Court, Forsyth County, for an evidentiary hearing to be held as soon as practicable for the sole purpose of determining whether defendant knowingly consented in advance to his attorney's admission of guilt to the assault on a female charge. *See State v. Morganherring*, 350 N.C. 701, 713, 517 S.E.2d 622, 630 (1999); *see also State v. Thomas*, 327 N.C. 630, 631, 397 S.E.2d 79, 80 (1990). Following the evidentiary hearing, the trial court shall expeditiously make findings of fact and conclusions of law and enter an order. The trial court shall then certify the order, the findings of fact and conclusions of law, and the transcript of the hearing to this Court. *See Thomas*, 327 N.C. at 631, 397 S.E.2d at 80.

**Conclusion**

We reverse the decision of the Court of Appeals and remand with instructions as set forth above.

REVERSED AND REMANDED.

Justice NEWBY dissenting.

A criminal defense attorney may concede that a defendant has engaged in bad behavior without admitting that the defendant has committed one of the crimes charged. Indeed, it may be in the defendant's best interests for his attorney to do so. Admitting to the jury that a defendant has behaved poorly can enhance defense counsel's credibility and help the jury better understand what is really at issue in a case. The majority's decision today limits defense counsel's ability to pursue this common strategy and starts the Court down a slippery slope with no obvious stopping point. The majority, content to refrain from considering whether defense counsel's statements actually harmed defendant, leaps beyond our precedent and says we must assume the statements were prejudicial. Such an assumption should be reserved for the rare, blatant case in which defense counsel makes an explicit admission of guilt or uses words that constitute the functional equivalent of such an explicit admission. That sort of admission did not occur in this case. Instead, defendant's counsel merely noted that defendant did wrong, but ultimately urged the jury to find him not guilty of all charges. A successful ineffective assistance of counsel claim based on facts like those at issue here requires proof of prejudice in accordance with the *Strickland* standard. I respectfully dissent.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to effective assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), the Supreme Court of the United States held that a defendant's right to effective assistance of counsel is violated when the defense counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and when those errors deprived the defendant of a fair trial. The Court left open the possibility, though, that in some cases a defense counsel's error is so egregious that prejudice to the defendant may be presumed. *Id.* at 692, 104 S. Ct. at 2067.

In *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985), this Court, recognizing a defendant's right to plead not guilty, explained

that prejudice to a defendant may be presumed when defense counsel concedes a defendant's guilt to the jury without the defendant's consent. When defense counsel does so, "the harm [to the defendant] is so likely and so apparent that the issue of prejudice need not be addressed." *Id.* In *Harbison*, this Court presumed prejudice to the defendant because defense counsel explicitly recommended that the jury find the defendant guilty of one of the crimes charged. *Id.* at 177–78, 337 S.E.2d at 506.

The central issue in this case is whether defense counsel's statements were so likely to harm defendant that the issue of prejudice need not even be addressed. *Id.* at 180, 337 S.E.2d at 507. According to this Court's precedent, such a result only occurs if defense counsel explicitly, or through the functional equivalent of an explicit statement, admits the defendant's guilt of a charged offense. *State v. Strickland*, 346 N.C. 443, 454, 488 S.E.2d 194, 200 (1997) (holding that *Harbison* did not control because "[d]efense counsel's statements were not the equivalent of asking the jury to find defendant guilty of any charge").

Defense counsel's statements in this case do not rise to that level of egregiousness. In fact, defense counsel's overall strategy in closing argument appears sound.[1] Defendant faced multiple serious charges, including charges of rape, sexual offense, and assault by strangulation, with indisputable facts that he had in fact injured the victim. Thus, the challenge to defense counsel was to help the jury appreciate its legal duty while at the same time personalize his client. During closing argument, defense counsel noted the following to the jury: "You heard [defendant] admit that things got physical. You heard him admit that he did wrong. God knows he did." Defense counsel also noted that the jury "may dislike [defendant] for injuring Ms. Leonard." Finally, at the end of his argument, he told the jury the following:

> I asked you at the beginning [to] make the State prove their case, make them. Have they? Anything but conjecture and possibility? All I ask is that you put away any feelings you have about the violence that occurred, look at the evidence and think hard. Can you convict this man

1. The majority asserts that emphasizing the soundness of defense counsel's strategy misses the point. Certainly it is true that defense counsel may not directly admit a defendant's guilt to the jury without the defendant's consent, no matter how good of a strategy it may be. But in this case defense counsel clearly did not admit defendant's guilt in that manner. The question then is whether counsel's statements were still so egregious that harm to defendant may be presumed without further inquiry. In cases like this one when a *Harbison* violation is not obvious, the *Strickland* analysis applies and the soundness of defense counsel's trial approach matters

> of rape and sexual offense, assault by strangulation based on what they showed you? You can't. Please find him not guilty.

The majority holds that through these statements defense counsel impliedly admitted defendant's guilt to the charge of assault on a female. That decision contradicts both the language in which defense counsel's argument is couched and this Court's repeated application of *Harbison*.

This Court has rejected almost every challenge brought under *Harbiso*n, because rarely are defense counsel's statements so egregious that harm to the defendant can simply be assumed without any further inquiry. The only instances in which we have held that such a violation occurred have been when defense counsel specifically and explicitly urged the jury to find the defendant guilty of a crime. *See Harbison*, 315 N.C. at 177–78, 337 S.E.2d at 506 (addressing statements made by defense counsel telling the jury that "I don't feel that [the defendant] should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first[-]degree [murder]"); *State v. Matthews*, 358 N.C. 102, 106, 591 S.E.2d 535, 539 (2004) (addressing a statement made by defense counsel telling the jury that "you ought not to find him not guilty because he is guilty of something").

But in cases in which defense counsel merely admits that the defendant committed a moral wrong, or only concedes the existence of an element of an offense, no *Harbison* violation has occurred. In *State v. Fisher*, 318 N.C. 512, 350 S.E.2d 334 (1986), the defendant was on trial for first-degree murder. Defense counsel admitted to the jury that the defendant acted with malice, an element of second-degree murder. *Id.* at 533, 350 S.E.2d at 346. Nevertheless, this Court held that there was no per se violation of the right to effective assistance of counsel under *Harbison* because the defense counsel never admitted guilt but instead only admitted an element of a crime while ultimately maintaining the defendant's innocence. *Id.* at 532–33, 350 S.E.2d at 346.

In *State v. Thomas*, 329 N.C. 423, 441, 407 S.E.2d 141, 153 (1991), defense counsel expressed to the jury multiple times that he did not condone the defendant's behavior and even described the defendant's actions as a sexual assault. This Court held that there was no *Harbison* violation because defense counsel did not specifically admit that the defendant committed one of the crimes charged—first-degree murder or first-degree sexual offense. *Id.* at 442, 407 S.E.2d at 153–54.

Finally, in *State v. Greene*, 332 N.C. 565, 573, 422 S.E.2d 730, 734 (1992), the defendant was on trial for first-degree murder after slapping a child and killing him. Defense counsel first conceded that the jury would likely find that the defendant acted with reckless disregard for the victim's life, but he later asserted that the defendant did not actually act in that manner. *Id.* at 570–71, 422 S.E.2d at 733. This Court held that there was no *Harbison* violation because even though defense counsel said that the jury may find reckless disregard by the defendant, defense counsel did not ultimately argue that the jury should do so. *Id.* at 571–72, 422 S.E.2d at 733–34.

In this case defense counsel did not claim that defendant should be found guilty of assault on a female. Nor did his statements functionally constitute a request that the jury should so find. Defense counsel did state that he thought defendant "did wrong" by engaging in a physical altercation with Leonard. But to say an accused person did something wrong is not the functional equivalent of saying that the person committed one of the crimes charged. And, looking at his statements more comprehensively, defense counsel did not insinuate that defendant committed one of the crimes charged. Shortly before stating that defendant "did wrong," defense counsel explained that the case simply involved "two people in a new relationship that got drunk and got in a fight and an argument, it's as basic as that."

Indeed, defense counsel was pursuing a reasonable and effective strategy of jury persuasion. Defendant was charged with several serious offenses. In such cases it is often in a defendant's best interests for his counsel to concede to the jury that the defendant has behaved poorly. Doing so can enhance defense counsel's credibility and enable counsel to direct the jury's attention not to the question of whether the defendant has done anything morally wrong, but whether the defendant has committed one of the charged crimes. In this case that strategy appears to have been effective: the jury acquitted defendant of all of the most serious charged offenses. So, viewed in context, defense counsel's statements of defendant's wrongdoing and of defendant's injuring Leonard simply conceded the undisputed facts—that defendant's conduct was far from perfect and that defendant was, along with Leonard herself, involved in activity that resulted in Leonard's injuries. Those concessions did not admit defendant's guilt of any of the charges.

Further, defense counsel did not admit defendant's guilt of assault on a female simply by failing to emphasize defendant's innocence of that crime during the closing argument. At the end of his closing argument,

defense counsel specifically expressed that the jury could not return a guilty verdict on the charges of rape, sexual offense, or assault by strangulation. The majority decides that the omission of the assault on a female charge from that list is glaring and obvious and would cause a jury to believe that defense counsel thought the jury should return a guilty verdict on that charge. That analysis is purely speculative and fails to take the statement in context and in accordance with the manner in which it is couched. First, it is reasonable to suspect that an attorney may omit one item from a list of charges simply by accident. And it is quite possible that the jury did not even notice the omission. Second, defense counsel at the end of his closing argument appears to have urged the jury to return a verdict of not guilty, without excepting any of the charges from that request. Naturally understood, defense counsel's statements during closing argument urged not-guilty verdicts across the board. And, in any event, it was not unreasonable for defense counsel to especially emphasize the importance of returning not-guilty verdicts on the most serious offenses charged.

The majority also emphasizes that defense counsel told the jury that defendant had been "honest" to police, in reference to a conversation in which defendant told police about various acts of physical violence he committed against Leonard. First, this statement comports with what appears to have been defense counsel's overall theory of the case—that defendant and Leonard got in a fight, that defendant committed a moral wrong, but that defendant is innocent of the crimes charged. And, again, this Court has held that even admissions by defense counsel of elements of offenses do not amount to admissions of the defendant's guilt and so are not per se reversible error under *Harbison*. *See*, *e.g.*, *Fisher*, 318 N.C. at 532–33, 350 S.E.2d at 346. In fact, one wonders what the majority believes defense counsel should have said about defendant's statements to police. Because this statement by defense counsel was not *Harbison* error, we cannot say that this is the sort of case in which no inquiry into prejudice is required.

Ultimately, of course, the majority holds that it is the *combination* of all of these decisions or mishaps by defense counsel that constituted an assertion to the jury that defendant is guilty of assault on a female. However, all of that together is still not enough to prove a *Harbison* violation. The point of our holding in *Harbison* is that in the rare case a defense counsel's statements are so egregious that harm to the defendant is near certain and it would be a waste of judicial resources to determine whether the defendant was actually prejudiced. *See Harbison*, 315 N.C. at 179, 337 S.E.2d at 507 (quoting *United States v. Cronic*, 466 U.S. 648,

658, 104 S. Ct. 2039, 2046 (1984)) ("Although this Court still adheres to the application of the *Strickland* test in claims of ineffective assistance of counsel, there exist 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.' "). So, the question is not whether defense counsel's actions could have led the jury to believe that defendant was guilty of assault on a female; the question is whether defense counsel's statements were so serious, because they were the functional equivalent of a direct and explicit admission of defendant's guilt, that significant harm to defendant is self-evident. Never have we found a *Harbison* error on facts as tenuous as those on which the majority rests its holding today.

Defense attorneys have a limited collection of tools at their disposal when in front of juries. One of these is to admit obvious mistakes made by the defendant. Doing so enhances the defense counsel's credibility, personalizes the defendant, and helps focus the jury's attention on the legal questions it must answer. Before today defense counsel could leverage their experience and discretion to pursue such a strategy as long as they did not admit the defendant's guilt without his consent. Today the majority substantially removes this tool from defense attorneys. Moving forward, defense counsel will hesitate to pursue this reasonable strategy out of fear that their representation will be ruled constitutionally deficient. Here, defense counsel's statements, viewed in their context and their entirety, do not admit defendant's guilt of any of the offenses with which he was charged. The majority wrongly holds that *Harbison* error occurred and thus presumes without further consideration that the fundamental fairness of defendant's trial was impaired. That conclusion is simply inconsistent with this Court's jurisprudence and excuses defendant from making a showing of prejudice in accordance with *Strickland* when he should be required to do so. The decision of the Court of Appeals should be affirmed.

I respectfully dissent.

Justice ERVIN joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
CHRISTINA SHEA WALTERS

No. 548A00-2

Filed 25 September 2020

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order dismissing defendant's motion for appropriate relief filed pursuant to the Racial Justice Act entered on 25 January 2017 by Judge W. Erwin Spainhour in Superior Court, Cumberland County. Heard in the Supreme Court on 26 August 2019.

*Joshua H. Stein, Attorney General, by Danielle Marquis Elder, Senior Deputy Attorney General, and Jonathan P. Babb, Special Deputy Attorney General, for the State-appellee.*

*Shelagh R. Kenney and Malcolm Ray Hunter Jr. for defendant-appellant.*

*James E. Coleman Jr. for Charles Becton, Charles Daye, Valerie Johnson, Irving L. Joyner, Floyd B. McKissick Jr., Cressie H. Thigpen Jr., and Fred J. Williams, amici curiae.*

*Jeremy M. Falcone, Paul F. Khoury, Robert L. Walker, and Madeline J. Cohen for Former State and Federal Prosecutors, amicus curiae.*

*Carlos E. Mahoney, Jin Hee Lee, and W. Kerrel Murray for NAACP Legal Defense and Educational Fund, Inc., amicus curiae.*

*Janet Moore for National Association for Public Defense, amicus curiae.*

*James E. Williams Jr., Burton Craige, and Bidish Sarma for North Carolina Advocates for Justice, amicus curiae.*

*Grady Jessup for North Carolina Association of Black Lawyers, amicus curiae.*

*Cynthia F. Adcock for North Carolina Council of Churches, amicus curiae.*

*Lisa A. Bakale-Wise and Irving Joyner for North Carolina State Conference of the NAACP, amicus curiae.*

*Professors Robert P. Mosteller & John Charles Boger, amici curiae.*

*Robert P. Mosteller for Retired Members of the North Carolina Judiciary, amici curiae.*

*Joseph Blocher for Social Scientists, amici curiae.*

PER CURIAM.

For the reasons stated in *State v. Robinson*, No. 411A94-6, 2020 WL 4726680 (N.C. Aug. 14, 2020), the decision of the trial court is vacated and this case is remanded to the Superior Court, Cumberland County, for the reinstatement of defendant's sentence of life imprisonment without parole.

VACATED AND REMANDED.

Justice ERVIN concurring in the result.

If the Court were addressing for the first time the issue of whether the trial court's order should be reversed and the sentence of life imprisonment imposed upon defendant by Judge Spainhour reinstated on double jeopardy and related grounds, I would dissent from that decision and hold, for the reasons stated in my dissenting opinion in *State v. Robinson*, No. 41194-6, 2020WL 4726680 (N.C. Aug. 14, 2020), that the trial court's order should be reversed and this case remanded to the Superior Court, Cumberland County, for a new Racial Justice Act proceeding in accordance with this Court's decision in *State v. Ramseur*, 374 N.C. 658, 843 S.E.2d 106 (2020), and our 2015 order in this case. The decision of the majority in *Robinson* is, however, the law of North Carolina to which I am now bound. For this reason, I concur in the result reached by the Court in this case.

Justice DAVIS joins in this concurring opinion.

Justice NEWBY dissenting.

For the reasons stated in my dissenting opinions in *State v. Robinson*, No. 411A94-6, 2020 WL 4726680 (N.C. Aug. 14, 2020), and *State v. Ramseur*, 374 N.C. 658, 843 S.E.2d 106 (2020), I respectfully dissent.

**STATE v. JOHNSON**

[375 N.C. 487 (2020)]

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| STATE OF NORTH CAROLINA | ) |
| | ) |
| v. | ) |
| | ) |
| JEREMY JOHNSON | ) |

No. 197P20

SPECIAL ORDER

Defendant's petition for a writ of supersedeas is allowed. Defendant's petition for discretionary review is allowed for the limited purpose of remanding this matter to the Court of Appeals for reconsideration of the trial court's 14 November 2018 Order denying defendant's motion to dismiss and motion to suppress evidence based on the claim that the officer's decision to initially seize defendant violated his rights under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and the parallel provisions of the North Carolina Constitution. Defendant's motion to amend his petition for discretionary review is dismissed as moot.

The remand for reconsideration of the trial court's 14 November 2018 Order is necessary because the Court of Appeals opinion concluded that there was no violation of defendant's right to equal protection under the law because the law enforcement officer had "the reasonable suspicion necessary for the subsequent stop of defendant" under the Fourth Amendment. *See State v. Johnson*, 840 S.E.2d 539 (N.C. Ct. App. 2020) (unpublished). We remand to the Court of Appeals for an examination of defendant's equal protection claims under the state and federal constitutions separate from its analysis of his Fourth Amendment claims.

By order of the Court in Conference, this the 23rd day of September, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 25th day of September, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
~~Assistant~~ Clerk

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| STATE OF NORTH CAROLINA | ) | |
| | ) | |
| v. | ) | From Catawba County |
| | ) | |
| JOHNNY WARREN SPEIGHT | ) | |

No. 161P20

SPECIAL ORDER

"[N]o petition for discretionary review may be filed in any post-conviction proceeding under Article 89 of Chapter 15A of the General Statutes." N.C. R. App. P. 15(a). Accordingly, we construe defendant's *pro se* petition for discretionary review as a petition for writ of certiorari. Defendant's *pro se* motion to proceed *in forma pauperis* is allowed and defendant's *pro se* motion to appoint counsel is dismissed as moot. Defendant's petition for writ of certiorari is allowed for the following limited purpose:

Defendant, in his *pro se* petition, asserts that he relied upon the promise of the prosecuting attorney that his sentence was to run concurrently with another sentence then-currently being served in another state and he provides a document which, on its face, appears to indicate that the prosecuting attorney had the same understanding. This promise, if honored by the sentencing court, would have been contrary to the law of this state. If defendant relied on such a promise in deciding to plead guilty, then defendant may be entitled to withdraw his guilty plea and face trial or negotiate a different plea agreement. *See State v. Wall*, 348 N.C. 671, 676, 502 S.E.2d 585, 588 (1998).

As a result, the 30 October 2019 order of the Superior Court, Catawba County, denying defendant's motion for appropriate relief is vacated and the case is remanded to that court for an evidentiary hearing and reconsideration of defendant's claim. *See State v. McHone*, 348 N.C. 254, 258, 499 S.E.2d 761, 763 (1998).

By Order of the Court in Conference, this the 23rd day of September, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 25th day of September, 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

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

25 SEPTEMBER 2020

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| 16P20 | State of North Carolina, *ex rel.* Roy Cooper, Attorney General v. Kinston Charter Academy, a North Carolina Non-Profit Corporation; Ozie L. Hall, Jr., Individually and as Chief Executive Officer of Kinston Charter Academy; and Demyra McDonald Hall, Individually and as Board Chair of Kinston Charter Academy | 1. Plts' PDR Under N.C.G.S. § 7A-31<br>2. Def's (Ozie L. Hall, Jr.) Pro Se Conditional PDR Under N.C.G.S. § 7A-31<br>3. Def's (Kinston Charter Academy) Conditional PDR Under N.C.G.S. § 7A-31 | 1. Allowed<br>2. Allowed<br>3. Allowed<br>**Davis, J., recused** |
| 27A20 | In the Matter of K.D.C. and A.N.C. | Guardian *ad Litem*'s Motion to Deem Brief Timely Filed | Allowed |
| 69A06-4 | State v. Terraine Sanchez Byers | 1. State's Motion for Temporary Stay<br>2. State's Petition for Writ of Supersedeas<br>3. State's Notice of Appeal Based Upon a Dissent<br>4. State's Motion to Amend Record on Appeal | 1. Allowed **01/15/2019**<br>2. Allowed **01/16/2019**<br>3. ---<br>4. Dismissed as moot<br>**Ervin, J., recused** |
| 79P20 | State v. Quavis Jerome Clyde | 1. Def's Notice of Appeal Based Upon a Constitutional Question<br>2. Def's PDR Under N.C.G.S. § 7A-31<br>3. State's Motion to Dismiss Appeal | 1. ---<br>2. Denied<br>3. Allowed |
| 86A02-2 | State v. Bryan Christopher Bell | 1. Def's Motion to Hold in Abeyance the Time in which to File Petition for Writ of Certiorari<br>2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Onslow County<br>3. 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<br>4. Def's Motion for Leave to File Reply in Support of Petition for Writ of Certiorari | 1. Special Order **01/24/2013**<br>2.<br>3. Special Order **04/29/2020**<br>4. Denied **08/13/2020** |

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

25 SEPTEMBER 2020

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| 109P17-7 | In re Olander R. Bynum | Petitioner's Pro Se Motion to Dismiss Appeal and Remand for 400 Dollar Damage Payment | Dismissed |
| 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 to Admit Esperanza Segarra Pro Hac Vice<br>2. Def's Motion to Admit David A. Sullivan Pro Hac Vice | 1. Allowed **09/04/2020**<br>2. Allowed **09/04/2020** |
| 140P20 | State v. David Jedediah Nyeplu | Def's PDR Under N.C.G.S. § 7A-31 | Denied |
| 142P20 | State v. Brock Allen Clark | Def's PDR Under N.C.G.S. § 7A-31 | Denied |
| 156P20 | State v. David Warren Taylor | 1. State's Motion for Temporary Stay<br>2. State's Petition for Writ of Supersedeas<br>3. State's PDR Under N.C.G.S. § 7A-31 | 1. Allowed **04/07/2020**<br>2. Allowed<br>3. Allowed |
| 158P20 | State v. Michael Addib Nazzal | 1. Def's PDR Under N.C.G.S. § 7A-31<br>2. State's PDR Under N.C.G.S. § 7A-31 | 1. Denied<br>2. Denied |
| 161P20 | State v. Johnny Warren Speight | 1. Def's Pro Se Motion for PDR Under N.C.G.S. § 7A-31<br>2. Def's Pro Se Motion to Proceed *In Forma Pauperis*<br>3. Def's Pro Se Motion to Appoint Counsel | 1. Special Order<br>2. Special Order<br>3. Special Order |
| 165P20 | State v. Myleick Shawn Patterson | 1. Def's Pro Se Motion for PDR<br>2. Def's Pro Se Motion for Appropriate Relief<br>3. Def's Pro Se Motion to Appoint Counsel | 1. Denied<br>2. Dismissed without prejudice<br>3. Dismissed as moot |
| 169P20-2 | State v. Fernando Hernandez | Def's Pro Se Motion to Dismiss Charges | Dismissed |

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

25 SEPTEMBER 2020

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| 180A17-2 | Kim and Barry Lippard v. Larry Holleman and Alan Hix | 1. Plts' Notice of Appeal Based Upon a Dissent<br>2. Plts' Notice of Appeal Based Upon a Constitutional Question<br>3. Plts' PDR as to Additional Issues<br>4. Defs' Motion to Dismiss Notice of Appeal Based Upon a Dissent<br>5. Defs' Motion to Dismiss Notice of Appeal Based Upon a Constitutional Question<br>6. Defs' Motion to Admit Seth James Kraus Pro Hac Vice | 1. ---<br>2. ---<br>3. Denied<br>4. Allowed<br>5. Allowed<br>6. Allowed |
| 182A20 | Ernest Nichols v. Administrative Office of the Courts, 7th Judicial District, Edgecombe County | Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question | Dismissed *ex mero motu* |
| 186P17-4 | State v. Lenwood Lee Paige | 1. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA<br>2. Def's Pro Se Motion to Proceed *In Forma Pauperis* | 1. Dismissed<br>2. Allowed<br>**Hudson, J., recused** |
| 197P20 | State v. Jeremy Johnson | 1. Def's Motion for Temporary Stay<br>2. Def's Petition for Writ of Supersedeas<br>3. Def's PDR Under N.C.G.S. § 7A-31<br>4. Def's Motion to Amend PDR | 1. Allowed **05/11/2020**<br>2. Special Order<br>3. Special Order<br>4. Dismissed as moot |
| 224A20 | In re D.A.A.R. and S.A.L.R. | Guardian *ad Litem*'s Motion to Strike Section II and Section III of Respondent-Mother's Reply Brief | Denied **09/22/2020** |
| 226P20 | Molly Schwarz v. St. Jude Medical, Inc., St. Jude Medical S.C., Inc., Duke University, Duke University Health Systems, Inc., Eric Delissio, Thomas Weber, M.D., and Ted Cole | 1. Plt's Notice of Appeal Based Upon a Constitutional Question<br>2. Plt's PDR Under N.C.G.S. § 7A-31<br>3. Defs' (St. Jude Medical, Inc., et al) Motion to Dismiss Appeal<br>4. Plt's Motion to Amend Notice of Appeal and PDR | 1. ---<br>2. Denied<br>3. Allowed<br>4. Dismissed as moot |

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

25 SEPTEMBER 2020

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| 229P20 | State v. Dwight Scott McClure | 1. Def's PDR Under N.C.G.S. § 7A-31<br>2. State's Motion to Deem Response to PDR Timely Filed | 1. Denied<br>2. Allowed |
| 233A19 | In the Matter of A.B.C. | Respondent-Mother's Petition for Rehearing | Denied **09/21/2020** |
| 239P20 | State v. Dwight Edward White | 1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Cabarrus County<br>2. Def's Pro Se Motion to Proceed *In Forma Pauperis*<br>3. Def's Pro Se Motion to Appoint Counsel | 1. Dismissed<br>2. Allowed<br>3. Dismissed as moot |
| 256P20 | State v. Perry L. Pitts | 1. Def's Notice of Appeal Based Upon a Constitutional Question<br>2. Def's PDR Under N.C.G.S. § 7A-31<br>3. State's Motion to Dismiss Appeal | 1. ---<br>2. Denied<br>3. Allowed |
| 263PA18-2 | State v. Cedric Theodis Hobbs, Jr. | Def's Motion for Supplemental Briefing | Allowed **08/26/2020** |
| 272P20 | State v. Raul Zamudio Perez | 1. Def's Petition for Writ of Certiorari to Review Order of the COA<br>2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Cabarrus County | 1. Denied<br>2. Denied |

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

25 SEPTEMBER 2020

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| 273P20 | Ronald Hoag and Holly Hoag; Jeremy Gonzalez and Kristen Gonzalez; William Harrell and Kathryn Harrell; Eric Finical and Sally Finical; James Lawless and Lisa Lawless; Sandra Hardee; Diane Semer; Joe McDowell and Lynell McDowell; Scott Pritchard and Donna Pritchard; Vincent Fischer and Patricia Fischer; Michael Bowman and Josie Bowman; John Lowe and Nelda Lowe; Beech Cove Subdivision Homeowner's Association, Inc.; Holly Ridge Homeowner's Association; and Moss Bend Homeowner's Association, Inc. v. County of Pitt; Bill Clark Homes of Greenville, LLC; and Umberto G. Fontana | 1. Plts' (Ronald Hoag, Holly Hoag, William Harrell, Kathryn Harrell, Eric Finical, Sally Finical, James Lawless, Lisa Lawless and Diane Semer) PDR Under N.C.G.S. § 7A-31<br>2. Plts' (Ronald Hoag, Holly Hoag, William Harrell, Kathryn Harrell, Eric Finical, Sally Finical, James Lawless, Lisa Lawless and Diane Semer) Motion to Accept PDR's Filing as Timely | 1. Denied<br>2. Dismissed as moot<br>**Davis, J., recused** |
| 274P15-8 | State v. Robert K. Stewart | Def's Pro Se Motion for Motion of Recusal Be Heard En Banc | Dismissed |
| 292A20 | State v. Donald Eugene Hilton | 1. Def's Notice of Appeal Based Upon a Dissent<br>2. Def's PDR as to Additional Issues<br>3. State's PDR Under N.C.G.S. § 7A-31 | 1. ---<br>2. Allowed<br>3. Allowed |
| 307P20 | Marisa Mucha v. Logan Wagner | 1. Def's Notice of Appeal Based Upon a Constitutional Question<br>2. Def's PDR Under N.C.G.S. § 7A-31 | 1. Retained<br>2. Allowed |
| 310P20 | State v. Eric Leonard Spinks | Def's PDR Under N.C.G.S. § 7A-31 | Denied |
| 312P20 | State v. John Lewis Jackson, Jr. | Def's PDR Under N.C.G.S. § 7A-31 | Denied |

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

25 SEPTEMBER 2020

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| 315P20 | State v. Vinson Pernell Lindsey | Def's Pro Se Motion for Declaration in Support of Racial Injustice by Guilford Court and Counsel | Dismissed |
| 318P20 | State v. Eric Pittman | Def's Pro Se Petition for Writ of Habeas Corpus | Denied **08/21/2020** |
| 322A20 | In the Matter of B.S. | Respondent-Father's Motion to Deem Appellant's Brief Timely Filed | Allowed **08/25/2020** |
| 326P20 | Robert E. Monroe, as Administrator of the Estate of Naka Hamilton v. Rex Hospital, Inc. d/b/a Rex Hospital, Rex Healthcare, UNC Rex Hospital, UNC Rex Healthcare, UNC Rex Hematology Oncology Associates, and Henry Cromartie, III, M.D. | Def's (Henry Cromartie, III, M.D.) Motion for Madeleine M. Pfefferle to Withdraw as Counsel | Allowed **08/21/2020** |
| 333P20 | Caymus Construction Company, Inc., and Kevin Thomas Quick v. John J. Janowiak and Kathleen L. Janowiak | Def's PDR Under N.C.G.S. § 7A-31 | Denied |
| 337A20 | Loretta Nobel v. Foxmoor Group, LLC, Mark Griffis, David Robertson | 1. Plt's Notice of Appeal Based Upon a Dissent<br>2. Def's (David Robertson) PDR Under N.C.G.S. § 7A-31<br>3. Plt's Motion to Stay Briefing Schedule and Set Briefing Deadlines | 1. ---<br>2. Denied<br>3. Allowed **08/20/2020** |
| 340A20 | In the Matter of M.V. | 1. Respondent-Father's Motion to Amend Certificate of Service to Record on Appeal<br>2. Respondent-Father's Motion to Withdraw Appeal<br>3. Respondent-Father's Motion to Waive Costs | 1. Dismissed as moot **08/24/2020**<br>2. Allowed **08/24/2020**<br>3. Allowed **08/24/2020** |

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

25 SEPTEMBER 2020

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| 341P20 | State v. Tymik Daijon Lasenburg | 1. Def's Petition for Writ of Certiorari to Review Order of the COA | 1. |
| | | 2. Def's Petition for Writ of Certiorari to Review Decision of District Court, Wake County | 2. |
| | | 3. Def's Petition for Writ of Habeas Corpus | 3. Denied **07/28/2020** |
| | | 4. Def's Petition for Writ of Mandamus (or Prohibition) | 4. |
| | | 5. Def's Motion to Submit Treatises | 5. |
| | | 6. Def's Motion for Temporary Stay | 6. Denied **08/18/2020** |
| | | 7. Def's Petition for Writ of Supersedeas | 7. |
| | | 8. Def's Motion to Suspend Appellate Rules | 8. |
| | | 9. Def's Motion for Leave of Court to Submit Transcript and Recording | 9. |
| | | 10. Def's Motion to Amend Certificates of Service | 10. |
| | | 11. Def's Motion to Submit Compact Disc | 11. |
| | | 12. Def's Motion to Substitute Motion to Suspend the Rules | 12. |
| | | 13. Def's Petition for Writ of Habeas Corpus | 13. Denied **09/15/2020** |
| | | 14. Def's Motion to Remove Filing From Electronic Document Library | 14. |
| | | 15. Def's Motion to Submit Certified Transcript | 15. |
| 343A19 | In the Matter of J.D. | 1. State's Motion for Leave to View Exhibits Filed Under Seal | 1. Allowed **08/17/2020** |
| | | 2. Def's Motion to Seal Oral Argument Recording | 2. Allowed **08/17/2020** |
| 345P20 | State v. David Brandon Lee | 1. Def's Notice of Appeal Based Upon a Constitutional Question | 1. --- |
| | | 2. Def's PDR Under N.C.G.S. § 7A-31 | 2. Denied |
| | | 3. State's Motion to Dismiss Appeal | 3. Allowed |
| 346P19 | State v. Lamont Edgerton | Def's PDR Under N.C.G.S. § 7A-31 | Denied |

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

25 SEPTEMBER 2020

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| 356A19 | In the Matter of K.M.W. and K.L.W. | 1. Respondent-Mother's Motion Requesting Oral Argument<br>2. Petitioner's Motion to Continue Oral Argument<br>3. Petitioner's Motion in the Alternative to Decide the Case Without Oral Argument | 1. Allowed **09/11/2020**<br>2. Denied **09/11/2020**<br>3. Denied **09/11/2020** |
| 357P20 | In the Matter of Calvin Taylor | Plt's Pro Se Motion for Prompt Execution of Requested Order | Dismissed |
| 360A09 | State v. Hasson Jamaal Bacote | Def's Motion to Allow Counsel to Withdraw | Allowed **08/31/2020** |
| 361P20 | Rachel E. Williams v. Enterprise Holdings, Inc., EAN Services, LLC, EAN Holdings, LLC, Enterprise Leasing Company Southeast, LLC | 1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question<br>2. Plt's Pro Se PDR Under N.C.G.S. § 7A-31<br>3. Defs' Motion to Dismiss Appeal<br>4. Plt's Pro Se Motion for Extension of Time to File Response<br>5. Plt's Pro Se Motion for Extension of Time to Respond to Motion to Dismiss<br>6. Plt's Pro Se Motion for Court Acceptance of Documents Under Seal | 1.<br>2.<br>3.<br>4. Allowed **08/28/2020**<br>5. Allowed for 14 days up to and including 7 October 2020 **09/22/2020**<br>6. Allowed **09/22/2020**<br>**Ervin, J., recused** |
| 362P20 | Curtis Lambert v. Town of Sylva | 1. Plt's Notice of Appeal Based Upon a Constitutional Question<br>2. Plt's PDR Under N.C.G.S. § 7A-31<br>3. Plt's Motion for Leave to File Amended Notice of Appeal (Constitutional Question) and PDR Under N.C.G.S. § 7A-31<br>4. Plt's Amended Notice of Appeal Based Upon a Constitutional Question<br>5. Plt's Amended PDR Under N.C.G.S. § 7A-31<br>6. Def's Motion to Dismiss Appeal | 1.<br>2.<br>3. Allowed **08/14/2020**<br>4.<br>5.<br>6. |

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

25 SEPTEMBER 2020

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| 365P20 | State v. Richard Lee Deyton | 1. Def's Pro Se Motion for PDR Under N.C.G.S. § 7A-31<br><br>2. Def's Pro Se Motion for Remand for Evidentiary Hearing and Resentencing<br><br>3. Def's Pro Se Motion to Appoint Counsel<br><br>4. Def's Pro Se Motion for Immediate Release | 1. Dismissed **08/17/2020**<br><br>2. Dismissed **08/17/2020**<br><br>3. Dismissed **08/17/2020**<br><br>4. Dismissed **08/17/2020** |
| 368A20 | Reynolds American Inc. v. Third Motion Equities Master Fund LTD, Magnetar Capital Master Fund, LTD, Spectrum Opportunities Master Fund LTD, Magnetar Fundamental Strategies Master Funds LTD, Magnetar MSW Master Fund LTD, Mason Capital Master Fund, L.P., BlueMountain Credit Alternatives Master Fund L.P., BlueMountain Foinaven Master Fund L.P., BlueMountain Guadalupe Peak Fund L.P., BlueMountain Summit Trading L.P., BlueMountain Montenvers Master Fund SCA SICAV-SIF, and Barry W. Blank Trust and Anton S. Kawalsky, trustee for the benefit of Anton S. Kawalsky Trust UA 9/17/2015, Canyon Blue Credit Investment Fund L.P., the Canyon Value Realization Master Fund, L.P., Canyon Value Realization Fund, L.P., Amundi Absolute Return Canyon Fund P.L.C., CanyonSL Value Fund, L.P., Permal Canyon IO LTD, Canyon Value Realization Mac 18 LTD | 1. Defs' (Mason and BlueMountain) Motion to Admit Lawrence M. Rolnick Pro Hac Vice<br><br>2. Defs' (Mason and BlueMountain) Motion to Admit Jennifer A. Randolph Pro Hac Vice<br><br>3. Defs' (Mason and BlueMountain) Motion to Admit Sheila A. Sadighi Pro Hac Vice | 1. Allowed **09/18/2020**<br><br>2. Allowed **09/18/2020**<br><br>3. Allowed **09/18/2020** |

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

25 SEPTEMBER 2020

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| 374P19 | North Carolina Farm Bureau Mutual Insurance Company, Inc. v. William Thomas Dana, Jr., Individually and as Administrator of the Estate of Pamela Marguerite Dana | 1. Plt's PDR Under N.C.G.S. § 7A-31<br>2. North Carolina Association of Defense Attorneys' Conditional Motion for Leave to File Amicus Brief | 1. Allowed<br>2. Allowed<br>**Davis, J., recused** |
| 377P20 | State v. Andrew Ellis | Def's Pro Se Petition for Writ of Habeas Corpus | Denied **09/04/2020** |
| 381P20 | State v. Archie Lynn McNeill | 1. Def's Motion for Temporary Stay<br>2. Def's Petition for Writ of Supersedeas | 1. Allowed **09/03/2020**<br>2. |
| 385P20 | State v. Mitchell Andrew Tucker | 1. State's Motion for Temporary Stay<br>2. State's Petition for Writ of Supersedeas | 1. Allowed **09/04/2020**<br>2. |
| 386P20 | North Carolina State Conference of the NAACP, et al. v. North Carolina State Board of Elections, et al. | 1. Plts' PDR Prior to a Determination by the COA<br>2. Plts' Motion to Suspend the Rules to Allow Expedited Review | 1. Denied **09/11/2020**<br>2. Dismissed **09/11/2020** |
| 387P13-2 | State v. James Gregory Armistead | Def's Pro Se Motion for PDR | Dismissed<br>**Ervin, J., recused** |
| 387P18-2 | State v. Jashawn A. Summers | 1. Def's Pro Se Motion for Order to Dismiss/Averment of Judgment<br>2. Def's Pro Se Motion to Dismiss All Charges | 1. Dismissed **08/28/2020**<br>2. Dismissed **08/28/2020** |
| 393P20 | In the Matter of L.N.H. | 1. Guardian *ad Litem*'s Motion to Withdraw and Substitute Counsel<br>2. Respondent-Mother's Motion for Extension of Time to File Response | 1. Allowed **09/17/2020**<br>2. Denied **09/21/2020** |
| 397P20 | State v. Billy Russell Land | 1. Def's Motion for Temporary Stay<br>2. Def's Petition for Writ of Supersedeas | 1. Allowed **09/16/2020** |
| 416P15-3 | State v. Nijel Ramsey Lee | Def's Pro Se Motion for PDR Under N.C.G.S. § 7A-31 | Denied **08/20/2020** |

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

25 SEPTEMBER 2020

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| 424P19 | State v. Randy Allen McDonald | Def's PDR Under N.C.G.S. § 7A-31 | Denied |
| 436PA13-4 | Lake, et al v. State Health Plan for Teachers, et al. | 1. Amicus Curiae's (AARP and AARP Foundation) Motion to Admit Ali Naini Pro Hac Vice<br><br>2. Amicus Curiae's (AARP and AARP Foundation) Motion to Reconsider Motion for Limited Admission Pro Hac Vice for Attorney Ali Naini<br><br>3. Amicus Curiae's (AARP and AARP Foundation) Motion to Amend Original Motion for Limited Admission Pro Hac Vice for Attorney Ali Naini<br><br>4. Amicus Curiae's (AARP and AARP Foundation) Motion for Limited Admission Pro Hac Vice for Attorney Ali Naini<br><br>5. AARP and AARP Foundation's Motion for Leave to File Amicus Brief | 1. Dismissed without prejudice **09/09/2020**<br><br>2. Allowed **09/22/2020**<br><br>3. Allowed **09/22/2020**<br><br>4. Allowed **09/22/2020**<br><br>5. Allowed<br>**Ervin, J., recused**<br>**Newby, J., recused** |
| 441A98-4 | State v. Tilmon Charles Golphin | 1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Cumberland County<br><br>2. Def's Motion to Address Double Jeopardy as a Threshold Issue Prior to Consideration of the Other Issues Raised in the Petition for Writ of Certiorari<br><br>3. Motion by North Carolina Advocates for Justice for Leave to File Amicus Curiae Brief<br><br>4. Def's Motion to Amend Petition for Writ of Certiorari<br><br>5. Motion of North Carolina Association of Black Lawyers to File Brief as Amicus Curiae<br><br>6. Motion of North Carolina State Conference of the NAACP for Leave to File Brief as Amicus Curiae<br><br>7. Motion for Leave to File Brief of Amici Curiae Social Scientists in Support of Petitioner | 1. Allowed **03/01/2018**<br><br>2. Dismissed as moot<br><br>3. Allowed **03/01/2018**<br><br>4. Allowed nunc pro tunc to **1 March 2018**<br><br>5. Allowed **07/13/2018**<br><br>6. Allowed **07/13/2018**<br><br>7. Allowed **07/13/2018** |

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| | | 8. Motion of National Association for Public Defense for Leave to File Brief as Amicus Curiae | 8. Allowed **07/13/2018** |
| | | 9. Motion of Professors John Charles Boger & Robert P. Mosteller for Leave to File Brief as Amici Curiae | 9. Allowed **07/17/2018** |
| | | 10. Amicus Curiae Motion for Admission of Attorney Jin Hee Lee, Pro Hac Vice | 10. Allowed **07/18/2018** |
| | | 11. Amicus Curiae Motion for Admission of Attorney W. Kerrel Murray, Pro Hac Vice | 11. Allowed **07/18/2018** |
| | | 12. Motion of NAACP Legal Defense and Educational Fund, Inc. to Not Require the Payment of Additional Pro Hac Vice Fees | 12. Denied **07/18/2018** |
| | | 13. Motion of North Carolina Council of Churches for Leave to File Amicus Curiae Brief | 13. Allowed **07/17/2018** |
| | | 14. Motion by North Carolina Advocates for Justice for Leave to File Amicus Curiae Brief | 14. Allowed **07/17/2018** |
| | | 15. Motion of Former State and Federal Prosecutors for Leave to File Amicus Brief in Support of Defendant Appellant | 15. Allowed **07/17/2018** |
| | | 16. Motion of the NAACP Legal Defense and Educational Defense Fund, Inc., for Permission to File an Amicus Curiae Brief | 16. Allowed **07/17/2018** |
| | | 17. Proposed Amici Curiae Motion for Admission of Attorney Paul F. Khoury, Pro Hac Vice | 17. Allowed **07/20/2018** |
| | | 18. Proposed Amici Curiae Motion for Admission of Attorney Robert L. Walker, Pro Hac Vice | 18. Allowed **07/20/2018** |
| | | 19. Proposed Amici Curiae Motion for Admission of Attorney Madeline J. Cohen, Pro Hac Vice | 19. Allowed **07/20/2018** |
| | | 20. Motion of Amici Curiae Former State and Federal Prosecutors Not to Require the Payment of Additional Pro Hac Vice Fees | 20. Denied **07/20/2018** |
| | | 21. Motion for Withdrawal and Substitution of Counsel for Amici Curiae Former State and Federal Prosecutors | 21. Allowed **03/14/2019**<br>**Beasley, C.J., recused** |

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

25 SEPTEMBER 2020

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| 449P11-25 | Charles Everette Hinton v. State of North Carolina, et al. | 1. Petitioner's Pro Se Motion for Objections to Orders; Demand for Trial and Trial by Jury | 1. Dismissed |
| | | 2. Petitioner's Pro Se Petition for Writ of Mandamus | 2. Dismissed |
| | | 3. Petitioner's Pro Se Motion to Proceed In Forma Pauperis | 3. Allowed |
| | | 4. Petitioner's Pro Se Motion to Appoint Counsel | 4. Dismissed as moot |
| | | | **Ervin, J., recused** |
| 463A19 | Sea Watch at Kure Beach Homeowners' Association, Inc. v. Thomas Fiorentino and Wife, Leah Fiorentino | 1. Defs' Notice of Appeal Based Upon a Dissent | 1. --- |
| | | 2. Defs' PDR Under N.C.G.S. § 7A-31 as to Additional Issues | 2. Denied |
| | | 3. Plt's Motion to Dismiss Appeal | 3. Allowed |
| | | 4. Defs' Motion for Extension of Time to File Response | 4. Allowed up to and including 9 January 2020 **01/02/2020** |

**IN RE A.H.F.S.**

[375 N.C. 503 (2020)]

IN THE MATTER OF A.H.F.S., R.S.F.S., AND C.F.S.

No. 369A19

Filed 20 November 2020

**1. Termination of Parental Rights—grounds for termination—failure to make reasonable progress**

Respondents' parental rights to their three children were properly terminated based on grounds of failure to make reasonable progress to correct the conditions which led to the removal of the children where respondents did not adequately address the mother's substance abuse and mental health, conditions and safety of the home, and the children's medical, dental, and developmental needs. Although respondent-father made some progress on his case plan, he did not make reasonable progress toward the primary issues which led to the removal of the children. The trial court's determination that respondent-mother's failure was willful was supported by the evidence and findings of fact.

**2. Termination of Parental Rights—best interests of child—findings—basis**

The trial court's conclusion that termination of respondents' parental rights to their three children was in the children's best interests was supported by unchallenged findings of fact addressing the statutory factors in N.C.G.S. § 7B-1110(a). Although respondent-father had a strong bond with the oldest child, and the three children would not be able to live together as a family unit after termination, the trial court did not abuse its discretion by weighing certain factors more than others in determining that termination was in the best interests of the children.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) and on writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 28 May 2019 by Judge Mack Brittain in District Court, Henderson County. This matter was calendared for argument in the Supreme Court on 7 October 2020 but 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 for petitioner-appellee Henderson County Department of Social Services.*

*Katelyn Bailey Heath and Heather Williams Forshey for appellee Guardian ad Litem.*

*Anné C. Wright for respondent-appellant father.*

*Mercedes O. Chut for respondent-appellant mother.*

BEASLEY, Chief Justice.

Respondent-parents appeal from the trial court's order terminating their parental rights to A.H.F.S., R.S.F.S., and C.F.S.[1] After careful review, we affirm.

On 5 May 2016, the Henderson County Department of Social Services (DSS) filed petitions alleging that Riley, a newborn, was a neglected and dependent juvenile, and Charley, a one-year-old, was a neglected juvenile. DSS stated that Riley and respondent-mother had tested positive for amphetamines at Riley's birth, and respondent-mother had admitted to using an unknown substance twice in the days leading up to Riley's birth. DSS further claimed that Charley, along with respondent-mother, had also tested positive for drugs when he was born in 2014. DSS alleged that respondent-mother had untreated bipolar and anxiety disorders and claimed that, while respondent-mother was still at the hospital, a social worker observed her "acting erratically, acting anxious, speaking very fast and repeating herself." Because of respondent-mother's behavior, the hospital would not allow respondent-mother to be with Riley unsupervised.

Respondent-mother left the hospital on 2 May 2016 against the advice of doctors because she stated she wanted a cigarette. Riley remained at the hospital, and respondent-mother visited only once after leaving. Respondent-father also visited Riley only once while she was at the hospital. Both respondents refused to take a drug screen offered by the social worker. DSS asserted that because of respondent-mother's history and current substance abuse and due to respondent-father's long work hours neither parent could properly supervise or care for Riley or Charley. DSS stated that a babysitter was watching Charley while respondent-father worked, but the babysitter could not also watch Riley. DSS further claimed that neither of the respondents could identify an

1. The minor children A.H.F.S., R.S.F.S., and C.F.S. will be referred to throughout this opinion as "Amy," "Riley," and "Charley," which are pseudonyms used to protect the identity of the juveniles and for ease of reading.

appropriate family member or friend who could care for the two juveniles. Accordingly, DSS obtained nonsecure custody of Riley.

A nonsecure custody hearing was held on 12 May 2016. DSS filed a supplemental petition claiming that Charley was at risk because respondent-father was allowing respondent-mother to care for Charley without supervision. DSS asserted that respondent-mother had unaddressed substance abuse and mental health issues and had refused to demonstrate sobriety by complying with drug screens. DSS obtained nonsecure custody of Charley.

On 2 August 2016, the trial court adjudicated Riley a neglected and dependent juvenile and Charley a neglected juvenile. On the same date, the trial court entered a separate dispositional order granting legal custody of the juveniles to respondents subject to "strict and complete compliance" with requirements set forth in the order.

On 21 February 2017, DSS filed new petitions alleging that Riley was a neglected and dependent juvenile and that Charley and newborn Amy were neglected juveniles. DSS alleged that Amy had been born approximately ten to twelve weeks premature but that it was difficult to determine her exact gestational age at birth because respondent-mother did not receive any prenatal care. At her birth, both Amy and respondent-mother tested positive for amphetamines and methamphetamines.

On 17 March 2017, DSS filed a supplement to Amy's juvenile petition. DSS stated that Amy was still in the Neonatal Intensive Care Unit, was being fed through a feeding tube, and had problems with her heart rate dropping. DSS further stated that respondents, or any potential caregivers for Amy, would need to receive special training in order to understand and identify the special needs of a premature baby. DSS claimed, however, that respondents had not received this training because respondent-mother had visited with Amy only twice since her birth, and respondent-father had not visited Amy since 25 February 2017. DSS additionally alleged that respondent-mother would not allow the social worker into the residence to observe its condition, and respondent-mother had refused drug screens requested by DSS on 9 February 2017 and 10 March 2017. Accordingly, DSS obtained nonsecure custody of Amy. Riley and Charley remained in respondents' home.

An adjudicatory hearing was held on 6 July 2017. On 3 August 2017, the trial court entered an order adjudicating Riley, Charley, and Amy neglected juveniles. On the same date, the trial court entered a separate dispositional order in which it granted legal custody of all three juveniles to DSS and authorized DSS to place the children in foster care. The trial

court granted respondents supervised visitation. To achieve reunification, both parents were ordered to, *inter alia*, obtain mental health and substance abuse services, maintain appropriate housing, ensure that the children received appropriate evaluations, and comply with recommendations from those evaluations.

On 15 November 2017, the trial court set the primary permanent plan for the juveniles as reunification and the secondary plan as termination of parental rights and adoption. On 23 August 2018, the trial court held a permanency planning review hearing. In an order entered 8 October 2018, the trial court found that respondents had failed to complete the requirements for reunification. The court determined that the juveniles' return home within six months was unlikely, reunification efforts would be unsuccessful or inconsistent with the health or safety of the juveniles, and adoption should be pursued. Accordingly, the trial court changed the primary permanent plan for the juveniles to termination of parental rights and subsequent adoption with a secondary permanent plan of reunification or custody/guardianship with a third party. The trial court further ordered that DSS should not file a petition or motion to terminate parental rights until the results of an Interstate Compact on the Placement of Children (ICPC) home study on a relative were known.

On 19 December 2018, DSS filed a motion to terminate respondents' parental rights pursuant to neglect and willful failure to make reasonable progress. *See* N.C.G.S. § 7B-1111(a)(1) and (2) (2019). On 28 May 2019, the trial court entered an order terminating respondents' parental rights based on the grounds alleged in the petition.

On 27 June 2019, respondents gave timely notice of appeal pursuant to N.C.G.S. §§ 7A-27(a)(5) and 7B-1001(a1)(1).

**[1]** Respondents first argue that the trial court erred by concluding that grounds existed to terminate their 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). 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 our General Statutes. N.C.G.S. § 7B-1109(f) (2019). 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 (1984) (citing *In re Moore*, 306 N.C. 394, 404 (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 (2016) (citing *In re Young*, 346 N.C. 244, 247 (1997); N.C.G.S. § 7B-1110).

"[A]n 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 (2019). We begin our analysis with consideration of whether grounds existed pursuant to N.C.G.S. § 7B-1111(a)(2) to terminate respondents' parental rights. This section provides that the court may terminate parental rights if "[t]he parent has willfully left the juvenile in foster care . . . for more than [twelve] 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).

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

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

Respondents do not contest that the juveniles have been in placement outside of their home for more than twelve months. Instead, respondents contend they made reasonable progress towards correcting the conditions which led to their removal. We disagree.

We first address the conditions that led to the removal of the juveniles. The trial court's finding of fact 21 states that the juveniles were adjudicated neglected and removed from respondents' care in 2017 "due to domestic violence between the parents, the mother's substance abuse, the conditions and safety of the home, the mother's mental health and the juvenile's medical needs which need to be addressed." Respondent-mother contends that this finding is inaccurate because the 2017 adjudicatory order contains no findings regarding domestic violence. We agree. The adjudicatory order entered on 3 August 2017 does not mention domestic violence as an issue necessitating the filing of the juvenile petition and removal of the juveniles from respondents' home. Thus, we will not consider that portion of finding of fact 21 that states the juveniles were removed from respondents' care due to domestic violence.

Respondent-mother also contends that the only conditions which led to the juveniles' removal were: (1) her positive drug test at Amy's birth; and (2) the unsafe and cluttered condition of her home shortly before Amy's birth. She claims the remaining conditions cited in finding of fact 21 and described in the adjudicatory order existed throughout the 2016 case in which the juveniles were not removed from her home, and thus these conditions were not a proximate cause of their removal in 2017. We are not persuaded.

In the 2017 adjudicatory order, the trial court cited respondent-mother's substance abuse and untreated mental health issues, the unsafe condition of respondents' home, and Riley's and Charley's physical, emotional and developmental issues that were not being addressed by respondents as grounds for removal. The trial court also noted that respondent-mother was the primary caregiver for the juveniles, and respondent-father's long work hours prevented him from contributing to childcare or the upkeep of the home. Respondent-mother did not appeal from the trial court's adjudicatory order and is bound by the doctrine of collateral estoppel from relitigating this issue. *See In re T.N.H.*, 372 N.C. 403, 409 (2019) (stating that because the challenged facts were necessary to the determination in a prior adjudicatory order and the mother did not appeal from that adjudicatory order, she was bound by the doctrine of collateral estoppel from relitigating the findings of fact) (citing *King v. Grindstaff*, 284 N.C. 348, 356 (1973)). Respondent-mother cannot now contend that these issues did not lead to the juveniles' removal.

We next address respondent-mother's failure to correct the conditions which led to the juveniles' removal. The trial court found that respondent-mother: (1) failed to complete individual substance abuse therapy as recommended by her Comprehensive Clinical Assessment; (2) failed to submit to forty-three of fifty-six requested drug screens and tested positive for methamphetamines on 1 April 2019 and 15 April 2019; (3) was convicted of two counts of Felony Possession of a Schedule II controlled substance in March 2019 with the dates of the offenses being 20 November 2018 and 28 February 2019; (4) was diagnosed with severe bipolar disorder and failed to address these issues in therapy as recommended by her Comprehensive Clinical Assessment; (5) failed to demonstrate skills learned in parenting classes; (6) failed to attend seventeen of twenty-eight medical/dental appointments for the juveniles and failed to ensure that the medical, dental, and developmental need of the juveniles are being met; and (7) failed to provide a safe and appropriate home for the juveniles.

Respondent-mother contends that there was insufficient evidence to support the trial court's finding that her home was unsafe. She further argues that her admission that the home was unsafe, cited by the trial court in finding of fact 35, occurred over a year before the termination hearing and was both stale and an improper recitation of testimony. We disagree. Respondent-mother refused to let social workers into the home on numerous occasions, thus preventing social workers from determining whether the conditions of the home had improved. When respondent-mother did allow social workers inside the home, they reported little improvement. On 7 July 2018, the guardian ad litem reported to the trial court that "[t]here has been marginal improvement in the cleanliness and safety of the house." On 23 August 2018, a social worker reported to the court that while she had observed some progress during recent visits, "the home consistently has extreme clutter, safety hazards throughout the home such as cleaning chemicals, motor oil bottles on the ground, choking hazards as well as trash throughout the home." Thus, the trial court could reasonably infer from these continuing conditions that the home was still unsafe.

Respondent-mother additionally challenges as not being supported by the evidence the portion of finding of fact 36 which states that while she completed parenting class, she failed to demonstrate the ability to provide proper care for the juveniles. We are not persuaded. The social worker testified at the termination hearing concerning respondent-mother's inability to meet the juveniles' needs. The social worker noted that immediately following a conversation with the pediatrician that Amy was lactose intolerant, respondent-mother offered the children regular milk, and social workers were forced to intervene. Moreover, respondent-mother was invited to attend the juveniles' medical and dental appointments. Of the twenty-eight appointments to which she was invited, she did not attend seventeen of those appointments. Considering the fact that each of the juveniles has special needs, the trial court could reasonably infer that respondent-mother has not demonstrated the ability to provide proper care for the juveniles when she missed over half of the juveniles' medical appointments.

Respondent-mother argues that finding of fact 39, that she failed to ensure the medical, dental, and developmental needs of the juveniles were being met, is erroneous. Respondent-mother asserts that she did not have legal custody of the juveniles and thus had no ability to ensure these needs were being met. We disagree. All three juveniles have special needs. To address the juveniles' special needs, the trial court ordered respondent-mother to attend medical, dental, and developmental

appointments. Respondent-mother does not challenge the trial court's findings that she failed to attend numerous appointments. Thus, again, we conclude the trial court could properly infer that respondent-mother failed to ensure the juveniles' medical, dental, and developmental needs were being met.

The trial court could reasonably conclude that respondent-mother's continuing unaddressed substance abuse issues, the unsafe condition of the home, and respondent-mother's failure to attend medical and developmental appointments for the juveniles, evidenced a failure to correct the conditions that led to the removal of the juveniles.

Respondent-mother contends that the trial court failed to find that she had the ability to make progress regarding the conditions of removal by making a finding of willfulness. However, the trial court made this required finding in its conclusions of law when it determined that respondent-mother had "willfully" failed to make reasonable progress. Although set forth in the conclusions of law, the trial court's determination of willfulness was an ultimate finding of fact. Regardless of whether this finding is classified as an ultimate finding of fact or a conclusion of law, it still must be sufficiently supported by the evidentiary findings of fact. *See In re Z.A.M.*, 374 N.C. at 97 (stating that 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"). Here, we conclude that the trial court's conclusion that respondent-mother willfully failed to make reasonable progress is supported by clear, cogent, and convincing evidence and sufficient evidentiary findings of fact. Accordingly, we hold that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(2) to terminate respondent-mother's parental rights.

We next address respondent-father's willful failure to correct the conditions which led to the juveniles' removal. Respondent-father contends that he completed a majority of the requirements of his case plan and thus made reasonable progress. While respondent-father did make progress on several requirements of his case plan, we conclude that the trial court did not err in finding that his progress did not constitute reasonable progress under the circumstances of this case.

Regarding respondent-father, the trial court made the following pertinent findings of fact:

> 34. The conditions of the home led to the removal of the juveniles. The Social Worker has been to the home 21

> times and has been denied access to the home 9 times. The Social Worker has observed the home and yard to be extremely cluttered with safety hazards and trash in the home and yard. On April 17, 2019 the Social Worker went to the home and was denied access to the inside of the home by the mother who said the house was trashed.
>
> 35. Both the mother and father have discussed numerous times that items and money have been stolen from the home. The mother has acknowledged to the Social Worker that the home is not safe for the juveniles.
>
> . . . .
>
> 47. The father continues to reside with the mother. The condition of the home is not appropriate for the juveniles.
>
> 48. The father completed parenting classes but has failed to demonstrate benefit from those classes.
>
> 49. The father has failed to ensure that the juveniles' medical, dental and developmental needs are being met. Of the 28 times the father was invited to the juveniles' appointment, he was a no show 18 times, even though [DSS] would notify the father months in advance to the date and time of the appointments.

Respondent-father contends that finding of fact 34 is not specific enough regarding when the clutter and safety hazards were observed. However, as noted previously herein, a social worker and the guardian ad litem raised concerns about the state of the home. Accordingly, we conclude this finding of fact was supported by clear, cogent, and convincing evidence.

Respondent-father challenges finding of fact 48, claiming that the trial court's determination that he "failed to demonstrate benefit" from parenting classes was not supported by clear, cogent, and convincing evidence. Respondent-father cites reports from DSS and the guardian ad litem which he claims demonstrated his progress. However, a social worker testified the respondents have had multiple meetings with the children's therapists, during which the therapists discussed recommendations for respondents to follow during visits to address each child's needs. Neither respondent has followed through with those recommendations. Additionally, respondent-father would engage in arguments with respondent-mother and would repeatedly tell her to "shut up" in

the presence of the juveniles. Accordingly, we conclude there was clear, cogent, and convincing evidence to support this finding of fact.

Respondent-father also challenges finding of fact 49 and argues that he attended over a third of the juveniles' appointments and "took no actions to impede [DSS] in getting the children's needs met." Respondent-father claims that this constitutes reasonable progress. We disagree. Respondent-father, along with respondent-mother, were ordered to attend the juveniles' medical, dental, and developmental appointments. As discussed previously, the juveniles all have special needs, and it was important that respondents attend these appointments to be educated regarding these special needs and to comply with treatment recommendations for the juveniles. As found by the trial court, respondent-father failed to attend a majority of the appointments even though he was given notification months in advance of the date and time of the appointments. Even when respondent-father attended appointments, a social worker testified that he was unable to follow through with treatment recommendations. Thus, we conclude that clear, cogent, and convincing evidence supports the trial court's finding that respondent-father missed numerous appointments, and the trial court could reasonably infer that respondent-father failed to ensure that the juveniles' medical, dental, and developmental needs were being met.

The trial court also made several findings demonstrating respondent-father's compliance with his case plan and efforts to correct the conditions that led to the juveniles' removal. The trial court found as fact that respondent-father completed individual therapy, "did what he could to complete couple's therapy," and had attended scheduled visitation with the juveniles. Despite these findings demonstrating that respondent-father made some progress, we conclude that respondent-father had not remedied the primary conditions which led to the removal of the juveniles. As noted by the trial court, respondents continue to reside together, and their primary residence is still unsafe.

Respondent-father argues that the trial court erroneously based its determination that grounds existed to terminate his parental rights largely based on his continuing relationship with respondent-mother. As discussed above, it is apparent that the trial court considered ample evidence independent of his relationship with respondent-mother.

Because the trial court's conclusion that a ground for termination existed pursuant to N.C.G.S. § 7B-1111(a)(2) is sufficient in and of itself to support termination of respondents' parental rights, we need not

address respondents' arguments regarding N.C.G.S. § 7B-1111(a)(1). *In re T.N.H.*, 372 N.C. at 413.

**[2]** We next consider respondents' arguments concerning disposition. 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) (2019). 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. "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 (1988).

We initially note that the trial court properly considered the statutory factors set forth in N.C.G.S. § 7B-1110(a) when determining the juveniles' best interests. The trial court made uncontested findings: (1) regarding the age of the juveniles; (2) that adoption of each juvenile was likely; (3) that termination of respondents' parental rights would aid in the permanent plan of adoption; (4) that Charley had a strong bond with respondents, but Riley and Amy did not; (5) that the juveniles were bonded to their prospective foster parents; (6) that the foster parents were providing for the juveniles' special needs; and (7) that the proposed adoptive parents had agreed to allow the juveniles to visit with each other on a regular basis. Because respondents do not challenge these dispositional findings, they are binding on appeal. *In re Z.L.W.*, 372 N.C. 432, 437 (2019).

Respondent-father argues that it was not in Riley's and Amy's best interests that his parental rights be terminated without first considering the results of an ICPC home study previously ordered by the court at the 23 August 2018 permanency planning review hearing. Respondent-father further claims that it was not in Charley's best interests to terminate his parental rights given the strong bond between himself and Charley. Lastly, respondent-father contends that while Riley and Amy did not have a strong bond with respondents because all three juveniles were living in different prospective adoptive homes, it was not in Riley's and Amy's best interests that respondent-father's parental rights be terminated because it eliminated the potential for them to live together as a family. We are not persuaded.

First, although the trial court found that Charley was strongly bonded to respondents, this Court has recognized 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. 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 in *In re Z.L.W.* 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. Similarly, here, we conclude that the trial court's determination that other factors outweighed respondents' strong bond with Charley was not an abuse of discretion.

Second, while the trial court had previously ordered that DSS wait to file a petition to terminate respondents' parental rights pending an ICPC home study in Virginia, and termination of respondents' parental rights precluded the three juveniles living together as a family unit, we have 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, (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.* at 438. Consequently, in *In re 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. Thus, while consideration of placement alternatives and preserving family integrity is an appropriate consideration in the dispositional portion of the termination hearing, the best interests of the juveniles remain paramount. 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 of respondent-father's parental rights was in the juveniles' best interests.

Respondent-mother's argument concerning disposition is contingent on respondent-father's retention of his parental rights. Respondent-mother claims that respondent-father substantially complied with his case plan and was a fit parent, and thus the trial court abused its discretion by determining that termination of their parental rights was in the juveniles' best interests. However, because we have already determined that the trial court properly terminated respondent-father's parental rights, these arguments are now moot. We therefore hold that the trial court's conclusion that termination of respondent-mother's parental rights was in the juveniles' best interests did not constitute an abuse of discretion.

In summary, we conclude that the trial court did not err in its determination that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(2) to terminate respondents' parental rights. We further conclude that the trial court did not abuse its discretion by determining that termination of respondents' parental rights was in the juveniles' best interests. Accordingly, we affirm the trial court's order terminating respondents' parental rights.

AFFIRMED.

**IN RE A.J.P.**

[375 N.C. 516 (2020)]

IN THE MATTER OF A.J.P.

No. 452A19

Filed 20 November 2020

**1. Termination of Parental Rights—motion for continuance—more time for counsel to review court records**

In a termination of parental rights case, the trial court did not abuse its discretion by denying the father's motion to continue the termination hearing to allow his counsel time to review a permanency planning order that counsel allegedly never received a copy of. The father failed to show extraordinary circumstances justifying the continuance—which would have extended beyond the statutorily allowed period—where his counsel's court file contained multiple references to the permanency planning order, including summaries of the trial court's findings and of the evidence at the permanency planning hearing.

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

The trial court properly terminated a father's parental rights to his daughter on grounds of willful failure to make reasonable progress to correct the conditions that led to the child's removal (N.C.G.S. § 7B-1111(a)(2)) where the evidence supported the court's findings of fact, including that the father was the mother's drug supplier, the father knew about the mother's pregnancy months before the child's birth, and the father provided drugs to the mother throughout her pregnancy. These findings established a nexus between the conditions leading to the daughter's removal (she tested positive for controlled substances at birth and her mother's drug abuse problems persisted) and the substance abuse and mental health components of the father's case plan that he failed to comply with.

**3. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—incarceration—ability to comply with case plan**

The trial court properly terminated a father's parental rights to his daughter on grounds of willful failure to make reasonable progress to correct the conditions that led to the child's removal (N.C.G.S. § 7B-1111(a)(2)) where the trial court found that, although the father's incarceration for a drug offense limited his ability to comply with his case plan, the father failed to complete parts of

his case plan that he could have accomplished while incarcerated or to supply documentation confirming that he completed any case plan item apart from one parenting class. Additionally, the court found that the father never inquired about his daughter in the fifteen months before his incarceration, even though he knew she was in the department of social services' custody.

**4. Termination of Parental Rights—grounds for termination—willful abandonment—conduct outside the statutory period**

The trial court properly terminated a father's parental rights to his daughter on grounds of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where the trial court found the father knew of his daughter about four months before her birth but failed to contact or provide support to her between her birth and his incarceration for possession of cocaine. Although the father was incarcerated during the relevant six-month period, the trial court properly considered the father's conduct outside that period in evaluating his credibility and intentions within the relevant period.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 26 July 2019 by Judge Hal G. Harrison in District Court, Madison County. This matter was calendared for argument in the Supreme Court on 7 October 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

*Law Offices of Jamie A. Stokes, PLLC, by Jamie A. Stokes, for petitioner-appellee Madison County Department of Social Services.*

*Cranfill Sumner & Hartzog LLP, by Laura E. Dean, for appellee Guardian ad Litem.*

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

NEWBY, Justice.

Respondent-father appeals from the trial court's order terminating his parental rights in the minor child A.J.P. (Ava).[1] On appeal

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

respondent-father argues (1) that the trial court abused its discretion by denying his motion to continue the termination hearing; (2) that some findings of fact are not supported by clear, cogent, and convincing evidence and that the remaining findings are insufficient to support the trial court's conclusions of law; (3) that sufficient grounds did not exist to terminate his parental rights for having willfully left Ava in foster care or placement outside the home for more than twelve months without making reasonable progress under the circumstances to correct the conditions that led to her removal, *see* N.C.G.S. § 7B-1111(a)(2) (2019); and (4) that sufficient grounds did not exist to conclude he had willfully abandoned Ava, *see* N.C.G.S. § 7B-1111(a)(7). After careful review, we affirm.

Ava was born in July 2016. On 13 July 2016, the Madison County Department of Social Services (DSS) obtained nonsecure custody of Ava and filed a juvenile petition alleging that Ava was a neglected and dependent juvenile. The juvenile petition alleged that Ava was born "possibly premature" with a low birth weight and was admitted into the neonatal intensive care unit (NICU). Ava's meconium tested positive for cocaine, benzodiazepines, and clonazepam. Ava's mother had received no prenatal care and tested positive for cocaine and benzodiazepines. Ava's mother was on probation for a felony possession of cocaine conviction. The putative father, who was Ava's mother's boyfriend at the time, was on probation for a felony hit-and-run conviction. The juvenile petition further alleged that Ava's mother and putative father were unable to care for Ava and lacked an appropriate alternative child care arrangement.

The trial court held a hearing on the juvenile petition on 8 August 2016 and later entered an order adjudicating Ava to be a dependent juvenile. The trial court set the permanent plan to reunification with a concurrent plan of adoption. Following a hearing held on 12 October 2016, the trial court entered a disposition order on 14 November 2016. The trial court adopted the developed and signed case plan for Ava's mother and the putative father but found that they had made minimal efforts on the case plan. Ava remained in DSS custody.

After a hearing on 6 April 2017, the trial court entered a permanency planning order on 4 May 2017 that changed the permanent plan to adoption, with a secondary plan of guardianship. On 6 April 2017, Ava's mother relinquished her parental rights to Ava. Following a hearing on 13 July 2017, the trial court entered a permanency planning order on 23 October 2017. The trial court found that the putative father had indicated he was willing to relinquish his parental rights to Ava but had failed to maintain contact with DSS. The trial court ordered DSS to

proceed with filing a petition to terminate the putative father's parental rights if a relinquishment was not received. On 25 July 2017, the putative father relinquished his parental rights to Ava; however, as later discovered, he is not the biological father.

After a hearing on 27 October 2017, the trial court entered a permanency planning order on 13 November 2017 ordering DSS to proceed with filing a motion to terminate the parental rights of any unknown fathers, and DSS did so on 18 January 2018. DSS alleged that any unknown fathers had willfully left Ava in foster care or placement outside the home for more than twelve months without making reasonable progress under the circumstances to correct the conditions that led to her removal, *see* N.C.G.S. § 7B-1111(a)(2), and had willfully abandoned Ava, *see* N.C.G.S. § 7B-1111(a)(7).

Ava was born in July 2016. A year and three months later, respondent-father was incarcerated on 9 October 2017 on convictions for possession of a firearm by a felon and felony possession of cocaine with a projected release date of 20 September 2019. Two months after DSS filed its motion, in March of 2018, respondent-father contacted DSS to indicate that he might be Ava's biological father. In May 2018, a paternity test confirmed that respondent-father was Ava's biological father.

On 13 June 2018, the trial court ordered DSS to facilitate a home study on two individuals as possible placement providers for Ava. DSS made reasonable efforts to secure a relative placement on behalf of respondent-father, but could not do so. On 2 August 2018, DSS sent an out-of-home family services agreement to respondent-father. The agreement required him to (1) complete a mental health assessment and substance use assessment and follow recommendations; (2) complete a domestic violence evaluation; (3) not incur new legal charges; (4) keep DSS informed of the outcomes of pending and future charges; (5) follow recommendations of probation and parole; (6) keep $25.00 in his possession at all times to pay for random urinary drug screens for six months; (7) remain substance free; (8) keep DSS informed of all prescribed medications; (9) obtain and maintain employment and show financial ability to meet Ava's basic needs for six months; (10) obtain and maintain housing for six months; (11) attend Child and Family Team meetings and permanency planning meetings, as well as cooperate with DSS; (12) be respectful to DSS staff; (13) keep DSS informed of any changes of address and/or phone number; (14) complete parenting classes; and (15) follow and adhere to the visitation plan. Six weeks later, respondent-father signed the agreement on 24 September 2018 and returned it.

On 24 September 2018, Ava's mother and respondent-father testified in a hearing, and the trial court entered a permanency planning order on 31 October 2018. In its findings, the trial court described Ava's mother's testimony that she and respondent-father had a sexual relationship which resulted in her pregnancy. Their relationship involved the use of controlled substances, and respondent-father was the supplier of her controlled substances. Ava's mother testified that she had a conversation with respondent-father in March 2016 when she learned she was pregnant and that respondent-father knew she was pregnant. Respondent-father continued to supply her with controlled substances during her pregnancy. In addition, Ava's mother testified that she contacted respondent-father from the hospital when Ava was born and that respondent-father bought Ava gifts from time to time but did not provide child support. Respondent-father, on the other hand, testified that he had no knowledge of Ava's birth until September 2017, after a conversation with Ava's mother. Six months later, in March of 2018, he contacted DSS regarding Ava, who was almost two years old by that time.

In a later proceeding on 1 July 2019, the trial court clarified by an oral finding of fact that, among other things, respondent-father knew of the child during the pregnancy, thereby finding the mother's testimony credible. In the 31 October 2018 order, the trial court relieved DSS of further reasonable efforts to reunify Ava with respondent-father, concluded that the permanent plan remained adoption, and ordered DSS to file a motion to terminate respondent-father's parental rights.

On 31 October 2018, the same day the order was filed, DSS filed a motion to terminate respondent-father's parental rights. The termination hearing was continued on 17 December 2018, 16 January 2019, and 21 February 2019. On 4 April 2019, DSS filed a petition to terminate respondent-father's parental rights. DSS alleged that respondent-father had willfully left Ava in foster care or placement outside the home for more than twelve months without making reasonable progress to correct the conditions that led to her removal, *see* N.C.G.S. § 7B-1111(a)(2), and willfully abandoned Ava, *see* N.C.G.S. § 7B-1111(a)(7). That same day, the termination hearing was continued to 16 May 2019.

On 16 May 2019, counsel for respondent-father withdrew from representing respondent-father due to a conflict of interest, and a new attorney was appointed to represent respondent-father. The trial court continued the termination hearing again until 1 July 2019 to allow the new attorney to prepare for the hearing.

On 1 July 2019, the trial court held a hearing on the petition to terminate respondent-father's parental rights. At the beginning of the termination hearing, respondent-father's attorney requested a continuance, indicating that he needed more time to review the permanency planning order filed on 31 October 2018 because it was not included in the court file that he copied at the time of his appointment. The trial court denied his motion to continue.

During the 1 July 2019 termination hearing, the trial court orally made substantive findings, stating that by the standard of clear, cogent, and convincing evidence

> the respondent is the biological father of this juvenile; that the biological mother informed him of her pregnancy back in March of 2016, approximately four months prior to the child's birth. Thereafter and for the next fifteen months, respondent father did nothing to pursue his rights as the biological father of this child; there was little or no contact. Attempts by the father to find an appropriate (inaudible) person failed because of his family's inability to let that happen.
>
> The one credit we learned for the respondent was presented through testimony of the DART [substance abuse] program, which he never signed and did not pursue any action to comply with that case plan except for the completion of a parenting class called Fatherhood Accountability in prison.
>
> [Respondent] testified as to other actions he could have (inaudible) classes, but offered no supporting documentation to support (inaudible) through that testimony.
>
> The Court further finds that at no time during or since the birth of this child has the . . . respondent contacted or tried to contact this child and to (inaudible). The respondent was here in August the child (inaudible) and acknowledged (inaudible) the Department's effort to terminate his parental rights, elected not to send cards, not to make calls. In addition, the respondent has been in this courtroom on (inaudible), during which time he never once requested the opportunity to see this child.
>
> Therefore, at this time the Court will conclude as to ground one that the respondent has failed to make

> reasonable progress toward complying (inaudible) and, further, that the respondent has abandoned the child (inaudible).
>
> All right. We will proceed with disposition.

On 26 July 2019, the trial court entered a written order concluding that both grounds alleged in the petition existed to terminate respondent-father's parental rights, that the respondent-father had willfully left Ava in foster care or placement outside the home for more than twelve months without making reasonable progress and had willfully abandoned Ava. To support its conclusion, the trial court reiterated its oral findings, including that "the respondent father was aware the . . . mother was pregnant" before Ava's birth in July 2016 even though "the respondent father . . . testified he did not know of the existence of the juvenile until shortly before he was incarcerated" in October 2017. The trial court found "that the . . . mother and father had an ongoing relationship prior to the birth of the juvenile that involved the use of controlled substances"; "that at no time from the birth of the juvenile in July 2016 (the same month the juvenile came into DSS custody) did the respondent father contact DSS to inquire as to the juvenile until March 2018, approximately 20 months after the juvenile came into DSS custody; [and] that the respondent father did not contact [DSS] prior to his incarceration before October 2017." The trial court also determined that it was in Ava's best interests that respondent-father's parental rights be terminated, and the trial court terminated his parental rights. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent-father appeals.

I.

**[1]** First, respondent-father argues that the trial court erred by denying his motion to continue the termination hearing in order to allow his counsel to review the permanency planning order filed 31 October 2018. We disagree.

Respondent-father's counsel made an oral motion to continue the termination hearing when it commenced on 1 July 2019 and advised the trial court that he needed "more time for preparation." He explained that although he had copied the court file at the time of his appointment on 16 May 2019, the court file did not contain a copy of the 31 October 2018 order, and he "was not aware" of the existence of the order at that time. Counsel claimed he did not become aware of the order until he "received a copy of the DSS Court Report . . . June 28th, which made reference to that hearing and order." Counsel for DSS opposed the motion to

continue, stating that he had provided a copy of the order to respondent-father's counsel as a potential exhibit and had not received a discovery request from him. The trial court denied respondent-father's motion.

Section 7B-803 of the North Carolina General Statutes provides the following:

> The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.

N.C.G.S. § 7B-803 (2019). Additionally, 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) (2019).

Respondent-father did not assert in the trial court that a continuance was necessary to protect a constitutional right. *See In re A.L.S.*, 374 N.C. 515, 517, 843 S.E.2d 89, 91 (2020) (A motion based on a constitutional right presents a question of law, and the order of the court is reviewable.). Thus, we review the trial court's denial of his motion to continue 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." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Here the petition to terminate respondent-father's parental rights was filed on 4 April 2019, and the termination hearing was scheduled for 16 May 2019 in District Court, Madison County. On 16 May 2019, respondent-father's counsel withdrew due to a conflict of interest, respondent-father was appointed new counsel, and the trial court continued the matter until 1 July 2019, more than six weeks later, "to allow [the new] attorney to prepare for the termination hearing." Any further continuance of the 1 July 2019 termination hearing, which was held eighty-eight days after the filing of the petition for termination, would have pushed the hearing beyond the 90-day period set forth in N.C.G.S. § 7B-1109(d). Thus, respondent-father was required to make a showing that extraordinary circumstances existed to warrant another continuance. *See* N.C.G.S. § 7B-1109(d).

Respondent-father, however, made no showing that extraordinary circumstances existed to require another continuance of the termination hearing, and we conclude that the trial court did not abuse its discretion by denying respondent-father's motion to continue. Although respondent-father's counsel argued that he was not aware of the order at issue until a few days prior to the termination hearing, there were numerous references to the 24 September 2018 permanency planning hearing and the resulting 31 October 2018 order in the court file. Significantly, five DSS court reports discuss the 24 September 2018 permanency planning hearing, provide that Ava's mother testified at that hearing, and summarize the findings of the resulting permanency planning order. The DSS court reports summarize key portions of the 31 October 2018 order such as Ava's mother's testimony that respondent-father knew she was pregnant and that she informed him that he was possibly the father of the child before Ava's birth and repeatedly after her birth.

Here the court file that counsel had access to and copied on 16 May 2019, a month and a half before the termination hearing, contained multiple references to the 31 October 2018 order following the 24 September 2018 permanency planning hearing and summarized the evidence presented at the hearing and some of the trial court's findings. We cannot say that the trial court abused its discretion by denying the motion to continue.

II.

**[2]** Next, respondent-father contends the trial court erred by adjudicating grounds for the termination of his parental rights based on willful failure to make reasonable progress to correct the conditions that led to Ava's removal and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(2), (7). Specifically, respondent-father challenges several of the trial court's findings of fact as not being supported by clear, cogent, and convincing evidence and argues that the findings of fact are insufficient to support the trial court's conclusions of law. Those findings of fact which he does not challenge are deemed to be supported by competent evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

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). 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 subsection 7B-1111(a) of the North Carolina General Statutes. N.C.G.S.

§ 7B-1109(f). "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)). 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); then citing N.C.G.S. § 7B-1110 (2015)).

Termination under N.C.G.S. § 7B-1111(a)(2)

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

*In re Z.A.M.*, 374 N.C. 88, 95, 839 S.E.2d 792, 797 (2020). Leaving a child in foster care or placement outside the home is willful when a parent has "the ability to show reasonable progress, but [is] unwilling to make the effort." *In re Fletcher*, 148 N.C. App. 228, 235, 558 S.E.2d 498, 502 (2002).

Moreover, this Court has held that

> parental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2) even when there is no direct and immediate relationship between the conditions addressed in the case plan and the circumstances that led to the initial governmental intervention into the family's life, as long as the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home.

*In re B.O.A.*, 372 N.C. 372, 384, 831 S.E.2d 305, 313–14 (2019). For a respondent's noncompliance with a case plan to support termination of his or 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.

In its written termination order filed 26 July 2019, the trial court found facts regarding the grounds under N.C.G.S. § 7B-1111(a)(2) in finding of fact 11, which spans a page and a half of the five-page order. The trial court found that Ava tested positive for controlled substances at birth, received treatment in the NICU, and was placed in DSS custody when she was eleven days old. By the time of the order, she had been in DSS custody for nearly three years. Ava had been removed from the home of her mother and her mother's boyfriend, partly as the result of their substance abuse issues. The trial court further found that respondent-father and the mother had an ongoing relationship before Ava's birth that involved the use of controlled substances, and respondent-father was aware the mother was pregnant.[2]

Over a year after Ava's birth in July 2016, respondent-father was incarcerated in October 2017 and, five months after that, contacted DSS in March 2018 to inquire about Ava. In its oral findings at the adjudicatory stage, the trial court found

> that at no time during or since the birth of this child has the . . . respondent contacted or tried to contact this child . . . . [He] elected not to send cards, not to make calls. In addition, the respondent has been in this courtroom on (inaudible), during which time he never once requested the opportunity to see this child.

In its written findings, the trial court found that respondent-father had not developed a case plan and had not complied with the requirements of a DSS case plan to eliminate the reasons Ava came into DSS custody or to place himself in a position to be reunified with Ava. The trial court found that respondent-father had failed to maintain contact with DSS; timely sign and return a case plan to DSS; make an effort to reunify with Ava, except for completing a parenting class; develop a relationship with Ava; and visit Ava.

Initially, respondent-father asserts that the style of the trial court's finding of fact 11 impedes appellate review because the findings therein constitute a "stream of consciousness" rather than careful consideration of the evidence presented. *See In re L.L.O.*, 252 N.C. App. 447, 458–59,

2. In an earlier order, the trial court had found respondent-father supplied Ava's mother with controlled substances during her pregnancy.

799 S.E.2d 59, 66 (2017) (determining that a trial court's "stream of consciousness" style of findings "impede[d its] ability to determine whether the trial court reconciled and adjudicated all of the evidence presented to it"). We are not persuaded that the trial court's findings in finding of fact 11 amount to "stream of consciousness." Although all of the trial court's findings supporting grounds for termination under N.C.G.S. § 7B-1111(a)(2) are grouped together in finding of fact 11, the trial court did not use a personal pronoun, describe its thought process, or explain its personal experiences and feelings. The style of the trial court's finding of fact 11 does not impede appellate review.

Next, respondent-father challenges the portion of finding of fact 11 which provides that Ava "came into DSS custody partly as the result of [the mother's] substance abuse issues," rather than describing the circumstances surrounding Ava's removal as "entirely" due to the mother's substance abuse. Although the mother's substance abuse was a primary reason for the juvenile's removal from the home, the trial court also cited additional reasons in its adjudication order, including the mother's lack of prenatal care; Ava testing positive for controlled substances at birth; Ava having a low birth weight and possibly being born premature; the mother being on probation for felony possession of cocaine; the putative father being on probation for felony hit-and-run causing serious injury; the mother and putative father's inability to care for Ava; and the mother and putative father's lack of an appropriate alternative child care arrangement. Accordingly, the trial court's use of the word "partly" was supported by clear, cogent, and convincing evidence.

Respondent-father also challenges the following portion of finding of fact 11: "a Petition was initially filed by Madison County DSS on 13 July, 2016 alleging the juvenile to be a neglected juvenile." Although Ava was ultimately adjudicated to be a dependent juvenile, the record clearly demonstrates that the 13 July 2016 juvenile petition alleged that Ava was a neglected and dependent juvenile. Thus, respondent-father's challenge is without merit.

Respondent-father next argues that no clear and convincing evidence supports the trial court's findings that he had an ongoing relationship with the mother that involved drug use and that he was aware of when Ava was born. Rather, respondent-father claims that the trial court relied solely on the mother's testimony for that finding. Here respondent-father's own testimony at the termination hearing, however, supports the trial court's finding. Respondent-father testified that he and Ava's mother had an ongoing relationship before Ava's birth that involved the use of controlled substances.

> [Attorney for DSS]: You and [Ava's mother] had a relationship with each other before this child was born. Right?
>
> [Respondent-father]: Yes, we did.
>
> . . . .
>
> [Attorney for DSS]: That relationship included, at some point, the use of controlled substances as well. Right?
>
> [Respondent-father]: Yes.

Accordingly, clear, cogent, and convincing evidence supports the trial court's finding that respondent-father's relationship with the mother before Ava's birth involved the use of controlled substances.

Respondent-father also disputes several of the trial court's findings regarding his case plan. First, respondent-father contests the portion of finding of fact 11 that provides that he "has not developed a DSS case plan" is not supported by clear, cogent, and convincing evidence and that his ability to comply with the case plan was "extremely limited" by his incarceration, rather than "more limited" as stated by the DSS social worker and incorporated into the findings of fact by the trial court. Even if the disputed portions of these findings are disregarded, *see In re J.M.*, 373 N.C. 352, 358, 838 S.E.2d 173, 177 (2020), respondent-father did not timely sign and return the case plan or make the necessary strides towards its completion.

A DSS social worker testified at the termination hearing that DSS sent respondent-father a case plan on 2 August 2018 and that he did not sign it until 24 September 2018. It was reasonable for the trial court to infer that waiting nearly two months to sign the DSS case plan was not "timely." Likewise, while the DSS social worker testified at the termination hearing that certain components of respondent-father's case plan were not possible to achieve in a prison setting, respondent-father could only verify that he completed one case plan item, completing a parenting class. According to the trial court,

> [respondent-father] testified that he completed the DART substance [abuse] program in 2017 and participated in Narcotics Anonymous meetings while incarcerated; the respondent father has provided no documentation of same to the Court to confirm these services were completed and the court therefore gives little to no weight to same.

When reading finding of fact 11 and finding of fact 12 in conjunction, it is clear that the trial court acknowledged that, while respondent-father

testified he completed a substance abuse program in 2017 and participated in Narcotics Anonymous meetings, he failed to provide any documentation to confirm that he completed those services. The crux of the challenged portions of both written findings 11 and 12 and the trial court's oral findings is that respondent-father failed to confirm his completion of substance abuse treatment.

Next, respondent-father argues that the remaining findings of fact do not support the trial court's conclusion that he willfully left Ava in foster care or placement outside of the home for more than twelve months without making reasonable progress to correct the conditions that led to her removal. Specifically, respondent-father argues that because the mother's substance abuse was the cause of Ava's removal, his lack of progress in the mental health, domestic violence, housing, and employment components of his case plan was not relevant in determining whether grounds existed under N.C.G.S. § 7B-1111(a)(2) to terminate his parental rights. We disagree.

Here the findings in the adjudication order indicate that Ava was removed from the custody of the mother and the putative father on 13 July 2016 based on a myriad of reasons, including the mother's substance abuse issues; the lack of prenatal care; Ava testing positive for controlled substances at birth; and their inability to care for Ava. Ava was not removed from respondent-father's custody since he never had custody of the child. Nonetheless, at the termination hearing, the trial court orally found as fact "that the biological mother informed [respondent father] of her pregnancy back in March of 2016, approximately four months prior to the child's birth." The trial court also found that respondent-father's relationship with the mother involved the use of controlled substances, respondent-father was the mother's supplier of controlled substances, and respondent-father continued to provide her with controlled substances during her pregnancy with Ava. The trial court found in its 31 October 2018 permanency planning order that respondent-father had been incarcerated since October 2017 for possession of cocaine and possession of a firearm by a felon and had previous convictions for possession of controlled substances in 1996 or 1997 and in 2006.

A careful review of the record shows the need for the substance abuse and mental health components of respondent-father's case plan. The family services agreement provided that the objective of the mental health and substance abuse components of respondent-father's case plan was to "identify and correct underlying traumas that cause these behaviors [in order] to create a safe and secure environment for

[Ava]." Because respondent-father contributed to the problematic circumstances that led to Ava's removal, we find there is a sufficient nexus between the conditions that led to Ava's removal and the substance abuse and mental health components of respondent-father's case plan. *See In re B.O.A.*, 372 N.C. at 386–87, 831 S.E.2d at 315 (noting that the history shown in various reports and orders contained in the record reflected the existence of a sufficient nexus between the conditions that led to the child's removal and the case plan relating to the mother's mental health, substance abuse, and medication management issues).[3]

III.

**[3]** Next, respondent-father asserts that the trial court's findings are insufficient to demonstrate that it considered the obstacles to his completion of the case plan, namely the timing of when he discovered Ava was in DSS custody and his incarceration. "A parent's incarceration is a 'circumstance' that the trial court must consider in determining whether the parent has made 'reasonable progress' toward 'correcting those conditions which led to the removal of the juvenile.' " *In re C.W.*, 182 N.C. App. 214, 226, 641 S.E.2d 725, 733 (2007). *But see*, *e.g.*, *In re Shermer*, 156 N.C. App. 281, 290, 576 S.E.2d 403, 409 (2003) ("Because respondent was incarcerated, there was little involvement he could have beyond what he did—write letters to [his children] and inform DSS that he did not want his rights terminated.").

Respondent-father was incarcerated in part due to a conviction for felony possession of cocaine. The trial court noted in its written findings of fact that a DSS social worker acknowledged that respondent-father's ability to comply with the case plan was "more limited" while incarcerated. Even if respondent-father attempted to comply with certain aspects of the case plan, he did not supply documentation to confirm his completion of any case plan item except for a parenting class taken while incarcerated. Given respondent-father's contribution to Ava's removal from the home by supplying drugs to Ava's mother during her pregnancy and his criminal history involving controlled substances, it was imperative that he prove his successful completion of the substance abuse components of the case plan, which could be accomplished while incarcerated.

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3. We agree, however, with respondent-father's assertion that a nexus between the domestic violence, housing, and employment components of his case plan and the conditions that led to Ava's removal is lacking. Accordingly, respondent-father's failure to comply with those components is not relevant to the determination of whether his parental rights to Ava are subject to termination under N.C.G.S. § 7B-1111(a)(2). *See In re B.O.A.*, 372 N.C. at 385, 831 S.E.2d at 314.

The trial court also orally found as fact that "that the biological mother informed him of her pregnancy back in March of 2016, approximately four months prior to the child's birth." Following Ava's birth, "and for the next fifteen months, respondent father did nothing to pursue his rights as the biological father of this child; there was little or no contact."

> The Court further f[ound] that at no time during or since the birth of this child has the . . . respondent contacted or tried to contact this child and to (inaudible). The respondent was here in August the child (inaudible) and acknowledged (inaudible) the Department's effort to terminate his parental rights, elected not to send cards, not to make calls. In addition, the respondent has been in this courtroom on (inaudible), during which time he never once requested the opportunity to see this child.

It is clear that respondent-father had limited communication with DSS and did not inquire as to how to communicate with Ava via cards, letters, or phone calls. He personally met and received contact information from the child's guardian *ad litem* but did not make an effort to contact him or to understand the role of the guardian *ad litem*. With regard to his efforts to complete other case plan items, the trial court found that "[a]ttempts by the father to find an appropriate (inaudible) person [as an alternative child care arrangement] failed because of his family's inability to let that happen." In finding of fact 11, the trial court found that respondent-father had "made no effort to reunify with [Ava], except the completion of a parenting class."

Ava has been in foster care since she was eleven days old. While respondent was incarcerated for over half of the time Ava was in foster care, he was not incarcerated at her birth or during the first fifteen months of her life during which she was in DSS custody. Fifteen months passed during which respondent-father knew of Ava but did not inquire about her even though he was not incarcerated. Given his minimal efforts to maintain contact with her or complete the case plan items he could during his incarceration, the trial court's findings are sufficient to demonstrate that respondent-father's failure was willful in that he had the ability to show reasonable progress but was unwilling to make the effort. Based on the foregoing, we conclude that the trial court's findings are sufficient to support its conclusion that respondent-father left Ava in foster care for more than twelve months without making reasonable progress to correct the conditions that led to her removal. The trial

court did not err by terminating respondent-father's parental rights to Ava on this ground.

IV.

**[4]** Under N.C.G.S. § 7B-1111(a)(7), a 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). "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 A.G.D.*, 374 N.C. 317, 319, 841 S.E.2d 238, 240 (2020) (alteration in original) (quoting *In re N.D.A.*, 373 N.C. 71, 79, 833 S.E.2d 768, 774 (2019)). "Wilful [sic] intent is an integral part of abandonment and this 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). "[I]f a parent withholds [that parent's] presence, [ ] love, [ ] care, the opportunity to display filial affection, and wilfully [sic] neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Id.*

"Although a parent's options for showing affection while incarcerated are greatly limited, a parent 'will not be excused from showing interest in his child's welfare by whatever means available.' " *In re D.E.M.*, 257 N.C. App. 618, 621, 810 S.E.2d 375, 378 (2018) (emphasis omitted) (quoting *In re J.L.K.*, 165 N.C. App. 311, 318–19, 598 S.E.2d 387, 392 (2004)). "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 A.G.D.*, 374 N.C. at 320, 841 S.E.2d at 240. The trial court may "consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions" within the relevant period. *In re C.B.C.*, 373 N.C. at 22, 832 S.E.2d at 697.

Here the relevant six-month period preceding the filing of the termination petition is 31 April 2018 to 31 October 2018; respondent-father was incarcerated during this time period.

In finding of fact 12, the trial court supported its conclusion that grounds existed to terminate respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(7). The trial court found in finding of fact 12 that

> subsequent to the birth of the juvenile the respondent father had no contact with the juvenile; provided no care for the juvenile; provided no support for the juvenile; did not provide any care or support for the juvenile during the 14/15 months from the time the juvenile was born until he was incarcerated in October, 2017; developed no bond or relationship with the juvenile; did not contact DSS to inquire as to the status of the juvenile or develop a case plan with DSS to work to reunification with the juvenile to prevent the juvenile from remaining placed in foster care; that since paternity was established has not complied with DSS case plan requirements; did participate in the DART program while in DAC custody but has not provided documentation of same to DSS; that despite having a significant substance abuse problem over the past 20 years has only received treatment for the same while incarcerated; has presented no documentation as to completion of that program during this hearing; has recently completed a parenting course offered while incarcerated; that the respondent father has an older child with whom he has a limited relationship.

Respondent-father argues that the first part of finding of fact 12, which provides that he had not contacted or provided support or care for Ava between her birth in July 2016 and his incarceration in October 2017, is outside the relevant period. In making this argument, he relies on the assertion that there was no evidence or proper finding that he knew of Ava's existence prior to his incarceration. As previously discussed, the trial court found as fact that respondent-father knew of the child approximately four months before her birth. Therefore, we conclude that his failure to contact Ava or provide support and care for her between her birth and his incarceration was purposeful and deliberative and was properly considered by the trial court in evaluating respondent-father's credibility and intentions within the relevant period even though the conduct fell outside the six-month window. Accordingly, the trial court's finding of fact 12 adequately supports its conclusion that respondent-father willfully abandoned Ava, and the trial court's order terminating respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(7) is affirmed.

For the reasons stated above, we affirm the 26 July 2019 order of the trial court terminating respondent-father's parental rights.

AFFIRMED.

Justice EARLS dissenting.

In affirming the trial court's order terminating respondent's parental rights, the majority agrees with the trial court's conclusion that petitioners have proven by clear, cogent, and convincing evidence that respondent willfully failed to make reasonable progress towards correcting the conditions that led to Ava's removal, pursuant to N.C.G.S. § 7B-1111(a)(2), and that he willfully abandoned Ava, pursuant to N.C.G.S. § 7B-1111(a)(7). In reaching this conclusion, the majority disregards numerous recent precedents which establish that (1) a trial court must analyze the effects of a parent's incarceration on his or her capacity to comply with the terms of a court-approved DSS case plan before concluding that the parent has willfully failed to make reasonable progress within the meaning of N.C.G.S. § 7B-1111(a)(2), and (2) a trial court must consider a parent's conduct within the "determinative" six-month period preceding the filing of a termination petition when assessing whether the parent has willfully abandoned his or her child within the meaning of N.C.G.S. § 7B-1111(a)(7). Because the trial court did neither, I dissent. However, because the record contains evidence that could support the conclusion that grounds existed to terminate respondent's parental rights, I would vacate the trial court's order and remand for further factfinding.

As a preliminary matter, the evidence that respondent knew he was Ava's biological father at or near the time of her birth is equivocal. At a permanency planning hearing in September 2018, respondent testified that he did not learn about Ava until September 2017 when he was informed of Ava's birth by her mother. At the same hearing, Ava's mother testified that, in the trial court's recounting, "respondent father was aware she was pregnant" and that she "contacted the respondent father from the hospital when the juvenile was born." In addition, DSS reported that Ava's mother "had told [respondent] he was possibly the father of [Ava] before [she] was born and repeatedly after her birth." On the basis of this testimony and the DSS report, the trial court made an oral finding of fact that "the biological mother informed [respondent] of her pregnancy in March of 2016, approximately four months prior to the child's birth. Thereafter and for the next fifteen months, respondent father did nothing to pursue his rights as the biological father of this child; there was little to no contact." In its written termination order, the trial court found that "respondent mother previously testified the respondent father was contacted shortly after the juvenile was born; that the respondent father was aware the respondent mother was pregnant; that

the respondent mother and father had an ongoing relationship prior to the birth of the juvenile that involved the use of controlled substances."[1]

Notably, the trial court did not find that respondent knew Ava was *his* biological child at any time prior to September 2017, notwithstanding Ava's mother's testimony and the DSS report. There is a distinction between this finding, which the trial court did not make, and the trial court's actual finding that respondent knew of Ava's mother's pregnancy. If respondent knew that Ava was his biological child at the time of her birth, then respondent's purported lack of effort to involve himself in her life might indicate a "purposeful and deliberative" intent to wholly abandon his parental duties, as the majority states. But if respondent instead knew only that Ava's mother was pregnant and gave birth to a child, his actions (or lack thereof) would be largely, if not entirely, irrelevant. From the beginning, Ava's mother represented to DSS that her boyfriend was Ava's biological father. At a minimum, the fact that Ava's mother was publicly maintaining that her boyfriend was Ava's biological father indicates that respondent's opportunities to initiate and maintain a relationship with Ava were limited. Of course, the trial court possessed the authority to "determine which inferences shall be drawn and which shall be rejected" from conflicting or contradictory evidence. *In re Gleisner*, 141 N.C. App. 475, 480 (2000). But the trial court did not expressly draw the inference that respondent knew he was Ava's biological father prior to September 2017. Thus, the significance of respondent's conduct towards Ava in the immediate aftermath of her birth is questionable.

Nevertheless, the majority relies heavily upon respondent's failure to develop a relationship with Ava "at her birth or during the first fifteen months of her life during which she was in DSS custody." Yet even if respondent knew or reasonably should have known that he was Ava's biological parent during this time period, the trial court's order still lacks sufficient findings to support its conclusion that there is clear, cogent, and convincing evidence that grounds existed to terminate respondent's parental rights.

First, the trial court, and the majority, both fail to adequately account for the limitations imposed by respondent's incarceration on his ability to comply with the court-approved DSS case plan. As this Court has

1. I reiterate my concern that a single individual's bare "testimony, supplemented by no other evidence besides the pleadings," may be insufficient to prove by clear, cogent, and convincing evidence that a ground exists to terminate parental rights. *In re L.M.M.*, 847 S.E.2d 770, 778 (N.C. 2020) (Earls, J., dissenting).

repeatedly emphasized, "[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re S.D.*, 374 N.C. 67, 75 (2020) (alteration in original) (quoting *In re T.N.H.*, 372 N.C. 403, 412 (2019)). It is not enough that the trial court "noted in its written findings of fact that a DSS social worker acknowledged that respondent-father's ability to comply with the case plan was 'more limited' while incarcerated." Rather, the trial court was required to independently conduct "an analysis of the relevant facts and circumstances" in order to determine "the extent to which [respondent's] incarceration . . . support[ed] a finding" that he had failed to make reasonable progress in correcting the conditions that led to Ava's removal. *In re K.N.*, 373 N.C. 274, 283 (2020).

The trial court conducted no such analysis. For example, the trial court found that "the respondent father has not developed a DSS case plan [and] has not complied with the requirements of a DSS case plan to eliminate the reasons the juvenile came into DSS custody." It is uncontroverted that respondent did indeed sign a DSS case plan on 24 September 2018. According to the majority, these facts are reconcilable because "[i]t was reasonable for the trial court to infer that waiting nearly two months to sign the DSS case plan was not 'timely.' " Yet neither the trial court nor the majority address respondent's argument that his failure to immediately sign the case plan was caused by his inability to confer with his attorney about its terms, which resulted from his incarceration. As the trial court noted in a prior order, a writ was issued to allow respondent to attend a review hearing scheduled for 21 August 2018, but "law enforcement did not bring [respondent]." Respondent signed the case plan the next time he appeared in court with his attorney present on 24 September 2018. The trial court was not entitled to ignore the possibility that respondent's incarceration delayed his signing of the DSS case plan. *Cf. In re N.D.A.*, 373 N.C. 71, 82 (2019) (trial court must first determine "whether respondent-father had the ability to contact petitioner and [his child] while he was incarcerated" before making "a valid determination regarding the extent to which respondent-father's failure to contact [his child] and petitioner . . . was willful"). Similarly, the trial court and the majority both disregard respondent's testimony that he completed numerous courses required by his case plan while he was incarcerated because respondent failed to provide proper "documentation . . . to confirm these services were completed." Again, neither the trial court nor the majority considers the possibility that respondent's lack of documentation, or his failure to bring documentation to the termination hearing, resulted from the circumstances of his incarceration.

We have frequently held that a parent's incarceration does not excuse the parent from his or her obligation to comply with a DSS case plan to the extent his or her circumstances allow. *See, e.g.*, *In re M.A.W.*, 370 N.C. 149, 153 (2017). But our precedents establish that a trial court must analyze the circumstances of a parent's incarceration before determining that the parent has failed to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(2). *Cf. In re S.D.*, 374 N.C. at 77 (affirming a trial court's order that "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 [his child] were subject to termination"). In affirming the trial court's order without any meaningful examination of "the extent, if any, to which respondent-father's incarceration affected his ability to" comply with his DSS case plan, the majority erodes the protections afforded to all parents, including incarcerated parents, in termination proceedings. *In re N.D.A.*, 373 N.C. at 82.

Second, in attempting to justify the trial court's conclusion that respondent willfully abandoned Ava pursuant to N.C.G.S. § 7B-1111(a)(7), the majority ascribes undue weight to respondent's conduct during the time period surrounding Ava's birth. In examining whether respondent willfully abandoned Ava, the "*determinative period* . . . is the six consecutive months preceding the filing of the petition." *In re N.D.A.*, 373 N.C. at 77 (emphasis added) (citation omitted); *see also In re K.N.K.*, 374 N.C. 50, 54 (2020); *In re J.D.C.H.*, 847 S.E.2d 868, 874 (N.C. 2020); *In re A.L.S.*, 374 N.C. 515, 521 (2020); *In re C.B.C.*, 373 N.C. 16, 22 (2019).[2] Thus, "[a]lthough the trial court *may* consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions," this conduct is less significant than conduct which occurs within the determinative period. *In re E.B.*, 847 S.E.2d 666, 672 (N.C. 2020) (emphasis added). A parent's conduct outside the determinative period is relevant only "*in evaluating a parent's credibility and intentions*"—that is, in providing context which the trial court may look to in interpreting the significance of a parent's conduct *during* the determinative period. *In re C.B.C.*, 373 N.C. at 22. A trial court's conclusion that a parent has "willfully abandoned" his or her child is necessarily unsupported

2. The majority does not cite to any of our numerous precedents describing the six-month period preceding the filing of the termination petition as the "determinative" period, instead referring only to a "relevant six-month period." The use of the phrase "relevant six-month period" appears intended to diminish the force of our precedents which conclusively establish that a parent's conduct during the determinative six-month period is more than "relevant" to the willful abandonment analysis under N.C.G.S. § 7B-1111(a)(7)—a parent's conduct during this window offers the most significant indicia of willful abandonment, carrying more probative value than conduct which occurs before (or after) the determinative period.

by clear, cogent, and convincing evidence when the trial court fails to address relevant conduct that occurs within the determinative six-month period.

In the present case, the petition to terminate respondent's parental rights was filed on 31 October 2018, meaning the "determinative six-month period" began on 31 April 2018. It is indisputable that respondent made efforts to assert his parental rights during these six months. In May 2018, respondent took a paternity test which confirmed his biological parenthood. In or around June 2018, respondent provided DSS with the names of two relatives for consideration as possible kinship placements for Ava. In September 2018, respondent entered into a case-plan agreement with DSS. These actions do not "impl[y] conduct on the part of the parent which manifests a willful determination to forego *all* parental duties and relinquish *all* parental claims to the child." *In re Young*, 346 N.C. 244, 251 (1997) (emphases added). Indeed, given that respondent's "options for showing affection . . . [were] greatly limited" while he was incarcerated, respondent's efforts are flatly inconsistent with the conclusion that he willfully abandoned Ava. *In re L.M.M.*, 847 S.E.2d 770, 775 (N.C. 2020).

Even assuming *arguendo* that "respondent acted willfully and with an intention to forego his parental responsibilities" by failing to establish himself in Ava's life at the time of her birth, *In re K.N.K.*, 374 N.C. at 55, the majority's reasoning fails because it does not account for his conduct evincing an intent to assume some responsibilities of parenthood during the determinative period. In affirming an order terminating parental rights pursuant to N.C.G.S. § 7B-1111(a)(7), this Court has held that a parent's "prior efforts in seeking a relationship with [his child]" before the determinative six-month period do not "preclude a finding that he willfully abandoned [his child] pursuant to N.C.G.S. § 7B-1111(a)(7) if he did nothing to maintain or establish a relationship with [the juvenile] during the determinative six-month period." *In re C.B.C.*, 373 N.C. at 23. The converse is also true—respondent's previous failure to establish himself in Ava's life is insufficient evidence to prove willful abandonment given that he attempted to establish a relationship with Ava during the determinative period. By failing to examine respondent's conduct during the six months preceding the filing of the termination petition, and instead relying solely on its evaluation of respondent's earlier conduct, the majority flips the willful abandonment inquiry on its head. This approach is irreconcilable with settled precedents which we have recently and repeatedly reaffirmed.

For the above-stated reasons, I respectfully dissent.

**IN RE A.S.M.R.**

[375 N.C. 539 (2020)]

IN THE MATTER OF A.S.M.R. AND M.C.R.

No. 379A19

Filed 20 November 2020

**1. Termination of Parental Rights—standing—underlying adjudication order—not appealed—collateral attack**

Respondents' failure to appeal from a trial court's order adjudicating their two children neglected constituted an abandonment of any non-jurisdictional challenges to that order. Not only were they precluded from collaterally attacking that order in a subsequent termination of parental rights proceeding, but in addition, their contention that the adjudication order contained errors, even if true, would not deprive the department of social services of standing to pursue a termination of parental rights proceeding.

**2. Termination of Parental Rights—jurisdiction—UCCJEA—home state—record evidence**

The trial court had jurisdiction to terminate respondents' parental rights to their two children, despite respondents' argument that the trial court failed to make specific findings establishing North Carolina as the children's home state (per the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)) in a previous order adjudicating the children neglected, where record evidence established that both children lived in various locations in North Carolina since they were born and at all times until the department of social services obtained custody.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 13 June 2019 by Judge Justin K. Brackett in District Court, Cleveland County. This matter was calendared for argument in the Supreme Court on 7 October 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

*Lauren Vaughan and Charles E. Wilson Jr. for petitioner-appellee Cleveland County Department of Social Services.*

*No brief for appellee Guardian ad Litem.*

*Leslie Rawls for respondent-appellant father.*

*J. Thomas Diepenbrock for respondent-appellant mother.*

DAVIS, Justice.

The issues in this case are whether (1) the existence of non-jurisdictional defects in an unappealed order adjudicating a juvenile to be neglected deprives a department of social services of standing to subsequently move for the termination of parental rights as to that juvenile; and (2) a trial court is required to make explicit findings in an adjudication order that jurisdiction exists under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) where evidence that clearly establishes jurisdiction is present in the record. For the reasons set out below, we affirm the trial court's order terminating the parental rights of respondents over their two children.

**Factual and Procedural Background**

This case involves a termination of parental rights proceeding initiated by petitioner Cleveland County Department of Social Services (DSS) against the respondent parents on the basis of neglect. Respondent-mother is the biological mother of two children—"Anna"[1] born in December 2015 and "Matthew" born in December 2016. Respondent-father is the legal father of Anna[2] and the biological father of Matthew. DSS first became involved with the family in June 2017 following a domestic violence incident between respondents. DSS found the family to be in need of services to address several issues related to mental health, domestic violence, and parenting, and the case was subsequently transferred for in-home case management. Due to respondents' failure to make reasonable progress to address these issues, DSS filed a juvenile petition on 1 September 2017 alleging that Anna and Matthew were neglected juveniles and obtained nonsecure custody of the children.

An adjudication hearing took place on 25 October 2017. At this proceeding, respondents waived their right to an evidentiary hearing, stipulated to the admission of the juvenile petition into evidence, and stipulated that the trial court could adjudicate Anna and Matthew to be neglected based on the information contained within the petition. The trial court entered an adjudication order on 2 November 2017

1. Pseudonyms are used throughout this opinion in order to protect the identities of the juveniles.

2. The termination order also terminated the parental rights of Anna's biological father. He is not a party to this appeal.

concluding that the children were neglected juveniles. The trial court entered a separate disposition order on 20 November 2017 in which it ordered that the children remain in DSS custody and that respondents address issues relating to domestic violence, substance abuse, parenting skills, and housing.

The trial court held permanency planning review hearings in December 2017, February 2018, May 2018, and July 2018. Following the July 2018 hearing, the trial court changed the children's primary permanent plan to adoption. On 23 October 2018, DSS filed motions to terminate respondents' parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) and (2). Following a hearing on 22 May 2019, the trial court entered an order on 13 June 2019 concluding that both grounds for termination existed. The trial court also determined that it was in the children's best interests for respondents' parental rights to be terminated. Respondents gave notice of appeal to this Court pursuant to N.C.G.S. § 7B-1001(a1)(1).

## Analysis

### I. Standing of DSS to Seek Termination of Parental Rights

**[1]** Respondents' first argument on appeal is based upon alleged evidentiary errors and insufficient findings in the trial court's 2 November 2017 adjudication order. These alleged errors concern a conclusion of law that was mislabeled as a finding of fact, an invalid stipulation to a conclusion of law, a nonbinding stipulation as to the admission of the juvenile petition into evidence, and insufficient factual findings to support the ultimate determination of neglect. Respondents argue that (1) due to this combination of errors the trial court's adjudication order was invalid and therefore insufficient to legally place custody of the children with DSS; and (2) without a valid order granting DSS custody, DSS consequently lacked standing to move for the termination of respondents' parental rights. *See In re E.X.J.*, 191 N.C. App. 34, 39, 662 S.E.2d 24, 27 (2008) ("If DSS does not lawfully have custody of the children, then it lacks standing to file a petition or motion to terminate parental rights, and the trial court, as a result, lacks subject matter jurisdiction."), *aff'd per curiam*, 363 N.C. 9, 672 S.E.2d 19 (2009).

In response, DSS contends that respondents' assertions of error as to the adjudication order—even if correct—cannot be used to attack the standing of DSS to seek termination of respondents' parental rights because respondents failed to appeal the adjudication order. DSS asserts that the proper avenue for review of the trial court's adjudication order was an appeal of that order. Because they did not appeal from the

2 November 2017 adjudication order, DSS argues that respondents are now barred from collaterally challenging the validity of that order.

We agree with DSS that respondents are precluded from contesting the validity of the trial court's adjudication order in the present appeal, which is an appeal only of the trial court's subsequent termination order. Respondents have abandoned any challenge to the 2 November 2017 adjudication order by failing to appeal that order. For this reason, they cannot now contest the termination order from which this appeal arises by pointing to non-jurisdictional errors allegedly contained in that prior adjudication order.

As an initial matter, respondents are correct that DSS must have had proper legal custody of the juveniles in order to possess standing to seek the termination of parental rights over the juveniles. "[S]tanding is a 'necessary prerequisite to a court's proper exercise of subject matter jurisdiction . . . .' " *Willowmere Cmty. Ass'n v. City of Charlotte*, 370 N.C. 553, 561, 809 S.E.2d 558, 563 (2018) (quoting *Crouse v. Mineo*, 189 N.C. App. 232, 236, 658 S.E.2d 33, 36 (2008)). Our General Assembly has determined that "[a]ny county department of social services, consolidated county human services agency, or licensed child-placing agency *to whom custody of the juvenile has been given by a court of competent jurisdiction*" has standing to file a petition or motion to terminate parental rights. N.C.G.S. § 7B-1103(a)(3) (2019) (emphasis added).

Even assuming, without deciding, that the 2 November 2017 adjudication order actually did contain the errors asserted by respondents, those errors did not affect DSS's standing to ultimately seek termination of respondents' parental rights. A termination proceeding is separate and distinct from an underlying adjudication proceeding. *See In re R.T.W.*, 359 N.C. 539, 553, 614 S.E.2d 489, 497 (2005) ("[A] termination order rests on its own merits."), *superseded by statute on other grounds*, Act of Aug. 23, 2005, S.L. 2005-398, § 12, 2005 N.C. Sess. Laws 1455, 1460–61 (amending various provisions of the Juvenile Code).

Although this Court has not previously considered the precise argument raised by respondents in this case, the Court of Appeals addressed this issue over thirty years ago in *In re Wheeler*, 87 N.C. App. 189, 360 S.E.2d 458 (1987). The respondent-parent in *In re Wheeler*—whose parental rights had been terminated by the trial court—argued that a fundamental error existed in the trial court's initial order adjudicating the child to be an abused and neglected juvenile because that order failed to recite the standard of proof as required by statute. *Id.* at 193. The respondent asserted that due to this error "the order was invalid and

could neither serve as [p]etitioner's . . . authority to file the [termination] petition nor bind the Court in the termination proceeding on the issue of abuse." *Id.*

The Court of Appeals agreed with the respondent that the trial court's failure to recite the applicable standard of proof constituted error but determined that the respondent had abandoned this argument. *Id.* at 193–94, 360 S.E.2d at 461. The court explained that

> the proper avenues for [r]espondent to attack the adjudication of neglect and abuse and the dispositional order granting custody to [p]etitioner were 1) appeal, . . . or 2) a motion for relief pursuant to N.C. Gen. Stat. Sec. 1A-1, Rule 60. Although collateral attack in an independent or subsequent action is a permissible means of seeking relief from a judgment or order which is void on its face for lack of jurisdiction, . . . the error in this case was not a jurisdictional error subject to that kind of challenge. Because no appeal was taken or other relief sought from the [adjudication] order, it remained a valid final order which was binding in the later proceeding on the facts regarding abuse and neglect which were found to exist at the time it was entered.

*Id.* at 193–94, 360 S.E.2d at 461 (citations omitted).

In *In re O.C.*, 171 N.C. App. 457, 615 S.E.2d 391 (2005), the Court of Appeals decided a similar issue. In that case, the respondent-parent argued that a termination order should be reversed due to the trial court's failure to appoint a guardian *ad litem* for her for the adjudication proceeding that had taken place nineteen months earlier. *Id.* at 462, 615 S.E.2d at 394. The Court of Appeals disagreed, ruling that even assuming that the trial court had, in fact, erred in failing to appoint a guardian *ad litem* for the adjudication proceeding, this error did not "bear[ ] [any] legal relationship with the validity of the later order on termination." *Id.* at 462, 615 S.E.2d at 394–95. The Court of Appeals held that this was so because "[o]nly the order on termination of parental rights is before th[e] Court; the order on adjudication is not." *Id.* at 462, 615 S.E.2d at 394. The Court of Appeals explained as follows the problems that would exist if the respondent's argument was allowed to prevail:

> First, this would create uncertainty and render judicial finality meaningless. Termination orders entered three, five, even ten years after the initial adjudication could be cast aside. Secondly, by necessarily tying the adjudication

> proceedings and termination of parental rights proceedings together, respondent misapprehends the procedural reality of matters within the jurisdiction of the district court: Motions in the cause and original petitions for termination of parental rights may be sustained irrespective of earlier juvenile court activity. . . .
>
> Finally, the consequences of reversing termination orders for deficiencies during some prior adjudication would yield nonsensical results. While the order on termination would be set aside, the order on adjudication would not; consequently, the order on adjudication would remain a final, undisturbed order in all respects. This would generate a legal quagmire for the trial court: It has continuing jurisdiction over these children by operation of the undisturbed order on adjudication, but must "undo" everything following the time the children were initially removed from the home if it ever wishes to enter a valid termination of parental rights order.

*Id.* at 463–64 (emphasis omitted), 615 S.E.2d at 395–96.

The Court of Appeals has reaffirmed these principles in a number of other decisions as well. *See*, *e.g.*, *In re Y.Y.E.T.*, 205 N.C. App. 120, 123, 695 S.E.2d 517, 519 (2010) ("Respondents did not appeal from the trial court's adjudication and disposition order, and thus, this order and the findings and conclusions contained therein are binding on the parties."); *In re D.R.F.*, 204 N.C. App. 138, 141, 693 S.E.2d 235, 238 (2010) (declining to address the respondents' challenges to the adjudication order because "[a]n [adjudication] order remains final and valid when no appeal is taken from it").

We conclude that the principles set out in *Wheeler* and its progeny are correct. For the reasons set out in those decisions, a respondent's failure to appeal an adjudication order generally serves to preclude a subsequent collateral attack on that order during an appeal of a later order terminating the parent's parental rights.

As a result, respondents' argument on this issue lacks merit. In this appeal, respondents seek to vacate the termination order based on alleged errors contained in the underlying order adjudicating Anna and Matthew to be neglected juveniles. These alleged errors in the adjudication order did not relate to the trial court's subject matter jurisdiction and instead concerned the sufficiency of the evidence, evidentiary issues relating to the parties' stipulations, and the trial court's factual

findings. Even assuming arguendo that these assertions have merit, any such errors did not affect DSS's standing to subsequently move for the termination of respondents' parental rights. The 2 November 2017 adjudication order conferred custody over the juveniles upon DSS, and—as a result—DSS possessed standing to file the motion to terminate respondents' parental rights. Accordingly, respondents' argument is overruled.

## II. UCCJEA Findings

**[2]** In their second argument, respondents contend that an additional error existed in the adjudication order that was, in fact, jurisdictional and therefore rendered that order void. Respondents' argument is based on the trial court's failure to include in its adjudication order findings related to its jurisdiction under the UCCJEA. Respondents assert that "[a]n order entered under the Juvenile Code must contain findings to establish subject matter jurisdiction" under the UCCJEA. Because the adjudication order here lacked specific findings establishing that North Carolina was the home state of Anna and Matthew or setting out some other basis for concluding that jurisdiction existed under the UCCJEA, respondents assert that the adjudication order "is invalid and has no effect." Respondents contend that because the adjudication order is void for lack of jurisdiction, the subsequent termination order that relied on the prior adjudication of neglect is also invalid.

In response, DSS asserts that nothing in the record indicates that the trial court lacked jurisdiction under the UCCJEA to enter the adjudication order. DSS further notes that respondents cite no legal authority for their contention that the omission of findings in an adjudication order that expressly demonstrate the existence of jurisdiction under the UCCJEA necessarily constitutes reversible error.

Respondents' argument is unsupported by our case law. The UCCJEA is a jurisdictional statute that aims to "[a]void jurisdictional competition and conflict with courts of other States in matters of child custody." N.C.G.S. § 50A-101, Official Comment (2019). This Court recently addressed the issue of jurisdictional findings under the UCCJEA in *In re L.T.*, 374 N.C. 567, 843 S.E.2d 199 (2020). In that case, the respondent argued that the trial court lacked jurisdiction to enter its termination order because the order did not contain findings that North Carolina (as opposed to Delaware) was the home state of the child and that, for this reason, the UCCJEA prerequisites were not satisfied. *Id.* at 569, 843 S.E.2d at 200. We disagreed, explaining as follows:

> This Court presumes the trial court has properly exercised jurisdiction unless the party challenging jurisdiction meets its burden of showing otherwise.

> The trial court must comply with the UCCJEA in order to have subject matter jurisdiction over juvenile abuse, neglect, and dependency cases and termination of parental rights cases. The 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 of the Act were satisfied when the court exercised jurisdiction.

*Id.* at 569, 843 S.E.2d at 200–01 (citations omitted).

After examining the record, we determined that North Carolina was, in fact, the child's home state for purposes of the UCCJEA because "the record reflects that [the child] had lived in North Carolina for more than six months by the time DSS filed the juvenile petition." *Id.* at 570–71, 843 S.E.2d at 201. We therefore affirmed the trial court's termination order. *Id.* at 571, 843 S.E.2d at 202.

Here, as in *In re L.T.*, the lack of explicit findings establishing jurisdiction under the UCCJEA does not constitute error because the record unambiguously demonstrates that "the jurisdictional prerequisites in the Act were satisfied." *Id.* at 569, 843 S.E.2d at 201. The specific portion of the UCCJEA cited by respondents provides that a North Carolina court "has jurisdiction to make an initial child-custody determination" if North Carolina "is the home state of the child on the date of the commencement of the proceeding." N.C.G.S. § 50A-201(a)(1) (2019). " 'Home state' means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C.G.S. § 50A-102(7) (2019).

The record is clear in this case that both Anna and Matthew lived in various locations in North Carolina with either respondents or the children's maternal grandmother and great-grandmother from the time of their birth through 1 September 2017 at which time DSS obtained nonsecure custody of them. Thus, because the record reflects that North Carolina was the home state of the juveniles under the UCCJEA at all relevant times, the trial court possessed jurisdiction to conduct the adjudication proceeding and enter the ensuing adjudication order.

## Conclusion

For the reasons set out above, we affirm the trial court's 13 June 2019 order terminating respondents' parental rights.

AFFIRMED.

**IN RE A.S.T.**

[375 N.C. 547 (2020)]

IN THE MATTER OF A.S.T.

No. 18A20

Filed 20 November 2020

**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 continued substance abuse, limited progress on his case plan, multiple criminal charges during the pendency of the case, and incarceration after entering an Alford plea to one of those charges—during which he made no attempt to contact his son—indicated a likelihood of future neglect if the son were returned to the father's care.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 17 October 2019 by Judge Benjamin S. Hunter in District Court, Person County. This matter was calendared for argument in the Supreme Court on 7 October 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 for petitioner-appellee Person County Department of Social Services.*

*Nelson Mullins Riley & Scarborough, LLP, by Carrie A. Hanger, for appellee Guardian ad Litem.*

*Richard Croutharmel for respondent-appellant father.*

BEASLEY, Chief Justice.

Respondent appeals from an order terminating his parental rights to his minor child, A.S.T. (Andrew).[1] We hold that the trial court did not err by terminating respondent's parental rights on the ground of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) and affirm the trial court's order.

On 10 May 2017, the Person County Department of Social Services (DSS) filed a juvenile petition alleging that Andrew was a neglected

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

juvenile after receiving reports of improper care, improper supervision, and substance abuse.[2] Subsequent drug screens of respondent and Andrew were positive for cocaine and benzoylecgonine. Andrew also tested positive for norcocaine, cocaethylene, and THC metabolites. Andrew's mother did not appear for her drug screens and her whereabouts were unknown when DSS filed the juvenile petition. DSS obtained nonsecure custody of Andrew by order entered 16 May 2017.

After a hearing on 5 June 2017, the trial court entered an order adjudicating Andrew to be a neglected juvenile. The trial court continued custody of Andrew with DSS and granted respondent supervised visitation with him for one hour each week. Respondent was ordered to establish a case plan with DSS, follow the terms of the case plan, submit to random drug screening, and complete a substance abuse assessment and follow all recommendations.

The trial court entered a review order after a hearing on 7 August 2017. The trial court found that respondent was participating in group substance abuse classes, was participating in the Parents as Teachers program during visitations, and was very appropriate during visitations. The only barrier to reunification was found to be consistency, and the trial court found that respondent needed to demonstrate he could continue with his sobriety, mental health treatment, and maintaining employment. Respondent was arrested on 24 September 2017 on charges of assault with a deadly weapon with intent to kill and discharging a firearm into occupied property.

In orders from review hearings on 20 November 2017 and 5 February 2018, the trial court again found that respondent was appropriate during visitations, but he continued to struggle with alcoholism. The trial court found respondent had tested positive for alcohol on 21 August 2017, he continued to have substance abuse issues, his bad judgment was slowing down his progress toward reunification, he was not in recommended group therapy, and he had not taken a recommended psychiatric evaluation.

In its order from the first permanency planning review hearing held on 30 April 2018, the trial court found that respondent had completed a psychiatric evaluation and had recently reengaged in substance abuse group therapy sessions, but his hair follicle drug screen on 28 February 2018 was positive for cocaine. Respondent continued to struggle with alcoholism and substance abuse issues. The trial court continued

2. Andrew was six months old when DSS filed the juvenile petition.

Andrew's primary permanent plan as reunification and set a concurrent plan of adoption.

At a subsequent permanency planning review hearing held on 16 July 2018, the trial court changed the primary permanent plan for Andrew to adoption and the concurrent plan to reunification.[3] Respondent had entered an *Alford* plea to discharging a firearm into occupied property on 18 May 2018 and was incarcerated at the time of the hearing, receiving a sentence of 25 to 42 months' imprisonment. In return for his plea, the State dismissed the charge of assault with a deadly weapon with intent to kill.

On 25 April 2019, DSS filed a motion to terminate respondent's parental rights to Andrew, alleging grounds of neglect and failure to make reasonable progress to correct the conditions that led to Andrew's removal from the home. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019). After a hearing on 30 September 2019, the trial court entered an order terminating respondent's parental rights to Andrew on 17 October 2019.[4] The trial court found both grounds alleged in the motion to terminate parental rights and concluded that terminating respondent's parental rights was in Andrew's best interests. Respondent appealed.

Respondent argues the trial court erred in adjudicating grounds to terminate his parental rights. We disagree.

This Court reviews a trial court's adjudication 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 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019) (citing *In re Moore*, 306 N.C. 394, 403–04 (1982)). "Unchallenged findings of fact made at the adjudicatory stage are binding on appeal." *In re Z.V.A.*, 373 N.C. 207, 211 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97

3. The trial court conducted two additional permanency planning review hearings on 1 October 2018 and 4 February 2019, while respondent was incarcerated. The trial court's orders from those hearings had findings of fact and conclusions of law similar to its previous permanency planning review orders with regard to respondent and Andrew but differed with regard to Andrew's mother and her child with another man.

4. The trial court's order also terminated the parental rights of Andrew's mother, but she is not a party to this appeal.

(1991)). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

Grounds exist to terminate parental rights where "[t]he parent has . . . neglected the juvenile . . . within the meaning of [N.C.]G.S. [§] 7B-101." N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019). To terminate parental rights 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. 835, 843 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15 (1984)). "When determining whether such future neglect is likely, the [trial] court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. at 212 (citing *In re Ballard*, 311 N.C. at 715).

The trial court concluded that respondent had neglected Andrew and there was a probability the neglect would continue if he were returned to respondent's care. The trial court made the following findings of fact in support of its adjudication of the ground of neglect to terminate respondent's parental rights:

> 13. Prior to May 16, 2017, the parents were exercising custody of this child;
>
> 14. The parents failed to provide proper care for the child, and did keep this child in an injurious environment by using and continuing to use controlled substance after his birth;
>
> 15. The parents failed to provide proper care for the child, and did keep this child in an injurious environment by allowing the child to ingest cocaine while the child was less than six (6) months old;
>
> . . . .
>
> 17. After the parents lost custody, DSS offered services to the parents to work towards recovering custody of their child;
>
> 18. The parents initially utilized the services offered by DSS, but failed to consistently comply with their respective case plans;

19. The parents have not been willing to consistently work with the DSS social workers to reunify themselves with their child;

. . . .

21. [Respondent] testified that he received a citation for Driving While Impaired during the pendency of this action, and that he plead [sic] guilty to such offense;

22. [Respondent] also acknowledged that at that time he did not possess a valid North Carolina Driver's License;

23. . . . [Respondent's] criminal history shows four prior Driving While License Revoked convictions and two additional Driving While Impaired convictions which occurred prior to the current DSS proceeding;

24. [Respondent] denied that he used cocaine, but he acknowledged that he took a drug test on February 28, 2018 that showed cocaine in his system;

25. [Respondent] has committed a serious criminal offense (Shooting into an Occupied Dwelling) which has caused him to be incarcerated, leaving him unavailable to visit or resume custody of his child; he has a projected release date of June 22, 2020;

26. [Respondent] testified that he was not guilty of the offense and only took a plea to "get the case over with";

27. In either case, [respondent] has voluntarily made himself unavailable to care for [Andrew] for a substantial portion of [Andrew's] life;

. . . .

34. Both parents' last visit with [Andrew] was May 15, 2018, and [Andrew] has not seen his parents for sixteen (16) months;

35. That the parents have not provided regular care for their minor child for more than two (2) years;

. . . .

37. That [respondent] has failed to significantly or substantially contribute to [Andrew's] care for the last two years;

> 38. During his time of incarceration [respondent] testified, and the [c]ourt so finds, that he made no attempt to make any phone calls to his son from prison, even though he telephoned the mother . . . regularly;
>
> 39. [Respondent] also testified, and the [c]ourt so finds, that he did not send any cards, letters or gifts to his child while in prison;
>
> 40. [Respondent] testified that he took this position of no contact "because [Andrew] is a baby";
>
> 41. [Respondent's] options for showing affection while incarcerated are greatly limited, but he is not excused from showing interest in the child's welfare by whatever means available;
>
> . . . .
>
> 47. Services and recommendations for services to achieve reunification have been offered to the parents by Person County DSS, and the parents have not successfully recovered custody of their child;
>
> 48. The [c]ourt has conducted regular reviews of the custody of this child, and at each review, the [c]ourt has maintained custody of the child with Person County DSS, and declined to return custody of the child to the . . . mother or [respondent];
>
> 49. Twenty-eight (28) months have passed since the child was removed from the parents' custody and the parents have taken few tangible steps to resume custody of their child;
>
> . . . .
>
> 53. Based upon the foregoing facts, there are grounds to terminate the parental rights as to . . . [respondent] pursuant to [N.C.G.S. § 7B-1111(a)(1)] as the child is a neglected juvenile and there is a probability of continuing neglect within the foreseeable future . . . because . . . [respondent has] failed to make contact with [his] child in more than one year[.]

Respondent argues that finding of fact 15's statement that he "allow[ed] the child to ingest cocaine" is speculative because there was no evidence

about how the cocaine came to be in Andrew's body. It is uncontroverted that Andrew had cocaine in his system while he was under respondent's care and supervision. There was no evidence concerning the means by which the cocaine came to be in Andrew's system, and we thus disregard the portion of finding of fact 15 regarding Andrew's ingestion of cocaine. Nevertheless, the evidence is sufficient to support the remaining portion of finding of fact 15, and respondent's failure to keep Andrew from being exposed to cocaine supports the trial court's findings that he failed to provide proper care for Andrew and kept him in an injurious environment.

Respondent next argues that findings of fact 18 and 19 are unsupported by the evidence because he consistently complied with his case plan until he was incarcerated after entering an *Alford* plea in May 2018, as shown by his participation in substance abuse treatment, taking random drug screens, participation in a parenting education program, consistent visitation prior to his incarceration, and contact with the social worker even while incarcerated. Respondent contends that the only reason he did not complete his case plan was because he was incarcerated. Respondent, however, overly emphasizes his successes and minimizes his failings. The social worker testified that respondent's participation in his substance abuse treatment was inconsistent up until his incarceration and that he tested positive for alcohol and cocaine during the course of the case. Respondent denied using cocaine and stated that he had no idea how cocaine could have been in his system. Respondent then willfully placed himself in a position of being unable to continue working on his case plan when he entered an *Alford* plea to the offense of discharging a firearm into occupied property. The trial court's findings that respondent failed to consistently comply with and work on his case plan are supported by clear, cogent, and convincing evidence.

Respondent next challenges finding of fact 27, in which the trial court found that he "voluntarily" made himself unavailable to care for Andrew, and argues that he was wrongfully accused and pled guilty to the offense to shorten the time he would be away from Andrew. It is well established that "an 'Alford plea' constitutes 'a guilty plea in the same way that a plea of *nolo contendere* or no contest is a guilty plea.' " *State v. Alston*, 139 N.C. App. 787, 792 (2000) (quoting *State ex rel. Warren v. Schwarz*, 579 N.W.2d 698, 706 (Wis. 1998)).

> [A]n *Alford* plea is not the saving grace for defendants who wish to maintain their complete innocence. Rather, it is a device that defendants may call upon to avoid the

> expense, stress and embarrassment of trial and to limit one's exposure to punishment . . . .

*Id.* at 793 (quoting *Warren*, 579 N.W.2d at 707). By entering an *Alford* plea, respondent "agreed to be[ ] 'treated as . . . guilty' whether or not he admitted guilt." *Id.* (second alteration in original). Respondent's charge of discharging a firearm into occupied property and his subsequent plea resulted in his incarceration for more than two years and supports the trial court's finding that he "voluntarily made himself unavailable to care for [Andrew] for a substantial portion of [Andrew's] life."

Respondent also challenges the portion of finding of fact 38 which states that he made no attempt to telephone Andrew while he was incarcerated. Respondent does not challenge the evidentiary support for the finding, and it is fully supported by respondent's own testimony. Respondent instead presents arguments relating to the weight this finding should be afforded given other evidence in the case, which is not the province of this Court. *See In re D.L.W.*, 368 N.C. 835, 843 (2016) (stating that it is the trial court's responsibility during a termination-of-parental-rights hearing to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom).

Next, respondent challenges the portion of finding of fact 49 which states that he has taken few tangible steps toward reunification. He contends that his participation in substance abuse treatment, drug screens, and a parenting education program, along with his consistent visitation with Andrew and continued contact with the social worker after his incarceration refute this finding. The evidence before the trial court established that respondent never completed his substance abuse treatment; continued to test positive for cocaine until he was incarcerated; drove while impaired by alcohol while the case was pending; and discharged a firearm into occupied property, which resulted in his incarceration and disrupted his limited progress toward addressing his substance abuse issues. We hold that this finding of fact is supported by clear, cogent, and convincing evidence.

Lastly, respondent challenges finding of fact 53, wherein the trial court finds that he neglected Andrew and that there is a probability of continuing neglect within the foreseeable future. This determination, however, is a conclusion of law, and we will review it as such in conjunction with respondent's challenges to the trial court's conclusion of law that respondent's parental rights should be terminated on the ground of neglect. *See In re J.O.D.*, 374 N.C. 797, 807 (2020) ("[T]he trial court's

determination that neglect is likely to reoccur if [a child is] returned to his [parent's] care is more properly classified as a conclusion of law. . . . 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.' ") (fifth and sixth alterations in original) (internal citations omitted)).

Respondent contends that the trial court's conclusion that there is a probability of future neglect is based solely on his alleged failure to keep in contact with Andrew, which is unsupported by the evidence due to his incarceration and Andrew's young age. Respondent further argues that the trial court made no finding of fact concerning the probability of future neglect that was supported by competent evidence and that he presented evidence controverting the finding that there was a probability of future neglect. Respondent's arguments are misplaced.

We review de novo conclusions of law on the existence of grounds to terminate parental rights. *In re C.B.C.*, 373 N.C. at 19. "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 (2003). Therefore, in our analysis of whether the trial court erred by concluding that the ground of neglect existed to terminate respondent's parental rights, we are not limited to the trial court's statement that the probability of continuing neglect is due to respondent's failure to keep in contact with Andrew.

The trial court's findings of fact show that Andrew was adjudicated to be a neglected juvenile due to the substance abuse issues of both respondent and the mother. Respondent has failed to appreciably address his substance abuse issues. Respondent denied using cocaine, but he tested positive for cocaine in February 2018 and has only shown an extended abstinence from cocaine use while incarcerated. Respondent did not complete substance abuse treatment and was charged with driving while impaired just three months after DSS filed the underlying juvenile petition, while he was attending substance abuse treatment. Respondent also incurred serious felony charges during the pendency of this case and was convicted of discharging a firearm into occupied property, which resulted in his incarceration for a minimum of 25 months. During his incarceration, he made no attempt to contact Andrew and had limited contact with DSS. Although Andrew's young age limits the effect that respondent's contact with Andrew may have had, respondent cannot use his incarceration as a shield against a conclusion that there is a probability of future neglect. *See In re S.D.*, 374 N.C. 67, 75–76 (2020) ("[I]ncarceration does not negate a father's neglect

of his child because the 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." (cleaned up)).

We hold that the trial court's findings of fact support its conclusion that respondent has previously neglected Andrew and that there is a likelihood of future neglect if Andrew were returned to his care. *See id.* at 87. Accordingly, the trial court did not err by concluding that respondent's parental rights in Andrew were subject to termination on the ground of neglect pursuant to N.C.G.S. § 7B-1111(a)(1). *See id.* at 87–88; *In re E.H.P.*, 372 N.C. at 395 ("[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights.") We therefore need not address respondent's arguments regarding the ground of failure to make reasonable progress to correct the conditions that led to the removal of Andrew from the home. *See id.* Respondent does not challenge the trial court's conclusion that it was in Andrew's best interests to terminate respondent's parental rights, and we thus affirm the trial court's order.

AFFIRMED.

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IN THE MATTER OF C.B., J.B., E.O., C.O., & M.O.

No. 354A19

Filed 20 November 2020

**1. Termination of Parental Rights—best interest of the child—sufficiency of findings—likelihood of adoption—bond between parent and child**

In a termination of parental rights case, the Supreme Court rejected the mother's challenges to the trial court's dispositional findings regarding her eleven-year-old child who had behavioral issues. The challenged findings on achievement of permanence and likelihood of adoption were supported by competent evidence, and the trial court was not required to make findings about the child's attitude toward adoption or whether the mother's relationship with the child was detrimental to his well-being.

**2. Termination of Parental Rights—best interest of the child—statutory factors—lack of proposed adoptive placement**

The trial court's findings supported its conclusion that termination of a mother's parental rights was in the best interests of her child, an eleven-year-old with behavioral issues. There was no abuse of discretion where the trial court properly considered the relevant statutory criteria in N.C.G.S. § 7B-1110(a); further, the lack of a proposed adoptive placement at the time of the hearing was not a bar to termination.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 19 July 2019 by Judge Wayne L. Michael in District Court, Davie County. This matter was calendared in the Supreme Court on 7 October 2020 and determined without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

*Holly M. Groce for petitioner-appellee Davie County Department of Social Services.*

*Ellis & Winters, LLP, by Steven A. Scoggan, for appellee Guardian ad Litem.*

*Mary McCullers Reece for respondent-appellant mother.*

HUDSON, Justice.

Respondent, the mother of the minor children, C.B. (Connor),[1] J.B., E.O., C.O., and M.O., appeals from the trial court's order terminating her parental rights. Because we determine the trial court did not abuse its discretion in determining that it was in Connor's best interests to terminate respondent's parental rights, we affirm the trial court's order.

## I. Factual and Procedural Background

Respondent has a history with the Davie County Department of Social Services (DSS) due to improper supervision and care of her three oldest children. Connor, along with two of her other children, was previously removed from respondent's care in 2013 and adjudicated to be neglected and dependent juveniles. They were returned to respondent's custody in 2014.

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

Respondent now has five children, each with medical or psychological needs that require significant care. Connor has been diagnosed with autism, oppositional defiant disorder, and attention deficit hyperactivity disorder. He has significant behavior difficulties, including kicking, hitting, cursing, cheating, and yelling.

In January 2016, DSS received a report alleging concerns of improper supervision of the children and an injurious environment. DSS found that the children were chronically dirty and not receiving proper hygiene and that the home was cluttered, filthy, and in disarray. The report was substantiated for neglect and in-home services were provided for the family.

DSS and the in-home services team made multiple home visits from March to May 2016 in which they observed "[a] pattern of the children being dirty, the home being cluttered, in disarray, and lack of supervision" which placed the children at risk. During a 7 July 2016 home visit, a social worker observed Connor to be "out of control[,]" running around the house, jumping from the top of the bunk bed near a ceiling light fixture, and not being properly supervised. Since the January 2016 report, DSS received several additional reports regarding the care of the children, and the parents failed to make any improvement in the condition of the home.

On 12 July 2016, DSS filed juvenile petitions alleging the children were neglected and dependent juveniles and DSS obtained non-secure custody. The children were adjudicated to be neglected and dependent juveniles on 15 August 2016. In a separate disposition order entered on 28 September 2016, the trial court ordered respondent to complete a psychological evaluation and parenting assessment and follow all recommendations; participate in individual counseling, family counseling, and medication management and follow all recommendations; participate in parenting classes and follow all recommendations; attend all medical appointments for the three youngest children; participate in shared parenting with all of the foster families; and submit to random drug screens.

Respondent complied with some aspects of her case plan. However, she failed to demonstrate any appreciable progress in improving her parenting skills or in being able to manage, control, and meet the needs of her five special needs children. The trial court suspended respondent's supervised visitation in March 2018.

On 18 March 2019, DSS filed a petition to terminate respondent's parental rights to all five children alleging the grounds of neglect and willful failure to make reasonable progress to correct the

conditions that led to the children's removal from her care. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019).[2] Following a 28 June 2019 hearing on the petition, the trial court entered an order on 19 July 2019 concluding that grounds existed to terminate respondent's parental rights as alleged in the petition, and that terminating respondent's parental rights was in the best interests of the children. Respondent appealed.

## II. Analysis

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) or the trial court's decision regarding the best interest of four of her children. She argues the trial court erred in its dispositional decision by determining that termination of her parental rights was in the best interest of her oldest child, Connor. Specifically, respondent argues that the trial court failed to make necessary findings of fact as required by N.C.G.S. § 7B-1110(a), and that the court's findings did not support its conclusion that termination was in Connor's best interests. We disagree.

The termination of a parent's parental rights in a juvenile matter is a two-stage process consisting of an adjudicatory stage and a dispositional stage. *See* N.C.G.S. § 7B-1109, -1110 (2019). "If during the adjudicatory state, 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." *In re J.J.B.*, 374 N.C. 787, 791 (2020) (cleaned up). In determining 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.

2. DSS also petitioned to terminate the parental rights of the children's fathers. However, none of the fathers are parties to this appeal.

(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. 3, 6 (2019). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107 (2015) (citing *State v. Hennis*, 323 N.C. 279, 285 (1988)). "We review the trial court's dispositional findings of fact to determine whether they are supported by competent evidence." *In re J.J.B.*, 374 N.C. at 793.

Here, the trial court made the following pertinent findings regarding the statutory factors set forth in N.C.G.S. § 7B-1110(a) as they pertain to Connor:

18. . . .

a. [Connor] is 11 years old. . . .

b. The children are each placed in foster homes and are doing well. . . . There are no relative placements available for the children.

c. Termination of the parental rights of Respondent Mother, [and the children's fathers] will aid in accomplishing the plan of care for the juveniles which is currently TPR/adoption.

d. . . . [Connor] is placed in a therapeutic foster home. This is not an adoptive home but his behavior has improved there. DSS will continue to look for a forever home for him.

e. The children once had bonds with Respondent Mother . . . . However, the children have now spent nearly three years in foster care and the bond is diminishing. All visits ceased in March 2019. . . .

f. There are no barriers to this adoption except for this termination of parental rights. The likelihood of adoption

> is high with all children except [Connor] [for] who[m] [it] remains unknown at this time.
>
> g. Respondent Mother and Respondent Father [ ] are no longer together. The needs of the children are great and require significant intervention.
>
> h. . . . [Connor's] behavior ha[s] improved in [his] most recent placements. . . .
>
> 19. It is in the best interest of the child that the parental rights of Respondent Mother [and the children's fathers] be terminated.

### A. Challenges to Findings

**[1]** In her brief, respondent challenges the trial court's finding "that the termination of [her] parental rights would help to achieve permanence for all of [her] children" as it relates to Connor, arguing that this finding is unsupported by the evidence. However, the trial court made no such finding. The trial court found only that termination "will aid in accomplishing the plan of care for the juveniles which is currently TPR/adoption." At the hearing, the social worker testified that the permanent plan for the children is termination of parental rights and adoption and that the termination of the parents' parental rights would aid in achieving that plan. The guardian ad litem's (GAL's) report, admitted into evidence at the hearing, stated the same conclusion. Therefore, this finding is supported by competent evidence.

Respondent further argues that "in substance, the trial court's 'finding' as to likelihood of adoption and accomplishment of the permanent plan amounted to a finding that there was insufficient information to make a determination about these factors." As stated above, the trial court made a finding regarding Connor's permanent plan and that finding was supported by competent evidence. Although the trial court found that Connor's likelihood of adoption was "unknown[,]" the trial court need not find a likelihood of adoption in order to terminate parental rights. *See, e.g.*, *In re A.R.A.*, 373 N.C. 190, 200 (2020) ("[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 (2014))). Therefore, we hold the trial court made the requisite findings under N.C.G.S. § 7B-1110(a)(2)–(3).

Respondent also challenges the trial court's finding that there were "no barriers to adoption except for this termination of parental rights" as

it relates to Connor, arguing that this finding is unsupported by the evidence. She argues that Connor's "severe behavioral and mental health issues" rendered him difficult to care for and "landed him in at least nine different placements[.]" She further argues that even if "Connor were able to 'step down' from a therapeutic setting, DSS would still need to identify a family willing to adopt" and "if an adoptive family were to step forward, Connor's consent would be required before any adoption could occur." *See* N.C.G.S. § 48-3-601 (2019). Respondent's arguments are misplaced.

The trial court's findings show that although Connor had issues that made it difficult to determine the likelihood of his adoption, the court did not find those issues to be barriers that would necessarily preclude his adoption. Indeed, the trial court found that Connor's behaviors were improving in his current therapeutic foster home. At the hearing, a social worker testified about the possibility of Connor stepping down to a traditional foster care setting "within the next six months . . . at which time [DSS] would then seek for a foster-to-adopt placement." She further testified that DSS believed they would be able to identify an adoptive family for Connor just as they had been able to do for the other children. Therefore, we hold the trial court's finding that there were no barriers to adoption except for the termination of parental rights is supported by competent evidence.

Respondent also argues that the trial court erred by failing to make a finding concerning Connor's attitude toward adoption and the extent to which he would consent to be adopted. She argues that because Connor is now twelve years old, he must consent to an adoption, and thus this was a "relevant consideration" under N.C.G.S. § 7B-1110(a)(6) about which the trial court must make a finding of fact. She further argues that there was no evidence presented that Connor wanted to be adopted. This Court recently rejected this argument in *In re M.A.*, 374 N.C. 865 (2020). "To be sure, N.C.G.S. § 48-3-601 provides that a juvenile over the age of twelve must consent to an adoption." *In re M.A.*, 374 N.C. at 880. However, a trial court may waive the minor's consent requirement "upon a finding that it is not in the best interest of the minor to require the consent." N.C.G.S. § 48-3-603(b)(2). Because any refusal by Connor to consent "would not necessarily preclude [his] adoption, we hold that the trial court was not required to make findings and conclusions concerning the extent, if any, to which [the child was] likely to consent to any adoption that might eventually be proposed." *In re M.A.*, 374 N.C. at 880.

Finally, respondent argues that while the trial court found that Connor's bond with respondent had diminished after three years

in foster care and that her visitation was ceased, it did not find that Connor's relationship with respondent was detrimental to his well-being. Respondent asserts that "[t]his finding provided little to support a conclusion that [respondent's] rights to Connor should be terminated." There is no requirement that the trial court make a specific finding that the parent's relationship with the child was detrimental before it can terminate parental rights. The trial court's finding addressed the requisite factor in N.C.G.S. § 7B-1110(a)(4)—the bond between parent and child. Further, "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. 432, 437 (2019).

**B. Best Interest Determination**

**[2]** Respondent contends the trial court's findings of fact do not support its conclusion that termination of her parental rights was in Connor's best interests. In arguing that the trial court's dispositional decision constituted an abuse of discretion, respondent primarily relies on the Court of Appeals' decision in *In re J.A.O.*, 166 N.C. App. 222 (2004).

This case is distinguishable from *In re J.A.O.* Here, although the court found that Connor has significant medical and psychological needs, the severity of those issues does not appear to reach the same level as the juvenile in *In re J.A.O. See also In re J.J.B.*, 374 N.C. 787, 794 (2020); *In re J.S.*, 374 N.C. 811, 824 n. 4 (2020). Although Connor has had at least nine placements in the three years he has been in foster care, the court found that his behaviors were improving in his current therapeutic placement. The juvenile in *In re J.A.O.* was fourteen at the time of the termination hearing and sixteen at the time the Court of Appeals issued its opinion. Connor was only eleven at the time of the termination hearing and is currently twelve years old. Further, the trial court in this case did not find that adoption was unlikely but instead found that the likelihood of adoption was unknown. Notably, the GAL in this case recommended terminating respondent's parental rights in her report, stating that "[t]he farther [Connor] gets from visitation with his biological family the likelihood of adoption is greater." Additionally, the mother in *In re J.A.O.* had made some reasonable progress towards correcting the conditions which led to the removal of her child from her care, whereas here, respondent failed to make such progress. Instead, the trial court found that the parents "have been unable to correct the conditions that led to children's removal" and that "[their] situation is no better today than it was at the time of the removal."

Respondent argues that this case, as in *In re J.A.O.*, "requires realistic weighing of the likelihood of adoption by an as-yet unidentified adoptive parent against the sense of permanence offered by relationships already in place." To the extent respondent is asking this Court to reweigh the record evidence and to substitute our weighing of the relevant statutory criteria for that of the trial court, we decline to do so as "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." *In re I.N.C.*, 374 N.C. 542, 551 (2020).

Here, the trial court's dispositional findings demonstrate that it considered the relevant statutory criteria in N.C.G.S. 7B-1110(a) and made a reasoned determination that termination of respondent's parental rights was in Connor's best interests. The trial court made findings, supported by competent evidence, concerning Connor's age, the likelihood of adoption for Connor, whether termination would aid in accomplishing the permanent plan of adoption, and respondent's bond with Connor. Because Connor was not in a pre-adoptive placement, the court was not required to make a finding regarding Connor's bond with prospective adoptive parents. *In re A.R.A.*, 373 N.C. at 200. Further, although he did not have an adoptive placement at the time of the hearing, "the lack of a proposed adoptive placement for [the child] at the time of the termination hearing is not a bar to terminating parental rights." *In re A.J.T.*, 374 N.C. 504, 513 (2020).

## III. Conclusion

We are satisfied that the trial court's conclusion that it was in Connor's best interests to terminate respondent's parental rights was neither arbitrary nor manifestly unsupported by reason. For these reasons, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

**IN RE D.L.A.D.**

[375 N.C. 565 (2020)]

IN THE MATTER OF D.L.A.D.

No. 123A20

Filed 20 November 2020

**Termination of Parental Rights—grounds for termination—neglect —likelihood of future neglect**

In an action between two parents, the trial court properly terminated respondent-mother's parental rights to her child on the grounds of neglect based on an unchallenged finding that the child was previously neglected due to living in an environment injurious to his welfare when living with respondent, and on findings showing a likelihood of repetition of neglect if the child were returned to her care. Respondent's previously stated desire to relinquish her parental rights for a sum of money, her past substance abuse and lack of treatment, her previous failure to contact her son for a period of more than a year, and a lack of evidence that the condition of her home had changed sufficiently demonstrated respondent's inability or unwillingness to provide adequate care and supported a reasonable conclusion that neglect would likely continue in the future.

Justice EARLS dissenting.

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

*Surratt Thompson & Ceberio PLLC, by Christopher M. Watford, for petitioner-appellees.*

*Richard Croutharmel for respondent-appellant mother.*

NEWBY, Justice.

Respondent-mother appeals from the trial court's order terminating her parental rights to D.L.A.D.,[1] a minor. We affirm the trial court's order.

1. The minor child D.L.A.D. will be referred to throughout this opinion as "Dillon," which is a pseudonym used to protect the identity of the child and for ease of reading. We use additional pseudonyms to protect the privacy of the parties discussed in this opinion.

Dillon was born to respondent-mother in October 2007 following her brief relationship with petitioner-father. Petitioner-father did not know that he was Dillon's father until 2013, when respondent-mother visited him at his place of employment and requested that he take a DNA test. Petitioner-father agreed, and the test confirmed his paternity. When petitioner-father learned he was Dillon's father, he went to the Guilford County child support agency and entered into a voluntary support agreement.

Petitioner-father met with Dillon for the first time in May 2015 and began visitation shortly thereafter. In August 2015, Dillon visited petitioner-father and arrived wearing clothing that was soiled, stained, torn, and did not fit properly. Additionally, on at least one visit, he was found to have an excessive amount of earwax in his ears. On 5 November 2015, after respondent-mother violated a court order and failed a drug test, petitioner-father was granted custody of Dillon in accordance with an emergency custody order. From then on, Dillon resided primarily with petitioner-father and his wife (petitioners) in Davidson County.

In early 2016, respondent-mother began conducting supervised visits with Dillon. But these visits eventually ceased, and respondent-mother indicated that she wanted her parental rights to Dillon to be terminated. On 8 March 2016, petitioner-father filed a petition in District Court, Surry County to terminate respondent-mother's parental rights to Dillon. On 16 December 2016, the trial court entered an order terminating respondent-mother's parental rights based on neglect. *See* N.C.G.S. § 7B-1111(a)(1) (2019). Respondent-mother appealed. The Court of Appeals vacated the termination order after concluding that the trial court erred by terminating respondent-mother's parental rights because it lacked subject matter jurisdiction. *In re D.L.A.D.*, 2017 WL2950772 at *3 (N.C. Ct. App. 2017) (unpublished).

On 2 May 2019, petitioners filed a new petition to terminate respondent-mother's parental rights in Davidson County on the grounds of neglect and dependency. *See* N.C.G.S. § 7B-1111(a)(1), (6) (2019). Respondent-mother filed an answer denying that grounds existed to terminate her parental rights. On 2 December 2019, the trial court entered an order in which it determined grounds existed to terminate respondent-mother's parental rights based on neglect under N.C.G.S. § 7B-1111(a)(1). The court also concluded that it was in Dillon's best interests that respondent-mother's parental rights be terminated. The trial court thus terminated her parental rights. Respondent-mother appeals.

Respondent-mother argues that several of the trial court's findings of fact are not supported by the evidence and that the court erred by

concluding that grounds existed to terminate her 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 one or more grounds for termination under section 7B-1111(a) of our General Statutes. N.C.G.S. § 7B-1109(f) (2019). 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)).

In this case the trial court concluded that grounds existed to terminate respondent-mother's parental rights based on neglect. Section 7B-1111(a)(1) provides for termination based on a finding that "[t]he parent has . . . neglected the juvenile" within the meaning of N.C.G.S. § 7B-101(15). Section 7B-101(15) defines a neglected juvenile as 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). To terminate parental rights 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. 825, 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).

Here Dillon was not in respondent-mother's custody at the time of the termination hearing and had not been for close to four years. Additionally, because the Department of Social Services was never involved with the parties, no petition alleging neglect was ever filed, and Dillon was never adjudicated neglected. The trial court did, however, find that Dillon lived "in an environment injurious to his welfare when he was living with Respondent Mother." Respondent-mother does not challenge this finding, and it is therefore binding on appeal. *See 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."). Thus, we conclude that the trial

court's findings demonstrate that Dillon was previously neglected by respondent-mother.

We next consider whether the trial court's findings demonstrate that neglect would likely be repeated if Dillon were returned to respondent-mother's care. The trial court made the following relevant findings of fact:

> 9. At the time [Dillon] came into the care of Petitioners [at age seven-and-a-half], he was able to demonstrate how to crush and snort pills. He did not know how to tie his shoes. There is conflicting testimony as to whether he knew how to use any utensils to eat with but the [c]ourt finds that he was using his fingers to eat his food when he came into Petitioner[s]' custody.
>
> 10. Sometime in early 2016, Respondent Mother was to have regular supervised visits that were to be supervised by her sister[.] Only a few of those visits occurred and then they stopped. There were [c]ourt hearings in Surry County, North Carolina regarding custody and visitation, and possibly child support. At one of those hearings, for an unknown subject matter, the Respondent Mother, during a court recess, approached the child's therapist . . . and did in fact grab her by the arm, according to [the therapist's] testimony. Respondent Mother denies having done this.
>
> 11. During a hearing, Respondent Mother stated that she wanted her rights to be terminated and did not want to know anything further about the minor child, or words to this [e]ffect.
>
> 12. Respondent Mother, under oath, denied that [Dillon] had ever[ ] witnessed her crushing pills and snorting them. She stated the last time she had done this was before she had children. She stated she has not used cocaine in the past five years, but she had used it before she had children. However, she was forced to admit on cross examination that she did test positive for cocaine in the fall of 2015.
>
> 13. Respondent Mother lives with her boyfriend, [G.H.]. She started dating him sometime around December 2014. She testified that [G.H.] has a prescription for pain

medication and instead of taking the medication in the prescribed manner he crushes the pills and snorts them. He has done this the entire time she has known him and he has in fact done this in front of the children.

14. Respondent Mother, following the positive cocaine result from the hair follicle test, took a urine test on her own volition. The test was negative.

15. Respondent mother told [petitioner-father] that she would surrender her parental rights in exchange for the sum of $25,000.00. She denies that she ever lowered that price.

16. There was a period of time of more than twelve months that Respondent mother did not attempt to contact her sister to arrange supervised visits that she was awarded but did beg[i]n talking about visitation again sometime near July 2018.

17. There was some communication to the Petitioners about visitation. Since early 2016, the Petitioners would respond to Respondent Mother's requests with something to the effect that they were busy or that the minor child did not want to see the Respondent Mother.

18. There is evidence that some of the circumstances have changed since the fall of 2015. Respondent mother was awarded, and now receives disability as of May 2019. The minor child is in the primary care of Petitioners. There is no evidence that the condition of Respondent mother's home has changed. [G.H.] still resides in the home and he still snorts his pain medication.

19. In evaluating the credibility of the testimony, the [c]ourt finds and believes Respondent Mother had a substance abuse problem. There is no evidence that she has received any treatment for that problem.

. . . .

22. As to the grounds alleged in N.C.G.S. Section 7B-1111(a)(1), due to the lack of change in the Respondent mother's home, the Court finds that there is a high likelihood of repetition of neglect if the child was to return to her home.

We review only those findings necessary to support the trial court's conclusion that grounds existed to terminate parental rights. *In re B.C.B.*, 374 N.C. 32, 38, 839 S.E.2d 748, 753 (2020). Again, unchallenged findings of fact "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.

Respondent-mother first challenges the portion of finding of fact 18 that states "[t]here is no evidence that the condition of Respondent mother's home has changed." Respondent-mother contends that this finding "implicitly shift[ed] the burden to [her] to produce evidence showing that her parental rights should not be terminated."

Though the burden in a proceeding to terminate parental rights ultimately lies with the petitioner, *see* N.C.G.S. § 7B-1109(f), the trial court did not improperly shift the burden to respondent-mother through finding of fact 18. When viewed in the context of the entire termination order, the trial court's finding is merely an expression of its observation that respondent-mother failed to rebut petitioners' clear, cogent, and convincing evidence that the conditions of her home had not changed. *See In re A.R.A.*, 373 N.C. 190, 196, 835 S.E.2d 417, 422 (2019) ("[T]he district court did not improperly shift DSS' burden of proof onto respondent-mother. Rather, the court simply observed that respondent-mother had failed to rebut DSS' clear, cogent, and convincing evidence that she and the father had not established safe and stable housing for the children."). Specifically, this observation appears to relate to the trial court's finding that respondent-mother's boyfriend G.H. still lived in her home and was still snorting his pain medication, just as he did when Dillon previously lived there.

Respondent-mother also contends that finding of fact 18 is erroneous because petitioners presented no evidence that the conditions of her home which were present in 2015 and led to her loss of custody of Dillon continued in 2019. The portion of finding of fact 18 that is directly relevant to the conditions of respondent-mother's home is that concerning G.H. continuing to reside in her home and snorting his pain medication. Respondent-mother does not challenge the portion of the finding that her boyfriend resides in her home. Furthermore, at the termination hearing, respondent-mother testified that G.H. had a prescription for pain medication and had been snorting his medication for as long as she had known him. Accordingly, we find that clear, cogent, and convincing evidence supports this finding of fact.

Respondent-mother next challenges the portion of finding of fact 19 which stated that she "had a substance abuse problem."

Respondent-mother asserts that the only evidence that she ever used illegal substances was a single positive drug test in 2015. However, in addition to respondent-mother's positive test for "benzos and cocaine" in 2015, respondent-mother has a criminal record which includes convictions for possession of a Schedule IV controlled substance and misdemeanor possession of drug paraphernalia. Thus, the trial court could reasonably infer from this evidence that respondent-mother previously had a substance abuse problem.

Respondent-mother further challenges the final portion of finding of fact 19 because she claims no evidence in the record indicates that she never received treatment for substance abuse. Finding of fact 19, however, simply states that there is no evidence that respondent-mother *did* receive substance abuse treatment. Because the record does support a finding that respondent-mother had a substance abuse problem, and no evidence on the record indicates she received any treatment for this problem, this portion of the trial court's finding is supported by clear, cogent, and convincing evidence.

Respondent-mother next challenges both finding of fact 22, which states that there is a likelihood of repetition of neglect "due to the lack of change" in her home, and the trial court's conclusion that grounds existed to terminate her parental rights under N.C.G.S. § 7B-1111(a)(1). We note that the challenged finding of fact is a conclusion of law, and we will review it accordingly in conjunction with respondent-mother's challenges to the trial court's explicit conclusion of law that her parental rights should be terminated on the ground of neglect. *See In re J.O.D.*, 374 N.C. 797, 807, 844 S.E.2d 570, 578 (2020) ("[T]he trial court's determination that neglect is likely to reoccur if [a child is] returned to his [parent's] care is more properly classified as a conclusion of law . . . . 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.' ").

Respondent-mother asserts both that there was insufficient evidence and that the trial court made insufficient findings to support a conclusion that neglect would likely continue. The trial court's conclusion that there would be a repetition of neglect if Dillon were returned to respondent-mother's custody was based on its determination that there had been no change in respondent-mother's home. We review conclusions of law on the existence of grounds to terminate parental rights *de novo*. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019). "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 Greens of Pine*

*Glen P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). Therefore, in our analysis of whether the court erred in concluding the ground of neglect exists to terminate respondent-mother's parental rights, we are not limited to the trial court's determination that the probability of continuing neglect is due to the lack of change in respondent-mother's home. Instead, we consider the totality of the trial court's findings in determining whether its conclusion was supported.

The trial court's findings of fact that support its conclusion that future neglect is likely are: (1) that respondent-mother originally stated that she wished to have her parental rights terminated and offered to relinquish them for $25,000.00, and that she never lowered that price; (2) that respondent-mother did not attempt to visit with Dillon for a period of over a year; (3) that respondent-mother had substance abuse issues, and no evidence shows she was ever treated for those issues; and (4) that G.H. continued to live in her home and snort pain medication. Moreover, the trial court complied with State law and specifically considered evidence of changed circumstances; it noted that respondent-mother now receives disability payments.

Based on all of these findings, the trial court could reasonably conclude that Dillon would likely be neglected in the future if he were placed in respondent-mother's custody. In open court, she stated her desire to terminate her parental rights. In 2016 she apparently conditioned her willingness to give up her parental rights on being paid $25,000.00, and, after she was questioned on this point, the trial court concluded she never lowered that price. Both of these indicate a future propensity to be inattentive to the child. An extended period in which a parent does not attempt to visit the child could show the same.[2] Next, a substance abuse problem that likely went untreated could inhibit a parent's capability or willingness to consistently provide adequate care to a child. In addition, although there was conflicting evidence regarding whether Dillon knew how to use eating utensils, the trial court ultimately found that he used his fingers to eat when he came into petitioners' custody at age seven-and-a-half. Finally, respondent-mother's apparent indifference to Dillon's ability from a young age to consume drugs in a way that violates standard professional recommendations could show a lack of the judgment required to keep a child safe. That simple fact is not undermined just because the substances G.H. consumes may themselves be

2. Though petitioners apparently resisted respondent-mother's efforts to visit Dillon at times, the facts indicate that respondent-mother did not attempt to visit Dillon at all for a period of over a year.

legal to possess. Therefore, the trial court's findings support not only the conclusion that Dillon was neglected in the past, but also that neglect would likely continue in the future.

Nor does the trial court's conclusion lose its footing simply because respondent-mother recently expressed a desire to visit Dillon, or because she now contests the termination of her parental rights. *See, e.g.*, *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1998) ("Moreover, while the evidence also shows that respondent frequently inquired about [the child] and stated that he loved [the child] in his correspondence with his sister, this evidence does not necessarily negate the court's finding that the child has been neglected."). Such expressions of minimally basic care matter, and the trial court was in fact aware of them in this case. But they need not outweigh the abundant evidence that, when viewed reasonably and as a whole, demonstrates a lack of capability or willingness on the part of respondent-mother to adequately care for Dillon.

We thus affirm the trial court's conclusion that grounds existed under N.C.G.S. § 7B-1111(a)(1) to terminate respondent-mother's parental rights.

AFFIRMED.

Justice EARLS, dissenting.

In this case, the trial court failed to make findings of fact to support its conclusion that there was "a likelihood of future neglect by [respondent]" as required under N.C.G.S. § 7B-1111(a)(1) when "the child has been separated from the parent for a long period of time." *In re N.P.*, 374 N.C. 61, 63 (2020). Accordingly, I dissent from the majority's affirmance of the trial court's order terminating respondent's parental rights to her son, Dillon. The majority's holding that the requirements of § 7B-1111(a)(1) have been met is based entirely on evidence of respondent's conduct in 2015 and 2016—the majority does not address the "evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212 (2019). This holding is inconsistent with the juvenile code, with our precedents, and with the fundamental protections all parents enjoy in termination proceedings.[1] Because the record contains no evidence that could

1. The majority states its belief that "the trial court complied with State law and specifically considered evidence of changed circumstances; it noted that respondent-mother now receives disability payments." Yet the trial court's obligation to consider changed

support the conclusion that there is a likelihood of future neglect by respondent, I believe the proper course is to vacate the trial court's order and reverse.

Respondent has not had custody of Dillon since November 2015. She does not dispute that her conduct around the time that she lost custody of Dillon was inconsistent with her responsibilities as a parent. She tested positive for "benzos and cocaine." Most significantly, she failed to provide Dillon with clean clothing or maintain his personal hygiene. The record supports the trial court's finding of fact that Dillon "did live in an environment injurious to his welfare when he was living with respondent." Respondent does not challenge this finding of fact, which supports by clear, cogent, and convincing evidence the conclusion that respondent previously neglected Dillon within the meaning of N.C.G.S. § 7B-1111(a)(1).

However, finding that respondent previously neglected Dillon is only one half of the necessary inquiry. Proof that respondent previously neglected Dillon is insufficient to establish that her parental rights may be terminated. When, as in this case, "it cannot be shown that a parent is neglecting his or her child at the time of the termination hearing because the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re Z.V.A.*, 373 N.C. at 211–12. Although respondent's past conduct may be relevant in assessing the likelihood that she will neglect Dillon in the future, we have long held that the "determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re Ballard*, 311 N.C. 708, 715 (1984). "[T]ermination of parental rights for neglect may not be based solely on conditions which existed in the distant past but no longer exist." *Id.* at 714.

In termination proceedings, the burden is on the petitioners to prove by clear, cogent, and convincing evidence the existence of all the legal elements of an alleged ground for terminating parental rights, including

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circumstances is not a mere formality. It is not enough that the trial court "noted" one changed circumstance. Instead, the trial court must analyze all of respondent's changed circumstances and explain how the changes connect to its ultimate disposition. *See Coble v. Coble*, 300 N.C. 708, 712 (1980) ("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 a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.") (cleaned up).

a likelihood of future neglect by the parent. *See, e.g.*, *In re A.R.A.*, 373 N.C. 190, 194 (2019). It is readily apparent that, in this case, the petitioners have failed to carry their burden. The trial court's sole finding of fact directly addressing the likelihood of future neglect by respondent is that "due to the lack of change in the Respondent mother's home, the Court finds that there is a high likelihood of repetition of neglect if the child was to return to her home." Even if the past conditions of respondent's home justified the conclusion that she previously neglected Dillon, the burden was still on the petitioners to affirmatively prove that (1) the conditions of respondent's home had not changed, and (2) those unchanged conditions currently indicate that respondent will likely neglect Dillon again in the future. The trial court's findings are plainly insufficient to support either conclusion.

In the absence of findings directly supporting the trial court's conclusion that respondent was likely to neglect Dillon in the future, the majority looks to the "the totality of the trial court's findings in determining whether its conclusion was supported." Ultimately, the majority rests upon four other findings of fact which, in its view, "support [the trial court's] conclusion that future neglect is likely." Yet these findings of fact are either not probative or not supported by the record.

First, respondent's statement to petitioner that she would relinquish her parental rights for $25,000 is not probative because it occurred in 2016 and has been repudiated by respondent's subsequent conduct. It is undoubtedly correct that respondent's extremely troubling comments were sufficient to "indicate a future propensity to be inattentive to the child" at the time the comments were made. But the trial court made no finding that respondent's desire to relinquish her parental rights extended beyond 2016. Indeed, such a finding would be inconsistent with her actions in this termination proceeding, as well as her consistent efforts to stay connected to Dillon and to exercise her visitation rights in 2018 and 2019. The fact that she has, by her actions, disavowed her previous statement—which occurred years ago—is precisely the kind of "changed circumstance[] occurring between the period of past neglect and the time of the termination hearing" that the trial court must consider. *In re Z.V.A.*, 373 N.C. at 212. Further, the connection between a statement uttered in 2016 and "the fitness of [respondent] to care for the child *at the time of the termination proceeding*" is highly attenuated, *In re Ballard*, 311 N.C. at 715, and respondent's vigorous assertion of her parental rights in the intervening years negates the probative value of her past comments. By relying upon a statement made in 2016 during an angry confrontation with petitioner to support its conclusion

that respondent is likely to neglect Dillon in the future, the majority collapses the "past neglect" and "likelihood of future neglect" inquiries into a single-factor test, impermissibly rendering the latter superfluous.

Second, the trial court's finding of fact that "there was a period of more than twelve months that Respondent mother did not contact her sister to arrange supervised visits that she was awarded" is not clear, cogent, and convincing evidence that respondent is likely to neglect Dillon in the future. As the trial court also found, "[s]ince early 2016, the Petitioners would respond to Respondent Mother's requests [for visitation] with something to the effect that they were busy or that the minor child did not want to see the Respondent Mother." This unchallenged finding of fact establishes that respondent's lack of visitation was not illustrative of her capacity or willingness to care for Dillon. *Cf. In re E.B.*, 847 S.E.2d 666, 674 (N.C. 2020) (in willful abandonment context, "it is relevant that respondent ceased visitation . . . after a breakdown in his relationship with petitioners, in that there was another possible cause for respondent's inconsistent visitation apart from a willful intent to abandon his child"); *In re Young*, 346 N.C. 244, 252 (1997) (failure to consider "probable hostile relationship between respondent and petitioner's family members who cared for [juvenile] during [] period of time" in which respondent did not attend visits diminishes significance of finding that there was a lack of visitation). This finding also suggests that respondent made efforts to initiate and maintain visitation with Dillon stretching back to around the time she initially lost custody of him. The majority claims that "[a]n extended period in which a parent does not attempt to visit the child when she is allowed to" could indicate a "future propensity to be inattentive to the child." Once again, the majority emphasizes respondent's conduct in 2016 without accounting for her actions in the intervening years. Dillon's father testified that he recalled respondent asking for visitation on two occasions in 2017. Further, the trial court found that respondent "began talking about visitation again sometime near July 2018." The circumstance that might support an inference of respondent's "future propensity to be inattentive to the child"—her failure to attempt to exercise her right to visits with Dillon—has changed. Accordingly, this fact does not support the conclusion that there is a likelihood of future neglect by respondent.

Third, the majority's reliance on the trial court's finding that respondent "had substance abuse issues" also misses the mark. The majority claims that based on respondent's positive test for "benzos and cocaine" in 2015, and her "criminal record which includes convictions for possession of a Schedule IV controlled substance and misdemeanor possession

of drug paraphernalia," the trial court could "reasonably infer . . . that respondent-mother previously had a substance abuse problem." I disagree. Although respondent tested positive for narcotics on a hair follicle test conducted in the fall of 2015, respondent tested negative on a urine test that she took "on her own volition" shortly thereafter. And while it is correct that respondent has previously been convicted for drug related offenses, none of these convictions establish that respondent herself personally abused illegal substances. Crucially, there is no indication in the record as to *when* those convictions occurred.[2] The only other evidence of respondent's purported substance abuse is respondent's sister's testimony that she "had concerns" about respondent based on "just some kinds of behavior and, honestly, hearsay," by which she meant her recollection that another sibling once told her that respondent was "snorting cocaine" at their mother's funeral. Respondent's sister also testified that she had never personally observed respondent abusing illegal substances.

Even if respondent previously had a substance abuse problem, evidence of her substance abuse in 2015 is of only extremely limited probative value in assessing the likelihood that she will neglect Dillon in the future. Respondent's past drug use is, standing alone and without further explanation, simply not enough to prove that her parental rights may be terminated pursuant to § 7B-1111(a)(1). As the Court of Appeals has rightfully held, it is not enough to prove that a respondent-parent has abused or continues to abuse illicit substances. Rather, "the burden is upon the petitioner to show that the parent's substance abuse would prevent the parent from providing for the proper care and supervision of the child." *In re D.T.N.A.*, 250 N.C. App. 582, 585 (2016). In this case, that means petitioner must bring forth "evidence to indicate that respondent's alleged drug or substance abuse would prevent [her] from providing for the proper care and supervision of [the juvenile]." *Id. See also In re Phifer*, 67 N.C. App. 16, 25 (1984) ("A finding of fact that a parent abuses alcohol, without proof of adverse impact upon the child, is not a sufficient basis for an adjudication of termination of parental rights for neglect"). And, as we have recently held, when the evidence of a respondent-parent's past drug use is equivocal, the trial court must offer

2. The transcript from the termination hearing indicates that these convictions occurred more than ten years ago. In response to the question "Can you tell the Court what convictions you've had for criminal activity within the last ten years?", respondent replied "[v]iolating probation" and did not mention any of the drug-related offenses. Later, when the juvenile's guardian *ad litem* is asked if he knew when the drug-related convictions occurred, he responded that "I honestly do not."

"greater explanation" than mere reference to a failed drug test in order to "support a determination as to the likelihood of future neglect." *In re K.N.*, 373 N.C. 274, 283 (2020). The trial court must consider "the nature and extent of respondent's earlier substance abuse issues." *Id.* We have also recently held that a parent's current drug use is "insufficient to support the conclusion" that the requirements of § 7B-1111(a)(1) have been satisfied unless the trial court "analyzes how th[is] fact[] connect[s] with the specific determinative question of respondent's future likelihood of neglecting [the child]." *In re E.B.*, 847 S.E.2d at 675. Thus, our precedents conclusively establish that evidence of respondent's purported substance abuse problem is not clear, cogent, and convincing evidence of a likelihood of future neglect by respondent.

The majority attempts to overcome this evidentiary deficit by noting the trial court's finding of fact that "[t]here is no evidence that [respondent] has received any treatment for [her substance abuse] problem." As a threshold matter, the burden is on the petitioners to prove that respondent currently has a substance abuse problem that renders her likely to neglect Dillon in the future, not on respondent to prove that she is a constitutionally fit parent. *In re Montgomery*, 311 N.C. 101, 110 (1984). A lack of evidence of respondent receiving treatment for her alleged prior substance abuse problem is not proof of an ongoing substance abuse issue, especially given that there is no evidence indicating that respondent has abused illegal substances even a single time since 2015. The trial court made no finding of fact that respondent has a substance abuse problem currently. To reach the opposite conclusion, the majority not only "improperly finds facts in this case, which is a job reserved for the trial court," it invents them out of whole cloth. *In re E.B.*, 847 S.E.2d at 677 (Newby, J., concurring in the result only).

Regardless, assuming *arguendo* that there was sufficient evidence in the record to support the finding that respondent currently has a substance abuse problem, the majority still fails to explain how this problem will adversely impact Dillon. According to the majority, "a substance abuse problem that likely went untreated could inhibit a parent's capability or willingness to consistently provide adequate care to a child." This generalized, conjectural inference is no substitute for an individualized analysis of how respondent's substance abuse problem implicates her own present and future "capability or willingness to provide adequate care to" Dillon. Just as a "respondent's incarceration, by itself, cannot serve as clear, cogent, and convincing evidence of neglect," and can only be evidence supporting termination of parental rights "depend[ing] upon an analysis of the relevant facts and circumstances," the mere existence of

a substance abuse problem would be insufficient to prove a likelihood of future neglect by respondent. *In re K.N.*, 373 N.C. 274, 282–83 (2020).[3]

Fourth, the majority does rely upon one finding of fact which is supported by evidence in the record and which establishes that conditions in respondent's home have not changed in at least one regard since she lost custody of Dillon—the fact that "[respondent's boyfriend] continued to live in her home and snort pain medication." According to the majority, respondent's "indifference to Dillon's ability from a young age to consume drugs in a way that violates standard professional recommendations could show a lack of the judgment required to keep a child safe." To be clear, the question presented to this Court is not whether or not it is advisable for a parent to allow his or her child to witness an adult ingest prescription medications "in a way that violates standard professional recommendations." The standard against which parents are judged is not the Platonic ideal. *Cf. In re E.B.*, 847 S.E.2d at 673 (that a parent exhibits "less than ideal parenting practices" does not justify terminating parental rights); *In re Adoption of Leland*, 65 Mass. App. Ct. 580, 583–84 (2006) ("[A] determination of current parental unfitness is not focused upon whether the parent is a good one, let alone an ideal one; rather, the inquiry is whether the parent is so bad as to place the child at serious risk of peril from abuse, neglect, or other activity harmful to the child.") (cleaned up). Instead, "the court may appropriately conclude that the child is neglected" only when "a parent has failed or is unable to *adequately* provide for his [or her] child's physical and economic needs, and it appears that the parent will not or is not able to correct those inadequate conditions within a reasonable time." *In re*

3. The majority's reasoning has potentially dramatic implications. As a practical matter, upwards of 12 percent of children aged 17 or younger "live in households in the United States with at least one parent who had a [substance use disorder]." Rachel N. Lipari & Struther L. Van Horn, *Children Living With Parents Who Have A Substance Use Disorder*, Substance Abuse and Mental Health Services Administration (SAMHSA), U.S. Department of Health and Human Services (2015), https://www.samhsa.gov/data/sites/default/files/report_3223/ShortReport-3223.html. Not all of those children are neglected children, and not all of those parents are likely to neglect their children in the future. Further, establishing the majority's reasoning as precedent will likely generate racially disparate consequences within the child welfare system, given that minorities are disproportionately likely to be arrested for drug-related offenses. *See, e.g.*, Cassia Spohn, *Race, Crime, and Punishment in the Twentieth and Twenty-First Centuries*, 44 Crime & Just. 49, 65-66 (2015) (summarizing numerous studies finding that minorities make up a disproportionate percentage of criminal drug offenders). It is also doubtful that the majority's reliance on a generalization about parents with substance abuse issues is sufficiently protective of every parent's paramount liberty interest in the care, custody, and control of his or her children. *See, e.g.*, *In re Montgomery*, 311 N.C. at 106 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)).

*Montgomery*, 311 N.C. at 109 (emphasis added). There is no evidence in the record to support a conclusion that respondent will be unable to stop her boyfriend from snorting pain medications in front of Dillon or that her failure to do so will cause Dillon harm. Absent such findings, the majority's assertion that respondent's decision to continue living with her boyfriend is evidence that she is likely to neglect Dillon in the future stretches N.C.G.S. § 7B-1111(a)(1) beyond recognition.

Our task in examining adjudicatory orders terminating a parent's rights to his or her child is not to judge parents against our own view of what constitutes a good parent. Nor is it our task, at the adjudicatory stage, to identify and secure the custodial arrangement that we believe advances the best interests of the juvenile.[4] Our only role is to examine the trial court's order and determine if it is based on evidence in the record establishing that the petitioners have met their burden of proving one of the statutorily enumerated grounds for terminating parental rights. In this case, the evidence in the record fails to support the trial court's conclusion that the petitioners have successfully carried their burden of proving by clear, cogent, and convincing evidence that there was "a likelihood of future neglect by the parent" as required under N.C.G.S. § 7B-1111(a)(1). Therefore, I respectfully dissent.

4. It is correct that, as we have often stated, "the best interest of the child is the polar star." *In re Montgomery*, 311 N.C. at 109. However, a trial court may only proceed to "the dispositional stage at which point it must determine whether terminating the parent's rights is in the juvenile's best interests" after the court "determines at the adjudicatory stage that one or more of the grounds in N.C.G.S. § 7B-1111(a) exists to terminate parental rights." *In re K.L.M.*, 375 N.C. 118, 121 (2020). Thus, until the trial court has concluded that a ground exists to terminate parental rights, "the constitutionally protected paramount right of parents to custody, care, and control of their children must prevail." *Petersen v. Rogers*, 337 N.C. 397, 403–04 (1994).

**IN RE E.C.**

[375 N.C. 581 (2020)]

IN THE MATTER OF E.C., C.C., N.C.

No. 413A19

Filed 20 November 2020

**1. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—removal conditions—direct or indirect**

In a termination of parental rights case, the Supreme Court rejected a mother's argument that the removal conditions she had to correct to avoid termination based on N.C.G.S. § 7B-1111(a)(2) were limited to those set forth in the underlying petition, which the mother contended were the need for stable and appropriate housing. The trial court had the authority to require her to address any condition that directly or indirectly contributed to the children's removal, which included parenting, mental health concerns, and housing instability.

**2. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—sufficiency of findings—failure to comply with case plan**

In a termination of parental rights case, the trial court's findings supported its conclusion that a mother willfully left her children in foster care where she failed to comply with the components of her case plan addressing her parenting and mental health issues, and she addressed the housing component only one month before the termination hearing—after the children had been in Youth and Family Services custody for more than three years.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 8 August 2019 by Judge David H. Strickland in District Court, Mecklenburg County. This matter was calendared for argument in the Supreme Court on 7 October 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 S. Smith, Senior Associate County Attorney, for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services Division.*

*Ward and Smith, P.A., by Mary V. Cavanagh, for appellee Guardian ad Litem.*

*J. Thomas Diepenbrock for respondent-appellant mother.*

HUDSON, Justice.

Respondent, the mother of minor children E.C. (Ellen)[1], C.C. (Cathy), and N.C. (Nancy), appeals from the trial court's order terminating her parental rights. Because we hold that the unchallenged findings of fact support the trial court's conclusion that grounds existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(2) for willfully leaving her children in foster care or a placement outside of the home for more than twelve months without making reasonable progress to correct the conditions that led to their removal, we affirm.

On 29 October 2015, the Mecklenburg County Department of Social Services, Youth and Family Services Division (YFS), obtained nonsecure custody of Ellen and Cathy and filed a juvenile petition alleging that they were dependent juveniles.[2] The juvenile petition alleged that respondent was incarcerated in August 2015 and had a scheduled release date of February or March 2016. At the time of respondent's incarceration, respondent requested that her adult daughter stay with the juveniles and provide care for them. The adult daughter did not make enough money to continue providing care for the juveniles or to maintain the home. Also at the time of her incarceration, respondent was behind on several bills, including electricity, gas, and rent. In early October 2015, the electricity in the family's home was turned off, and an eviction notice was served on the family demanding that they vacate the home by 30 October 2015. In December 2015, while respondent was incarcerated, she gave birth to Nancy. YFS obtained nonsecure custody of Nancy on 7 December 2015 and filed a juvenile petition alleging that she was a dependent juvenile.

Following a hearing on 22 February 2016, the trial court entered an adjudication and disposition order on 8 April 2016. The trial court concluded that Ellen, Cathy, and Nancy (collectively, the children) were dependent juveniles and continued custody with YFS.

Following her release from prison in March 2016, respondent entered into a Family Services Agreement (FSA) with YFS on 15 March 2016.

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

2. The juvenile petition and nonsecure custody order also concerned four of respondent's other children, but they are not the subjects of this appeal.

The FSA required respondent to: (1) complete a Families in Recovery to Stay Together (FIRST) assessment; (2) complete a Love and Logic Parenting course; (3) obtain employment; and (4) obtain safe and stable housing. Respondent had already completed a FIRST assessment on 14 March 2016 and it was recommended that she undergo a mental health assessment at Amara Wellness. She started the parenting course on 9 April 2016. Respondent completed a mental health assessment and the Love and Logic Parenting course in May 2016.

Following a hearing on 25 October 2016, the trial court entered a permanency planning order on 15 November 2016 finding that respondent was making limited progress on her case plan. She was taking temporary work assignments through a labor agency and was living with the children's father in a motel room. The trial court set the primary permanent plan as reunification and the secondary permanent plan as adoption and guardianship.

Following a hearing on 27 January 2017, the trial court entered a subsequent permanency planning order finding that respondent needed to participate in mental health services on a consistent basis. Although it was recommended that she participate in outpatient therapy two times per week, respondent had last seen her therapist on 6 January 2017.

The trial court held a hearing on 14 June 2017 and entered a subsequent permanency planning order on 15 August 2017 finding that respondent was not making adequate progress on her case plan within a reasonable time. She continued to live in a motel room with the children's father and acknowledged that it did not provide sufficient space to house her, the children's father, and all of her children. Respondent had last seen her therapist in May 2017. She had reported that she was working full time at Jack in the Box, but YFS was not able to confirm her employment. The trial court changed the primary permanent plan to adoption and the secondary permanent plan to reunification, guardianship, or custody with a relative or other suitable person.

Following a hearing on 1 November 2017, the trial court entered a subsequent permanency planning order on 9 November 2017 finding that respondent failed to attend therapy sessions. Respondent had not seen her therapist at Amara Wellness since May 2017. She claimed to be receiving therapy at a different agency but could not provide confirmation. Respondent had failed to attend several medical appointments for the children.

The trial court held a permanency planning hearing that began on 22 March 2018 but was continued to 3 May 2018 and then again to 13 July

2018. The trial court entered an order on 29 August 2018 finding that respondent had last participated in therapy in March 2018 and still lived in a motel room with the children's father. Respondent had left her employment at Jack in the Box and was working at McDonald's. The trial court concluded that termination of respondent's parental rights was in the best interests of the children and ordered YFS to file a petition to terminate respondent's parental rights within sixty days.

On 27 November 2018, YFS filed petitions to terminate respondent's parental rights to the children. YFS alleged grounds of neglect, willfully leaving the children in foster care or placement outside the home for more than twelve months without making reasonable progress to correct the conditions that led to their removal, and dependency. *See* N.C.G.S. § 7B-1111(a)(1), (2), (6) (2019).

A hearing on YFS's petition for termination took place on 22 May 2019, 23 May 2019, and 11 June 2019. On 8 August 2019, the trial court entered an order terminating respondent's parental rights. The trial court concluded that grounds existed to terminate respondent's parental rights and that it was in the children's best interests that respondent's parental rights be terminated. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent appealed.

Respondent contends that the trial court erred by adjudicating grounds for termination of her parental rights under N.C.G.S. § 7B-1111(a)(1), (2), and (6). Because only one ground is needed to terminate parental rights, we only address respondent's arguments regarding the ground of willfully leaving the children in foster care or a placement outside of the home for more than twelve months without making reasonable progress to correct the conditions that led to their removal. *See In re Moore*, 306 N.C. 394, 404 (1982) ("[T]he trial court is authorized to terminate parental rights 'upon a finding of *one or more*' of the six grounds . . . .").

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." *In re Montgomery*, 311 N.C. 101, 111 (1984). Here, respondent does not challenge any findings of fact, and thus, they are binding on appeal. *In re D.W.P.*, 373 N.C. 327, 330 (2020). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019) (citing *In re S.N.*, 194 N.C. App. 142, 146 (2008), *aff'd per curiam*, 363 N.C. 368 (2009)).

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). "[T]he willfulness of a parent's failure to make reasonable progress toward correcting the conditions that led to a child's removal from the family home 'is established when the [parent] had the ability to show reasonable progress, but was unwilling to make the effort.' " *In re L.E.W.*, 846 S.E.2d 460, 469 (N.C. 2020) (second alteration in original) (quoting *In re Fletcher*, 148 N.C. App. 228, 235 (2002)).

"[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 (2019). A trial court should refrain from finding that a parent has failed to make reasonable progress in correcting the conditions that led to the children's removal "simply because of his or her 'failure to fully satisfy all elements of the case plan goals.' " *Id.* at 385 (citation omitted). However, "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).

**[1]** Respondent argues that the trial court's findings of fact do not support its conclusion that she failed to correct the removal conditions by the time of the termination hearing. She argues that the conditions that must be corrected "are limited to those set forth in the underlying petition" and that "[i]ssues which arise after the child's removal are irrelevant to the analysis." Respondent asserts that by the time of the termination hearing, she had addressed the single issue that led to the removal of her children—"the need for stable and appropriate housing." Her argument is without merit.

In *In re B.O.A.*, this Court rejected a similar argument, stating that

> nothing in the relevant statutory language suggests that the only 'conditions of removal' that are relevant to a determination of whether a particular parent's parental rights in a particular child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) are limited to those which are explicitly set out in a petition seeking the entry of a

> nonsecure custody order or a determination that a particular child is an abused, neglected, or dependent juvenile.

372 N.C. at 381. The trial court in an abuse, neglect, and dependency proceeding "has the authority to order a parent to take any step reasonably required to alleviate any condition that directly or indirectly contributed to causing the juvenile's removal from the parental home." *Id.* This Court concluded that:

> as long as a particular case plan provision addresses an issue that, directly or indirectly, contributed to causing the juvenile's removal from the parental home, the extent to which a parent has reasonably complied with that case plan provision is, at minimum, relevant to the determination of whether that parent's parental rights in his or her child are subject to termination for failure to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(2).

*Id.* at 385.

In the initial adjudication and disposition order, the trial court found that the children were placed in YFS custody due to respondent's incarceration, "which led to financial disruption and the eviction of the family[,]" and because no relative or caretaker could provide for them. In addition, the trial court made unchallenged findings of fact in its termination order that respondent's issues "revolve and have revolved around parenting, mental health concerns, and housing instability." These findings of fact establish the necessary "nexus" between the components of respondent's court-approved case plan with which she failed to comply and the conditions which led to the children's removal. *See In re B.O.A.*, 372 N.C. at 385.

**[2]** Respondent next argues that the trial court's findings of fact fail to support its conclusion that she willfully left the children in foster care. She contends that the findings fail to reflect her efforts to make a "positive and sustained response toward achieving reunification with her children." We disagree.

In its termination order, the trial court found that a case plan was developed for respondent in February 2016 to "address issues of parenting concerns, mental health concerns[,] and housing instability." Respondent only addressed the housing component of her case plan by moving into a four-bedroom house, and she did not address that component until April 2019.

Regarding parenting concerns, the trial court found that respondent adopted some stray cats and refused to get rid of them after Ellen and Cathy experienced allergic reactions during visitations. The trial court found that respondent had shown up for very few of the children's medical, dental, and therapy appointments, that respondent lacked the ability to understand and meet the needs of her children, and that respondent lacked a plan to understand and meet the children's needs. The trial court also found that on or about 29 August 2018, another child (Amy) of respondent who was also in YFS custody, had been placed with respondent for several months. Respondent became upset in response to a hearing during which the trial court ordered YFS to proceed with terminating respondent's parental rights to the children and demanded that YFS pick up Amy and place her back into foster care because she did not want to take care of her.

With respect to the mental health component of respondent's case plan, the trial court found that respondent was diagnosed, *inter alia*, with unspecified personality disorder with narcissistic, antisocial, and borderline traits, bipolar I disorder, and unspecified anxiety disorder. In March 2016, it was recommended that respondent engage in mental health services with Amara Wellness. Respondent attended sessions at Amara Wellness from March 2016 until spring 2017, but was inconsistent with attending her appointments. She began receiving mental health services again in the spring of 2018 until October 2018, but she had not received any mental health treatment from October 2018 until the date of the termination hearing in May and June of 2019.

These unchallenged findings of fact establish that respondent failed to comply with the components of her case plan addressing her parenting and mental health concerns. While respondent addressed the housing component of her case plan by moving from a motel room into a house, she did so only a month before the termination hearing. This limited and delayed progress does not amount to reasonable progress in light of the fact that the children had been in YFS custody for over three years. *See*, *e.g.*, *In re B.S.D.S.*, 163 N.C. App. 540, 546 (2004) (holding that when the respondent had not followed through on her obligation to seek therapy, only seeing a counselor three weeks prior to the termination hearing, such a delayed effort was deemed to be insufficient progress.).

Based on the foregoing, we hold that the trial court's findings of fact support its conclusion that grounds exist to terminate respondent's parental rights to the children under N.C.G.S. § 7B-1111(a)(2). The trial court's conclusion on this ground is "sufficient in and of itself to support

termination of respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 413 (2019). Respondent does not challenge the trial court's conclusion that termination of her parental rights is in the children's best interests. *See* N.C.G.S. § 7B-1110(a). Therefore, we affirm the trial court's order terminating respondent's parental rights to the children.

AFFIRMED.

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IN THE MATTER OF G.L. AND I.L.

No. 191A20

Filed 20 November 2020

**Termination of Parental Rights—no-merit brief—neglect and willful failure to make reasonable progress**

The trial court's termination of a mother's parental rights to her two daughters—on grounds of neglect and willful failure to make reasonable progress to correct the conditions leading to the children's removal from the home—was affirmed where her counsel filed a no-merit brief, and where the record evidence supported the trial court's findings of fact, which in turn supported the statutory grounds for termination and the court's determination that terminating the mother's parental rights was in the children's best interest.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 22 and 28 January 2020 by Judge Meredith A. Shuford in District Court, Lincoln County. This matter was calendared in the Supreme Court on 7 October 2020, but was determined upon the basis of the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

*Randel S. Hudson for petitioner-appellee Lincoln County Department of Social Services.*

*Michelle FormyDuval Lynch for appellee Guardian ad Litem.*

*Richard Croutharmel for respondent-appellant mother.*

ERVIN, Justice.

**IN RE G.L.**

[375 N.C. 588 (2020)]

Respondent-mother Melissa C. appeals from adjudication and disposition orders[1] terminating her parental rights in her minor children G.L. and I.L.[2] On appeal, counsel for respondent-mother has filed a no-merit brief on his client's behalf as is authorized by N.C.R. App. P. 3.1(e). After carefully considering the potential issues identified by respondent-mother's counsel in light of the record and the applicable law, we affirm the trial court's termination orders.

The Lincoln County Department of Social Services had been involved with the children's family since the time that the children were born in 2005 and 2007, respectively. Prior to 13 January 2018, when DSS received yet another child protective services report relating to Ilsa and Gillian, the family had been the subject of five earlier child protective service reports and had been provided with case management services that were intended to address substance abuse and domestic violence concerns. According to the 13 January 2018 child protective services report, Ilsa and Gillian had attempted to intervene in an incident of domestic violence involving their parents in an attempt to protect respondent-mother. After failing to protect respondent-mother from their father, the children went to the home of a neighbor, who sought the assistance of law enforcement officers. At the time that investigating officers arrived at the scene of the assault, they determined that respondent-mother was intoxicated.

In the early morning hours of 5 March 2018, the father was arrested based upon pending drug-related charges. At that time, investigating officers reported that both Ilsa and Gillian were in the automobile that he was operating and that a strong odor of marijuana was emanating from the vehicle. Investigating officers discovered "two burnt marijuana joints" in the vehicle and eight amphetamine pills, a brown waxy substance wrapped in tinfoil, and a bag of methamphetamine on the father's person. Although a social worker went to the family home following this incident, no one was there.

At about noon on the same day, a social worker spoke by phone to respondent-mother, who stated that she was in Hickory and could not return until eight o'clock that night. In response to the social worker's

1. The trial court's orders also terminated the parental rights of the children's father. However, since the father has not challenged the lawfulness of the trial court's orders before this Court, we will refrain from discussing the evidence relating to the father in any detail in the remainder of this opinion.

2. G.L. and I.L. will be referred to throughout the remainder of this opinion as, respectively, "Gillian" and "Ilsa," which are pseudonyms used to protect the identities of the juveniles and for ease of reading.

assertion that respondent-mother needed to return to Lincoln County immediately, respondent-mother told the social worker that she would call at the time that she arrived home. At approximately 3:00 p.m., the social worker returned to the family home and was present when Ilsa and Gillian got off of the school bus. At the time of the children's arrival, there were no adults in the family home or in the grandparents' adjoining residence and the social worker could not make contact with either parent. As a result, the children were taken into DSS custody on an emergency basis.

On the same date, DSS filed a juvenile petition alleging that Ilsa and Gillian were neglected juveniles and obtained the entry of an order taking them into nonsecure custody. On 1 October 2018, Judge K. Dean Black entered an adjudication order finding the children to be neglected juveniles. On 25 October 2018, Judge Larry J. Wilson entered a disposition order placing the children in DSS custody, and ordering respondent-mother to complete parenting classes, obtain a mental health assessment and comply with all resulting recommendations, obtain a substance abuse assessment and comply with all resulting recommendations, complete domestic violence non-offenders counseling, and submit to random drug screens. In addition, Judge Wilson authorized respondent-mother to have weekly visits with Ilsa and Gillian in the event that she was able to produce a negative drug screen.

Unfortunately, respondent-mother made little progress in attempting to satisfy the requirements of her case plan. On 11 July 2019, following a permanency planning hearing held on 23 April 2019, Judge Black entered an order in which he found as a fact that respondent-mother had failed to complete parenting classes, had not scheduled a mental health assessment, had not completed substance abuse classes after having obtained a substance abuse assessment, had refused to participate in domestic violence treatment, had failed to submit to requested drug screens, had not visited with the children for several months in light of her refusal to submit to requested drug screens, and had been charged with possession of a controlled substance in a jail or prison, possession of methamphetamine, and possession of drug paraphernalia. Based upon these and other determinations, Judge Black changed the permanent plan for the children to a primary plan of adoption and a secondary plan of reunification and authorized the cessation of attempts to reunify Ilsa and Gillian with respondent-mother. In the interval between the 23 April 2019 review hearing and the entry of the 11 July 2019 order, respondent-mother was convicted of the pending drug-related offenses, placed upon supervised probation, and ordered to wear an ankle

monitor. On 29 May 2019, respondent-mother failed a drug screen that had been conducted for probation-related purposes by testing positive for the presence of methamphetamine.

On 15 July 2019, DSS filed a petition seeking to have respondent-mother's parental rights in Ilsa and Gillian terminated on the grounds of neglect, N.C.G.S. § 7B-1111(a)(2); willful failure to make reasonable progress toward correcting the conditions that had led to the children's removal from the family home, N.C.G.S. § 7B-1111(a)(2); willful failure to pay a reasonable portion of the children's care while they were in DSS custody, N.C.G.S. § 7B-1111(a)(3); and willful abandonment, N.C.G.S. § 7B-1111(a)(7). After the filing of the termination petition, respondent-mother was charged with interfering with her electronic monitoring device, found to have violated the terms and conditions of her probation, and had her suspended sentence activated.

The termination petition came on for an adjudication hearing on 10 December 2019 and a disposition hearing on 10 January 2020. On 13 January 2020, the trial court entered an adjudication order, with an amended adjudication order having been entered on 22 January 2020. On 28 January 2020, the trial court entered a dispositional order. In these orders, the trial court concluded that respondent-mother's parental rights in Ilsa and Gillian were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1), and willful failure to make reasonable progress toward correcting the conditions that had led to the children's removal from the family home, N.C.G.S. § 7B-1111(a)(2), and that it was in the children's best interests for respondent-mother's parental rights to be terminated. Respondent-mother noted an appeal to this Court from the trial court's termination orders.

Respondent-mother's appellate counsel has filed a no-merit brief on her behalf as authorized by N.C.R. App. P. Rule 3.1(e). As part of that process, respondent-mother's appellate counsel has advised respondent-mother of her right to file *pro se* written arguments on her own behalf and has provided her with the documents necessary to do so. Respondent-mother has not, however, submitted any written arguments for our consideration.

In the event that a parent's appellate counsel files a no-merit brief on his or her client's behalf pursuant to N.C.R. App. P. 3.1(e), this Court reviews the issues that are listed in that brief to see if they have potential merit. *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). In his no-merit brief, respondent-mother's counsel identified certain issues relating to the adjudication and disposition portions of this proceeding

that could arguably support an award of appellate relief, including whether the trial court properly found that grounds for the termination of respondent-mother's parental rights in the children existed and whether the trial court abused its discretion by determining that the termination of respondent-mother's parental rights in the children would be in their best interests, before explaining why he believed that these potential issues lacked merit. After a careful review of the issues identified in the respondent-mother's no-merit brief in light of the record and the applicable law, we are satisfied that the findings of fact contained in the trial court's termination orders have ample record support and that those findings of fact support the trial court's determinations that respondent-mother's parental rights in Ilsa and Gillian were subject to termination on the basis of at least one of the grounds delineated in N.C.G.S. § 7B-1111(a) and that the termination of respondent-mother's parental rights in the children would be in their best interests. As a result, we affirm the trial court's termination orders.

AFFIRMED.

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IN THE MATTER OF K.C.T.

No. 461A19

Filed 20 November 2020

**1. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—willfully leaving juveniles in placement outside home—voluntary kinship placement**

The trial court erred in finding grounds to terminate a mother's parental rights for willfully leaving her daughter in a placement outside the home for more than twelve months without making reasonable progress toward correcting the conditions that led to her removal (N.C.G.S. § 7B-1111(a)(2)). These grounds did not apply because the mother agreed to place her child with the child's aunt and uncle through a voluntary kinship placement, and the aunt and uncle later obtained full custody though a civil custody order under Chapter 50 of the General Statutes.

**2. Termination of Parental Rights—grounds for termination—dependency—alternative care placement—sufficiency of findings**

The trial court erred in finding grounds to terminate a mother's parental rights based on dependency (N.C.G.S. § 7B-1111(a)(6)) where it failed to enter a finding of fact that the mother lacked an appropriate alternative child care arrangement, and where no evidence was presented to support such a finding.

**3. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—neglect by abandonment**

The trial court erred in finding grounds to terminate a mother's parental rights to her daughter based on neglect (N.C.G.S. § 7B-1111(a)(1)) where there was no evidence to support a finding of a high likelihood of future neglect if the child were returned to the mother's care, apart from highly speculative testimony regarding the mother's ability to care for the child in light of her own mental disabilities. Furthermore, the mother did not neglect her daughter by abandonment where she consistently sent gifts and repeatedly contacted her daughter and her daughter's caregivers over a long period of time leading up to the termination hearing.

**4. Termination of Parental Rights—grounds for termination—abandonment—no findings on willfulness—evidence of minimal contact with child**

The termination of a mother's parental rights to her daughter on grounds of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) was reversed and remanded on appeal where the termination order failed to address whether the mother's conduct was willful but where some evidence (showing minimal contact between the mother and her child during the relevant statutory period) might have supported termination of parental rights on these grounds.

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 23 August 2019 by Judge William F. Brooks in District Court, Wilkes County. This matter was calendared for argument in the Supreme Court on 7 October 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-appellees.*

*No brief for appellee Guardian ad Litem.*

*Anné C. Wright for respondent-appellant.*

EARLS, Justice.

Respondent-mother appeals the trial court's order terminating her parental rights to her minor child K.C.T.[1] After careful review, we reverse in part and reverse and remand in part.

On 9 October 2015, the Wilkes County Department of Social Services (DSS) placed Kelly in a voluntary kinship placement with petitioners, who are her paternal aunt and uncle. DSS became involved with the family after respondent-mother reported that Kelly's father was manufacturing methamphetamine in their home. The father was arrested and charged with multiple felony drug offenses as well as misdemeanor child abuse. Respondent-mother was not charged with any crimes.

On 8 January 2016, petitioners filed a civil custody action. On 18 April 2016, they were awarded sole legal and physical custody of Kelly. The custody order denied respondent-mother any visitation with Kelly "until she petition[ed] the Court to modify the Order."

On 12 March 2019, petitioners filed a petition seeking to terminate the parental rights of both of Kelly's parents on the grounds of neglect, willfully leaving Kelly in a placement outside the home for more than twelve months without making reasonable progress toward correcting the conditions that led to her removal, dependency, and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1)–(2), (6)–(7) (2019). Kelly's father then relinquished his parental rights. On 27 June 2019, the trial court appointed a guardian *ad litem* to represent respondent-mother's interests under Rule 17 of the North Carolina Rules of Civil Procedure. *See* N.C.G.S. § 1A-1, Rule 17 (2019).

The matter was heard on 13 August 2019. Ten days later, the trial court entered an order terminating respondent-mother's parental rights. The trial court concluded that respondent-mother's parental rights were subject to termination based on all four grounds alleged by petitioners

1. The minor child K.C.T. is referred to by the pseudonym "Kelly" throughout this opinion in order to protect her identity and for ease of reading.

and further concluded that termination was in Kelly's best interest. Respondent-mother appeals.

The termination of parental rights proceeds in two stages, beginning with an adjudicatory determination. *See* N.C.G.S. § 7B-1109 (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 (2019) (quoting N.C.G.S. § 7B-1109(f)). "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, 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) (2019).

**[1]** In her brief, respondent-mother challenges each of the four grounds for termination found by the trial court. We begin with the ground both parties agree was improper: that respondent-mother willfully left Kelly in a placement outside the home for more than twelve months without making reasonable progress toward correcting the conditions that led to her removal under N.C.G.S. § 7B-1111(a)(2). The Court of Appeals previously held, relying on our decision in *In re Pierce*, 356 N.C. 68 (2002),[2] that the "removal" contemplated by this ground "refers only to circumstances where a court has entered *a court order* requiring that a child be in foster care or other placement outside the home." *In re A.C.F.*, 176 N.C. App. 520, 525–26 (2006). In support of this holding, the Court of Appeals explained:

> [A]n interpretation of "left . . . in foster care or placement outside the home" and "removal" in G.S. § 7B-1111(a)(2) that broadly covers circumstances where parents leave their children in others' care without regard to involvement of the juvenile court may lead to nonsensical results. There are an infinite variety of reasons parents decide to entrust their children's care to others. Oftentimes, these reasons will not implicate the child welfare concerns of the State. To allow the termination ground set forth in G.S. § 7B-1111(a)(2) to be triggered no matter what the cause for a child's separation from his parent is inconsistent with affording parents notice that they are at risk of

2. In *In re Pierce*, this Court concluded that the period of the twelve-month placement outside the home in N.C.G.S. § 7A-289.32(3) (current version at N.C.G.S. § 7B-1111(a)(2)) did not begin until the juvenile was the subject of an order issued by the juvenile court. 356 N.C. 68, 74 (2002).

> losing their parental rights. Instead, it is logical that the General Assembly, in adopting G.S. § 7B-1111(a)(2), was primarily concerned with allowing termination where a juvenile court was involved in the "removal" of the child.

*Id.* at 525 (alteration in original). We find this reasoning persuasive and believe it applies with equal force to the circumstances of this case. Kelly entered petitioners' custody when respondent-mother agreed to a voluntary kinship placement. Although petitioners later obtained full custody of Kelly through a civil custody order, that order was entered under Chapter 50 of our General Statutes and not under Chapter 7B. A Chapter 50 civil custody order does not provide sufficient notice to a parent that their parental rights would be imperiled by their loss of custody or inform the parent what steps would be necessary to make reasonable progress and avoid termination. Accordingly, we reverse the portion of the trial court's termination order that relies on this ground for termination.

**[2]** The trial court also found that respondent-mother's rights were subject to termination based on dependency under N.C.G.S. § 7B-1111(a)(6). An adjudication under this ground requires the trial court to make two ultimate findings: (1) that the parent is incapable (and will continue to be incapable for the foreseeable future) of providing proper care and supervision to their child, rendering the child a "dependent juvenile" as defined by N.C.G.S. § 7B-101(9) (2019); and (2) that the parent lacks an appropriate alternative child care arrangement. N.C.G.S. § 7B-1111(a)(6); *see In re K.R.C.*, 374 N.C. 849, 859 (2020). Respondent-mother does not raise an argument with respect to the first required finding, and thus we do not discuss whether respondent-mother's alleged incapability rendered Kelly a dependent juvenile. But we agree with respondent-mother that the trial court failed to make the second required finding regarding an appropriate alternative child care arrangement, and thus its conclusion that dependency provides a ground for termination must be reversed. *See In re E.L.E.*, 243 N.C. App. 301, 308 (2015) (concluding that the failure to make a necessary termination finding requires reversal).

Petitioners argue that a finding regarding an alternative child care arrangement was unnecessary because respondent-mother "did not come forward with an alternative child care arrangement." However, the burden was on petitioners to show that respondent-mother lacked a suitable alternative child care arrangement, and they presented no evidence to meet their burden. *See* N.C.G.S. § 7B-1109(f) ("The burden in [adjudicatory hearings on termination] shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and

convincing evidence."). Respondent-mother was not questioned about potential alternative child care arrangements during her testimony, and no other witness addressed the issue. Since the trial court failed to make this required finding and no evidence was presented that would allow it to make such a finding, the portion of the trial court's order relying upon this ground for termination must be reversed. *See id.*

**[3]** The trial court also found that termination was warranted based on neglect. Under N.C.G.S. § 7B-1111(a)(1), a trial court may terminate a parent's rights if that parent has neglected their child. A neglected juvenile is one "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15). 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. 835, 843 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15 (1984)). "When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212 (2019) (citing *Ballard*, 311 N.C. at 715).

At the time of the termination hearing on 13 August 2019, Kelly had been out of respondent-mother's care for almost four years. Respondent-mother argues the trial court's findings fail to address the likelihood of future neglect if Kelly was returned to her care.[3] She acknowledges the trial court found that "[s]ince the minor child has been in the custody of the Petitioners, the Respondent-Mother's circumstances have not improved such that she would be able to provide proper care for the child" but argues that this finding is both inadequate to satisfy the two-part neglect test and unsupported by the evidence. Since we agree with respondent-mother that the record evidence does not support this finding of fact, we need not consider whether the finding, if adequately supported, demonstrated a likelihood of repetition of neglect.

At the time Kelly entered petitioners' care she was living with her parents, and her father was manufacturing methamphetamine in the

3. Respondent-mother does not contest that the circumstances which led to her voluntarily placing Kelly with petitioners and which eventually led to respondent-mother losing custody of Kelly to petitioners constituted past neglect.

family home. There is no dispute that Kelly's parents were no longer in a relationship and were living apart at the time of the termination hearing, and thus the circumstances which led respondent-mother to voluntarily place Kelly in petitioners' care were irrelevant to her ability to provide care for Kelly at the time of the termination hearing. *See In re Young*, 346 N.C. 244, 248 (1997) ("Termination of parental rights for neglect may not be based solely on past conditions which no longer exist."). In order for the trial court's finding that respondent-mother was unable to provide proper care for Kelly to be viable, there must have been other evidence presented during the termination hearing to support it.

Two witnesses testified during the adjudicatory phase of the termination hearing. The first, Kelly's aunt, offered the following regarding respondent-mother's ability to provide care:

> Q. Do you currently have any concerns about [respondent-mother's] ability to take care of [Kelly]?
>
> A. I don't think that she would be able to take care of [Kelly].
>
> Q. Why do you believe that?
>
> A. I don't believe that she can because she can't, you know, keep her—she can't be in her own home. She don't have—she lives with her mom still. The only time that I knew that she was out of her mom's home is when she was with [the father].
>
> Q. Do you know why [respondent-mother] is living with her mother?
>
> A. I'm not sure.
>
> Q. Do you know if [respondent-mother's] mother is helping to take care of her?
>
> A. To the best of my knowledge, possibly. I'm not living there so I really couldn't say.

Her responses on cross-examination further reflected her lack of knowledge regarding respondent-mother's disabilities.

> Q. Now, you don't actually know—you testified believing that [respondent-mother] was mentally disabled. You don't actually know the details of her disability do you?
>
> A. No, I do not.

> Q. And, you don't actually have any frame of reference for whether or not she is capable of caring for a child in general do you?
>
> A. No.

The other witness was respondent-mother, and she denied that her "disability would make it impossible . . . to provide at least some level of care for [Kelly]."

Between respondent-mother's clear assertion that she could provide care for Kelly and the paternal aunt's mere supposition about whether respondent-mother was capable of caring for Kelly, there is no clear, cogent, and convincing evidence to support the trial court's finding that "the Respondent-Mother's circumstances have not improved such that she would be able to provide proper care for the child." Accordingly, we will disregard this finding. *See In re N.G.*, 374 N.C. 891, 901 (2020) (disregarding findings of fact not supported by clear, cogent, and convincing evidence). Without this finding, the trial court's order lacks any findings whatsoever that address the possibility of repetition of neglect.[4]

Moreover, the trial court's remaining findings of fact and the other evidence presented at the termination hearing do not suggest that Kelly would be neglected if returned to respondent-mother's care. The trial court found that respondent-mother lived with her own mother, her brother, and her two minor cousins in a two-bedroom apartment. There were neither findings nor testimony identifying any issues with the safety of respondent-mother's residence or mentioning any concerns with the family members living there. The trial court also found that respondent-mother relies on family members for "assistance in caring for herself" and for travel. But as she was living with the very family members she was relying on for assistance, it is unclear how respondent-mother's disabilities, standing alone, would place Kelly at risk of neglect if she returned to respondent-mother's care.

Although a lack of evidence showing the probable repetition of neglect forecloses termination of parental rights for most forms of neglect, this Court has recognized that the neglect ground can support termination without use of the two-part *Ballard* test if a parent is

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4. The dissent argues that respondent-mother's disability, standing alone, is sufficient to show a likelihood of future neglect. The position proposed by the dissent would require a trial court to find a likelihood of future neglect whenever a parent is unable to care for him or herself, regardless of the level of support surrounding the parent. That is not the law of this state.

presently neglecting their child by abandonment. *In re N.D.A.*, 373 N.C. 71, 81–82 (2019). Petitioners argue that the trial court's findings support a conclusion that respondent-mother neglected Kelly by abandoning her.

A trial court may terminate a parent's rights under the ground of neglect by abandonment when it finds that the parent has engaged in "wilful neglect and refusal to perform the natural and legal obligations of parental care and support." *Pratt v. Bishop*, 257 N.C. 486, 501 (1962). The trial court's findings in support of this ground must reflect "that the parent has engaged in conduct 'which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child' as of the time of the termination hearing." *In re N.D.A.*, 373 N.C. at 81 (citation omitted). In deciding whether this ground exists, the trial court should consider the parent's conduct over an extended period, up to and including the time of the termination hearing. *Id.* at 81–82.

Here, the trial court found that while Kelly was in petitioners' care, respondent-mother never filed a motion seeking visitation, did not provide for Kelly's physical and financial needs, and wrote a Facebook message to petitioners in 2016 in which she stated she no longer wished to be a parent. But the trial court also found that respondent-mother (1) had four visits with Kelly prior to the filing of the civil custody action; (2) would send gifts to Kelly, usually around the time of her birthday; (3) sent $100 to petitioners for Kelly's care on one occasion in 2016; (4) had a video chat with Kelly on her fourth birthday; and (5) periodically communicated with petitioners on Facebook Messenger. Considering the totality of respondent-mother's conduct up until the time of the termination hearing, respondent-mother did not "manifest[ ] a willful determination to forego all parental duties" while Kelly was in petitioners' care.[5] *Id.* at 81. By consistently providing gifts and repeatedly contacting Kelly and her caregivers over a long period of time, respondent-mother showed her intent to remain a part of Kelly's life. Therefore, the trial court's findings of fact affirmatively demonstrate respondent-mother did not neglect Kelly by abandonment, and consequently, the portion of the trial court's termination order relying on this ground must be reversed.

**[4]** The final ground for termination found by the trial court was willful abandonment under N.C.G.S. § 7B-1111(a)(7). Under that provision, the trial court may terminate a parent's rights when said "parent has

5. The trial court's order also fails to address whether respondent-mother's alleged abandonment of Kelly was willful, and it is also subject to reversal on this basis. *See In re N.D.A.*, 373 N.C. 71, 82–83 (2019).

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). Unlike neglect by abandonment, an adjudication under this ground requires specific focus on a parent's actions during "the six consecutive months preceding the filing of the petition." *In re N.D.A.*, 373 N.C. at 77 (citation omitted). But the trial court may also look outside the six-month window in order to evaluate the parent's "credibility and intentions." *Id.* (citation omitted).

In this case, the termination petition was filed on 12 March 2019, and thus the relevant period was from that date back until 12 September 2018. The trial court's findings and the evidence at the termination hearing reflect only one concrete action taken by respondent-mother during the determinative period: she provided Kelly "three boxes" of gifts for Christmas 2018. The trial court found that respondent-mother otherwise had no meaningful contact with Kelly and provided no financial assistance during the six-month period, and it also found that respondent-mother did not file a motion for visitation after petitioners were granted sole custody of Kelly. However, the trial court's findings do not address whether respondent-mother's conduct was willful.

Willful intent is a necessary component of abandonment, and, when adjudicating willful abandonment as a ground for termination under N.C.G.S. § 7B-1111(a)(7), the trial court must make adequate evidentiary findings to support its ultimate finding as to whether willful intent exists. *In re N.D.A.*, 373 N.C. at 78. There is no such ultimate finding here, and the trial court's termination order identifies multiple possible impediments to respondent-mother's ability to contact and provide support to Kelly. The trial court found that respondent-mother "has been diagnosed with bipolar disorder, oppositional defiant disorder, attention deficit disorder, and mental retardation" and that she "has an IQ in the range of 40–45." It also found that she lacked a driver's license, that she relied on her family and public transportation for travel, and that she lived in a different county than petitioners. Finally, the trial court found that respondent-mother was unemployed and relied on supplemental security income. Nonetheless, the trial court's order makes no attempt to explore the interplay between these impediments and respondent-mother's intent. Moreover, while the trial court found that respondent-mother had no meaningful contact during the relevant six-month period, it also found that respondent-mother "sent some gifts to [Kelly], usually around the time of [Kelly's] birthday"; that respondent-mother "had Facetime communication" with Kelly on her fourth birthday, which occurred two days after the termination petition

was filed; and that respondent-mother "used the social media platform Facebook and Facebook messenger to communicate periodically with the Petitioners," without discussing whether these actions had any relevance to respondent-mother's credibility and intentions. Taken together, the trial court's findings fail to show that respondent-mother "had a 'purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to [Kelly].' " *Id.* at 79 (quoting *In re D.M.O.*, 250 N.C. App. 570, 573 (2016)). However, in light of the minimal contact between respondent-mother and Kelly during the relevant six-month period, the evidence may still support this ground for termination. *See In re C.B.C.*, 373 N.C. 16, 23 (2019) (establishing that efforts outside the six-month period do not preclude a finding of willful abandonment if nothing is done to maintain or establish a relationship during that period). Under these circumstances, the appropriate disposition is to reverse this part of the trial court's order and remand "for further proceedings, including the entry of a new order containing findings of fact and conclusions of law addressing the issue of whether" willful abandonment existed. *In re K.N.*, 373 N.C. 274, 284 (2020) (citing *In re N.D.A.*, 373 N.C. at 84).

None of the grounds for termination found by the trial court were supported by sufficient findings of fact established by clear, cogent, and convincing evidence. The portions of the trial court's order concluding that respondent-mother's rights were subject to termination under N.C.G.S. § 7B-1111(a)(1), (2), and (6) are reversed. The portion of the trial court's order adjudicating grounds for termination under N.C.G.S. § 7B-1111(a)(7) is reversed and remanded for further proceedings not inconsistent with this opinion, including the entry of a new order containing proper findings and conclusions addressing the issue of whether respondent-mother willfully abandoned Kelly during the six months prior to the filing of the termination petition. The trial court may, in the exercise of its discretion, receive additional evidence on remand if it elects to do so. *See In re K.N.*, 373 N.C. at 285.

REVERSED IN PART; REVERSED AND REMANDED IN PART.

Justice NEWBY dissenting.

The standard for appellate review of these cases is well-settled. This Court should ask whether the trial court's findings are supported by clear, cogent, and convincing evidence and whether those facts in turn support the trial court's conclusions of law. *See In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019). This Court should not find facts,

as it is not positioned to make observations and determinations that a trial court can. Yet again, however, the majority of this Court chooses to ignore the facts found by the trial court to reach its desired outcome.

When the trial court order is viewed as a whole, it is clear that the trial court's findings of fact supported by clear, cogent, and convincing evidence ultimately support its decision to terminate respondent's rights based on, *inter alia*, neglect and willful abandonment.[1] Moreover, I would remand to the trial court to make the required finding on whether there was an alternative childcare placement for the termination ground of dependency. Therefore, I respectfully dissent.

The evidence at the termination hearing showed the following: The child was born on 14 March 2015. Around June of 2015, when the child was three months old, respondent learned that the child's father was making methamphetamine in the mobile home they lived in with their daughter. Despite knowing that the child's father was manufacturing and using drugs in the home, respondent and the child continued to live in the mobile home with him until around October 2015, a little less than approximately five months after respondent discovered the child's father was manufacturing methamphetamine. The father and respondent got into a domestic dispute, leading respondent to contact DSS to seek assistance. Respondent told DSS about the meth lab and was not criminally charged. After respondent contacted DSS, the child's biological father was arrested and charged with felony drug offenses, including manufacturing methamphetamine; maintaining a dwelling for the use, storage, or sale of a controlled substance; trafficking methamphetamine; and misdemeanor child abuse. Following the father's arrest, DSS placed the child in petitioners' care and custody pursuant to a voluntary kinship placement. Petitioners are the child's paternal aunt and uncle. At the time that the child was placed with petitioners, she was not up to date on her vaccinations.

Eventually, on 8 January 2016, petitioners filed an action seeking sole legal and physical custody of the child. In April 2016, petitioners were granted custody of the child. In its order, the trial court held that respondent would have no visitation with the minor child until she petitioned the court to modify the custody order. Respondent did not appear

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1. Because termination would be proper on any of these grounds, I do not address the trial court's decision to terminate respondent's parental rights based on N.C.G.S. § 7B-1111(a)(2). *See* N.C.G.S. § 7B-1111(a)(2) (2019); *In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019) ("[A] finding of only one ground is necessary to support a termination of parental rights . . . .").

at that hearing, nor did she ever file a motion to address visitation despite the court order allowing her to do so. While respondent visited the child four times between the child's voluntary kinship placement and petitioners filing their custody action, respondent had no visitation with the minor child since the entry of the custody order.

On 12 March 2019, petitioners filed a petition to terminate respondent's parental rights. Respondent was appointed a guardian *ad litem* (GAL) for herself based on need. After receiving evidence and holding a termination hearing, the trial court made the following findings:

> 14. . . . . [Respondent] resides in a 2-bedroom apartment with her mother, her biological brother and two minor cousins.
>
> 15. The Respondent-Mother is not gainfully employed. She receives supplemental security income for disabilities diagnosed in her childhood. The Respondent-Mother has been diagnosed with bipolar disorder, oppositional defiant disorder, attention deficit disorder, and mental retardation. The Respondent-Mother has an IQ in the range of 40–45. The Court makes these findings based upon the Respondent-Mother's testimony, although no documentation was submitted supporting these diagnoses.
>
> 16. After the Petitioners were granted custody of the minor child, the Respondent-Mother sent some gifts to the minor child, usually around the time of the minor child's birthday.
>
> 17. In 2016, the Respondent-Mother sent the Petitioners one hundred ($100.00) dollars. Apart from this isolated payment, the Respondent-Mother has provided no financial support for the benefit of the minor child.
>
> 18. On or about the minor child's 4th birthday, the Respondent-Mother had Facetime communication with the child. The Respondent-Mother has used the social media platform Facebook and Facebook messenger to communicate periodically with the Petitioners.
>
> 19. On the date of the custody hearing in April 2016, the Respondent-Mother sent a vulgar message to the Petitioners through Facebook messenger insulting them and also stating she no longer wanted to be a parent to

the minor child. The Respondent-Mother denied sending the message and asserted her Facebook account had been hacked. The Court admitted the messages into evidence over the objection of the Respondent-Mother's attorney.

20. The Respondent-Mother has never had a driver's license and relies on family members and public transportation for travel.

21. As a result of her psychological conditions and her mental limitations, the Respondent-Mother does not have the capability to provide for the proper care of the minor child. The Respondent-Mother needs assistance in caring for herself and has always depended on family members.

22. The Respondent-Mother has failed to provide for the minor child's physical and economic needs while she has been in the care of the Petitioners.

23. The Respondent-Mother neglected the minor child while the child was in her custody by failing to obtain proper medical care and exposing her to an environment where methamphetamine was manufactured.

24. During the six-months immediately preceding the filing of the petition to terminate her parental rights, the Respondent-Mother had no meaningful contact with the minor child and did not provide any financial support.

25. The Respondent-Mother has failed to perform her natural and legal obligations of support and maintenance for the minor child.

26. Since the minor child has been in the custody of the Petitioners, the Respondent-Mother's circumstances have not improved such that she would be able to provide proper care for the child.

Ultimately, the trial court concluded as a matter of law that respondent's rights should be terminated on, *inter alia*, grounds of neglect, N.C.G.S. § 7B-1111(a)(1), dependency, N.C.G.S. § 7B-1111(a)(6), and willful abandonment, N.C.G.S. § 7B-1111(a)(7).

First, the trial court properly terminated respondent's parental rights based on neglect. Subsection 7B-1111(a)(1) of the North Carolina General Statutes provides that a trial court may terminate a parent's parental rights when "[t]he parent has . . . neglected the juvenile." A

neglected juvenile is defined in the North Carolina General Statutes as a child "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). To terminate a parent's rights based on neglect, one must "show[ ] . . . 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)). Neglect can also be shown through abandonment, and the determinative period for evaluating a parent's conduct is not limited to the six months preceding the petition's filing. *In re N.D.A.*, 373 N.C. 71, 81, 833 S.E.2d 768, 776 (2019).

In this case, there is no question that respondent allowed the child to live in a home where the child's biological father was manufacturing methamphetamine, clearly indicating a showing of past neglect. Though respondent was not living with the child's biological father at the time of the termination hearing, the trial court made several findings about respondent's current living situation, i.e., her sharing a two-bedroom apartment with four other family members, her inability to function without assistance based on her diagnosed disabilities, and her sole reliance on others for transportation, among other things. Ultimately, the trial court found that, though respondent no longer lived with the child's biological father, she "does not have the capability to provide for the proper care of the minor child" due to her inability to care for herself. This manifested itself initially, for example, in her failure to be able to ensure that the child received proper medical care before coming into petitioners' custody. These findings all indicate that because of respondent's limitations, it is likely respondent will neglect the child in the future, in addition to showing neglect based on abandonment due to respondent's failure to make meaningful contact with the child or provide financial support.

The majority rejects these trial court findings, instead reasoning that it did not believe that the mother's disabilities would place the child at risk of future neglect if the child were returned to respondent's care. The wisdom of this determination, however, is not for this Court to question. Instead, utilizing the proper standard of review, it is clear based on respondent's own testimony that the trial court's findings of fact about past neglect of the child and respondent's own disabilities are supported by the record. The trial court certainly could conclude these limitations

ultimately prevent respondent from taking care of herself, and even more, from taking care of the child. Thus, the trial court's decision to terminate respondent's parental rights based on neglect is supported by the findings and evidence.

Second, the trial court properly terminated respondent's parental rights based on subsection 7B-1111(a)(6), which provides for termination when

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

N.C.G.S. § 7B-1111(a)(6) (2019).

Here there is no question that the trial court made findings on respondent's inability to care for the child. As discussed above, the trial court found that even after the child had been removed from the home, respondent was still unable to care for herself without the assistance of others. Specifically, "[s]ince the minor child has been in the custody of the Petitioners, the Respondent-Mother's circumstances have not improved such that she would be able to provide proper care for the child." This was based on her psychological conditions and mental limitations, manifested in the fact that respondent had to depend on other family members for her own care, rendering it impractical for her to provide proper care for the child.

The majority nonetheless makes much about the fact that petitioners had the burden "to show that respondent-mother lacked a suitable alternative child care arrangement." Notably, at no point in the proceeding did respondent present an alternative childcare arrangement. Despite the majority's contention that petitioners bore the burden to show the lack of an alternative placement, case law has recognized that "[h]aving an appropriate alternative childcare arrangement means that the parent himself must take some steps to suggest a childcare arrangement." *In re L.H.*, 210 N.C. App. 355, 366, 708 S.E.2d 191, 198 (2011). While petitioners bear the burden generally to show that respondent's parental rights

should be terminated, contrary to the majority's suggestion, the burden does not rest solely on petitioners to show that respondent offered no alternative childcare arrangement. Where, as here, respondent fails to present an alternative childcare arrangement, that fact must be taken into account. Instead of reversing the entire ground for termination as the majority does, this termination ground should be remanded to the trial court to make the proper finding of whether there was an alternative childcare arrangement.

Finally, the trial court properly terminated respondent's parental rights based on willful abandonment. Under N.C.G.S. § 7B-1111(a)(7), the 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. [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 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).

*In re B.C.B.*, 374 N.C. 32, 35–36, 839 S.E.2d 748, 752 (2020) (alterations in original).

Because petitioners filed the termination petition on 12 March 2019, the determinative period spans from 12 September 2018 to 12 March 2019. The trial court determined that during this period respondent had no meaningful contact with the minor child and did not provide financial

support. Despite the trial court's order in the custody action allowing petitioner to petition the trial court to modify the order to allow for visitation privileges, the trial court's order here expressly indicates that respondent never filed any motion to address visitation, nor has she had any visitation with the child since the entry of the custody order. Moreover, the trial court explicitly found that other than one isolated $100 payment in 2016, three years before the filing of the termination petition, respondent failed to provide financial support for the minor at any other time, including within the determinative six-month period. When viewed as a whole and combined with the findings that respondent cannot properly care for the child based on her own limitations and inability to care for herself without assistance, the trial court's findings support its conclusion that respondent willfully abandoned the child.

The majority, however, faults the trial court for failing to use the word "willful" in its findings and, in its view, for failing to link its findings to its conclusion that respondent willfully abandoned the child. Instead, the majority cites to respondent's actions outside of the determinative six-month window to support its conclusion that the trial court's findings here were insufficient. It remands to the trial court to make a clearer connection between its factual findings and its determination that willful abandonment existed as a ground to terminate respondent's parental rights. This is unnecessary, however, since the trial court considered the evidence before it, evaluated respondent's lack of meaningful contact and lack of support during the determinative six-month period, and evaluated all facts before it to reach its conclusion. Respondent's inability to care for herself and her failure to make any meaningful contact or provide support during the determinative period show that respondent's conduct met the required statutory ground to terminate her parental rights based on willful abandonment.

Under the proper standard of review, the trial court's decision to terminate respondent's parental rights based on neglect and willful abandonment was supported by its findings and the evidence. I would remand to the trial court to make the required finding on whether there was an alternative childcare placement for the termination ground of dependency. Thus, I respectfully dissent.

**IN RE K.H.**

[375 N.C. 610 (2020)]

IN THE MATTER OF K.H.

No. 255A19

Filed 20 November 2020

1. **Termination of Parental Rights—grounds for termination—failure to make reasonable progress—juvenile mother and child in same foster home**

   Where a sixteen-year-old mother and her nine-month-old baby were taken into social services custody and placed in the same foster home, the time that the mother and baby lived together in the same foster home could not count toward the requisite twelve months of separation for termination under N.C.G.S. § 7B-1111(a)(2) because they were not living apart from each other.

2. **Termination of Parental Rights—grounds for termination—failure to pay reasonable portion of cost of care—six months immediately preceding petition—sufficiency of findings**

   Where the trial court terminated a sixteen-year-old mother's parental rights in her infant for willful failure to pay a reasonable portion of the cost of care (N.C.G.S. § 7B-1111(a)(3)) but failed to address the six-month time period immediately preceding the filing of the petition, the trial court's findings were insufficient to support its conclusion of law on this ground for termination and the order was reversed.

3. **Termination of Parental Rights—grounds for termination—dependency—existence of appropriate alternative child care arrangement—sufficiency of findings**

   Where the trial court terminated a sixteen-year-old mother's parental rights in her infant based on dependency (N.C.G.S. § 7B-1111(a)(6)) but failed to make any findings regarding whether the mother had an appropriate alternative child care arrangement, the trial court's findings were insufficient to support its conclusion of law on this ground for termination and the order was reversed.

Justice ERVIN concurring in part and dissenting in part.

Justice DAVIS concurs in this concurring and dissenting opinion.

Justice NEWBY dissenting.

**IN RE K.H.**

[375 N.C. 610 (2020)]

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 28 March 2019 by Judge Christy E. Wilhelm in District Court, Cabarrus County. Heard in the Supreme Court on 2 September 2020.

*Austin "Dutch" Entwistle III for petitioner-appellee Cabarrus County Department of Social Services.*

*Daniel E. Peterson for appellee Guardian ad Litem.*

*Anné C. Wright for respondent-appellant mother.*

HUDSON, Justice.

In 2017 a sixteen-year-old mother and her nine-month-old baby were taken into custody by the Cabarrus County Department of Social Services (DSS) and placed in the same foster home. After six months together, the child was moved to a different foster home apart from her mother. Less than eight months later, DSS filed a motion to terminate respondent-mother's parental rights to her child. Here, we conclude that a parent and child must be living apart from each other for more than twelve months prior to the filing of a motion to terminate parental rights in order for grounds for termination to exist under N.C.G.S. § 7B-1111(a)(2). Furthermore, the factual findings the trial court made here were insufficient to support the termination of the mother's parental rights under either N.C.G.S. § 7B-1111(a)(3) or (6). Accordingly, we reverse the trial court's order terminating respondent-mother's parental rights.

## I. Factual and Procedural History

In March of 2017, respondent was only sixteen years old and had a nine-month-old daughter named Kaitlyn.[1] At the time, DSS received a report that respondent's father punched her in the face. It was also reported to DSS that respondent abused drugs, left Kaitlyn in the care of strangers, and had attempted to poison her family. On 5 April 2017, DSS filed a petition alleging that Kaitlyn was a neglected and dependent juvenile. That same day, DSS was granted nonsecure custody of both respondent and Kaitlyn.

Initially, respondent and Kaitlyn were placed in separate foster homes. Kaitlyn was adjudicated to be a neglected and dependent juvenile by an order filed on 8 June 2017 and the trial court determined that

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

the primary permanent plan for Kaitlyn would be reunification with a secondary plan of guardianship.

The next day, 9 June 2017, respondent and Kaitlyn were placed in the same foster home. They remained together until 19 December 2017 when Kaitlyn was moved to a placement apart from respondent after respondent was caught with cigarettes and marijuana stems were found in a shoebox under her bed. Over the course of the next several months, respondent's progress was turbulent, respondent was moved between multiple placements, and ultimately the primary permanent plan for Kaitlyn was changed to adoption with a secondary plan of reunification.

On 8 August 2018, DSS filed a motion to terminate the parental rights of Kaitlyn's parents (TPR motion) alleging that termination was appropriate under N.C.G.S. § 7B-1111(a)(1)–(3), (6), and (7). A hearing on the motion was held on 25 February 2019 and 27 February 2019. On 28 March 2019, the trial court entered an order terminating respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2), (3), and (6) (TPR order). Respondent filed a notice of appeal on 10 April 2019.

## II. Standard of Review

Proceedings to terminate parental rights consist of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019). At the adjudicatory stage, the petitioner bears the burden "of proving by 'clear, cogent, and convincing evidence' that one or more grounds for termination exist under section 7B-1111(a) of the North Carolina General Statutes." *In re Z.A.M.*, 374 N.C. 88, 94 (2020) (citing N.C.G.S. § 7B-1109(f) (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.' The trial court's conclusions of law are reviewable de novo on appeal." *Id.* (citation omitted).

## III. Analysis

### A. N.C.G.S. § 7B-1111(a)(2)

**[1]** In the TPR order, the trial court found that grounds for termination existed under N.C.G.S. § 7B-1111(a)(2), which provides as follows:

> The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made

> in correcting those conditions which led to the removal of the juvenile.

N.C.G.S. § 7B-1111(a)(2) (2019).

As the Court has previously explained, "[t]ermination under this ground requires the trial court to perform a two-step analysis where it must determine by clear, cogent, and convincing evidence whether (1) a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and (2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child." *In re Z.A.M.*, 374 N.C. at 95–96 (citing *In re O.C.*, 171 N.C. App. 457, 464–65, *disc. review denied*, 360 N.C. 64 (2005)). Under the first step, "the twelve-month period begins when a child is left in foster care or placement outside the home pursuant to a court order, and ends when the motion or petition for termination of parental rights is filed." *In re J.G.B.*, 177 N.C. App. 375, 383 (2006). "Where the twelve-month threshold does not expire before the motion or petition is filed, a termination on the basis of N.C.G.S. § 7B-1111(a)(2) cannot be sustained." *Id.*

The time period a juvenile is left in foster care or placement outside the home is distinct from the time period a trial court considers in evaluating whether the parent has made reasonable progress in correcting the conditions that led to the juvenile's removal. *In re J.S.*, 374 N.C. 811, 815 (2020) ("[A]n 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. 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." (cleaned up) (emphasis in original)). In the TPR order, the trial court found that "[t]he juvenile has been in care for approximately 13 months" and considered respondent's conduct up until the date of the termination hearing in February 2019. It is unclear which thirteen months the trial court considered when calculating how long Kaitlyn had been in foster care and whether the trial court considered the months between the filing of the TPR motion and the termination hearing. The trial court's consideration of respondent's conduct up until the termination hearing was relevant to its consideration of respondent's reasonable progress but should not have been considered in its calculation of how long Kaitlyn had been left in foster care or placement

outside the home. We are unable to determine from the TPR order how the trial court calculated the relevant time period.[2]

The issue we are asked to consider is how long Kaitlyn was "left in foster care or placement outside the home" and thus whether the statutory twelve-month period elapsed.[3] Importantly, this case presents a rare circumstance in which respondent was also a minor in DSS custody. If the relevant time period began when Kaitlyn was put into nonsecure custody on 5 April 2017 and ran continuously until 8 August 2018 when DSS filed the TPR motion, more than twelve months had elapsed, and we would then analyze whether the trial court's findings of fact were supported by clear, cogent, and convincing evidence that respondent "willfully" left Kaitlyn in the placement for that period of time. *See* N.C.G.S. §§ 7B-1109(f), -1111(a)(2). However, if the relevant time period was suspended during the time Kaitlyn and respondent lived together in the foster home from 9 June 2017 to 19 December 2017, Kaitlyn had only been "left in foster care or placement outside the home" for approximately ten months in total,[4] and a termination of respondent's parental rights under subsection (a)(2) could not be sustained. *In re J.G.B.*, 177 N.C. App. at 383.

The General Assembly's stated purpose with respect to the termination of parental rights is "to provide judicial procedures for terminating the legal relationship between a juvenile and the juvenile's biological or legal parents when the parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the juvenile." N.C.G.S. § 7B-1100(1) (2019).

Our appellate courts have previously explained that the purpose of the twelve-month requirement under N.C.G.S. § 7B-1111(a)(2) is to "provide[ ] parents with at least twelve months' notice to correct the

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2. Although the TPR order does not specify which time period it utilized for this part of the analysis, DSS argued in its brief to this Court that the trial court "properly considered evidence ranging from 5 April 2017, when the trial court placed Kaitlyn in [DSS]'s custody, until 25 February 2019 when the trial court held a hearing on [DSS]'s motion to terminate." As explained, this time period cannot satisfy the statutory requirement because almost half of it elapsed after the TPR motion was filed.

3. The parties do not dispute that Kaitlyn was placed in foster care "pursuant to a court order." *In re J.G.B.*, 177 N.C. App. 375, 383 (2006); *see also In re A.C.F.*, 176 N.C. App. 520, 525–26 (2006) ("[W]e conclude the statute refers only to circumstances where a court has entered *a court order* requiring that a child be in foster care or other placement outside the home."). Kaitlyn was placed under a nonsecure custody order on 5 April 2017.

4. Kaitlyn and respondent were separated from 5 April 2017 through 9 June 2017 and then again from 19 December 2017 until 8 August 2018.

conditions which led to the removal of their children before being made to respond to a pleading seeking the termination of his or her parental rights." *In re A.C.F.*, 176 N.C. App. at 527. This requirement "gives full support to the State's interests in preserving the family, while keeping in place a legislatively-established time frame for moving to termination if a child's return home proves untenable." *Id.* (citing N.C.G.S. § 7B-1100 (2003)).

We apply the law with this purpose in mind. The statute requires that the parent have "willfully left the juvenile *in foster care or placement outside the home* for more than 12 months." N.C.G.S. § 7B-1111(a)(2) (emphasis added). Typically, when a child is placed in foster care he or she is removed from the parents' home and placed elsewhere. *See* N.C.G.S. § 131D-10.2(9) (2019) (" 'Foster care' means the continuing provision of the essentials of daily living on a 24-hour basis for dependent, neglected, abused, abandoned, destitute, orphaned, undisciplined or delinquent children or other children who, due to similar problems of behavior or family conditions, *are living apart from their parents, relatives, or guardians* in a family foster home or residential child-care facility." (emphasis added)). Thus, the plain meaning of the term "foster care" presumes that the child has been physically separated and is living apart from his or her parents. Likewise, the phrase "placement outside the home" connotes a separation of the parent and child where the child lives in a home apart from the parent.

In the case of a minor parent, interpreting "foster care or placement outside the home" to require a physical separation of the parent and juvenile fulfills the legislature's purpose of requiring that "more than 12 months" pass between the time a juvenile is left in foster care and the time a motion or petition for termination may be filed. As we explained above, this time period "provides parents with at least twelve months' notice to correct the conditions which led to the removal of their children[.]" *In re A.C.F.*, 176 N.C. App. at 527. It is unlikely that a parent—particularly a minor parent—would be on notice that his or her child has been "removed" from the home or that a court might find that he or she "willfully left" the child in foster care during the period of time when the parent and child were living in the same foster home. Requiring that the minor parent and juvenile live separately for at least twelve months prior to the filing of a motion or petition for termination provides the notice the legislature intended to the parent that he or she must correct the conditions that led to the child's removal.

Here, Kaitlyn and respondent were placed in the same foster home on 9 June 2017. We conclude that as of that date Kaitlyn was not in a living situation upon which the legislature intended to base the termination

of respondent's parental rights under N.C.G.S. § 7B-1111(a)(2). To the contrary, reading the statute as a whole and affording the words their plain meaning, we conclude that grounds for termination exist under subsection (a)(2) only when the juvenile has actually lived apart from the parent for more than twelve months. Therefore, we conclude that the months that Kaitlyn and respondent lived together in the same foster home from 9 June 2017 to 19 December 2017 cannot count towards the requisite twelve-month separation under N.C.G.S. § 7B-1111(a)(2). When DSS filed the TPR motion on 8 August 2018, Kaitlyn had only been "left in foster care or placement outside the home" for approximately ten months. Because the statutorily required twelve months had not accrued, termination on the basis of this ground cannot be sustained. *See In re J.G.B.*, 177 N.C. App. at 383 ("Where the twelve-month threshold does not expire before the motion or petition is filed, a termination on the basis of N.C.G.S. § 7B–1111(a)(2) cannot be sustained."). Accordingly, we reverse the trial court on this issue.

### B. N.C.G.S. § 7B-1111(a)(3)

**[2]** The trial court also found that grounds for termination of respondent's parental rights existed under N.C.G.S. § 7B-1111(a)(3), which provides as follows:

> The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C.G.S. § 7B-1111(a)(3).

The motion to terminate respondent's parental rights was filed on 8 August 2018. Therefore, the relevant six-month period of time during which the trial court must determine whether respondent was able to pay a reasonable portion of the cost of Kaitlyn's care but failed to do so was from 8 February 2018 to 8 August 2018.

In the TPR order, the trial court made factual findings that respondent "worked at Shoe Show as well as Cook Out in 2018 and has not paid any monies towards the cost of care for the juvenile"; that "at various points in time, [respondent] was employed, although that employment was part-time"; that "[respondent] is physically and financially able to pay a reasonable portion of the child's care, and thus has the ability

to pay an amount greater than zero"; that "[respondent] has [not] made a significant contribution towards the cost of care"; and that "[t]he total cost of care for [Kaitlyn] through June 2018 is $14,170.35."

However, none of these findings—nor any others related to this ground for termination—address the specific, relevant six-month time period from 8 February 2018 to 8 August 2018. Therefore, we conclude that the trial court's findings of fact are insufficient to support its conclusion of law that there were grounds to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(3), which specifically requires that "the parent has for a *continuous period of six months immediately preceding the filing of the petition or motion* willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so." N.C.G.S. § 7B-1111(a)(3) (emphasis added). Accordingly, we reverse the trial court on this issue.

### C. N.C.G.S. § 7B-1111(a)(6)

**[3]** Lastly, the trial court found that grounds for termination of respondent's parental rights existed under N.C.G.S. § 7B-1111(a)(6), which provides as follows:

> That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of 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). The trial court failed to make any finding in the TPR order that addressed whether respondent had an appropriate alternative child care arrangement. Therefore, there are insufficient findings of fact to support the trial court's conclusion of law that there were grounds to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(6). Accordingly, we reverse the trial court on this issue.

## IV. Conclusion

We conclude that Kaitlyn was not "left in foster care or placement outside the home for more than 12 months" and therefore that termination of respondent's parental rights under N.C.G.S. § 7B-1111(a)(2)

cannot be sustained. Furthermore, the trial court made insufficient findings of fact to support its conclusions of law that grounds to terminate respondent's parental rights existed under N.C.G.S. § 7B-1111(a)(3) and (6). Accordingly, we reverse the order terminating respondent's parental rights.[5]

REVERSED.

Justice ERVIN, concurring, in part, and dissenting, in part.

I agree with the Court's determinations that the trial court erred by concluding that grounds exist to support the termination of respondent-mother's parental rights in Kaitlyn for failure to make reasonable progress toward correcting the conditions that led to Kaitlyn's removal from her home pursuant to N.C.G.S. § 7B-1111(a)(2), failure to pay a reasonable portion of the cost of Kaitlyn's care following her removal from the home pursuant to N.C.G.S. § 7B-1111(a)(3), and incapability pursuant to N.C.G.S. § 7B-1111(a)(6). I also agree that the trial court's decision that respondent-mother's parental rights in Kaitlyn were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) should be reversed given the absence of any evidence tending to show that respondent-mother "willfully left the juvenile in foster care or placement outside the home for more than [twelve] months." I am, however, unable to join those portions of the Court's opinion reversing, rather than remanding, the trial court's decision that respondent-mother's parental rights in Kaitlyn were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3) and N.C.G.S. § 7B-1111(a)(6). As a result, I concur in the Court's decision, in part, and dissent from that decision, in part.

As the Court notes, the trial court erred by determining that respondent-mother's parental rights in Kaitlyn were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3) given its failure to make sufficient findings of fact to establish that respondent-mother failed to pay a reasonable portion of the cost of the care that Kaitlyn received following her removal from the home during the six month period immediately preceding the filing of the DSS termination motion and pursuant to

5. We note that in an adjudicatory hearing on the termination of parental rights all findings of fact must be based on "clear, cogent, and convincing evidence." N.C.G.S. § 7B-1109(f) (2019). We do not find such evidence in the record here that could support findings of fact necessary to conclude that respondent-mother's parental rights could be terminated under N.C.G.S. § 7B-1111(a)(2), (3), and (6). Thus, we conclude that the proper disposition is to reverse rather than remand.

N.C.G.S. § 7B-1111(a)(6) given the trial court's failure to make sufficient findings of fact to establish that respondent-mother lacked an alternative plan of care for Kaitlyn. Having made that set of determinations, however, I believe that the Court should next address the issue of what remedy should be provided in order to rectify the trial court's errors. The Court has not, however, engaged in the sort of evidentiary analysis that I believe to be appropriate and has, instead, simply reversed the trial court's determination with respect to the grounds for termination set out in N.C.G.S. § 7B-1111(a)(3) and N.C.G.S. § 7B-1111(a)(6) without further analysis.

As a general proposition, a reversal represents a proper remedy on appeal in the event that the record evidence is "too scant" to support the trial court's decision, *State v. Greene*, 255 N.C. App. 780, 783, 806 S.E.2d 343, 345 (2017), while a remand is appropriate in the event that, even if the trial court's required findings of fact are defective, the record contains sufficient evidence to permit the trial court to have reached the result that it deemed appropriate in the event that proper findings had been made. *See*, *e.g.*, *In re N.B.*, 200 N.C. App. 773, 779, 688 S.E.2d 713, 717 (2009) (remanding a termination of parental rights case to the trial court for further findings of fact on the grounds that "[t]he trial court . . . [did] not make any findings of fact which directly address[ed] whether [the respondent] lacked an appropriate alternative childcare arrangement"); *Watts v. Borg Warner Auto., Inc.*, 171 N.C. App. 1, 5, 613 S.E.2d 715, 719 (remanding a worker's compensation order which lacked necessary findings to the Industrial Commission for further proceedings given that "[s]pecific findings on crucial issues are necessary if the reviewing court is to ascertain whether the findings of fact are supported by competent evidence and whether the findings support the conclusion of law"), *aff'd*, 360 N.C. 169, 622 S.E.2d 492 (2005); *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987) (stating that, "[w]here the findings are insufficient to enable the court to determine the rights of the parties, the case must be remanded . . . for proper findings of fact"); *Barnes v. O'Berry Center*, 55 N.C. App. 244, 247, 284 S.E.2d 716, 718 (1981) (vacating and remanding a worker's compensation order "for more definitive findings and conclusions based on the evidence in the present record").[1] Thus, in identifying the proper

1. A trial court is, of course, entitled, in the exercise of its discretion, to receive and consider additional evidence upon remand, *see In re S.M.L.*, 846 S.E.2d 790, 802 (N.C. Ct. App. 2020) (stating that, "[o]n remand, . . . the trial court may," "in its discretion," "hold an additional hearing and consider additional evidence regarding the allegation of neglect"), unless the appellate courts either explicitly mandate or prohibit the taking of such an

remedy for the trial court's erroneous decision to find that respondent-mother's parental rights in Kaitlyn were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3) and N.C.G.S. § 7B-1111(a)(6), the ultimate issue that we must resolve is whether the record contained sufficient evidence to support the result that the trial court originally reached in the event that proper findings had been made.

After a careful examination of the record, I am persuaded that the complete reversal of the trial court's order required by the Court's decision is unwarranted given that "the trial court may be able to make more specific findings," *Cty. of Durham ex rel. Wilson v. Burnette*, 262 N.C. App. 17, 32, 821 S.E.2d 840, 852 (2018) (citing *Clark v. Gragg*, 171 N.C. App. 120, 126, 614 S.E.2d 356, 360 (2005)), *aff'd*, 372 N.C. 64, 824 S.E.2d 397 (2019), that support a determination that respondent-mother's parental rights in Kaitlyn were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3) and N.C.G.S. § 7B-1111(a)(6). More specifically, the record developed before the trial court indicates that respondent-mother failed to make any contribution toward the cost of the care that Kaitlyn received between 8 February 2018 and 8 August 2018, which is the relevant six-month period preceding the filing of the termination petition for purposes of determining whether respondent-mother's parental rights in Kaitlyn are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3). In addition, the record contains evidence tending to show that, at some point between "late 2017" and 8 August 2018, respondent-mother was employed at a shoe store, that she did not work there for "long at all," and that she was terminated from that employment "due to her attendance." Finally, the record reflects that respondent-mother did not suffer from any physical or other health-related limitations that precluded her from earning sufficient income to allow her to make a payment in excess of zero toward the cost of Kaitlyn's care. *See*, *e.g.*, *In re J.M.*, 373 N.C. 352, 359, 838 S.E.2d 173, 178 (2020) (affirming the trial court's conclusion that the respondent had failed to pay a reasonable portion of the cost of her children's care while they were in DSS custody based upon a determination that the respondent "was working at a . . . restaurant at the beginning of the six-month period but quit the job of her own accord"); *In re Tate*, 67 N.C. App. 89, 95, 312 S.E.2d 535, 539–40 (1984) (affirming the trial court's conclusion that the respondent failed to pay a reasonable portion of the cost of foster care for the child based upon determinations that, while the respondent was "an able-bodied

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action, *see Robbins v. Robbins*, 240 N.C. App. 386, 407–08, 770 S.E.2d 723, 735 (2015) (stating that "[o]n remand the trial court shall, if requested by either party, consider additional evidence and arguments" regarding the marital distribution scheme).

woman capable of working," she had quit multiple jobs during the child's placement in foster care, with at least one of these resignations having stemmed from the respondent's lack of enthusiasm for working on weekends); *In re Bradley*, 57 N.C. App. 475, 478–79, 291 S.E.2d 800, 802 (1982) (affirming the trial court's determination that the respondent, a prisoner, had failed to pay a reasonable portion of the cost of care for the child given that the respondent had been terminated from a work-release program "for having returned therefrom in a highly intoxicated condition" and holding that, where "the parent had an opportunity to provide for some portion of the cost of care of the child, and forfeits that opportunity by his or her own misconduct, such parent will not be heard to assert that he or she has no ability or means to contribute to the child's care and is therefore excused from contributing any amount").

Assuming, without in any way deciding, that the record is insufficient to establish precisely when respondent-mother left the shoe store's employment, I believe that the trial court could have reasonably concluded that, except for respondent-mother's failure to pay proper attention to her work-related responsibilities, she would have been employed and able to make a contribution in an amount in excess of zero toward the cost of the care that Kaitlyn received. As a result, I believe that the record contains sufficient evidence to have permitted the trial court to have reasonably determined, in the event that it chose to do so and made the necessary factual findings, that respondent-mother's parental rights in Kaitlyn were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3).

Similarly, I believe that the record contains sufficient evidence to permit a reasonable trial judge to determine that respondent-mother lacked an appropriate child care arrangement for Kaitlyn for purposes of N.C.G.S. § 7B-1111(a)(6).[2] Although respondent-mother argues that

2. Respondent-mother did not contend on appeal that the record lacked sufficient evidence, if believed, to establish that she was "incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile" as defined in N.C.G.S. § 7B-101, and that "there is a reasonable probability that the incapability will continue for the foreseeable future." N.C.G.S. § 7B-1111(a)(6). Any such contention would have been unpersuasive given the presence of evidence tending to show that respondent-mother had consistently struggled with serious behavioral issues, including running away, acting disrespectfully toward authority figures, continuously abusing impairing substances, setting fire to a book, and engaging in sexually inappropriate conduct, that resulted in the disruption of numerous placements and Kaitlyn's removal from respondent-mother's care. According to DSS social worker Tara Williams, there had been no change throughout the duration of the proceedings before the trial court relating to respondent-mother's drug use, "sexualized behavior," propensity to run away, failure to cooperate with her case plan, "[a]gressiveness toward adults," or lack of significant effort to regain custody of Kaitlyn. In spite of the fact that respondent-mother had been doing well in the placement in which

record contains evidence tending to show that respondent-mother's foster mother and her husband were willing to have Kaitlyn placed with them, that they had space for Kaitlyn in addition to respondent-mother, and that the foster mother's husband had the time to care for Kaitlyn, I am not convinced the presence of this evidence in the record precludes the trial court from finding that respondent-mother lacked an adequate alternative child care arrangement.

As an initial matter, the record suggests that the foster mother's husband smoked cigarettes, a factor that a reasonable trial court might deem disqualifying given the child's relatively young age and the potential health risks associated with second-hand smoke. More fundamentally, given respondent-mother's history of failing to successfully remain in any one placement for a significant period of time and the relative novelty of her placement at the time of the termination hearing, a reasonable trial judge could have serious doubts about the likelihood that respondent-mother's placement with the child in that household would be successful over the long haul. At an absolute minimum, I believe that the record discloses the existence of a genuine issue of fact concerning whether respondent-mother did, in fact, have an adequate alternative child care arrangement sufficient to preclude termination of her parental rights in Kaitlyn pursuant to N.C.G.S. § 7B-1111(a)(6). *See*, *e.g.*, *In re N.N.B.*, 843 S.E.2d 474, 447 (N.C. Ct. App. 2020) (concluding that, while the respondent's sister "may well be an 'appropriate' placement for a child who does not require" a particularly high level of care, the sister "[was] not an 'appropriate' placement for [the child] because of his psychiatric needs"). As a result, given that the record contains sufficient evidence that, if believed and set out in proper findings of fact, would support a determination that respondent-mother's parental rights in Kaitlyn were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3) and N.C.G.S. § 7B-1111(a)(6), I would reverse the trial court's termination order and remand this case to the District Court, Cabarrus County, for the entry of a new order containing proper findings of fact and conclusions of law concerning the issue of whether respondent-mother's parental rights in Kaitlyn were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3) and N.C.G.S. § 7B-1111(a)(6) and respectfully dissent from the Court's

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she resided at the time of the termination hearing, the trial court expressed skepticism that this "[twelve]-week period is sufficient to indicate . . . that there has been a substantial change in behavior and there is not a likelihood of future continued behavior to remove the dependency of the child." As a result, the record contains ample evidence tending to show respondent-mother's incapability for purposes of N.C.G.S. § 7B-1111(a)(6).

decision to simply reverse the trial court's order with respect to these two grounds for termination.

Justice DAVIS concurs in this concurring and dissenting opinion.

Justice NEWBY dissenting.

I agree with Justice Ervin that, because the trial court failed to make all the necessary factual findings under N.C.G.S. § 7B-1111(a)(6) (2019), the appropriate disposition is to remand for additional findings, not to simply reverse and permanently undo the termination order. But my disagreement with the majority goes deeper. The trial court appropriately found that grounds exist to terminate respondent-mother's parental rights under N.C.G.S. §§ 7B-1111(a)(2) and (a)(3), and it did not omit any necessary factual findings for those grounds. Its order should be affirmed. The majority, by a combination of misguided statutory interpretation and selective review of the facts, reverses the trial court on these well-supported determinations. I respectfully dissent.

First, the majority errs by reversing the trial court's conclusion that grounds existed to terminate respondent-mother's parental rights under N.C.G.S. § 7B-1111(a)(2). That provision states that a court may terminate a respondent's parental rights if it finds that "[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). The majority holds that because respondent-mother (who was a minor) and the child, "Kaitlyn," were placed in the same home for foster care for several months, that period of time cannot count towards the required twelve or more months under the statutory provision. The majority thus interprets the phrase "in foster care or placement outside the home" in subsection 7B-1111(a)(2) to not include time when the minor parent and child are under the same roof, even if during that time the child is neither under the parent's care nor in the parent's home.

That interpretation evades a natural understanding of the statutory provision. Subsection 7B-1111(a)(2) applies when the parent willfully leaves the child in foster care or some other placement outside of the home for over twelve months. *Id.* The majority, quoting *In re A.C.F.*, 176 N.C. App. 520, 527, 626 S.E.2d 729, 734 (2006), notes that the purpose behind this requirement is to "provide[ ] parents with at least twelve

months' notice to correct the conditions which led to the removal of their children before being made to respond to a pleading seeking the termination of his or her parental rights." The provision thus helps ensure that for a period of time the child does not reside in the home in which they would typically reside if the parent had full custody and supervision—it gives the parent a chance to get things in order in that home so that perhaps the child could eventually return. Thus, a plain understanding of this provision dictates that it applies when the child is not under the parent's care and not living in the parent's home.

The facts of this case make the analysis under subsection (a)(2) somewhat tricky. Respondent-mother is a minor. For her and Kaitlyn, home was respondent-mother's adoptive parents' home, until they were each removed and placed in foster care. Kaitlyn was placed in foster care from 5 April 2017 at least until the termination motion was filed on 8 August 2018. For part of that time, from 9 June 2017 to 19 December 2017, respondent-mother and Kaitlyn were both placed in the same foster home, and then at Church of God Children's Home. After that, respondent-mother was sent elsewhere because of recurring serious behavioral issues. Even during that six-month stretch, though, Kaitlyn was outside of respondent-mother's custody, and no evidence shows that respondent-mother had the responsibility for caring for Kaitlyn during that time. Similarly, neither was Kaitlyn in "respondent-mother's home." She was in the home of a foster family, and then in Church of God Children's Home. Indeed, respondent-mother herself was removed from her home and placed in foster care, so Kaitlyn was not in respondent-mother's home (with respondent-mother's adoptive parents) for as long as both of them were in foster care. Therefore, the evidence shows that from around April 2017 until the filing of the termination motion in August 2018—a period of about sixteen straight months—Kaitlyn resided "in foster care or placement outside [respondent-mother's] home."

Moreover, the majority's contrary holding will create perverse incentives. If the time when both minor parent and child are in the same foster care placement cannot count towards the time in which the child is outside the parent's home, DSS may be unnecessarily encouraged to put minor parents and their children in separate placements. Thus, the trial court's determination that grounds exist to terminate respondent-mother's parental rights to Kaitlyn under N.C.G.S. § 7B-1111(a)(2) should be affirmed.[1]

1. Because the majority holds that Kaitlyn was not out of the home for over twelve months, it does not consider whether respondent-mother "willfully" left Kaitlyn in such placement or care, or whether reasonable progress has been made to correct the

Affirming the trial court's conclusion under subsection (a)(2) would be sufficient to uphold the order terminating respondent-mother's parental rights. Nevertheless, I also disagree with the majority's decision to reverse the trial court's determination that grounds exist to terminate respondent-mother's parental rights under subsection (a)(3).

Subsection 7B-1111(a)(3) provides that the court may terminate a parent's parental rights when

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

N.C.G.S. § 7B-1111(a)(3). The majority holds that because, in its view, the trial court order was not sufficiently specific in its findings regarding respondent-mother's earnings and contributions during the six-month period immediately preceding the filing of the termination motion, that court's findings do not support a conclusion that grounds exist under N.C.G.S. § 7B-1111(a)(3) to terminate respondent-mother's parental rights.

I disagree. As the majority notes, the relevant six-month period stretches from 8 February 2018 to 8 August 2018. The trial court specifically found that respondent-mother "worked at Shoe Show as well as Cook Out in 2018 and has not paid any monies towards the cost of care for the juvenile." By broadly referencing the year "2018," the trial court recognized and included all of the appropriate six-month period. Arguably, it also included the month of January 2018, which was outside the relevant six months. But that hardly invalidates the fact that its findings apply to the relevant six months as well. The trial court also found that respondent-mother "is physically and financially able to pay a reasonable portion of the child's care, and thus has the ability to pay an amount greater than zero" but that she "has [not] made a significant contribution towards the cost of care." Again, though the trial court did not specifically say that respondent-mother made no payments during the

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conditions leading to the child's removal. *See* N.C.G.S. § 7B-1111(a)(2). But the record and the trial court's findings abound with evidence that respondent-mother has had recurring issues abusing drugs, engaging in sexually inappropriate behavior, running away, and failing to provide appropriate discipline and nutrition to Kaitlyn, and that any progress on these issues has been limited.

applicable six-month period, its finding that respondent-mother had not contributed substantially *whatsoever* would include the relevant period.

Overall, the trial court's findings may not go as far as precisely naming the relevant six-month period, but they do encompass that period. The findings are thus sufficient to support the trial court's conclusion that, during the relevant six-month period leading up to the filing of the termination motion, respondent-mother "willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so." N.C.G.S. § 7B-1111(a)(3). The trial court's conclusion that grounds existed to terminate respondent-mother's parental rights under that provision should be affirmed.[2]

Thus, the trial court appropriately found that grounds exist to terminate respondent-mother's parental rights under both N.C.G.S. § 7B-1111(a)(2) and N.C.G.S. § 7B-1111(a)(3). The trial court order should be affirmed on either or both of those bases.

I respectfully dissent.

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IN THE MATTER OF K.S.D-F., K.N.D-F.

No. 491A19

Filed 20 November 2020

**1. Termination of Parental Rights—standing to file petition—effect on trial court's jurisdiction**

In a termination of parental rights case, where the trial court entered a permanency planning order awarding custody and guardianship of the children to their great-aunt and uncle while specifically retaining jurisdiction and providing for further hearings upon motion by any party, the trial court had jurisdiction to enter an order granting nonsecure custody of the children to the department of social services (DSS) after DSS filed a motion seeking review of the children's custody arrangement. Thus, as a party granted custody by a "court of competent jurisdiction," DSS had standing to file a

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2. Alternatively, if, as the majority holds, the trial court's findings regarding subsection (a)(3) were somehow technically deficient, I agree with Justice Ervin that the appropriate disposition would be to remand, not to reverse.

petition to terminate respondent-parents' rights to the children and, therefore, did not deprive the trial court of its jurisdiction over the termination proceeding.

**2. Termination of Parental Rights—best interest of the child—likelihood of adoption—sufficiency of evidence**

The trial court did not abuse its discretion by determining that termination of a mother's and father's parental rights was in their children's best interest where, although no potential adoptive placement had been identified at the time of the termination hearing, the evidence showed a high likelihood of the children being adopted and of more resources for recruiting potential adoptive families becoming available once the parents' rights were terminated.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 12 September 2019 by Judge Burford A. Cherry in District Court, Catawba County. This matter was calendared for argument in the Supreme Court on 7 October 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

*Marcus Almond for petitioner-appellee Catawba County Department of Social Services.*

*Elon University Guardian ad Litem Appellate Advocacy Clinic, by Senior Associate Dean Alan D. Woodlief Jr., for appellee Guardian ad Litem.*

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

*Robert W. Ewing for respondent-appellant mother.*

EARLS, Justice.

Respondents appeal from an order terminating their parental rights to their children K.S.D-F. (Katie) and K.N.D-F. (Kennedy).[1] Because the trial court had jurisdiction to enter the termination order and did not abuse its discretion by concluding that termination of respondents'

1. Pseudonyms used throughout the opinion to protect the children's identities and for ease of reading.

parental rights was in the children's best interests, we affirm the trial court's order.

Background

On the day of Kennedy's birth in May 2008, both she and respondent-mother tested positive for marijuana, which initiated a report to Catawba County Department of Social Services (DSS). Respondent-mother admitted that she and respondent-father both smoked marijuana, and respondent-father later confirmed that he smoked marijuana every day. On 7 July 2008, the children were found by DSS to be in need of services.

On 12 August 2008, respondents participated in a Child and Family Team Meeting where they both admitted to using marijuana on a regular basis, and respondent-father stated he would continue to do so. Respondents entered into a case plan on 21 August 2008, but they refused to consent to random drug screens. Respondents were unemployed and were evicted from their residence on or about 5 September 2008. The children moved from relative to relative, and on 19 December 2008 respondent-mother agreed to place the children in a Safety Resource Placement. The children were placed with their paternal great-aunt and great-uncle (the Turners).

On 23 December 2008, DSS filed a juvenile petition alleging that Katie and Kennedy were neglected juveniles, due to respondents' failure to provide proper care, supervision, or discipline. In addition to the disclosures of drug use, unemployment, and unstable housing, the juvenile petition alleged that respondent-mother had failed a drug screen requested by her probation officer in October 2008, respondent-father had previously relinquished his parental rights to another child after DSS filed a motion to terminate his parental rights, and both respondents had criminal records.

Following a hearing on 26 January 2009, Katie and Kennedy were adjudicated to be neglected juveniles based upon the facts alleged in the juvenile petition. At the time of the hearing, the children were in the custody of their mother but were residing with the Turners. The trial court granted custody of the children to DSS, which left the children in the Turners' care. Respondents were ordered to enter into and comply with a case plan that required them to abstain from possessing or using illicit substances; submit to drug screens; complete a substance abuse assessment, a psychological evaluation, and a parenting assessment; follow recommendations from the assessments and psychological evaluation; and maintain stable housing and employment. Respondents were allowed one hour of visitation a week.

In an order entered on 18 May 2009 after a 20 April 2009 review hearing, the trial court noted that respondent-mother had completed her mental health assessment but had missed several drug screens. Of the two drug screens she did complete, she tested positive for marijuana once. Respondent-father visited the children twice but had not contacted the social worker in several months, had not engaged in his case plan, and had not responded to messages left by the social worker or his attorney. The children remained in DSS's custody and in the care of the Turners, though the Turners were not approved for a long-term placement after a home study was completed. Visitation remained unchanged.

In an order entered on 7 August 2009 after a 13 July 2009 review hearing, the trial court ceased reunification efforts with respondent-father due to his lack of participation. The children remained in DSS's custody and in the care of the Turners. The trial court found that respondent-mother was not in compliance with her case plan; she had missed five requested drug screens and had only attended two visitations over a fourteen-week period. Visitation with respondent-father was ceased, and respondent-mother's visitation was modified to one hour every other week.

The trial court entered a permanency planning order on 28 October 2009. Custody of the children remained unchanged, and while the trial court noted several concerns that prevented the Turners from being an appropriate long-term placement, it noted that the children were doing "very well" in their care. The trial court found that respondent-mother remained noncompliant with her case plan, noting six missed drug screens, several missed visits with the children, her continued unemployment, and her failure to "meaningfully" address the issues which brought the children into DSS's care. The trial court ceased reunification efforts with respondent-mother and ordered that the permanent plan be a concurrent plan of (1) custody/guardianship with relatives, namely the Turners, or adoption by the Turners; and (2) adoption by a non-relative. Respondent-mother was allowed one visit per month, and the trial court restricted unauthorized contact between the children and respondent-mother.

The trial court entered a subsequent permanency planning order on 23 February 2010 following a hearing on 25 January 2010. The trial court noted respondent-father's complete lack of contact and respondent-mother's continued noncompliance with her case plan. The trial court found that while a home study would not allow the Turners to be approved to adopt the children, guardianship with the Turners was

appropriate. The permanent plan was changed to custody/guardianship with relatives, namely the Turners, and custody and guardianship was granted to the Turners. The trial court prohibited visitation with respondent-father but allowed respondent-mother two hours of visitation a month, supervised by the Turners, provided that respondent-mother was "sober and appropriate." The trial court did not schedule further reviewing hearings, but it retained jurisdiction and provided that "the matter may be brought on for hearing upon motion of any party."

On 24 June 2016, DSS filed a "Motion for Review," which requested that the trial court "conduct a custody review . . . to address the children's custody, placement, and safety." The motion alleged that the Turners returned the children to respondent-mother's care in December 2015. The children also had contact with respondent-father, had witnessed illegal drug use by respondents, and had been subjected to inappropriate discipline by respondent-mother, where she slapped and hit them in the head or face and kicked them. After respondent-mother tested positive for THC, the trial court entered an order for nonsecure custody, granting custody of the children to DSS. Katie and Kennedy were placed into foster care and were moved several times due to their behavior.

The trial court entered a permanency planning order on 5 January 2017 following a hearing on 9 December 2016. The trial court concluded that the most appropriate permanent plan remained guardianship with the Turners. The children remained in DSS's custody, but a trial home placement with the Turners was approved. Reunification with respondents was not resumed, visitation with respondent-father was denied, and respondent-mother was allowed one hour a week of visitation supervised by DSS.

In February 2017, the Turners requested that Katie and Kennedy be removed from their care due to their unmanageable behaviors. They were placed in separate foster homes. A subsequent permanency planning order entered on 26 April 2017 removed the Turners as parties in the matter. The trial court found that respondent-mother had begun working on her case plan again; she completed a parenting and substance abuse assessment, obtained stable housing and employment, and was attending all visitations. DSS maintained custody of the children, reunification efforts with respondent-mother were resumed, and the permanent plan was changed to reunification with respondent-mother, with a secondary plan of adoption. Respondent-mother was allowed at least four, and up to twelve, hours of visitation per month, though visitation for respondent-father was not resumed.

A 13 September 2017 permanency planning order noted respondent-mother's "sporadic" visitation, missed drug screens, unemployment, and arrest for assault since the last hearing. While the permanent plan remained unchanged, respondent-mother's visitation was suspended pending two consecutive negative drug screens.

A 5 April 2018 permanency planning order found that respondent-mother had no contact with DSS since the previous hearing. She had not visited the children due to her failure to produce two consecutive negative drug screens. She missed five requested drug screens but had tested positive for cocaine and THC in January 2018 at the birth of another child. She was involved in a high-speed car chase with law enforcement, who witnessed drugs being thrown from the car during the chase. The social worker was able to reach respondent-father, who signed a case plan but did not submit to a drug screen. The primary plan was changed to adoption, with a secondary plan of reunification. Katie and Kennedy remained in foster care, though they had changed placements several times due to their behavior.

In a 25 September 2018 permanency planning order, the trial court maintained the permanent plan as adoption and changed the secondary plan to guardianship. Respondent-mother had only sporadically attended therapy to address her substance abuse concerns and failed to follow through on additional options offered by her social worker. The trial court also found she had limited contact with her social worker, was unemployed, had missed eighteen drug screens but had tested positive for THC at a screen in April 2018, had failed to comply with three requests for a hair follicle drug screen, and DSS had been unable to verify her residence. Due to her failure to provide acceptable drug screens, she had not visited with the children. The trial court found that respondent-father did not have legal employment. He completed a substance abuse assessment but only attended one class. Like respondent-mother, he failed to submit to eighteen requested drug screens, as well as three requested hair follicle tests, though he tested positive for marijuana after submitting to a drug screen requested by his probation officer. The trial court concluded that further efforts to reunify the children with respondents "would clearly be unsuccessful and contrary to the children's best interests, safety and welfare." The children remained in foster care, and each child had changed foster placements three more times.

On 16 November 2018, DSS filed a motion to terminate respondents' parental rights. As grounds for termination, the petition alleged that the children were neglected, respondents had willfully left the children

in foster care for more than twelve months without showing reasonable progress to remedy the conditions that led to the removal of the children, and respondents had failed to pay a reasonable portion of the cost of care for the children while they were in foster care. *See* N.C.G.S. § 7B-1111(a)(1)–(3) (2019).

Subsequent to a termination hearing conducted on 4 June, 3 July, 30 July, and 14 August 2019, the trial court entered an order terminating respondents' parental rights on 12 September 2019. The trial court concluded it had jurisdiction over the proceeding and that DSS was a proper party to bring the motion before the court. It adjudicated that grounds existed to terminate respondents' parental rights due to neglect and willfully leaving the children in foster care for more than twelve months without showing reasonable progress to remedy the conditions that led to the children's removal. Based upon the evidence presented at the termination hearing, the trial court concluded that terminating respondents' parental rights was in Katie's and Kennedy's best interests. Respondents filed notices of appeal.

Analysis

"Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94 (2020) (citing 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 (2019) (quoting N.C.G.S. § 7B-1109(f) (2017)).

On appeal, respondents do not challenge the trial court's adjudication of grounds to terminate their parental rights under N.C.G.S. § 7B-1111(a)(1), neglect, or N.C.G.S. § 7B-1111(a)(2), failure to make reasonable progress. Instead, they argue that: (1) DSS did not have standing to file the petition to terminate respondents' parental rights, which prevented the trial court from having jurisdiction to enter the termination order; and (2) the trial court erred in making its dispositional determination that terminating their parental rights was in the children's best interests. They also contend that a de novo standard of review applies to their best interests argument. We address each argument in turn.

*Standing and Jurisdiction*

**[1]** Respondents argue that the trial court lacked jurisdiction over the termination proceeding because DSS did not have standing to file a

motion to terminate their parental rights, as DSS had not been given custody of the children by a court of competent jurisdiction pursuant to N.C.G.S. § 7B-1103(a) (2019). They assert that the trial court did not have subject-matter jurisdiction to enter the 15 August 2016 nonsecure custody order granting custody to DSS because there was no pending juvenile petition before the court. Specifically they claim that because DSS only filed a "Motion for Review" and not a juvenile petition, the trial court did not have jurisdiction to enter the 15 August 2016 nonsecure custody order, arguing that once the juvenile petition had been adjudicated, the nonsecure custody provisions in the Juvenile Code were no longer effective. This argument has no merit.

"The [district] court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights . . . ." N.C.G.S. § 7B-1101 (2019); *see also* N.C.G.S. § 7B-101(6) (2019) (defining "[c]ourt" as the district court). Jurisdiction arises upon the filing of "a properly verified juvenile petition" and extends "through all subsequent stages of the action." *In re T.R.P.*, 360 N.C. 588, 593 (2006) (citing N.C.G.S. § 7B-201(a) (2005)); *see* N.C.G.S. § 7B-201(a) (2019) ("When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated . . . .").

In this matter, the trial court obtained jurisdiction on 23 December 2008, when DSS filed a petition alleging that Katie and Kennedy were neglected juveniles. Following a hearing, Katie and Kennedy were adjudicated to be neglected juveniles, and the trial court ordered they be placed in the custody of DSS, "with placement in its discretion." At the time of the hearing, the children had been residing with the Turners, and the trial court ordered that the placement continue. In the 23 February 2010 permanency planning order, the trial court determined that a permanent plan for custody and guardianship with the Turners was in the children's best interests and awarded custody and guardianship to the Turners. The trial court specifically retained jurisdiction and provided that further hearings could be brought upon a motion by any party. DSS filed such a motion on 24 June 2016, seeking to address the children's "custody, placement, and safety" as it had reason to believe the children had been residing with respondent-mother since December 2015 and had contact with respondent-father, both in violation of court orders, and that the children witnessed illegal drug use and been subjected to inappropriate discipline.

Contrary to respondents' assertion, the trial court did have jurisdiction to enter the nonsecure custody order on 15 August 2016. The trial

court obtained jurisdiction on 23 December 2008 with the filing of the juvenile petition, and upon ordering custody and guardianship to the Turners in its 23 February 2010 permanency planning order, it did not terminate its jurisdiction and have a civil custody order entered but specifically retained jurisdiction and provided for further hearings through the filing of a motion by any party. *See* N.C.G.S. § 7B-911 (2019) ("Upon placing custody with a parent or other appropriate person, the court shall determine whether or not jurisdiction in the juvenile proceeding should be terminated and custody of the juvenile awarded to a parent or other appropriate person . . . ."). DSS then filed a "Motion for Review," and the trial court had jurisdiction when it entered the nonsecure custody order on 15 August 2016 granting custody of the children to DSS. DSS subsequently had standing to file the 16 November 2018 motion to terminate respondents' parental rights as DSS had been granted custody of the children. *See* N.C.G.S. § 7B-1103(a)(3) (2019) (stating that "[a]ny county department of social services, consolidated county human services agency, or licensed child-placing agency to whom custody of the juvenile has been given by a court of competent jurisdiction" has standing to file a petition or motion to terminate parental rights).

Further, in contrast to respondents' argument that the trial court entered the order for nonsecure custody without being presented with such a request in a "proper pleading," DSS did request review of custody in its "Motion for Review." Therefore, this matter is distinguishable from those cited by petitioners, *In re Transp. of Juvs.*, 102 N.C. App. 806, 807–08 (1991), where the Court of Appeals concluded that "without an action pending before it, the district court was without jurisdiction to enter an order" *ex mero motu* to transport delinquent juveniles; and *In re McKinney*, 158 N.C. App. 441, 448 (2003), where the Court of Appeals determined that a "Motion in the Cause" that did not ask for parental rights to be terminated was insufficient to give the trial court jurisdiction to enter an order doing so.

This matter is also distinguishable from *In re Ivey*, 156 N.C. App. 398 (2003), which respondents also rely on. In *In re Ivey*, DSS filed *no* petition alleging the child to be abused or neglected, which prevented the trial court from having jurisdiction to grant DSS nonsecure custody. *Id.* at 401. Moreover, DSS presented no evidence, and the nonsecure custody order contained no findings of fact, to allow for DSS to take temporary custody prior to a petition being filed. *Id.* at 402. Here, a juvenile petition was filed which conferred jurisdiction on the trial court, and jurisdiction continued "through all subsequent stages of the action," including the entry of the nonsecure custody order. *In re T.R.P.*, 360 N.C. at 593.

Accordingly, we conclude the trial court had jurisdiction to enter the nonsecure custody order placing the children into the custody of DSS, and thus, the agency had standing to file the motion to terminate respondents' parental rights. The trial court had jurisdiction over the termination action.

*Best Interests Determination*

**[2]** " '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,' at which it 'determine[s] whether terminating the parent's rights is in the juvenile's best interest.' " *In re I.N.C.*, 374 N.C. 542, 546 (2020) (alteration in original) (first quoting *In re A.U.D.*, 373 N.C at 6; then quoting N.C.G.S. § 7B-1110(a)). In determining whether termination of parental rights is in the child's best interests,

> 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).

We first address respondents' argument concerning the appropriate standard of review for a disposition entered under N.C.G.S. § 7B-1110(a). Respondents acknowledge this Court's long-standing precedent that "[t]he 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 (citing *In re D.L.W.*, 368 N.C. 835, 842 (2016)); *see also In re Montgomery*, 311 N.C. 101, 110 (1984). However, they argue that "*Montgomery*'s dispositional standard of review has been abrogated by statutory changes and *A.U.D.* was incorrect to rely on it and its progeny for the standard of review" and advocate for a de novo standard of review. We recently considered similar arguments in *In re C.V.D.C.*,

374 N.C. 525 (2020), and as in that case, "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)." *Id.* at 529; *see also In re Z.A.M.*, 374 N.C. 88, 99 (2020); *In re A.R.A.*, 373 N.C. 190, 199 (2019). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re A.U.D.*, 373 N.C. at 6–7 (alteration in original) (quoting *In re T.L.H.*, 368 N.C. 101, 107 (2015)). Given this standard of review, respondents' argument that each of the N.C.G.S. § 7B-1110(a) factors weighs against termination in this matter when reviewed under a de novo standard cannot prevail.

Respondents also argue that even under the abuse of discretion standard the termination order should be reversed. Under their abuse of discretion argument, they only challenge Finding of Fact 7, which provides that "[a]lthough there is not a potential adoptive placement identified at this time, it is likely that the children can be adopted[, and f]urthermore, more resources for recruiting potential adoptive families will be available after entry of an order terminating parental rights." Respondents contend that the trial court's finding that the children likely would be adopted is "manifestly unsupported by reason" because DSS was unable to find a stable home for the children in the ten years between the adjudication and the termination hearing.

However, the trial court's finding is supported by the evidence. Both the social worker and the guardian ad litem recommended terminating respondents' parental rights and reported it was "likely that [Katie and Kennedy] can be adopted together" and "very likely [they can] be adopted once they have been legally free for adoption." At the disposition hearing, the social worker testified to potential adoptive placements, including one with a relative, and "absolutely" agreed that additional doors for recruiting potential adoptive homes would open upon the termination of respondents' parental rights. This evidence fully supports the challenged finding.

Respondents also rely on *In re J.A.O.*, 166 N.C. App. 222 (2004). However, the salient facts in that case are very different from the facts here. In *In re J.A.O.*, 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. At the termination hearing, the guardian ad litem opined that it was in the juvenile's best interests not to terminate the respondent's parental rights. *Id.* at 225. The guardian ad litem 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 adoptive family." *Id.* at 228. 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.* This is distinguishable from the current matter, where the guardian ad litem and social worker both recommended termination and provided that adoption was likely, or even very likely, and the social worker testified to potential adoptive placements.

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). The record establishes that the trial court's conclusion that termination of respondents' parental rights was in Katie's and Kennedy's best interests was neither arbitrary nor manifestly unsupported by reason. For the reasons stated above, we affirm the 12 September 2019 order of the trial court terminating respondents' parental rights.

AFFIRMED.

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IN THE MATTER OF N.M.H.

No. 474A19

Filed 20 November 2020

**Termination of Parental Rights—grounds for termination—willful abandonment—no contact or financial support**

In an action between two parents, the trial court properly terminated a father's parental rights to his daughter based on willful abandonment where, during the nearly three years prior to the filing of the termination petition, the father had no contact with his daughter and provided no financial or other tangible support for her. Although the trial court failed to use the statutory language of "willful abandonment," its findings—based on clear, cogent, and convincing evidence—supported the conclusion that respondent's conduct constituted willful abandonment.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 28 August 2019 by Judge Robert J. Crumpton in District Court, Wilkes

County. This matter was calendared for argument in the Supreme Court on 7 October 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 mother.*

*No brief for appellee Guardian ad Litem.*

*Mercedes O. Chut for respondent-appellant father.*

NEWBY, Justice.

Respondent appeals from the trial court's order terminating his parental rights to his minor child, N.M.H. (Nicole)[1], in this private termination action. We affirm.

Petitioner and respondent are the mother and father of Nicole, who was born in September 2010 while petitioner and respondent were married. Petitioner and respondent resided in Caldwell County for most of their marriage. Petitioner admitted to abusing drugs during her marriage to respondent and accused respondent of the same, which he denied. Petitioner and respondent separated in 2012 when petitioner stopped using drugs and moved to Wilkes County with Nicole in order to provide a better life for herself and Nicole. Respondent helped care for Nicole while petitioner continued to work in Caldwell County for approximately one month after the parties separated, until petitioner got a job in Wilkes County. Petitioner and respondent divorced in 2014, and petitioner married her current husband in 2015.

From 2012 until July 2016, respondent had sporadic contact with petitioner through Facebook Messenger. During this four-year period, respondent visited the minor child approximately three or four times. Around 1 July 2016, petitioner agreed to let the minor child stay overnight at respondent's house. The next day, the child came home dirty and smelling like cigarette smoke, and the child stated that respondent had a smoke room in his house. At that point, petitioner contacted respondent via Facebook Messenger, and they got into an argument. Petitioner told respondent she would not bring the child back to him. From that point in 2016, respondent had no contact with petitioner until March 2019, after

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

he was served with the petition in this matter. Similarly, respondent had no contact with the minor child from July 2016 on. Other than paying for a $160 dance class in 2016, respondent did not provide any financial support for the minor child from 2012 on, nor did he give the child any type of gift or tokens of affection at any point.

On 14 March 2019, petitioner filed a petition to terminate respondent's parental rights to Nicole on grounds of neglect and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1), (7) (2019). In support of the asserted grounds, petitioner alleged that respondent had abandoned Nicole, had not provided any financial support for Nicole, had not provided any care for Nicole, had not shown any ability and/or willingness to provide a safe and loving home for Nicole, and had shown a complete indifference to the welfare and well-being of Nicole.

The termination petition was heard on 23 August 2019, and the trial court entered an order terminating respondent's parental rights on 28 August 2019. The trial court determined that both grounds alleged in the termination petition to terminate respondent's parental rights existed and concluded that termination was in Nicole's best interests. Respondent appealed to this Court.

On appeal, respondent argues that the trial court erred by adjudicating grounds to terminate his parental rights to Nicole. "Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94, 839 S.E.2d 792, 796 (2020) (citing 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 subsection 7B-1111(a). N.C.G.S. § 7B-1109(f) (2019). . . . 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 re B.C.B.*, 374 N.C. 32, 35, 839 S.E.2d 748, 751–52 (2020).

Respondent only challenges the trial court's determination that grounds existed to terminate his parental rights at the adjudicatory stage in this case.

> "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).

*In re K.N.K.*, 374 N.C. 50, 53, 839 S.E.2d 735, 737–38 (2020) (alteration in original).

In this case, the trial court concluded that petitioner proved that grounds existed to terminate respondent's parental rights based on neglect and willful abandonment based on the following findings of fact:

> 11. From 2012 until July 2016, the Respondent had sporadic contact with the Petitioner using the Facebook messenger app.
>
> 12. From 2012 until the summer of 2016, the Respondent visited with the child approximately three to four times. These visits were of short duration and in a public location. The Petitioner arranged these visits because the minor child did not know the Respondent.
>
> 13. On or about July 1, 2016, the Petitioner agreed for the minor child to have an overnight visit at the Respondent's home.
>
> 14. When the minor child returned after her visit at the Respondent's home, she was dirty and smelled of cigarette smoke. The minor child told the Petitioner that the Respondent had a "smoke room" in his home.
>
> 15. The Petitioner contacted the Respondent using Facebook messenger and an argument ensued. The

Petitioner told the Respondent she would not bring the minor child back to him.

16. The Respondent did not have any further contact with the Petitioner until March 2019, after he was served with the petition filed in this matter.

17. The Respondent has not provided financial support for the minor child at any time that she has been in the Petitioner's care since 2012.

18. The Respondent has been self-employed as a mechanic. He is under no physical or mental disability that prevents him from being gainfully employed. The Respondent has had the ability to provide financial support for the minor child but has provided no support since the parties separated.

19. The Respondent has four other children. He pays child support for two of the children that do not reside in his primary custody.

20. The Respondent never filed any type of custody action seeking visitation with the minor child. The Respondent has not sought any visits with the minor child since July 2016.

21. The Respondent has had no contact with the minor child since July 2016.

22. The Respondent has never sent the minor child any type of gift or customary or expected tokens of affection on her birthday, Christmas, or any holiday.

23. The Respondent has failed to provide for the minor child's physical and economic needs while she has been in the care of the Petitioner since 2012.

24. During the six-months immediately preceding the filing of the petition to terminate his parental rights, the Respondent had no contact with the minor child and did not provide any financial support.

25. The Respondent has failed to perform his natural and legal obligations of support and maintenance as a parent for the minor child.

Respondent first argues the trial court erred by determining that his parental rights to Nicole were subject to termination based on willful abandonment. Under N.C.G.S. § 7B-1111(a)(7), the 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).

*In re B.C.B.*, 374 N.C. at 35–36, 839 S.E.2d at 752 (alterations in original).

Petitioner filed the petition to terminate respondent's parental rights on 14 March 2019. Thus, the determinative six-month period for willful abandonment was from 14 September 2018 through 14 March 2019.

Respondent challenges several of the trial court's findings as not supported by the evidence, including findings of fact 12 and 17. Those findings of fact concern the number and duration of his visits with Nicole prior to the summer of 2016, petitioner's reason for scheduling those visits, and his failure to contribute anything to Nicole's care. Respondent directs this Court's attention to evidence that petitioner did not remember how many visits respondent had with Nicole before 1 July 2016, that he was more involved in Nicole's life prior to 2012, and that he paid for a dance class for Nicole in 2016. We note that respondent's challenges to findings of fact 12 and 17 do not relate to the determinative six-month

period, but that the trial court may still rely on the findings to evaluate respondent's credibility and intentions. *See In re N.D.A.*, 373 N.C. at 77, 833 S.E.2d at 773.

We agree with respondent that the trial court's finding of fact 17, that respondent failed to provide financial support for the minor child since 2012, is not consistent with the evidence at the termination hearing showing that at one point in 2016 respondent paid $160 for a dance class for the minor child. Nevertheless, other than this one payment, the record is clear that respondent did not provide any financial support to the child from 2016 to the date the termination petition was filed, including during the relevant six-month period.

As for finding of fact 12, even assuming that respondent had more than three to four visits with the child between 2012 and 2016, it is undisputed that after the summer of 2016 respondent neither contacted nor visited the child at any point during the almost three years preceding the filing of the termination petition, including within the relevant six-month period. Moreover, respondent testified that he did not see the minor child at any point during 2014 or 2015 and that he saw the child three times during 2016, meaning that he only saw the child three times between 2014 and 2016, and did not see the child at any point after mid-2016.

Respondent asserts, and we agree, that the trial court does not utilize the word "willful" when discussing whether respondent's conduct met the required statutory standard of willful abandonment. Nevertheless, when read in context, the trial court's order makes clear that the court applied the proper willfulness standard to determine that respondent willfully abandoned the child under N.C.G.S. § 7B-1111(a)(7). When evaluating the findings together, it is evident that the trial court took into consideration that respondent did not contact the minor child or petitioner at any point in the nearly three years preceding the filing of the termination petition. Only after the filing did petitioner reach out. Similarly, during the years preceding the filing, respondent never pursued court-ordered visitation with the child, nor did he utilize any avenue to arrange visits with the minor child since mid-2016. In sum, from the summer of 2016 to the filing of the termination petition, which occurred on 14 March 2019, respondent made no attempt to contact the child.

Though in July 2016 respondent and petitioner got into a disagreement via Facebook Messenger and petitioner testified that she told respondent that she was "done messaging [respondent]," nothing in the record indicates that petitioner blocked respondent from further

communicating with her or from seeking to communicate with the minor child. Respondent knew how to contact petitioner through Facebook Messenger despite not having her phone number, but respondent did not make any effort to contact the child in a nearly three-year time span. *See In re L.M.M.*, 847 S.E.2d 770, 775–76 (N.C. 2020) (concluding that the trial court did not err by terminating the respondent's parental rights based on willful abandonment where, though the petitioner had blocked the respondent on Facebook, the respondent utilized no other channel to contact the petitioner or minor child during the determinative period).

The trial court's conclusion that respondent's conduct met the statutory standard of abandonment of the child is consistent with other cases in which this Court has upheld termination based on willful abandonment. *See In re K.N.K.*, 374 N.C. at 54–55, 839 S.E.2d at 738–39 (concluding that termination was justified based on willful abandonment where the respondent had no contact with the minor child, provided no financial support, and sent no cards, gifts, or other tokens of affection not only during the determinative six-month period, but at any point during the approximately three years preceding the filing of the termination petition); *In re B.C.B.*, 374 N.C. at 40–41, 839 S.E.2d at 754–55 (concluding that the trial court properly terminated the respondent's parental rights based on willful abandonment when the respondent chose not to take advantage of visitation and had no contact with the minor child, and reiterating that a parent is not excused from contacting or showing interest in a child even if only limited means are available to do so).

Moreover, the findings as a whole show that the trial court, in making its ultimate determination, properly considered respondent's failure to provide any tangible or financial support. Despite paying for a $160 dance class for the child in 2016, respondent did not provide any other financial or tangible support or any tokens of affection, including cards, for the child from 2016 on, including within the determinative six-month period preceding the filing of the termination petition. Nonetheless, respondent pays child support for his other biological children who do not reside in his primary custody. *See In re C.J.H.*, 240 N.C. App. 489, 503–04, 772 S.E.2d 82, 92 (2015) (discussing the respondent's failure to provide support during the relevant period when concluding that the respondent had abandoned the juvenile).

While the trial court should have used the statutory language of "willful abandonment" to address respondent's conduct, the trial court's findings that are supported by clear, cogent, and convincing evidence ultimately support the conclusion that respondent's conduct met the statutory criterion of willful abandonment. *Cf. In re N.D.A.*, 373 N.C.

at 77–78, 833 S.E.2d at 773–74 (concluding that, despite the trial court's finding that the respondent had failed to contact the minor child or provide support during the six-month period, the record indicated that the respondent had attempted to work out arrangements to visit the child on numerous occasions, including during the relevant six-month period, and therefore the trial court's order did not support termination based on willful abandonment since the trial court failed to make specific findings on whether the respondent's actions were willful).

Because we conclude that termination was proper on willful abandonment grounds, we need not review the neglect ground for termination as contested by respondent. *See In re A.R.A.*, 373 N.C. at 194, 835 S.E.2d at 421 ("[A] finding of only one ground is necessary to support a termination of parental rights . . . ."). Accordingly, the trial court's order terminating respondent's parental rights is affirmed.

AFFIRMED.

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IN THE MATTER OF O.W.D.A.

No. 397A19

Filed 20 November 2020

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

The trial court's findings supported its conclusion that grounds existed to terminate a father's parental rights based on neglect (N.C.G.S. § 7B-1111(a)(1)) where the father's failure to comply with his case plan during the time he was not incarcerated demonstrated a likelihood of future neglect. Specifically, he continued using illegal drugs, failed to comply with mental health treatment, failed to maintain stable employment or income, failed to take parenting classes, and failed to maintain stable housing suitable for the child. His minimal eleventh-hour efforts during his subsequent incarceration did not outweigh his previous failure to make progress on his case plan.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 15 August 2019 by Judge C.W. McKeller in District Court, Henderson County. This matter was calendared for argument in the Supreme Court on 7 October 2020 but determined on the record

and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

*Deputy County Attorney Sara H. Player for petitioner-appellee Henderson County Department of Social Services.*

*Michelle FormyDuval Lynch, for appellee Guardian ad Litem.*

*Edward Eldred for respondent-appellant father.*

HUDSON, Justice.

Respondent-father appeals from the trial court's order terminating his parental rights to O.W.D.A. (Owen).[1] After careful review, we affirm.

At Owen's birth in February 2017, his mother tested positive for oxycodone, amphetamines, and methamphetamines, and Owen tested positive for amphetamines and methamphetamines. Consequently, the mother agreed to a safety plan where she would be supervised with Owen by the maternal grandparents.

The Henderson County Department of Social Services (DSS) filed a petition on 6 July 2017 alleging that Owen was a neglected juvenile. At the time DSS filed the petition, the mother was unemployed and did not have stable housing for herself and Owen other than in the maternal grandparents' home. DSS stated that respondent-father was in jail due to a probation violation, was unemployed, and had no stable income. Respondent-father admitted to having an extensive criminal history which included convictions for obtaining property by false pretenses, fraud, larceny, and drug-related offenses. Additionally, respondent-father admitted to using heroin and methamphetamine prior to and since Owen's birth.

At the time of the adjudicatory hearing on 21 December 2017, Owen was in a kinship placement with the maternal grandparents. On 7 February 2018, the trial court entered the consent order in which it adjudicated Owen a neglected juvenile. The trial court entered a separate dispositional order on the same day, and DSS was granted legal custody of Owen.

Following hearings held on 8 November and 13 December 2018, the trial court entered a review order on 11 February 2019. The trial court

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

made extensive findings regarding how both respondent-father and the mother were and were not making progress in the areas required by the court; ultimately, the court found that neither parent was making sufficient progress toward reunification, such that "[i]t is neither possible nor likely that the juvenile can be returned to a parent within six months." Accordingly, the trial court ordered that the primary permanent plan for the juvenile be adoption with a secondary permanent plan of guardianship.

On 12 February 2019, DSS filed a petition to terminate respondent-father's and the mother's parental rights. DSS alleged that grounds existed to terminate respondent-father's parental rights based on neglect and willful failure to make reasonable progress during the requisite period of time. N.C.G.S. § 7B-1111(a)(1)–(2) (2019). On 28 June 2019, respondent-father filed an answer in which he opposed termination of his parental rights. The mother relinquished her parental rights on 11 July 2019. Following a hearing held on 25 July 2019, the trial court entered an order on 15 August 2019 in which it determined that grounds existed to terminate respondent-father's parental rights as alleged in the petition. The trial court further concluded it was in Owen's best interest that respondent-father's parental rights be terminated. Accordingly, the trial court terminated his parental rights.

On 11 September 2019, respondent-father gave timely notice of appeal pursuant to N.C.G.S. §§ 7A-27(a)(5) and 7B-1001(a1)(1). Respondent-father's counsel, however, failed to sign the notice of appeal. On 13 February 2020, cognizant of the defect in the notice of appeal, respondent-father filed a petition for writ of certiorari. On 10 March 2020, we allowed respondent-father's petition for writ of certiorari.

Respondent-father argues that the trial court erred by adjudicating that grounds existed to terminate his parental rights. "Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94 (2020) (citing 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 (2019) (quoting N.C.G.S. § 7B-1109(f) (2019)). We review a trial court's adjudication 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 (2019)

(quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

"[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. at 395. We begin our analysis with consideration of whether grounds existed to terminate respondent-father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1). A trial court may terminate parental rights where it concludes the parent has neglected the juvenile within the meaning of section 7B-101 of the 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).

> 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 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15 (1984)). "When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212 (2019) (citing *Ballard*, 311 N.C. at 715). "However, this evidence of changed conditions must be considered in light of the history of neglect by the parents and the probability of a repetition of neglect." *Smith v. Alleghany Cty. Dep't of Soc. Servs.*, 114 N.C. App. 727, 732 (1994) (quoting *Ballard*, 311 N.C. at 714).

Here, the trial court found that Owen was adjudicated neglected on 21 December 2017 and noted the requirements that respondent-father was required to complete in order to achieve reunification. Among these requirements were that respondent-father refrain from substance abuse, obtain a mental health assessment and comply with all recommendations, including medication compliance, maintain stable income, obtain and maintain an appropriate residence that would be "sufficient and safe" for respondent-father and Owen, refrain from criminal activity, maintain contact with his social worker, and complete a parenting class. The trial court also made the following additional findings of fact concerning the adjudication of neglect, respondent-father's compliance

with his case plan, and its determination that there would be a repetition of neglect should Owen be returned to respondent-father's care:

> 18. The essential underlying issues of the neglect adjudication that concerned the father were [his] abuse of alcohol and illegal substances as well as housing and employment instability. The juvenile has been in [DSS'] custody since he was 10 months old and, prior to entering [DSS'] custody, he was in a kinship placement with [his maternal grandparents]. The father was given the opportunity to work a case plan in the In-home services case prior to [DSS] filing a petition for neglect and did not work the plan sufficient to prevent custody being granted to [DSS]. Throughout the history of this case, the father tested positive for illegal substances on numerous drug screens even after engaging in DART treatment on two separate occasions. The father had a major relapse in May 2018 and was found in the possession of Methamphetamine and the implements to use the drug in June 2018. He is currently incarcerated for the next several years as a result of his criminal activity related to his continued use of drugs.
>
> 19. The father obtained a mental health assessment with Family Preservation Services/Parkway on May 29, 2018, but failed to follow through with the recommended treatment. He was assigned a therapist, but never started therapy. By his own admission, he is not taking the medication prescribed by a mental health professional while incarcerated.
>
> 20. The father has had a sporadic employment history. He was terminated from his employment at Asheville Packaging after less than a month due to being late for work. Prior to his incarceration, he was performing occasional odd jobs with a friend, but did not have stable income and employment.
>
> 21. The father only recently started a parenting class while incarcerated. He had the opportunity to take parenting classes during the time period that he was not incarcerated from December 21, 2017 to June 27, 2018 and failed to do so.
>
> 22. Prior to his incarceration, the father was residing with the paternal grandfather of the juvenile. The father did not

> want the social worker to visit the home, stating that he was only staying there temporarily. The father also stated that he did not feel that the home was appropriate for the juvenile. This was the last residence that the father had prior to his incarceration and now he will be incarcerated for at least three years.
>
> 23. The father's progress on his case plan prior to entering incarceration in July 2018 was not reasonable progress under the circumstances towards correcting the conditions which led to the neglect adjudication. Although the father has been incarcerated on multiple occasions throughout the course of this case, there was a period of time from December 21, 2017 to June 27, 2018 when he was not incarcerated and could have worked his case plan and court-ordered requirements for reunification given to him at Disposition on December 21, 2017 and he failed to do so.
>
> . . . .
>
> 26. The father has neglected the juvenile within the meaning of Chapter 7B of the General Statutes, and there is a probability that such neglect would recur if the Juvenile were to be in the care of the father.
>
> 27. While the father is currently incarcerated, based upon the father's lack of progress during the substantial period of time that he was not in custody, the Court has determined that the neglect of the juvenile would likely be repeated if the juvenile were to be placed in the father's care.

"Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019).

We first consider respondent-father's challenge to the portion of finding of fact number 18 which states, in part, that "[t]he essential underlying issues of the neglect adjudication that concerned the father were the abuse of alcohol and illegal substances as well as housing and employment instability." Respondent-father contends that the sole essential underlying issue of the neglect adjudication that related to him was his incarceration. We are not persuaded.

First, respondent-father stipulated to the findings of fact and consented to Owen's adjudication as a neglected juvenile. Among the trial court's findings of fact were:

> 12. The father admitted to using heroin and methamphetamine prior to and since the juvenile's birth. The father was on probation and his probation was violated. He was recommended for an intensive outpatient program. At the time the petition was filed, the father was in jail and the father was likewise unemployed and had no stable income or housing. Father has an extensive criminal history including convictions for obtaining property by false pretenses, fraud, larceny and drug-related offenses.

Respondent-father did not appeal from the trial court's adjudicatory order and is bound by the doctrine of collateral estoppel from re-litigating this issue. *See In re T.N.H.*, 372 N.C. at 409 (stating that because the challenged findings of fact concerned necessary facts that were stipulated to by the mother when the juvenile was adjudicated neglected, and the mother did not appeal from the adjudicatory order, she was bound by the doctrine of collateral estoppel from re-litigating the findings of fact) (citing *King v. Grindstaff*, 284 N.C. 348, 356 (1973)). Respondent-father cannot now contend that the above issues did not lead to the juvenile's adjudication as neglected. Therefore, finding of fact number 12 above, which was stipulated to by respondent-father in the adjudication order, supports finding of fact number 18 in the order terminating respondent-father's parental rights in Owen.

Additionally, we note that the trial court's finding stated that "[t]he essential underlying issues of the neglect adjudication *that concerned the father* were [his] abuse of alcohol and illegal substances as well as housing and employment instability." Although it appears that the direct issues that led to the adjudication of neglect primarily related to the mother, the trial court was permitted to consider indirect issues which contributed to Owen's neglect and removal. *See In re B.O.A.*, 372 N.C. 372, 381 (2019) (stating that "the trial judge in an abuse, neglect, or dependency proceeding has the authority to order a parent to take any step reasonably required to alleviate any condition that *directly or indirectly* contributed to causing the juvenile's removal from the parental home" (emphasis added)). Thus, we conclude that finding number 18 is supported by clear, cogent, and convincing evidence.

We next consider respondent-father's arguments that the trial court erred by concluding that grounds existed pursuant to N.C.G.S.

§ 7B-1111(a)(1) to terminate his parental rights. Respondent-father contends the trial court erroneously relied on circumstances that existed twelve months prior to the termination hearing and failed to consider the circumstances that had changed during the intervening months. Relatedly, respondent-father asserts that the trial court considered only one circumstance that existed at the time of the hearing: his incarceration. Respondent-father thus argues that the trial court terminated his parental rights solely because he was incarcerated and would remain incarcerated for several more years. Respondent-father cites *In re N.D.A.*, 373 N.C. 71 (2019), and argues that "a trial court may not use incarceration as a sword to terminate parental rights[.]" We do not find his arguments persuasive.

We first note that *In re N.D.A.* is distinguishable from this case. In *In re N.D.A.*, the trial court concluded that grounds existed to terminate the father's parental rights on the ground of neglect by abandonment. This Court stated:

> A trial court is entitled to terminate a parent's parental rights in a child for neglect based upon abandonment pursuant to N.C.G.S. § 7B-1111(a)(1) in the event that the trial court finds that the parent's conduct demonstrates a "wilful neglect and refusal to perform the natural and legal obligations of parental care and support." We agree with the Court of Appeals that, "in order to terminate a parent's rights on the ground of neglect by abandonment, the trial court must make findings that the parent has engaged in conduct 'which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child' as of the time of the termination hearing."

*Id.* at 81 (citations omitted). The father in *In re N.D.A.* had been incarcerated when DSS began its investigation relating to the juvenile, remained incarcerated when the juvenile was adjudicated neglected, and continued to be incarcerated for a period of time thereafter. *Id.* at 82. This Court vacated and remanded the trial court's termination order upon determining that:

> the trial court's findings of fact did not adequately support a determination that respondent-father's parental rights in [the juvenile] were subject to termination based upon neglect by abandonment given the absence of any findings concerning respondent-father's ability to contact petitioner or [the juvenile], to exercise visitation, or to pay

> any support in order to determine that his abandonment was willful.

*Id.*

Here, the trial court's conclusion that grounds existed to terminate respondent-father's parental rights was not based upon neglect by abandonment. Instead, the trial court determined that there would be a likelihood of future neglect based upon respondent-father's history of failure to comply with his case plan. In addition to finding that the father was incarcerated at the time of the hearing, the trial court also found that during the period before his incarceration respondent-father: (1) failed to refrain from substance abuse; (2) obtained a mental health assessment but failed to follow through with the recommended treatment; (3) failed to maintain stable employment or income; (4) failed to take parenting classes; and (5) failed to maintain stable housing suitable for Owen. The court considered each of these failures as evidence of past neglect and the likelihood of future neglect. *See In re Z.V.A.*, 373 N.C. at 211–12 (stating that if it cannot be shown whether the parent is neglecting the child at the time of the termination hearing because the parent and child have been separated, "there must be a showing of past neglect and a likelihood of future neglect by the parent"); *see also In re T.N.H.*, 372 N.C. at 412–13 (recognizing that although "[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision," respondent-mother's history of unstable housing and her failure to complete her case plan *before* becoming incarcerated supported the trial court's conclusion to terminate her parental rights under N.C.G.S. § 7B-1111(a)(9)).

Furthermore, the trial court here did not look only at past circumstances in making its determination. While the trial court emphasized respondent-father's failure to comply with his case plan before his incarceration, it is evident that the trial court also considered evidence of changed circumstances occurring during his incarceration, which began in late June 2018. Specifically, the trial court found and considered that respondent-father had started taking a parenting class and that he was working while incarcerated. The trial court also found and considered, however, that respondent-father, by his own admission, was not taking the medication prescribed to him for his mental health while incarcerated.

Although a 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. at 212, "evidence of changed

conditions must be considered in light of the history of neglect by the parents and the probability of a repetition of neglect," *Smith*, 114 N.C. App. at 732 (quoting *Ballard*, 311 N.C. at 714). Therefore, although respondent-father may have made some minimal progress during his most recent incarceration, the trial court was within its authority to weigh the evidence and determine that these eleventh-hour efforts did not outweigh the evidence of his persistent failures to make improvements while not incarcerated, and to conclude that there was a probability of repetition of neglect should Owen be returned to his care. *See id.* at 732 (holding that the trial court adequately considered mother's improved psychological condition and living conditions at the time of the hearing even though it found, because of recency of improvement, that probability of repetition of neglect was great), *disc. review denied*, 337 N.C. 696 (1994); *see also In re J.H.K.*, 215 N.C. App. 364, 369 (2011) ("Relevant to the determination of probability of repetition of neglect is whether the parent has made any meaningful progress in eliminating the conditions that led to the removal of the children." (cleaned up)). Taken together, the trial court's findings support its conclusion that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) to terminate respondent-father's parental rights.

The trial court's conclusion that one statutory 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-father's parental rights. *In re E.H.P.*, 372 N.C. at 395. As such, we need not address respondent-father's arguments regarding N.C.G.S. § 7B-1111(a)(2).[2] Furthermore, respondent-father does not challenge the trial court's conclusion that termination of his parental rights was in Owen's best interest. *See* N.C.G.S. § 7B-1110(a) (2019). Accordingly, we affirm the trial court's order terminating respondent-father's parental rights.

AFFIRMED.

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2. We note respondent-father's challenge to finding of fact 13. However, this finding of fact related solely to the trial court's conclusion that grounds existed to terminate his parental rights pursuant to N.C.G.S. § 7B-1111(a)(2). Accordingly, this finding 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. at 407 ("[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. 394, 404 (1982)).

**IN RE R.L.O.**

[375 N.C. 655 (2020)]

IN THE MATTER OF R.L.O., L.P.O., AND C.M.O.

No. 87A20

Filed 20 November 2020

**1. Termination of Parental Rights—on remand from earlier appeal—no new evidence taken—abuse of discretion analysis**

On remand from an earlier appeal, the trial court did not abuse its discretion by terminating respondent-father's parental rights to his three children on review of the existing record without taking further evidence. Not only did respondent stipulate that the trial court could enter an order on remand without an evidentiary hearing, but also the Court of Appeals' instructions for the trial court on remand left the decision to take new evidence in the trial court's discretion.

**2. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect**

The trial court properly terminated respondent-father's parental rights to his three children on the grounds of neglect after making supplemental findings of fact from the existing record (on remand from an earlier appeal) without taking new evidence. The findings were binding where respondent did not challenge their evidentiary basis, and they established a pattern of neglect consisting of an unsafe and unsanitary home and improper care of the children, which in turn supported a reasonable conclusion that neglect would likely continue if the children were returned to the father's care.

**3. Termination of Parental Rights—best interests of the child—current circumstances—speculation**

On remand from an earlier appeal, respondent-father failed to show the trial court abused its discretion by concluding that termination of his parental rights was in the best interests of his three children on the existing record without taking additional evidence. The trial court properly relied on evidence from the original termination hearing, and respondent's argument that the trial court failed to take into account changes in the children's circumstances was based on speculation and not supported by a forecast of evidence.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 20 December 2019 by Judge Christine Underwood in District Court, Iredell County. This matter was calendared for argument in the Supreme

Court on 7 October 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

*Lauren Vaughan for petitioner-appellee Iredell County Department of Social Services.*

*Matthew D. Wunsche, GAL Appellate Counsel, for appellee Guardian ad Litem.*

*Christopher M. Watford, for respondent-appellant father.*

EARLS, Justice.

Respondent-Father appeals from an order terminating his parental rights to his minor children, R.L.O. (Ron), L.P.O. (Larry), and C.M.O. (Cathy).[1] Having successfully appealed an earlier order that was vacated and remanded by the Court of Appeals, respondent's central argument before this Court is that the trial court failed to hear new evidence on remand and therefore could not make appropriate findings of fact to justify the termination of his parental rights on grounds of neglect, pursuant to N.C.G.S. § 7B-1111(a)(1). However, on remand, respondent stipulated that the trial court could proceed without receiving new evidence. While that does not relieve the trial court of the responsibility to determine whether the petitioner has presented "clear, cogent, and convincing" evidence of the grounds for termination, *see* N.C.G.S. § 7B-1109(f) (2019) ("The burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence."), the stipulation is binding here as well and does prevent respondent from raising the trial court's failure to hear new evidence as a reason for this Court to reverse its order. The trial court's supplemental findings of fact establish a pattern of neglect by respondent and a course of conduct from which it was reasonable to conclude that his neglect of the children would continue in the future. Therefore we affirm the trial court's order.

*A. Factual and Procedural Background*

The Iredell County Department of Social Services (DSS) obtained non secure custody of the children and filed juvenile petitions alleging

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

that they were neglected and dependent juveniles on 3 July 2017.[2] On 4 October 2017, prior to the hearing of the juvenile petition filed by DSS, the guardian *ad litem* (GAL) for the children filed a petition seeking to terminate the parental rights of respondent and the children's mother. The GAL alleged that grounds existed to terminate their parental rights based on abuse, neglect, and the commission of a felony assault resulting in serious bodily injury to another child who lived in the home. *See* N.C.G.S. § 7B-1111(a)(1), (8) (2019). The trial court consolidated the proceedings for hearing and entered orders in the matters on 5 April 2018. The trial court adjudicated the children to be neglected and dependent juveniles but concluded the entry of a disposition in the juvenile matter was "moot" because it also entered an order terminating parental rights. The trial court found the existence of all three grounds alleged in the petition to terminate the parental rights of respondent and the children's mother and concluded that termination of parental rights was in the children's best interests. Respondent and the children's mother appealed to the North Carolina Court of Appeals.

The Court of Appeals affirmed the order adjudicating the children to be neglected and dependent juveniles but vacated the trial court's determination that the disposition was moot and remanded for entry of a disposition order. *In re R.L.O.*, No. COA18-593, 2018 WL 6613855, at *14 (N.C. Ct. App. Dec. 18, 2018) (unpublished). The Court of Appeals also affirmed the orders terminating the parental rights of the children's mother. *Id.* As to respondent, the Court of Appeals held that the trial court erred in concluding that respondent committed a felony assault resulting in serious bodily injury to another child who lived in the home pursuant to N.C.G.S. § 7B-1111(a)(8) because there was insufficient evidence. *Id.* at *10. The Court of Appeals further concluded that the trial court erred by ruling that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) to terminate respondent's parental rights because the trial court failed to make findings demonstrating abuse or neglect at the time of the termination hearing or that there was a probability of a repetition of abuse or neglect if the children were returned to respondent's care. *Id.* at *12–13. Accordingly, the Court of Appeals vacated the order terminating respondent's parental rights and remanded for additional findings on whether there was a probability of repetition of neglect. *Id.* at *11–14. In remanding the matter, the Court of Appeals explicitly

2. The Court of Appeals' opinion in this case includes a detailed discussion of the underlying facts surrounding the filing of the juvenile petitions which will not be repeated here. *See In re R.L.O.*, No. COA18-593, 2018 WL 6613855 (N.C. Ct. App. Dec. 18, 2018) (unpublished).

stated that whether to receive additional evidence on remand was in the trial court's discretion. *Id.* at *14.

On remand, the trial court did not receive additional evidence and entered new adjudication and disposition orders terminating respondent's parental rights on 20 December 2019 based on "a review of the record[ ] and . . . without consideration of new evidence." The trial court did make additional findings of fact, again found the existence of all three grounds alleged in the petition, and concluded that termination of respondent's parental rights was in the children's best interests. Respondent appeals.

*B. Legal Analysis*

The legal standards applicable to this case are well established. "Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94 (2020) (citing 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 (2019) (quoting N.C.G.S. § 7B-1109(f) (2017)). We review a trial court's adjudication 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 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "Unchallenged findings of fact made at the adjudicatory stage are binding on appeal." *In re Z.V.A.*, 373 N.C. 207, 211 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)). Whether or not to receive additional evidence on remand is a determination within the trial court's discretion so long as the reviewing court's mandate does not specify otherwise. *See In re S.M.M.*, 374 N.C. 911, 914 (2020) (holding that when the Court of Appeals is silent as to whether the trial court should take new evidence on remand, that decision is left to the trial court's discretion).

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 (2019) (citing *In re Moore*, 306 N.C. 394, 403–04 (1982)). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

**[1]** With regard to respondent's appeal, the Court of Appeals' instructions for the trial court on remand were clear:

> On remand, the trial court must consider the evidence of a probability of a repetition of neglect by respondent-father in light of a parent's right to reunification efforts when a child is placed in DSS custody following an initial adjudication of abuse, neglect, or dependency and the limited grounds upon which the trial court is authorized to forgo such efforts under N.C. Gen. Stat. § 7B-901(c). The court may receive additional evidence as it deems appropriate. *See In re D.R.B.*, 182 N.C. App. 733, 739, 643 S.E.2d 77, 81 (2007).

*In re R.L.O.*, 2018 WL 6613855, *14. The Court of Appeals explicitly left to the trial court the determination of whether to consider new evidence on the issue of the probability of future neglect by respondent. Respondent contends that the trial court erred by making new findings of fact and entering its new adjudication order without receiving new evidence. However, respondent stipulated that the trial court could enter an order on remand without receiving new evidence.[3] The adjudication and disposition orders on remand both specifically state that "[t]he attorneys stipulated that the Court conduct a review of the record, and to enter this order without consideration of new evidence." Respondent does not dispute the existence of this stipulation, stating in his brief that "[i]n its order following remand, the trial court and the parties who stipulated agreed that the trial court could enter a new order without a hearing and 'without consideration of new evidence.' " Having made that stipulation before the trial court, respondent is bound by it now. Therefore, it was not an abuse of discretion for the trial court to decide not to open the record to receive additional evidence on remand.

**[2]** Nevertheless, we still must consider respondent's argument that the trial court erred by adjudicating that grounds existed to terminate his parental rights based on neglect pursuant to N.C.G.S. § 7B-1111(a)(1). "[A]n 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. at 395.

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(15). N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or

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3. Between the time of the first termination hearing and the hearing on remand, respondent was found guilty of felony child abuse and sentenced to a term of incarceration. Any reopening of the record would have permitted consideration of that fact.

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 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15 (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. at 212 (citing *In re Ballard*, 311 N.C. at 715).

Respondent objects to the findings made by the trial court but does not challenge the trial court's evidentiary basis supporting those findings. Instead, respondent argues that the findings improperly attempt to implicate him in the abuse perpetrated by the mother against the children's sibling. Respondent contends the trial court's findings are irrelevant and apply only to the time before DSS removed the children from his care. He argues the trial court failed to make findings on remand that demonstrated that it considered evidence of changed circumstances and instead relied solely on pre-removal evidence for its conclusions of law. Ultimately, he contends the trial court's findings do not support its conclusion that there is a high likelihood of repetition of neglect should the children be returned to his care, and thus the trial court erred in adjudicating the existence of the ground of neglect. Respondent's arguments are misplaced.

Respondent's failure to challenge the evidentiary basis for the trial court's findings of fact makes them binding on appeal. *In re Z.V.A.*, 373 N.C. at 211. The trial court's findings establish that the children were removed from respondent's home on 3 July 2017 and subsequently adjudicated to be neglected juveniles. The children's mother was suffering from postpartum depression after the birth of Cathy and was not fit to care for them. Respondent knew the mother was incapable of providing for their care, yet he regularly left her to care for the children without providing her assistance or ensuring that she was receiving proper treatment for her mental health issues. The trial court found respondent willfully failed to ensure the children were properly cared for and placed

them at a substantial risk of harm by other than accidental means when he left them in their mother's care. Their home was in poor condition, with "scraps of food, insects, and trash in the home," and "[o]utside of the home, there was a copious amount of trash, including tires and scrap metal." During one visit by a social worker, the home had a nonfunctioning toilet that was clogged with human waste and toilet paper; there were bags of trash inside the home, some of which were torn; the kitchen was dirty; clothes were strewn about the house; some of the rooms could not be accessed due to the clutter found therein. The social worker described the home at times as appearing to have been "ransacked." Respondent was responsible for keeping the home in a habitable condition but failed to do so and did not ensure the children were properly cared for.

Respondent also entered into a safety agreement with DSS and moved with the children to temporarily reside with a family friend. Shortly thereafter, however, he returned with the children to the home and left them in their mother's unsupervised care knowing she had not received treatment for her mental health issues and that she was not a proper caregiver for them. The trial court found that respondent failed to comply with the safety agreement and placed the children at substantial risk of harm by other than accidental means.

DSS identified problems in the home, discussed the problems with respondent, and offered him services to alleviate the problems. DSS made a referral for day care to assist respondent and the children's mother, in part to alleviate pressures on the mother, but respondent and the mother failed to properly follow up with that offered assistance. DSS also recommended services to assist with the following: (1) therapy for the children's sibling; (2) the mother's mental health; (3) improper supervision of the children; (4) "domestic discord"; and (5) lack of transportation. Nonetheless, respondent and the mother failed to take advantage of the services and address the problems.

The trial court also made detailed findings about the mother's child abuse which showed that respondent had to have been aware of the abuse and did nothing to either protect his children or seek medical treatment for the abused child. The trial court's findings demonstrate that respondent and the mother did not provide proper care for the children. Among the findings found by the trial court were that (1) respondent and the mother failed to seek proper treatment for diaper rashes; (2) respondent and the mother allowed the children to become extremely dirty with ants in their hair and mouse feces in their diapers; (3) the children suffered from numerous insect bites; and (4) Larry had a bruise on

his arm consistent with a human bite mark. The lack of care continued up until DSS obtained custody of the children. Police officers and social workers found Larry in his bed with roaches and ants, his clothing so dirty it was sticking to his skin, roaches running around the house, the house uninhabitable and smelling of human feces, and the house full of trash and personal belongings strewn about making it difficult to walk inside. Ron also suffered from a speech delay for which respondent and the mother failed to seek treatment. The parents had been arrested and remained in custody through the hearings on charges for felony child abuse. Based on these findings, the trial court concluded respondent had neglected the children, and there was a high probability the neglect would reoccur if the children were returned to his care and custody.

Respondent argues the trial court based its entire conclusion on findings of fact regarding events that occurred prior to the children's removal from the home by DSS. Respondent concedes there was evidence to support prior neglect but argues the trial court made no findings regarding changed circumstances occurring between the period of past neglect and the time of the termination hearing and thus failed to comply with the Court of Appeals' mandate and our law regarding neglect. *See In re Z.V.A.*, 373 N.C. at 212. We disagree.

The mandate from the Court of Appeals was that "the trial court must consider the evidence of a probability of a repetition of neglect by respondent-father." *In re R.L.O.*, 2018 WL 6613855, at *14. The mandate did not require the trial court to make specific findings of fact, and the trial court's new findings on remand establish a probability of repetition of neglect. Moreover, respondent directs this Court to no evidence of changed circumstances from the time the children were removed from his care through the hearing from which the trial court may have made the findings sought by respondent. "It is not the role of the appellate courts . . . to create an appeal for an appellant," *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402 (2005), and this Court will not presume error where none is shown. *See State v. Williams*, 274 N.C. 328, 333 (1968) ("An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court.").

We hold the trial court's findings on remand, which are binding on this Court, fully support its determination that the ground of neglect existed to terminate respondent's parental rights. Because only one ground is needed to terminate parental rights, we need not address respondent's arguments as to the remaining two grounds found by the trial court. *See In re E.H.P.*, 372 N.C. at 395.

**[3]** We next address respondent's argument that the trial court abused its discretion when it determined that termination of respondent's parental rights was in the best interests of the children. " '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,' at which it 'determine[s] whether terminating the parent's rights is in the juvenile's best interest.' " *In re I.N.C.*, 374 N.C. 542, 546 (2020) (alteration in original) (first quoting *In re A.U.D.*, 373 N.C. 3, 6 (2019); then quoting N.C.G.S. § 7B-1110(a)). In determining whether termination of parental rights is in the child's best interests,

> 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 (citing *In re D.L.W.*, 368 N.C. 835, 842 (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 (alteration in original) (quoting *In re T.L.H.*, 368 N.C. 101, 107 (2015)).

Respondent contends that the trial court abused its discretion when it accepted counsel's stipulation that new evidence need not be considered on remand and by failing to consider the children's current circumstances when making its best interests determination. Certainly the trial court was not restricted from considering new evidence on remand. However, there is nothing in the record suggesting the trial court believed it was bound by the stipulation of trial counsel or that it felt restricted in any manner from receiving new evidence in this case

if such evidence were required. The Court of Appeals specified that, on remand, "[t]he court may receive additional evidence as it deems appropriate" and "the trial court may hear additional evidence in its sound discretion." *In re R.L.O.*, 2018 WL 6613855, at *14. Moreover, respondent has not demonstrated any need for the trial court to receive new evidence in this case beyond his mere speculation, which is insufficient to show that the trial court abused its discretion by not receiving additional evidence on remand. *See In re S.M.M.*, 374 N.C. 911, 915 (2020) ("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."). Respondent has not forecast any evidence concerning the children's current circumstances that would have had a bearing on the trial court's determination of the children's best interests. Thus, we conclude respondent has not shown that the trial court abused its discretion by entering its dispositional order without taking new evidence, and we hold this argument is without merit.

Respondent also challenges the trial court's ultimate conclusion that it was in the children's best interests to terminate his parental rights. Respondent contends that the trial court's findings as to the ages of the children are unsupported because they are based on the date of the original termination hearing and not the date of the hearing on remand. However, the trial court's order was based on evidence from the original termination hearing and its analysis of that evidence. Consequently, there is no error.

Respondent additionally argues the trial court's finding that there is a high likelihood the children will be adopted is unsupported in the absence of new evidence of the children's circumstances since the original termination hearing. He presents a similar argument regarding the finding that the children have been placed in the same foster home and have a loving bond with their foster parents who desire to adopt them. Respondent's arguments are speculative, and he has not shown that the trial court abused its discretion by not receiving new evidence on remand. *See In re S.M.M.*, 374 N.C. at 914–15. Additionally, respondent concedes that, as found by the trial court, there was no permanent plan

for the children at the time of the hearing. Respondent asserts, however, that the trial court's dispositional finding that adoption would be the most appropriate permanent plan for the children is an expression of preference and not a proper finding of fact. We agree and ignore this portion of the trial court's finding of fact.

The trial court made findings of fact regarding the relevant factors under N.C.G.S. § 7B-1110(a), which are either unchallenged by respondent or supported by competent evidence. The trial court's findings reflect reasoned decision-making and support its conclusion that termination of respondent's parental rights is in the children's best interests. Respondent has not shown that the trial court abused its discretion in so concluding, and we affirm the trial court's orders terminating respondent's parental rights to Ron, Larry, and Cathy.

AFFIRMED.

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IN THE MATTER OF S.E.T.

No. 10A20

Filed 20 November 2020

**Process and Service—termination of parental rights case—personal jurisdiction—service of process by publication—affidavit requirement**

The trial court's order terminating a father's parental rights to his daughter was void where the court lacked personal jurisdiction over the father because the mother (who filed the termination petition) failed to properly serve the father with process by publication, pursuant to Civil Procedure Rule 4(j1), by neglecting to file an affidavit showing the circumstances warranting service by publication. Moreover, where the mother filed a motion seeking leave to serve process by publication, her trial counsel's signature on the motion—certifying the facts therein pursuant to Civil Procedure Rule 11(a)—did not satisfy the affidavit requirement under Rule 4(j1).

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 25 September 2019 by Judge Kim Gasperson-Justice in District Court, Henderson County. This matter was calendared in the Supreme Court on 7 October 2020, but was determined upon the basis

of the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

*Emily Sutton Dezio, PA, by Emily Sutton Dezio, for petitioner-appellee.*

*Sean P. Vitrano for respondent-appellant.*

ERVIN, Justice.

Respondent-father Jeremy T. has sought review of an order entered by the trial court terminating his parental rights in his daughter S.E.T.[1] As a result of our determination that the trial court lacked personal jurisdiction over respondent-father in light of the failure of petitioner-mother Heather G. to effect proper service by publication pursuant to N.C.G.S. § 1A-1, Rule 4(j1) (2019), we vacate the trial court's termination order.

Petitioner-mother gave birth to Sara in Buncombe County in April 2009 and named respondent-father as Sara's father on her birth certificate. On 7 May 2019, petitioner-mother filed a petition seeking to terminate respondent-father's parental rights in Sara on the grounds that respondent-father had neglected Sara, N.C.G.S. § 7B-1111(a)(1); was incapable of caring for Sara and lacked an adequate alternative child care arrangement, N.C.G.S. § 7B-1111(a)(6); and had willfully abandoned Sara, N.C.G.S. § 7B-1111(a)(7). On the same date, a summons directed to respondent-father at 639 Maple Street in Hendersonville, which is the address at which the Hendersonville Rescue Mission is located, was issued. The summons was returned unserved on 16 May 2019 bearing a notation made by Deputy Sheriff C.E. Wade of the Henderson County Sheriff's Office that respondent-father had "[n]o address located in Henderson County," that respondent-father did "not stay at address given," and that respondent-father had "been banned from property per Director."

On 28 May 2019, petitioner-mother filed a motion seeking leave to serve respondent-father by publication in which respondent-mother alleged:

> 2. That the [p]etitioner-mother] has been unable to obtain service of [her] Petition on [respondent-father].

1. S.E.T. will be referred to throughout the remainder of this opinion as "Sara," which is a pseudonym that will be used to protect the juvenile's privacy and for ease of reading.

3. Pursuant to criminal charges in 2019 the last known address of [respondent-father] was: 639 Maple Street, Hendersonville, NC 28792.

4. The current whereabouts of [respondent-father] are unknown.

5. That after all due diligence service on [respondent-father] is not possible.

On 14 June 2019, Judge Thomas M. Brittain entered an order granting petitioner-mother's request to be allowed to serve respondent-father by publication in which Judge Brittain made findings of fact that tracked the allegations contained in respondent-mother's motion and concluded that petitioner-mother was "in need of an order allowing service on [respondent-father] by publication in Henderson County at this time to perfect service in this matter."

On three consecutive Wednesdays ending on 10 July 2019, petitioner-mother obtained the running of a notice of service by publication in the *Hendersonville Lightning* that informed respondent-father that a termination of parental rights proceeding had been initiated against him and advising him that he had until 28 July 2019 within which to file a responsive pleading. Respondent-father did not file a pleading in response to petitioner-mother's termination petition. On 9 August 2019, petitioner-mother filed a notice of hearing directed to respondent-father's provisional appointed counsel indicating that this matter would be heard on 29 August 2019.

The issues raised by petitioner-mother's termination petition came on for hearing before the trial court on 29 August 2019. After respondent-father failed to appear for the termination hearing, his provisional appointed counsel sought leave to withdraw from his representation of respondent-father on the grounds that he "ha[d] not heard from this client in [an]y way, shape or form[.]" The trial court granted this withdrawal motion based upon a finding that respondent-father's provisional appointed counsel had "received no communication from [respondent] and . . . can take no position in this matter . . . ." The only evidence received at the termination hearing consisted of petitioner-mother's testimony.

On 25 September 2019, the trial court entered an order finding that respondent-father's parental rights in Sara were subject to termination for neglect pursuant to N.C.G.S. § 7B-1111(a)(1) based upon his use of methamphetamine, his failure to maintain contact with Sara, and his

failure to provide any financial support for Sara; his failure to pay for Sara's support after custody had been awarded to petitioner-mother pursuant to N.C.G.S. § 7B-1111(a)(4); his incapability of caring for Sara as a result of his substance abuse pursuant to N.C.G.S. § 7B-1111(a)(6);[2] and his abandonment of Sara pursuant to N.C.G.S. § 7B-1111(a)(7). In addition, the trial court found that it would be in Sara's best interests for respondent-father's parental rights to be terminated given that petitioner-mother had married, that her husband assisted petitioner-mother in caring for Sara, that petitioner-mother and her husband were able to provide financial and emotional support for Sara, and that petitioner-mother's husband intended to adopt Sara.

Respondent-father, proceeding *pro se*, attempted to note an appeal to this Court from the trial court's order. After respondent-father's appellate counsel filed a certiorari petition noting that respondent-father had failed to attach a certificate of service to his notice of appeal and requesting the issuance of a writ of certiorari authorizing review of the trial court's termination order on the merits, *see* N.C. R. App. P. 3(e), 3.1(b), 26(d), this Court granted respondent-father's certiorari petition.

In seeking relief from the trial court's termination order before this Court, respondent-father contends that, since the trial court never acquired jurisdiction over his person in this case, the challenged termination order is void. More specifically, respondent-father contends that petitioner-mother failed to comply with the statutory requirements for service of process by publication set out in N.C.G.S. § 1A-1, Rule 4(j1), given that "[p]etitioner[- mother]'s counsel did not file with the [trial] court an affidavit showing 'the circumstances warranting the use of service [by] publication, and information, if any, regarding the location of the party served.' " N.C.G.S. § 1A-1, Rule 4(j1). In response, petitioner-mother asserts that, prior to serving respondent-father by publication, she filed a motion seeking leave to serve respondent-father by publication signed by her trial counsel in which she set forth the basis for her contention that she was entitled to serve respondent-father by publication; notes that N.C.G.S. § 1A-1, Rule 11(a), provides that an attorney's signature upon a pleading, motion, or other similar document "constitutes a certificate by [counsel] that [s]he has read the [motion]" and that, "to the best of h[er] knowledge, information, and belief formed after reasonable inquiry," the filing "is well grounded in fact[,]" N.C.G.S. § 1A-1, Rule 11(a) (2019); and argues that the presence of her trial counsel's

2. Petitioner-mother had not alleged that respondent-father's parental rights were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(6) in her termination petition.

signature on the motion seeking leave to have respondent-father served by publication was "the equivalent of a verification of the facts contained therein" sufficient to satisfy the requirements of N.C.G.S. § 1A-1, Rule 4(j1).

As a result of the fact that "[s]ervice of process by publication is in derogation of the common law," statutory provisions authorizing service of process in that manner "are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute." *Harrison v. Hanvey*, 265 N.C. 243, 247, 143 S.E.2d 593, 596–97 (1965). "A defect in service of process by publication is jurisdictional, rendering any judgment or order obtained thereby void." *Fountain v. Patrick*, 44 N.C. App. 584, 586, 261 S.E.2d 514, 516 (1980) (citing *Sink v. Easter*, 284 N.C. 555, 561, 202 S.E.2d 138, 143 (1974)); *see also Macher v. Macher*, 188 N.C. App. 537, 539, 656 S.E.2d 282, 284 (2008) (stating that "[a] judgment against a defendant is void where the court was without personal jurisdiction"), *aff'd per curiam*, 362 N.C. 505, 666 S.E.2d 750 (2008).

N.C.G.S. § 7B-1106, which governs service of process in termination of parental rights proceedings, provides, in pertinent part, that:

> (a) Except as provided in [N.C.]G.S. [§] 7B-1105, upon the filing of the petition, the court shall cause a summons to be issued. The summons shall be directed to the following persons or agency, not otherwise a party petitioner, who shall be named as respondents:
>
> (1) The parents of the juvenile.
>
> . . . .
>
> The summons shall notify the respondents to file a written answer within 30 days after service of the summons and petition. Service of the summons shall be completed as provided under the procedures established by [N.C.]G.S. [§] 1A-1, Rule 4. Prior to service by publication under G.S. 1A-1, the court shall make findings of fact that a respondent cannot otherwise be served despite diligent efforts made by petitioner for personal service. The court shall approve the form of the notice before it is published.

N.C.G.S. § 7B-1106(a) (2019). As a result, in order to properly effectuate service of process by publication in a termination of parental rights proceeding, the petitioner must comply with both the "findings" requirement

set out in N.C.G.S. § 7B-1106(a) and the provisions of N.C.G.S. § 1A-1. Rule 4(j1).

According to N.C.G.S. § 1A-1, Rule 4(j1):

> A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2)may be served by publication. . . . If the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence. Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of [N.C.]G.S. [§] 1-75.10(a)(2), the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served.

N.C.G.S. § 1A-1, Rule 4(j1). As the Court of Appeals has correctly held, a "[f]ailure to file an affidavit showing the circumstances warranting the use of service by publication is reversible error." *Cotton v. Jones*, 160 N.C. App. 701, 703, 586 S.E.2d 806, 808 (2003).

Petitioner-mother candidly concedes that she did not file an affidavit showing "the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served,"[3]

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3. Although petitioner-mother has not directly asserted that the findings that the trial court made in the order allowing petitioner-mother's motion for leave to serve respondent-father by publication obviated the necessity for compliance with the affidavit requirement set out in N.C.G.S. § 1A-1, Rule 4(j1), she does mention the fact that the the trial court "agreed [that] there was good cause to serve [respondent] by publication" in attempting to distinguish decisions finding a lack of personal jurisdiction stemming from failures to comply with the affidavit requirement from the facts of this case. *See In re A.J.C*, 259 N.C. App. 804, 810, 817 S.E.2d 475, 480 (2018) (vacating a termination of parental rights order as a result of the petitioner's failure to file the affidavit required by N.C.G.S. § 1A-1, Rule 4(j1)); *Cotton*, 160 N.C. App. at 704, 586 S.E.2d at 808 (stating that, "where there was no affidavit showing circumstances warranting use of service by publication or alleging facts showing due diligence, no *in personam* jurisdiction was established over the defendant") (citing *County of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 160–61, 323 S.E.2d 458, 463 (1984))). However, nothing that appears in N.C.G.S. § 7B-1106(a) in any way suggests that the making of the findings required by N.C.G.S. § 7B-1106(a) suffices to excuse a petitioner's failure to comply with the separate affidavit requirement contained in N.C.G.S.

N.C.G.S. § 1A-1, Rule 4(j1), as part of her effort to obtain service of process upon respondent-father by publication. In addition, while the record does contain an affidavit executed by the publisher of the *Hendersonville Lightning* "attesting to the publication of the notice of service by publication" in a local newspaper, the existence of this affidavit does not satisfy the requirements of N.C.G.S. § 1A-1, Rule 4(j1), given that it fails to delineate the circumstances warranting service by publication in this case. *Cotton*, 160 N.C. App. at 703, 586 S.E.2d at 808; *In re A.J.C.*, 259 N.C. App. 804, 808, 817 S.E.2d 479, 480 (2018). As a result, the record simply does not contain an affidavit of the type contemplated by N.C.G.S. § 1A-1, Rule 4(j1).

We are not persuaded by petitioner-mother's argument that the fact that her trial counsel signed her motion for leave to serve respondent-father by publication, when taken in conjunction with N.C.G.S. § 1A-1, Rule 11, should be deemed sufficient to satisfy the affidavit requirement set out in N.C.G.S. § 1A-1, Rule 4(j1), and that a contrary determination "would mean that there is no value in the attorney's verification on the Motion Requesting Leave to Serve by Publication." Simply put, N.C.G.S. § 1A-1, Rule 11(a), provides that

> Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . .

N.C.G.S. § 1A-1, Rule 11(a). Petitioner-mother's argument to the contrary notwithstanding, the statutory language contained in N.C.G.S. § 1A-1, Rule 11(a), obviating the necessity for a verification or an affidavit does not apply in situations in which the necessity for a verification or affidavit is "specifically provided by rule or statute[.]" *Id.* As a result,

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§ 1A-1, Rule 4(j1). In addition, we note that the trial court's findings provide little or no justification for a decision to authorize petitioner-mother to serve respondent-father by publication. *Cf. Cotton*, 160 N.C. App. at 703–04, 586 S.E.2d at 808 (concluding that the trial court's after the fact finding that "plaintiff had satisfied the trial court [at a child custody hearing] that she had made diligent efforts to locate defendant" lacked sufficient record support and did not suffice to "cure plaintiff's failure to strictly comply with the statute permitting service by publication").

since N.C.G.S. 1A-1, § Rule 4(j1), specifically requires the filing of "an affidavit showing . . . the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served" in order for service by publication to be properly effectuated, the signature of petitioner-mother's trial counsel upon the motion seeking leave to serve respondent-father by publication does not suffice to satisfy the statutory affidavit requirement.

"An affidavit is '(a) written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath.' "[4] *Schoolfield v. Collins*, 281 N.C. 604, 612, 189 S.E.2d 208, 213 (1972) (quoting BLACK'S LAW DICTIONARY, 80 (Rev. 4th ed. 1968)). "Documents which are not under oath may not be considered as affidavits." *In re Ingram*, 74 N.C. App. 579, 580, 328 S.E.2d 588, 589 (1985). In light of the fact that the signature of petitioner-mother's trial counsel on the motion seeking leave to serve respondent-father by publication was not "confirmed" by an "oath or affirmation," that motion simply cannot be treated as an affidavit sufficient to satisfy the requirements of N.C.G.S. § 1A-1, Rule 4(j1).

Thus, we hold that, since the statutory requirements for service of process by publication must be strictly construed, *Harrison*, 265 N.C. at 247, 143 S.E.2d at 596–97, and since petitioner-mother failed to properly serve respondent-father by publication in accordance with N.C.G.S. § 1A-1, Rule 4(j1), the trial "court acquired no jurisdiction over [respondent-father,]" *Sink*, 284 N.C. at 561, 202 S.E.2d at 143. As a result, we vacate the trial court's order terminating respondent's parental rights in Sara.[5]

VACATED.

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4. Unlike the situation before the Court in our recent decision in *Gyger v. Clement* (No. 31PA19) (14 August 2020), nothing in the statutory provisions at issue in this case in any way suggests that the term "affidavit" as used in N.C.G.S. § 1A-1, Rule 4(j1), should be understood in any way other than in its traditional sense.

5. In view of our decision to vacate the trial court's termination order for lack of personal jurisdiction, we need not address respondent-father's remaining challenges to that order.

**IN RE S.M.**

[375 N.C. 673 (2020)]

IN THE MATTER OF S.M., J.M., S.M., A.M., I.M., S.M.

No. 462A19

Filed 20 November 2020

**1. Appeal and Error—preservation of issues—constitutional rights—continuance—termination of parental rights hearing**

A father in a termination of parental rights case waived his argument that a continuance was necessary to protect his constitutional rights where he failed to make his constitutional arguments before the trial court.

**2. Termination of Parental Rights—continuances beyond 90 days after initial petition—extraordinary circumstances—procrastination**

The trial court did not abuse its discretion by denying a father's motion to continue a termination of parental rights hearing where the father filed the motion at the start of the hearing and argued that he had insufficient time to follow the recommendations in his psychosexual evaluation, which he received only the day before the hearing. The father failed to show the existence of extraordinary circumstances for continuance of the termination hearing beyond 90 days from the date of the initial petition (pursuant to N.C.G.S. § 7B-1109(d))—especially because the father's procrastination in submitting to the court-ordered evaluation caused the delay.

**3. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—sufficiency of findings—extremely limited progress**

Grounds existed to terminate a mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2) for willful failure to make reasonable progress where the mother made only extremely limited progress in correcting the conditions that led to her children's removal and no evidence suggested that the mother had any barriers preventing her from complying with her case plan. Among other things, she failed to cooperate with social services workers; to obtain stable housing, employment, and income; to participate in domestic violence counseling; and to complete a court-ordered substance abuse assessment.

**4. Termination of Parental Rights—best interest of the child—statutory factors—likelihood of adoption—behavioral issues**

The trial court did not abuse its discretion by concluding that termination of a mother and father's parental rights served their twelve-year-old child's best interests where a family was interested in adopting all six of their children (including the twelve-year-old) and the trial court did not find that the child's behavioral issues made adoption unlikely.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 8 August 2019 by Judge Hal G. Harrison in District Court, Yancey County. This matter was calendared for argument in the Supreme Court on 7 October 2020 but determined on the record and briefs, without oral argument, pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

*Daniel M. Hockaday for petitioner-appellee Yancey County Department of Social Services.*

*James M. Weiss for appellee Guardian ad Litem.*

*Christopher M. Watford for respondent-appellant mother.*

*Sydney Batch for respondent-appellant father.*

MORGAN, Justice.

Respondents, the parents of the minor children S.M. (Sarah), J.M. (Jimmy), S.M. (Sam), A.M. (Ann), I.M. (Inez), and S.M. (Sally),[1] appeal from orders terminating their parental rights which were entered by the Honorable Hal G. Harrison, District Court, Yancey County, on 8 August 2019. The trial court found the existence of the ground of neglect and the ground of willful failure to make reasonable progress to correct the conditions that led to the children's removal from the parents' care. Both parents appeal the trial court's decision that termination of their parental rights was in the best interests of their second oldest child, Jimmy. Respondent-mother singly appeals both grounds for termination, arguing that the record does not contain clear, cogent, and convincing evidence

1. Pseudonyms are used to protect the juveniles' identities and to facilitate ease of reading.

that her failure to make reasonable progress was willful, or that the children were at risk of future neglect. Respondent-father also challenges the trial court's denial of his oral motion for a continuance which was made on the day of the termination hearing. The trial court did not err in its denial of respondent-father's motion. Since the trial court properly concluded that grounds for termination of both respondents' parental rights were shown to exist by clear, cogent, and convincing evidence, and that such termination of their parental rights was in the best interests of all six children, consequently we affirm the determinations of the trial court in this case.

***Factual and Procedural Background***

Respondents are the parents of six children: S.M., J.M., S.M., A.M., I.M., and S.M. The Yancey County Department of Social Services (DSS) received a report on 8 February 2018 that the children were dirty, did not have clothing appropriate for the weather, and had not been enrolled in school since August of 2016. A second report dated 16 February 2018 alleged concerns about sexual abuse of the eldest child, Sarah, by respondent-father. Following an investigation of this report, DSS placed the children with their maternal grandparents as a safety resource on the same date.

On 23 February 2018, DSS filed petitions alleging that Sarah was an abused and neglected juvenile and that Jimmy, Sam, Ann, Inez, and Sally were neglected juveniles. DSS also obtained nonsecure custody of all six children on the same date. The petitions detailed the investigations of both reports, in which a social worker observed that the children were dirty and had an unpleasant odor; the house was unclean, sparsely furnished, and had a terrible odor; the children had not been enrolled in public school since 31 August 2016; and respondents could not provide documentation to prove that the children were being homeschooled. Substance abuse and domestic violence issues in the home were described in the DSS court filings. In one such instance, the children and respondent-mother reported that earlier in February 2018, respondent-father had poured alcohol on respondent-mother and had set her on fire in front of the children.

Upon filing the abuse and neglect petitions, DSS developed many of the same concerns with the maternal grandparents in their capacity as a safety resource for the children as the agency had expressed with the respondents' home. As a result, DSS placed the children at Black Mountain Home for Children. The children remained in this placement for the duration of the case, except for respondents' second eldest child,

Jimmy, whom DSS transferred to a therapeutic foster home due to behavioral issues.

The trial court held a hearing on the abuse and neglect petitions on 10 May 2018. It adjudicated the children to be neglected juveniles and entered an order reflecting this determination in open court on the same day. The order was signed by the trial court and filed on the respective dates of 15 and 18 June 2018. At a disposition hearing held on 18 June 2018, the trial court found that the barriers to reunification were substance abuse, housing instability, domestic violence, a history of sexual abuse, the children's lack of schooling, and respondents' lack of progress on their case plan. In a written order signed on 25 September 2018 which referenced the 18 June 2018 hearing, the trial court ordered respondents to obtain substance abuse and mental health assessments, and to comply with the recommendations resulting from those evaluations. Additionally, respondents were directed to find and maintain employment in order to provide for the basic needs of the children, as well as to be able to provide housing which was sufficient to accommodate a large family. Respondent-father was also ordered to obtain a psychosexual evaluation. In a review order entered 1 November 2018, the trial court maintained the children's permanent plan as reunification with respondents, but also found many of the same barriers to reunification as still intact, including substance abuse issues, domestic violence, housing instability, and a general lack of progress on respondents' DSS case plan. The trial court required ongoing efforts on the part of respondents to comply with each directive contained in the original disposition order which was entered after the 18 June hearing.

The trial court held a permanency planning hearing on 28 January 2019. In an order entered on 19 February 2019, the trial court changed the permanent plan from reunification to adoption with a concurrent plan of guardianship, consequently ceasing reunification efforts with respondents. The permanency planning order detailed a significant lack of compliance with the DSS case plan and prior orders of the court. While respondents had obtained substance abuse assessments which resulted in no recommendations, each of them subsequently had failed additional drug screens and had refused to take other tests offered by DSS as ordered in their case plan. While respondents reported that they were living in a single-family home leased by the father of respondent-mother, they offered inconsistent accounts about the duration of time that they were able to stay there. Respondents refused to provide DSS with court-ordered information, including their prescriptions and sources of income. They also failed to be forthcoming with information

that they had changed addresses when county officials attempted to initiate child support litigation against them. Despite claiming substantial income from a plumbing and electrical business that the couple reportedly ran, respondents had failed to pay any money towards the children's support and had failed to secure a residence suitable for a large family on their own initiative. In addition, respondent-father had failed to pay for his psychosexual evaluation during the seven months since the trial court had ordered the assessment. While the trial court noted that respondents had completed parenting classes as ordered, the couple still "failed to comply with a majority of the case plan requirements . . . ." In finding the existence of these aforementioned facts and circumstances in its 19 February 2019 order, the trial court suspended visitation privileges of respondents until they complied with their case plan, relieved DSS of its duty to further provide reasonable efforts to reunify respondents with their children, and ordered DSS to file termination of parental rights petitions as to both respondents.

On 28 February 2019, DSS filed petitions to terminate respondents' parental rights to the children, alleging the grounds of neglect and willful failure to make reasonable progress to correct the conditions that led to the children's removal from their care. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019). The trial court conducted the termination of parental rights hearing on 28 May 2019, at which time respondent-father's attorney made several preliminary requests. Relevant to this appeal, counsel for respondent-father noted for the trial court that the parties had received the report of respondent-father's psychosexual evaluation only the day before the hearing via facsimile transmission, and moved for a continuance "for the father to be able to respond to that evaluation by following recommendations." The trial court denied the continuance motion, citing the protracted time period which elapsed between the tribunal's order for the evaluation and the point at which respondent-father chose to address the issue.

At the hearing, DSS elicited testimony from the social worker who was assigned to the children's cases. Cross-examination of the DSS witness ensued after her direct examination. Following closing statements, the trial court found "complete and total irresponsibility" on the part of respondents in complying with their case plan. Specifically, the trial court stated that, based on the neglect that compelled the removal of the children from respondents' care in the first place, and combined with the respondents' conduct during the fifteen months preceding the hearing, it was "highly likely" that neglect of the children would continue. Likewise, the parents had "allowed the children to remain in [DSS]

custody for a period of twelve months without making any substantial progress" on their case plans. The trial court expressed amazement with the social worker's testimony that a prospective adoptive family had indicated a willingness to accept all six children, found that a bond had already formed between the family and the children, and determined that termination of respondents' parental rights remained as the only barrier between the children and adoption. The trial court entered six orders on 8 August 2019, ultimately concluding that there was clear, cogent, and convincing evidence that grounds existed to terminate respondents' parental rights as alleged in the petition, and that terminating respondents' parental rights was in the best interests of each child. Respondents appealed.

***Analysis***

In this matter, we examine respondent-mother's appeal and respondent-father's appeal separately; we combine each parent's individual challenge to the trial court's decisions only with regard to their mutual position that the trial court erred in its conclusion that termination of their parental rights was in the best interests of their child, Jimmy. First, we address respondent-father's separate contention that the trial court's denial of his oral motion to continue the 28 May 2019 termination of parental rights hearing violated his due-process rights, before discussing respondent-mother's individual argument that the trial court's findings of two different grounds for termination of her parental rights were unsupported by clear, cogent, and convincing evidence. We note here that the trial court entered a separate termination order for each of respondent-mother's six children, with each order containing virtually identical findings of fact and conclusions of law supporting the trial court's adjudications. In order to facilitate our discussion of the salient matters pertaining to the adjudication of grounds for termination involving all six of the juveniles with respect to respondent-mother's argument, we shall refer to the findings of fact and conclusions of law as enumerated in the trial court's termination order entered in Jimmy's case. Lastly, we review the respondents' united argument.

*A. Motion to Continue*

**[1]** Respondent-father first argues that the trial court erred in denying his motion to continue the termination hearing "after counsel received [respondent-father's] psychosexual evaluation the day prior to trial and was unable to prepare or call witnesses based on said evaluation." Respondent-father asserts that "[i]t was evident that [respondent-father's] counsel did not have sufficient time to prepare for how

the evaluation may be used in the TPR trial nor did he have time to subpoena any necessary witnesses." Therefore, respondent-father contends that the trial court violated his constitutional right to due process, as that right, combined with the right to counsel and the right to confront witnesses, includes a guarantee in favor of parties to have a reasonable time to prepare their case according to *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982).

"Ordinarily, a motion to continue is 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." *In re A.L.S.*, 374 N.C. 515, 516-17, 843 S.E.2d 89, 91 (2020) (quoting *State v. Walls*, 342 N.C. 1, 24, 463 S.E.2d 738, 748 (1995)). "However, if 'a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal.' " *State v. Jones*, 342 N.C. 523, 530–31, 467 S.E.2d 12, 17 (1996) (quoting *State v. Covington*, 317 N.C. 127, 129, 343 S.E.2d 524, 526 (1986)). Although respondent-father argues on appeal that the trial court's denial of his motion to continue violates his due-process rights to prepare his defense and to subpoena witnesses, respondent-father did not assert this position at the termination hearing. Respondent-father argued at the hearing that the continuance was necessary "in order for [respondent-father] to be able to respond to [the psychosexual] evaluation by following recommendations." Because respondent-father did not assert before the trial court that a continuance was necessary to protect a constitutional right, that position is waived and we are constrained to review the trial court's denial of his motion to continue for abuse of discretion. *In re A.L.S.*, 374 N.C. at 516-17, 843 S.E.2d at 91. "An '[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015) (alteration in original) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

**[2]** Our state's Juvenile Code offers controlling guidance on the continuance of a termination of parental rights hearing with regard to the date on which a petitioning party initiates such a termination proceeding. In juvenile cases, the trial court

> may for good cause shown continue the hearing for up to 90 days from the date of the initial petition in order to receive additional evidence including any reports or assessments that the court has requested, to allow the parties to conduct expeditious discovery, or to receive any other information needed in the best interests

> of the juvenile. Continuances that extend beyond 90 days after the initial petition shall be granted *only in extraordinary circumstances when necessary for the proper administration of justice*, and the court shall issue a written order stating the grounds for granting the continuance.

N.C.G.S. § 7B-1109(d) (2019) (emphasis added). Furthermore, "[c]ontinuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice." *In re D.W.*, 202 N.C. App. 624, 627, 693 S.E.2d 357, 359 (2010) (quoting *In re Humphrey*, 156 N.C. App. 533, 538, 577 S.E.2d 421, 425 (2003)).

In the present case, the transcript from the termination hearing shows that respondent-father's counsel made an oral motion to continue at the start of the termination hearing on 28 May 2019, advising the trial court that all parties had received the psychosexual evaluation report regarding respondent-father just the previous day through facsimile transmission. The attorney argued that a continuance was necessary "in order for [respondent-father] to be able to respond to that evaluation by following recommendations." DSS objected to the continuance motion, asserting that the fault for the delayed receipt of the results rested solely with respondent-father because he did not present himself to Crossroads Counseling Center (Crossroads) to begin the evaluation until 22 January 2019, seven months after he was first ordered to complete it. In response to the objection of DSS, respondent-father submitted that the delay was due in part to his inability to pay the required $500.00 down payment for the evaluation, as well as his difficulty in finding a provider to complete the evaluation.

The 28 May 2019 hearing at which respondent-father made his motion was conducted 89 days after the termination petitions were filed on 28 February 2019. Thus, any continuance granted in the matter would obviously have extended the occurrence of the hearing beyond 90 days after the filing of the termination petitions. Although the trial court had ordered respondent-father to complete the evaluation in June 2018, nearly a year prior to the termination hearing, respondent-father did not go to Crossroads to begin the evaluation process until 22 January 2019. At a permanency planning hearing which was held six days later on 28 January 2019, respondent-father was reminded that two more evaluation sessions were needed to complete the process; however, he proceeded to miss two appointments on 13 February 2019 and 25 March 2019.

Due to the applicable authority of N.C.G.S. § 7B-1109(d) and the appellate case law of *In re Humphrey* as construed in *In re D.W.*, respondent-father must show, as the movant for a continuance of the termination of parental rights hearing, the existence of extraordinary circumstances for the continuance and its necessity for the proper administration of justice. Here, respondent-father has failed to demonstrate to the trial court that good cause exists for the continuance of the termination of parental rights hearing to a juncture beyond 90 days from the date of the initial petition. Respondent-father's procrastination in addressing his court-ordered obligation to report to Crossroads for the essential evaluation directly resulted in the shortness of time for the parties involved in the hearing to have access to the psychosexual evaluation of respondent-father. The trial court did not abuse its discretion in heeding the standards of N.C.G.S. § 7B-1109(d) in its determination that extraordinary circumstances did not exist so as to make it necessary for the proper administration of justice to grant respondent-father's continuance motion in order to have more time to review the psychosexual evaluation report which he himself had delayed due to his slowness to fulfill the trial court's directive. The trial court's denial of the continuance request was within its discretion, and since continuances are not favored and good cause for the termination hearing's continuance was not shown within the purview of the cited statute, there was not an abuse of the trial court's discretion in its denial of the motion.

*B. Grounds*

**[3]** Respondent-father concedes that DSS met its burden in establishing grounds to terminate his parental rights. Respondent-mother argues, however, that the trial court erred in concluding that grounds existed to terminate her parental rights to the children pursuant to N.C.G.S. § 7B-1111(a)(2) because the findings of fact do not support the court's determination that she willfully failed to make reasonable progress to correct the conditions that led to the children's removal from her care. Among her contentions, respondent-mother takes issue with the trial court's Finding of Fact 12, citing a lack of evidentiary basis for the trial court's conclusions that respondent-mother tested positive for drugs on 5 February 2019, that she "continued to test positive" or "refused to comply with requested drug screens," that she "evaded service of child support paperwork," and that she failed to provide a home address to DSS. We address each of respondent-mother's issues, including Finding of Fact 12, along with examining her overall contention that the trial court never explained why it found her noncompliance with the court-ordered case plan to be willful.

This Court reviews a trial court's adjudication that grounds exist 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 (1984)). "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)). "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).

In determining that respondent-mother willfully failed to make reasonable progress, the trial court found that, in order to comply with the case plan, respondent-mother was required "to obtain and maintain stable and suitable housing; maintain employment; obtain a substance abuse assessment and comply with treatment recommendations from the same; submit to requested random drug screens; participate in recommended therapy; attend [child and family team meetings]; and exercise visitations." The trial court further found in Finding of Fact 12:

> 12. . . . The parents have not complied with the terms of the DSS case plan in that the parents have not maintained stable housing; have failed to provide DSS information regarding their housing; have failed to provide documentation as to employment and income; have failed to provide their address to DSS; that their initial substance [abuse] assessments contained no recommendations; the parents tested positive for controlled substances thereafter; that the parents were ordered to obtain a second substance abuse assessment; that the parents have not obtained that assessment; have continued to test positive for controlled substances and/or refused to comply with requested drug screens; had a recent positive drug screen (02/05/19); have missed some scheduled DSS meetings; have failed to provide copies of prescriptions to DSS although being ordered to do so; . . . that domestic violence counseling is also recommended and the parents have not participated in the same at this point; the parents' visitations have been

> suspended by prior [o]rder of the [c]ourt; that the parents have failed to provide for the monthly support for juveniles; have evaded the service of child support paperwork from the local child support agency; have acted in a generally uncooperative manner with respect to DSS workers; and have not remedied the reasons the juveniles came into DSS custody.

Regarding this finding at issue, respondent-mother directs our attention to the social worker's testimony that during the social worker's interactions with respondent-mother, respondent-mother provided a house number for an address. Respondent-mother submits that this information refutes the trial court's determination contained in Finding of Fact 12 that states that respondent-mother "failed to provide [her] address to DSS." However, a review of the social worker's testimony about this subject beyond the isolated reference illuminated by respondent-mother reveals that respondent-mother's mere identification of a house number does not constitute a provision of her address to DSS in light of conflicting and even incorrect residential information which also was supplied. A fuller examination of the social worker's testimony shows that she was unable to locate the residence after respondent-mother and respondent-father provided contradictory addresses. The social worker also testified that she had received conflicting information from respondents as to whether they owned or rented the residence. Upon consideration of this broader context of respondent-mother's compliance with the case plan as to the furnishment of the address to DSS, the trial court's finding of fact that respondent-mother had failed to provide her address is supported by clear, cogent, and convincing evidence.

Respondent-mother also disputes the segment of Finding of Fact 12 that the parents "have continued to test positive for controlled substances and/or refused to comply with requested drug screens." She concedes that she refused drug screens previously requested by DSS, but that there was no evidence that DSS offered another drug screen after her negative drug test of 5 February 2019. Respondent-mother therefore posits the deduction that there "can be no reasonable inference drawn for the affirmative finding that [she] 'continues to test positive' or 'refused to comply' with requested drug screens without evidence those screens were actually requested." Respondent-mother's creative rationale is unpersuasive.

At the hearing, the social worker testified that after the parents' first substance abuse assessment, they both subsequently tested positive for controlled substances. The social worker confirmed that

respondent-mother refused drug screens previously requested by DSS and that there were occasions when both parents left the DSS building without taking drug tests when asked by the agency to submit to drug screens prior to departure from its site. While the social worker did not testify as to the timing of respondent-mother's positive drug test results or the frequency of respondent-mother's drug screen refusals, nonetheless the trial court's determination that the evidence at the hearing had shown that, during the course of the case plan, respondent-mother along the way had "continued to test positive" and/or had "refused to comply with requested drug screens" is supported by clear, cogent, and convincing evidence. The lack of specificity regarding any positive drug screens or refusals of drug screens by respondent-mother after 5 February 2019 does not render the trial court's determination based on the social worker's competent and uncontroverted testimony to be unsupported.

Respondent-mother next challenges the portion of Finding of Fact 12 which states that the parents "had a recent positive drug screen (02/05/19)," asserting that the determination is contrary to DSS's own evidence. She claims that the social worker testified that respondent-father tested positive on 5 February 2019 while respondent-mother "tested clean." We agree with respondent-mother's assertion on this point; the uncontested testimony of the social worker indeed establishes that respondent-mother tested negative for controlled substances on 5 February 2019. Therefore, we disregard this portion of Finding of Fact 12 as it pertains to respondent-mother. *In re N.G.*, 374 N.C. 891, 901, 845 S.E.2d 16, 24 (2020) (disregarding findings of fact not supported by clear, cogent, and convincing evidence).

Respondent-mother then contests the aspect of Finding of Fact 12 that she "evaded the service of child support paperwork from the local child support agency." Respondent-mother was not ordered to pay child support as part of her case plan, and therefore this finding is not germane to the trial court's adjudication of grounds for termination under N.C.G.S. § 7B-1111(a)(2), that she willfully left the children in foster care or placement outside the home for more than twelve months without making reasonable progress to correct the conditions prompting removal of the juveniles. As a result, we need not address this challenge. *See In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58–59.

Respondent-mother contends that the remaining contents of Finding of Fact 12 do not support the trial court's conclusion that she willfully failed to make reasonable progress. 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). "[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 J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (quoting *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996)). "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001). 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. 372, 385, 831 S.E.2d 305, 314 (2019) (alteration in original) (citation omitted). However, "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).

Respondent-mother represents that she made progress on her case plan and "changed those things she could control." She asserts that the record demonstrates that she completed parenting classes and obtained a comprehensive clinical assessment which resulted in no further recommendations for her to follow. This assertion of respondent-mother must be evaluated with a recognition that the referenced clinical assessment was based on her self-report alone without any contact or solicitation of information from DSS, after which respondent-mother proceeded to test positive for opiates. While respondent-mother trumpets her regular attendance of visitations with the children and that she only stopped spending such time with the juveniles due to a court order, it is worthy of note that the visitations were ceased due to respondent-mother's repeated noncompliance with stipulated rules to be followed during the visitations. Respondent-mother offers the bald assertion that she had secured housing, and that she "attempted to secure employment and continued to seek out opportunities," while supporting these claims only with the reference that she failed to show up for work on her first day on a new job and consequently was terminated. As to her representation that she obtained housing, respondent-mother did not challenge the trial court's findings that she failed to maintain stable housing and to provide DSS with information regarding her housing, and therefore

these findings are binding on appeal. *In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58.

Respondent-mother additionally maintains that she "refrained from the use of illegal drugs as indicated by her negative drug screen on 5 February 2019"; that she "refrained from domestic violence situations"; and that "DSS could present no evidence that she gained criminal charges or otherwise behaved in a manner that was unfit for the minor children." Respondent-mother's contention that she "refrained from domestic violence situations" is unfounded, as she never completed the domestic violence counseling ordered by the trial court, and continued to relate and reside with respondent-father whom she claimed set her on fire in front of the children. Having presented no evidence of her own during the hearing, respondent-mother's completion of parenting classes and the registration of a single negative drug screen stand alone as affirmative attainments by her toward the successful fulfillment of her case plan, while the remainder of the record illustrates respondent-mother's lack of reasonable progress in correcting the conditions which led to the removal of the children from the home. *See In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 224–25 (1995) ("Extremely limited progress is not reasonable progress.").

Respondent-mother contends that although the trial court's Finding of Fact 12 "contain[s] language characterizing [respondent-mother's] failures as willful," it "never explains for the purposes of appellate review, why this demonstrates willfulness." Specifically, she argues that the trial court never made findings regarding respondent-mother's ability to make progress on her case plan, and the findings "are silent on the ways that [respondent-mother] could overcome barriers such as transportation and cost to complete such a plan."

There is no evidence in the record that respondent-mother had any barriers in her ability to comply with the case plan or any circumstances that would render it unduly difficult for her to meet the requirements. Indeed, respondent-mother has failed to direct this Court to any such evidence. After the removal of the children from the care of respondent-mother, her "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.S.*, 374 N.C. at 815, 845 S.E.2d at 71 (quoting *In re J.W.*, 173 N.C. App. 450, 465–66, 619 S.E.2d 534, 545 (2005), *aff'd per curiam*, 360 N.C. 361, 625 S.E.2d 780 (2006)). We have cited and

applied the pertinent appellate case law regarding the manner in which respondent-mother's failures and incompletions constitute "willfulness" under N.C.G.S. § 7B-1111(a)(2). Therefore, we hold that the findings of fact sufficiently demonstrate willfulness in respondent-mother's lack of progress.

The trial court's findings demonstrate that respondent-mother failed to fully cooperate with the DSS social workers; failed to obtain stable housing, employment, and income; failed to participate in domestic violence counseling; failed to complete a second substance abuse assessment after being ordered to do so; failed to provide DSS with a list of her prescriptions as ordered; and failed to provide DSS with accurate information and court-ordered documentation in order to verify that she was meeting her case plan requirements. Based upon all of the noted shortfalls in respondent-mother's compliance with her case plan as established by the trial court, we conclude that the trial court's findings of fact support its decision to find the existence of the ground that respondent-mother willfully failed to make reasonable progress to correct the conditions that led to the children's removal from the home. *See In re L.E.W.*, 375 N.C. 124, 139, 846 S.E.2d 460, 471 (2020) (holding that even though the mother had "made some progress toward compliance with the provisions of her case plan, she had failed to make reasonable progress toward correcting the conditions that had led to" the child being removed from the home).

In light of our conclusion that the trial court properly adjudicated a ground for terminating respondent-mother's parental rights under N.C.G.S. § 7B-1111(a)(2), we deem it unnecessary to address respondent-mother's contentions regarding the ground of neglect. *See In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019); *In re E.H.P.*, 372 N.C. at 395, 831 S.E.2d at 53 ("[W]here the trial court finds multiple grounds on which to base a termination of parental rights, and 'an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds.' " (alteration in original)).

*C. Best Interests Determination*

**[4]** Both respondents argue that the trial court erred in finding that termination of their parental rights as to the child Jimmy served the juvenile's best interests. They challenge several portions of the trial court's Finding of Fact 15 with regard to its best interests conclusion, while claiming that the prototypical nature of the trial court's order terminating their parental rights to Jimmy failed to account for his unique

circumstances. In addition, respondent-mother independently argues that the trial court committed reversible error by failing to address two of the six best interests factors found in N.C.G.S. § 7B-1110(a). Neither respondent-mother nor respondent-father challenges the trial court's determinations as to the best interests of the other five children. While we agree with respondents that two portions of the trial court's Finding of Fact 15 lack sufficient evidentiary foundation, thus compelling us to disregard them, the remaining findings of the trial court and composition of the record provide an abundance of support for the conclusion that termination of respondents' parental rights regarding Jimmy was in the best interests of the child.

In determining 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) (2019) (emphasis added).

"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. 3, 6, 832 S.E.2d 698, 700 (2019). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. at 107, 772 S.E.2d at 455 (quoting *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527). "The trial court's dispositional findings are binding on appeal if supported by any competent evidence." *In re J.S.*, 374 N.C. at 822, 845 S.E.2d at 75. The trial court's position offers the most candid weighing of the evidence, thus its findings as to the disposition of respondents' parental rights "cannot be upset" if the record

contains any competent evidence supporting such a disposition. *Stephens v. Stephens*, 213 N.C. App. 495, 503, 715 S.E.2d 168, 174 (2011) (quoting *Metz v. Metz*, 138 N.C. App. 538, 541, 530 S.E.2d 79, 81 (2000)).

Here the trial court entered the following Finding of Fact 15 regarding the factors set forth in N.C.G.S. § 7B-1110(a):

> 15. That the [c]ourt finds by clear, cogent and convincing evidence that it is in the best interests of the juvenile that the parental rights of the respondent parents be terminated in that the respondent parents were given an opportunity to comply with the DSS case plan to reunify with the juvenile; the parents have failed to comply with the terms of the same; that at the permanency planning hearing held 28 January, 2019, DSS was relieved of providing further efforts to reunify the juvenile with the respondent parents; the parents have failed to eliminate those reasons the juvenile came into DSS custody; the parents have failed to provide for the financial support of the juvenile; the juvenile's permanent plan is designated adoption; that DSS is seeking an adoptive family for the juvenile; that an adoptive family has been identified and is willing to take the juvenile and siblings; that a bond has been established with these individuals; that although acknowledging the parents have a bond with the juvenile the visitations for the parents have been suspended by prior [o]rder of the [c]ourt due to their failure to comply with case plan requirements; that one of the remaining barriers to implementing that permanent plan is termination of parental rights; that terminating parental rights of the respondent parents would assist DSS in achieving the permanent plan for the juvenile; that the juvenile is currently placed at Black Mountain Children's Home; the juvenile is thriving in that placement; the juvenile's current physical, emotional and educational needs are being met; these needs were not met in the home of the respondent parents; that the Guardian Ad Litem Report recommended termination of parental rights to be in the interests of the juvenile.

Respondents challenge passages of Finding of Fact 15 as being unsupported by the evidence. First, respondents dispute the portion of the finding which states that Jimmy had formed a bond with the prospective adoptive parents, asserting that DSS did not present any evidence to

support this determination. We disagree. The social worker testified that DSS had identified a prospective adoptive family that was interested in adopting all six children. Her testimony described the bond which had formed between the prospective adoptive family and each of the children, coupled with a fondness between each of them as denoted by an earnest desire of the juveniles to visit and live with the identified family. Reporting generally on all six juveniles, including Jimmy, the social worker stated that each child spoke highly of the prospective adoptive family. She further confirmed Jimmy's inclusion in the process of building the familial bond by describing his visits with the family later in the hearing. We find that this evidence is competent to support the trial court's finding of an established bond between Jimmy and the prospective adoptive parents.

Second, respondents attack the section of Finding of Fact 15 that states that Jimmy was thriving in his placement at Black Mountain Children's Home. Respondent-father points out that Jimmy was removed from the placement in March 2019; both respondents contend that DSS presented no evidence that Jimmy thrived while he resided there. We agree with respondent-father and respondent-mother that this element of Finding of Fact 15 is not supported by the evidence. DSS supplied the report for the termination hearing that indicated that Jimmy was residing and thriving at Black Mountain Children's Home on 22 February 2019, three months before the termination hearing. The social worker testified at the hearing, however, that Jimmy was removed from Black Mountain Children's Home in March 2019 due to behavioral issues and was currently in a therapeutic foster home where he was "doing very well." We therefore disregard the portion of Finding of Fact 15 which states that Jimmy was "currently placed at Black Mountain Children's Home" and was "thriving in that placement," because the evidence does not support it. *See In re N.G.*, 274 N.C. at 901, 845 S.E.2d at 24.

Respondents also challenge the trial court's establishment in Finding of Fact 15 that the Guardian ad Litem (GAL) report recommended that it was in the best interests of the juvenile that respondents' parental rights be terminated. Respondents argue that the GAL report was not admitted into evidence at the hearing and that the GAL did not testify because she was not present at the hearing. We agree with respondents' position in this challenge. The transcript from the hearing indicates only that a copy of the GAL report was "distribute[d]" to the parties and to the trial court before the start of the termination hearing; the transcript does not show that the GAL report was admitted into evidence by the trial court during the hearing. The GAL report was not included in the record on appeal

and there is nothing in the record to show that the GAL testified at the hearing. Therefore, we find that there was not competent evidence of record to support a consideration of the GAL's recommendation by the trial court regarding the best interests of the child Jimmy, and we therefore pay no heed to this portion of Finding of Fact 15. *See In re N.G.*, 374 N.C. at 901, 845 S.E.2d at 24.

Respondent-mother further argues that the trial court failed to make necessary findings regarding all of the factors set forth in N.C.G.S. § 7B-1110. She asserts that the trial court neglected to make findings with respect to both Jimmy's age and the likelihood of his adoption. "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 J.S.*, 374 N.C. at 822, 845 S.E.2d at 75 (alterations in original) (citation omitted). Here, neither party disputed the fact that Jimmy was twelve years old at the time of the termination hearing, and the record does not reflect any controversy concerning the relevance of Jimmy's age in a calculation of his best interests. Therefore, the trial court was not required to make a finding on the factor of Jimmy's age in determining the juvenile's best interests.

As to the factor of Jimmy's likelihood of adoption, the trial court found "that an adoptive family has been identified and is willing to take the juvenile and siblings . . . ." The social worker testified at the termination of parental rights hearing that DSS had "identified [a] preadoptive home that is interested in adopting all six kids" and that the home was "a licensed home through Black Mountain [Children's Home]." In considering the factor of likelihood of adoption as codified in N.C.G.S. § 7B-1110(a)(2), the trial court must endeavor to ensure that the drastic action of terminating a respondent's parental rights operates to achieve the concrete goal of a permanent home for the child. Supported by the competent and uncontested testimony of the social worker, the trial court sufficiently addressed in written format the statutory factor of the juvenile's likelihood of adoption under N.C.G.S. § 7B-1110(a)(2) in finding that there was a home interested in adopting all six children, thus including Jimmy. We do not require a trial court to reproduce the exact language of the statute in its findings, as confronting the concern of the statute will suffice. *See In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013) ("The trial court's written findings must address the statute's concerns, but need not quote its exact language.").

Respondents also contend that the trial court abused its discretion in determining that termination of their parental rights was in Jimmy's best interests because it failed to consider the child's unique circumstances and needs arising from his behavioral issues. Both respondents rely on the Court of Appeals decision in *In re J.A.O.*, 166 N.C. App. 222, 601 S.E.2d 226 (2004) to support their arguments.

The juvenile in *In re J.A.O.* 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. At the time of the termination hearing, the juvenile was fourteen years old, had been in foster care since he was eighteen months old, and had been in nineteen different treatment centers during that time. *Id.* at 227, 601 S.E.2d at 230. The GAL testified at the hearing that the juvenile was an unlikely candidate for adoption and that termination was not in his best interests because it would "cut him off from any family that he might have." *Id.* On appeal, the Court of Appeals held that the trial court abused its discretion in concluding that termination of the mother's parental rights was in the juvenile's best interests. *Id.* at 228, 601 S.E.2d at 230. The lower appellate court reasoned that "after '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, we must conclude that termination would only cast [the juvenile] further adrift.' " *Id.* (citation omitted). Therefore, the Court of Appeals determined that rendering the juvenile a "legal orphan" was not in the juvenile's best interests. *Id.* at 227, 601 S.E.2d at 230.

The instant case is readily distinguishable from *In re J.A.O.* Here, although Jimmy was diagnosed with attention deficit hyperactivity disorder and post-traumatic stress disorder, his diagnoses and behavioral issues remain significantly less severe than the juvenile's more numerous and challenging conditions in *In re J.A.O.* The trial court in the case at bar did not find that Jimmy's behavioral issues made adoption unlikely, and instead recognized that a pre-adoptive home was interested in adopting Jimmy and his five siblings; on the other hand, the trial court in *In re J.A.O.* determined there that "it is 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 adoptive family." *Id.* at 228, 601 S.E.2d at 230. Furthermore, while the trial court in the current case expressly found that the evidence sufficiently established the

existence of the ground that respondent-mother failed to show that reasonable progress had been made in correcting those conditions which led to the removal of the juvenile, the trial court in *In re J.A.O.* noted that "evidence tended to show that respondent 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. Respondents' reliance on *In re J.A.O.* is misplaced regarding their contention that the trial court here abused its discretion in terminating their parental rights in light of Jimmy's behavioral challenges. In *In re J.A.O.*, the Court of Appeals determined that the juvenile's "woefully insufficient support system" caused the appellate court to "conclude that termination [of parental rights] would only cast [the juvenile] further adrift." *Id.* at 227–28, 601 S.E.2d at 230. We have no basis upon which to find that the trial court abused its discretion regarding Jimmy's circumstances where the evidence supports an optimism for the juvenile's well-being which is already being advanced by a potential adoptive family. Such prospects justify the trial court's decision that termination of respondents' parental rights was in the child Jimmy's best interests.

***Conclusion***

Based upon the foregoing considerations, this Court determines that the trial court properly acted within its discretion in denying respondent-father's oral motion to continue the termination of parental rights hearing. The trial court did not err in finding that grounds existed to terminate respondent-mother's parental rights based on its determination under N.C.G.S. § 7B-1111(a)(2) that respondent-mother willfully left the juveniles in foster care or in a placement outside the home for more than twelve months without showing to the satisfaction of the trial court that reasonable progress under the circumstances had been made in correcting those conditions that led to the removal of the juveniles, as clear, cogent, and convincing evidence supported this determination. The trial court did not abuse its discretion in concluding that it was in the best interests of the child Jimmy that the parental rights of respondent-mother and respondent-father be terminated. Accordingly, we affirm the trial court's orders terminating respondents' parental rights to each of their six children.

AFFIRMED.

**IN RE X.P.W.**

[375 N.C. 694 (2020)]

IN THE MATTER OF X.P.W., B.W.

No. 39A20

Filed 20 November 2020

**Termination of Parental Rights—no-merit brief—abandonment and neglect—drug use and failure to comply with case plan**

The termination of a father's parental rights on the grounds of neglect and abandonment (he had a history of drug-related offenses and failed to comply with his case plan) was affirmed where the father's counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 11 October 2019 by Judge Elizabeth T. Trosch in District Court, Mecklenburg County. This matter was calendared in the Supreme Court on 7 October 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 for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services Division.*

*Kelsey L. Kingsbery and Michelle C. Prendergast, for appellee Guardian ad Litem.*

*Jeffrey L. Miller for respondent-appellant father.*

HUDSON, Justice.

Respondent-father appeals from the trial court's 11 October 2019 order terminating his parental rights to his minor children X.P.W. and B.W. ("Zeb" and "Ann").[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 issues identified by counsel in respondent-father's brief are meritless and therefore affirm the trial court's order.

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

On 14 March 2018, the Mecklenburg County Department of Social Services, Youth and Family Services Division (YFS) became involved with respondent-father's family when Zeb tested positive for opiates at birth. After additional testing was performed on Zeb, he also tested positive for Fentanyl, codeine, and morphine. The mother subsequently admitted to YFS that she used non-prescribed oxycodone and Xanax, and had also used Percocet shortly before Zeb's birth. YFS requested that both respondent-father and the mother obtain a substance abuse assessment.

On 24 March 2018, the mother was found unresponsive by respondent-father on the floor of their hotel room after she suffered an overdose. Emergency responders revived the mother using Narcan, and she was taken to the hospital. Ann and several older siblings not party to this appeal were present in the hotel room when the mother overdosed. The mother told YFS that she took too much oxycodone, although hospital records reflect that she informed hospital staff that she had used heroin. On 26 March 2018, Ann was temporarily placed with the father of her older siblings.

On 4 April 2018, YFS filed a petition alleging that Zeb and Ann were neglected and dependent juveniles. YFS recounted how it became involved with the family and claimed the mother had a history of substance abuse. YFS stated that Ann had previously tested positive for opiates at her birth, that the mother had overdosed in August 2017 and had to be revived with six doses of Narcan, and that the mother also tested positive for opiates on 18 January 2018 while on probation. YFS also claimed that respondent-father was on probation and had a history of drug-related offenses. YFS noted that both respondent-father and the mother were supposed to obtain substance abuse assessments following Ann's birth. Respondent-father went to obtain an assessment on 3 April 2018, but YFS had not received the results as of the filing of the petition. The mother had received an assessment on 29 March 2018 but did not attend recommended detox. DSS asserted, however, that neither respondent-father or the mother had presented relatives or other individuals who could provide care for the juveniles. Accordingly, DSS obtained non-secure custody and placed the juveniles in foster care.

Following a hearing held on 23 May 2018, and in accordance with a mediated case plan agreement, the trial court entered an order on 29 June 2018 in which it adjudicated Zeb and Ann neglected juveniles. The trial court ordered respondent-father and the mother to comply with a case plan that included substance abuse treatment, random drugs screens, and maintaining sobriety. The trial court further ordered that

the primary permanent plan for the juveniles be reunification with a secondary plan of adoption.

The trial court held review hearings on 3 August 2018 and 24 October 2018. In orders entered from those hearings on 21 August 2018 and 19 November 2018, respectively, the trial court found that respondent-father and the mother had "engaged in a pattern of excuses" and had not complied with their case plans. The trial court noted that both respondent-father and the mother had positive drug screens, failed to engage in recommended substance abuse treatment, and were inconsistent with visitation. Nevertheless, the trial court ordered that reunification remain part of the permanent plan for the juveniles.

Following a permanency planning review hearing held on 14 January 2019, the trial court entered an order on 4 February 2019 in which it found that respondent-father and the mother were not actively participating in their case plans and were not cooperating with YFS or the guardian ad litem. The trial court also noted that neither respondent-father nor the mother had seen the juveniles since 28 September 2018 and that when they had attended visitation they appeared to be under the influence of substances. Both parents tested positive for drugs on 21 August 2018. Additionally, the trial court found that YFS last had contact with the mother on 14 September 2018, and respondent-father last had contact with YFS on 24 October 2018. Accordingly, the trial court suspended reunification efforts, changed the primary permanent plan for the juveniles to adoption, and changed the secondary permanent plan to guardianship. The trial court also concluded that termination of respondent-father's and the mother's parental rights were in the juveniles' best interests.

On 1 April 2019, YFS filed a petition to terminate respondent-father's and the mother's parental rights on the grounds of neglect, dependency, and abandonment. *See* N.C.G.S. § 7B-1111(a)(1), (6)–(7) (2019). On 6 June 2019, respondent-father filed an answer denying the material allegations in the petition. The mother passed away due to Fentanyl and cocaine toxicity on 14 June 2019. Following hearings held in August and September 2019, the trial court entered an order on 11 October 2019 in which it determined grounds existed to terminate respondent-father's parental rights due to neglect and abandonment. *See* N.C.G.S. § 7B-1111(a)(1), (7). The trial court further concluded it was in Zeb's and Ann's best interests that respondent-father's parental rights be terminated. Accordingly, the trial court terminated respondent-father's parental rights. Respondent-father appeals.

Counsel for respondent-father has filed a no-merit brief on his client's behalf under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. 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 independently review issues identified by counsel in a no-merit brief filed pursuant to Rule 3.1(e). *In re L.E.M.*, 372 N.C. 396, 402 (2019). Respondent-father's counsel identified three issues that could arguably support an appeal, but he also explained why these issues lacked merit. Based upon our careful review of the issues identified in the no-merit brief and in light of our consideration of the entire record and applicable law, we are satisfied that the trial court's 11 October 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 respondent-father's parental rights.

AFFIRMED.

**IN RE A.K.O.**

[375 N.C. 698 (2020)]

IN THE MATTER OF A.K.O. AND A.S.O.

No. 68A20

Filed 11 December 2020

**1. Termination of Parental Rights—best interests of the child—adoption or guardianship—sixteen-year-old minor—misapprehension of law—remand**

Where the trial court's best interests determination—which found that termination of parental rights would aid in the accomplishment of the permanent plan of adoption or guardianship—appeared to rest upon a misapprehension of the legal differences between adoption and guardianship (termination was not necessary to accomplish guardianship), the matter was remanded for reconsideration of guardianship as a dispositional alternative. The trial court was instructed to give proper weight to the now-seventeen-year-old minor's age, his lack of consent to adoption, his bond with his parents, and the availability of a family to be appointed as guardians.

**2. Termination of Parental Rights—best interests of the child—statutory factors—sufficiency of findings—adoption**

The trial court did not abuse its discretion by concluding that termination of a mother's and father's parental rights was in their nine-year-old daughter's best interests where the trial court appropriately considered the statutory factors, making unchallenged findings that the daughter was bonded with her prospective adoptive family and that termination would aid in the permanent plan of adoption. Explicit written findings were not required on matters for which there was no conflict in the evidence.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 2 December 2019 by Judge Dennis J. Redwing in District Court, Cherokee County. This matter was calendared for argument in the Supreme Court on 23 November 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

*Elizabeth Myrick Boone for petitioner-appellee Cherokee County Department of Social Services.*

*Michelle FormyDuval Lynch for appellee Guardian ad Litem.*

**IN RE A.K.O.**

[375 N.C. 698 (2020)]

*J. Thomas Diepenbrock for respondent-appellant mother.*

*Dorothy Hairston Mitchell for respondent-appellant father.*

NEWBY, Justice.

Respondents appeal from the trial court's orders terminating their parental rights to A.K.O. and A.S.O. ("Alyson" and "Adam").[1] After careful review, we affirm in part, vacate in part, and remand to the trial court to reconsider Adam's age of 17 years old, reweigh his request to keep respondents' parental rights intact with whom he had a strong bond, and to reevaluate guardianship for Adam as an alternative to termination of parental rights. Alyson, Adam's younger sister, was only nine years old at the time of the hearing, significantly younger than Adam; thus, our analysis regarding Adam is not applicable to Alyson.

On 31 March 2017, the Cherokee County Department of Social Services (DSS) received a report claiming that respondents were both in jail, and Alyson had not been in school that day. The reporter expressed concern because Alyson had stated that the family was homeless, and they were "going to somebody's old house that stinks." The reporter believed it to be an abandoned house. Social workers met with respondent-father at the Cherokee County Detention Center concerning the allegations. Respondent-father told social workers that he was not sure what was happening with the children because he had been in jail for the past week, but he informed social workers that he, along with respondent-mother and the two juveniles, had recently moved to Murphy, North Carolina and were living in his grandparents' house.

Social workers went to the grandparents' house in Murphy. Upon arriving at the house, they observed a significant amount of furniture, trash, clothes, broken glass, and other objects on the outside grounds. The items were stacked in large unorganized piles and had "a strong offensive pet like odor." The social workers knocked on the door, and it was answered by respondent-mother. The social workers informed respondent-mother of the report they received and told her they needed to discuss it with her. Upon being admitted into the home, social workers found the house to be cluttered with trash, clothing, dishes, glasses, and other items. They also found three mattresses on the floor of the

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

living room. On the mattresses were two unrelated males and the two juveniles. The two men and the two juveniles were wearing dirty and soiled clothing. The home had a pungent smell, and one of the social workers observed a dog urinate in the living room. The dog's urine was not cleaned up throughout the visit, and pet feces and urine spots could be found throughout the home. Additionally, the floor was falling in one of the bedrooms, and some rooms were so cluttered that social workers could not enter them.

Social workers asked if respondent-mother would be willing to take a drug screen, and respondent-mother agreed to complete one. At that time, she disclosed that she had taken prescription medication that had not been prescribed for her a couple of days beforehand. Respondent-mother was transported to the Health Department where she tested positive for methamphetamine, amphetamine, and THC. Respondent-mother subsequently admitted to "snorting meth a couple of days ago." Respondent-mother was asked about a safety resource placement for the children, but she was unable to identify a suitable placement that would be approved by DSS. Accordingly, DSS filed a petition alleging that Alyson and Adam were neglected and dependent juveniles and obtained nonsecure custody.

On 15 May 2017, the trial court adjudicated Alyson and Adam neglected and dependent juveniles. The trial court ordered that custody of the juveniles should remain with DSS, granted respondents visitation, and ordered respondents to work on their case plan. The trial court subsequently set the permanent plan for the juveniles as reunification. Following a hearing held on 7 March 2018, the trial court entered an order changing the permanent plan to guardianship along with a concurrent plan of reunification.

In an order entered on 20 May 2019, the trial court found that respondents were not complying with their case plans. Specifically, the trial court found respondents did not have appropriate housing, had not made child support payments, and had missed half their visits with the juveniles since December 2018. The trial court additionally found that respondents were consistently testing positive for marijuana and methadone, and on 7 January 2019 their drug screens were positive for opioids and marijuana. Accordingly, the trial court changed the permanent plan for the juveniles to adoption with a concurrent plan of guardianship.

On 26 August 2019, DSS filed petitions to terminate respondents' parental rights on the grounds of neglect, failure to make reasonable progress, failure to pay support, and dependency. N.C.G.S.

§ 7B-1111(a)(1)–(3), (6) (2019). On 2 December 2019, the trial court entered orders in which it determined grounds existed to terminate respondents' parental rights based on the grounds alleged in the petitions. The trial court further concluded in separate dispositional orders that it was in Alyson's and Adam's best interests that respondents' parental rights be terminated. Accordingly, the trial court terminated their parental rights. Respondents appeal, arguing that the trial court erred when it determined termination of their parental rights was in Alyson's and Adam's best interests.

A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under subsection 7B-1111(a) of the General Statutes. N.C.G.S. § 7B-1109(f). 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).

We review the trial court's determination of "whether terminating the parent's rights is in the juvenile's best interest," *id.*, for abuse of discretion, *In re Z.A.M.*, 374 N.C. 88, 99, 839 S.E.2d 792, 800 (2020). "Under this standard, we defer to the trial court's decision unless it is 'manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* at 100, 839 S.E.2d at 800 (quoting *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998)). 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 (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).

I.

**[1]** First, we consider whether the trial court abused its discretion by terminating respondents' parental rights to Adam. The trial court made a finding of fact indicating it considered Adam's age and took judicial notice of the findings of facts made at the adjudication hearing. The trial court also made the following findings concerning the factors set forth in N.C.G.S. § 7B-1110(a):

> 8. [Adam] is bonded with his current foster parents, their biological children, and their extended family.
>
> 9. [Adam's] foster family have extended family that are bonded with [Adam] and are interested in adopting [him].
>
> 10. That the court considered the testimony of [Adam] with regard to his bond with his sister [Alyson] and his forthright expression of his desires in this case.
>
> 11. That the [c]ourt admires [Adam] for his actions in trying to understand this situation and responding by making reasoned decisions on behalf of his sister [Alyson].
>
> . . . .
>
> 15. That termination of the Respondent Parents' parental rights will aid in the accomplishment of the permanent plan of Adoption or Guardianship for [Adam], legally freeing [Adam] for adoption [or] guardianship.
>
> 16. That [Adam] testified that he would prefer Guardianship with the family in Alabama so he can remain with his sister, but wishes to maintain a relationship with the Respondent Parents and does not want their parental rights terminated.
>
> 17. That [Adam] testified that he wishes to keep his family name and wants to continue to have the Respondent Parents' names listed on all of his legal documents.
>
> 18. That [Adam] testified that he wanted to stay with and protect his sister.

> 19. The Respondent Parents testified to their desire to maintain a relationship with [Adam].
>
> . . . .
>
> 21. Based upon the ongoing Neglect of [Adam] demonstrated by the Respondent Parents from at least March 31, 2017 to the present, there is a probability of repetition of the Neglect should [Adam] be returned to the home of the Respondent Parents.
>
> 22. The conduct of the Respondent Parents has been such as to demonstrate that they will not promote the healthy and orderly physical and emotional wellbeing of [Adam].
>
> 23. [Adam] is in need of a Permanent Plan of Care at the earliest age possible that can be obtained only by the severing of the relationship between [Adam] and the Respondent Parents by termination of the parents' parental rights.

Respondents challenge findings of facts 8, 9 and 15 in the trial court's order. Respondents both argue that there was no competent evidence to support findings of fact 8 and 9 that Adam had a bond with his foster family's extended relatives in Alabama. Respondents further challenge finding of fact 15, which states that termination of respondents' parental rights will aid in the accomplishment of the permanent plan of adoption or guardianship by "legally freeing [Adam] for adoption [or] guardianship." Respondents note that, due to his age, Adam's consent is required for him to be adopted. *See* N.C.G.S. § 48-3-601(1) (2019) (providing that a minor over the age of 12 must consent to adoption, unless consent is not required under N.C.G.S. § 48-3-603 (2019) and the trial court makes the necessary findings under that section). Here Adam clearly expressed his desire to not be adopted but rather to keep his biological parents' rights intact.

Findings of fact 8 and 9 are supported by competent evidence. During the dispositional hearing, DSS's Court Report was admitted into evidence without objection. In the report, DSS stated that Adam and Alyson had "spent holidays and vacations" with the family in Alabama and, "[d]uring these times, they have developed a bond with the family." This evidence supports the factual findings in that it permits a reasonable inference that Adam is bonded with the prospective adoptive family in Alabama. Consequently, we are bound by them on appeal. *See In re E.F.*, 375 N.C. 88, 91, 846 S.E.2d 630, 632 (2020).

We next consider respondents' challenges to finding of fact 15 concerning the need to terminate respondents' rights to aid in the accomplishment of the permanent concurrent plans of adoption or guardianship. Adam, just days away from his sixteenth birthday when the trial court entered its order, indicated that he does not wish to be adopted and prefers guardianship even though his permanent plan remains a concurrent plan of adoption or guardianship. While it is true that termination of respondents' parental rights would aid in the permanent plan of adoption, *see In re A.J.T.*, 374 N.C. 504, 512, 843 S.E.2d 192, 197 (2020), it is not legally necessary to accomplish the concurrent permanent plan of guardianship, *see* N.C.G.S. § 7B-600(a) (2019) (providing for appointment of guardians "when no parent appears in a hearing with the juvenile or when the court finds it would be in the best interests of the juvenile"). Thus, the trial court was incorrect in believing that termination of respondents' parental rights is necessary to free Adam for guardianship.

We next consider respondents' arguments that the trial court failed to make written findings regarding all the factors set forth in N.C.G.S. § 7B-1110(a). Respondent-father contends the trial court failed to address his bond with Adam, whereas respondent-mother asserts that the trial court failed to make written findings regarding her bond with Adam, as well as the likelihood of Adam being adopted.

Subsection 7B-1110(a) requires the trial court to consider all the factors but "does not, however, explicitly require written findings as to each factor," particularly when there was no conflict in the evidence regarding those factors. *In re A.U.D.*, 373 N.C. 3, 10, 832 S.E.2d 698, 702 (2019). Here it is uncontested that Adam had a bond with his parents. Adam testified that he had a bond with his father, and during closing arguments the attorney for DSS stated that Adam was bonded with his parents. It was also undisputed that Adam did not wish to be adopted and would not give his consent to being adopted, and therefore it was unlikely that he would be adopted. Thus, because these factors were uncontested, no written findings were necessary. *Id.* at 11, 832 S.E.2d at 703.

We further note that while the trial court may not have made explicit findings regarding the statutory factors set forth in N.C.G.S. § 7B-1110(a)(2) and (4), its remaining dispositional findings of fact demonstrate that it considered Adam's bond with his parents and the likelihood of his being adopted. In finding of fact 10, the trial court found that it had considered the "expression of [Adam's] desires in this case," meaning that Adam did not wish to be adopted. In finding of fact 16, the trial court noted Adam's testimony that he wished to maintain a relationship with his parents and did not want their rights terminated.

Accordingly, we conclude that the trial court did not err by failing to make written findings of fact using the exact language contained in N.C.G.S. § 7B-1110(a).

Lastly, respondents argue that consideration of the statutory factors set forth in N.C.G.S. § 7B-1110(a) does not support termination of their parental rights. Specifically, respondents cite: (1) their bond with Adam; (2) the likelihood that he would not be adopted because he would not grant consent; (3) that termination of their parental rights was unnecessary to accomplish Adam's preferred disposition of guardianship; and (4) that due to Adam's age, there were few, if any, benefits to Adam being adopted. While generally the trial court's decision is well supported, it seems the trial court's decision to terminate respondents' parental rights was made under a mistake of law concerning guardianship.

First, it is undisputed that Adam had a bond with respondents, and it appears he especially had a strong bond with respondent-father. When considering the other factors set forth in N.C.G.S. § 7B-1110(a), however, the trial court's determination that termination of respondents' parental rights is in Adam's best interests seems to misapprehend the weight that should be given to Adam's consent to adoption, particularly given his age. While termination of respondents' parental right would technically aid in accomplishing the permanent plan of adoption, the trial court should not place undue emphasis on this statutory factor when Adam will not consent to adoption and is a much older juvenile.

Adam clearly expressed that he did not wish to be adopted and would not give consent to being adopted. Here, just prior to the termination hearing, Adam wrote a letter to the judge who would preside over the hearing, in which he stated:

> I understand there is a family in Alabama who are willing to adopt my sister and provide guardianship for me. I understand that I have a choice, being over 12 years old, that I seek guardianship and **NOT** adoption. I prefer guardianship over adoption due to wanting to keep my last name, I want [respondents'] names to remain on legal documents, and I will be an adult in two years and will only return to Alabama to visit my biological sister. I am struggling to understand the benefits of adoption as I will be turning 18 in twenty-six months. When moving to Alabama I do not want to give up access to mom and dad. I want to be able to speak directly to my parents . . . unrestrained and unsupervised by others.

Adam is now 17 years old. Given Adam's well-reasoned objection to adoption, the trial court's unchallenged finding that Adam's interest in maintaining a relationship with respondents is reciprocated by respondents, as well as the fact that Adam is approaching the age of majority, there are few benefits to terminating respondents' parental rights. As a juvenile ages, the trial court should afford more weight to his wishes.

While Adam is unlikely to be able to return to respondents' home, other dispositional alternatives were available. The guardian *ad litem* advocated for placing Adam in guardianship rather than proceeding with adoption. Contrary to findings of fact 15 and 23, termination of respondents' parental rights is not necessary to place Adam in guardianship with the family in Alabama. *See* N.C.G.S. § 7B-600(a). Those findings suggest a misapprehension of the legal differences between adoption and guardianship. In such a situation, the proper remedy is to remand for reconsideration. *Cf. In re Estate of Skinner*, 370 N.C. 126, 146, 804 S.E.2d 449, 462 (2017) ("It is well-established in this Court's decisions that a misapprehension of the law is appropriately addressed by remanding the case to the appropriate lower forum in order to apply the correct legal standard."). As such, we vacate that portion of the order terminating respondents' parental rights to Adam and remand to the trial court to reconsider guardianship as a dispositional alternative, which does not require termination, and to give proper weight to Adam's age, his lack of consent to adoption, his bond with his parents, and the availability of a family that could be appointed as guardians.

II.

**[2]** We next consider respondents' arguments concerning the order terminating their parental rights to Alyson. Respondents argue that the trial court failed to make a written finding of fact regarding the bond between Alyson and respondents. Respondent-mother argues that the matter should be remanded for further findings under N.C.G.S. § 7B-1110(a), whereas respondent-father asserts that because the trial court failed to consider all relevant statutory factors, the trial court abused its discretion by terminating his parental rights. We are not persuaded.

Explicit written findings regarding each of the factors set forth in N.C.G.S. § 7B-1110(a) are not required when there is no conflict in the evidence. *In re A.U.D.*, 373 N.C. at 10–12, 832 S.E.2d at 702–03. Here the guardian *ad litem* testified that Alyson had a bond with respondent-mother. The guardian *ad litem* described a visit between Alyson and respondent-mother as follows: "[Alyson] and her mom generally will color, or they'll play a game on the phone, or yesterday they were

playing a Heads Up! game and enjoying themselves. It was a nice visit." Additionally, a DSS Court Report from July 2018 stated that "the children and the respondent parents are well bonded." Alyson also wrote a letter to the presiding judge, which was admitted into evidence, in which she stated that she loved her prospective adoptive family and would like to live with them. Alyson further explained, "I would live with my parents but I know why I can't." It thus appears that the undisputed evidence shows Alyson had a bond with respondents. Even assuming *arguendo*, however, that the trial court erred by failing to make a finding regarding this dispositional factor, we would decline to find reversible error because it would only delay permanence for Alyson.

Here Alyson was only nine years old at the time of the hearing, significantly younger than Adam, and thus the same considerations are not applicable to Alyson. Specifically, Alyson's consent is not required for adoption. Additionally, the trial court made unchallenged findings that Alyson was bonded with her prospective adoptive parents, termination of respondents' parental rights would aid in the permanent plan of adoption, Alyson was in need of a permanent plan of care at the earliest age possible, and respondents' conduct had demonstrated that they would not promote Alyson's physical and emotional well-being. Furthermore, it is not contested that Alyson is likely to be adopted.

Therefore, we conclude the trial court appropriately considered the factors set forth in N.C.G.S. § 7B-1110(a) when determining Alyson's best interests and that the trial court's determination that respondents' minimal bond with Alyson was outweighed by other factors was not manifestly unsupported by reason. We therefore hold the trial court's conclusion that termination of respondents' parental rights was in Alyson's best interests did not constitute an abuse of discretion and affirm the trial court's orders as to Alyson.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

**IN RE A.L.S.**

[375 N.C. 708 (2020)]

IN THE MATTER OF A.L.S. AND M.A.W.

No. 153A20

Filed 11 December 2020

**Termination of Parental Rights—grounds for termination—dependency—incarceration**

The trial court did not err by terminating a mother's parental rights in her children on the grounds of dependency (N.C.G.S. § 7B-1111(a)(6)) where the mother would be incarcerated for at least twenty-two months beyond the termination hearing and there was no appropriate alternative child care arrangement. The trial court's error in finding that her expected release date was approximately eight additional months later (thirty months) was harmless.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 27 December 2019 by Judge Christy E. Wilhelm in District Court, Cabarrus County. This matter was calendared for argument in the Supreme Court on 23 November 2020, but was determined upon the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

*E. Garrison White for petitioner-appellee Cabarrus County Department of Human Services.*

*Adams, Howell, Sizemore & Adams PA, by Sarah M. Skinner, for appellee Guardian ad Litem.*

*Sean P. Vitrano for respondent-appellant mother.*

ERVIN, Justice.

Respondent-mother Tiffany K. appeals from orders entered by the trial court terminating her parental rights in her minor children A.L.S. and M.A.W.[1] After careful consideration of respondent-mother's arguments in light of the record and the applicable law, we affirm the trial court's termination orders.

1. A.L.S. and M.A.W. will, respectively, be referred to throughout the remainder of this opinion as "Allen" and "Maria," which are pseudonyms used to protect the juveniles' identities and for ease of reading.

On 24 August 2018, the Cabarrus County Department of Human Services filed petitions alleging that Allen and Maria were neglected and dependent juveniles and obtained the entry of orders placing the children in nonsecure custody. DHS alleged that respondent-mother had tested positive for the presence of cocaine and marijuana while pregnant with Maria. On or about 17 May 2018, DHS received a report that Maria had tested positive for the presence of cocaine at birth and that there were concerns about the quality of the care that respondent-mother had been providing for the children. Respondent-mother provided the name of an individual who was willing to serve as a temporary safety provider for Allen and Maria. However, several problems developed with this safety placement, including an accidental shooting in the home, the existence of domestic discord and criminal activity, and the fact that the provider's health difficulties interfered with her ability to provide adequate care for the children. In addition, DHS alleged that, on 16 July 2018, respondent-mother had tested positive for the presence of cocaine and reported that she would be rendered homeless as a result of being evicted from her home. Finally, DHS alleged that respondent-mother was on probation and had pending court dates in both Cabarrus and Rowan County involving multiple criminal charges.

The juvenile petitions came on for hearing in the District Court, Cabarrus County, on 25 October 2018. On 7 November 2018, Judge William G. Hamby, Jr., entered an order concluding that the children were neglected and dependent juveniles and ordering that they remain in DHS custody. As a precondition to allowing her to reunify with the children, Judge Hamby ordered respondent-mother to complete a psychological and parenting capacity evaluation and a substance abuse assessment, to submit to random drug and alcohol screens, to complete a life skills assessment, to take advantage of a supervised weekly visitation plan, and to obtain and maintain suitable housing for herself and her children. On or about 27 October 2018,[2] respondent-mother was arrested and charged with having committed multiple criminal offenses including giving fictitious information to a law enforcement officer, resisting a public officer, hit and run driving, and fleeing to elude arrest.

After a review hearing held on 10 January 2019, the trial court entered an order on 20 February 2019 finding that respondent-mother

2. As an aside, we note that the 20 February 2019 order states that respondent-mother's arrest occurred on both 24 October 2018 and 27 October 2018. However, we are unable to determine that the actual date upon which respondent-mother was placed under arrest makes any material difference for the purpose of properly resolving the issues that have been raised for our consideration on appeal.

had made little progress toward satisfying the requirements imposed upon her in the initial dispositional order. Prior to her incarceration, respondent-mother had attended two of a possible six visits with Allen and Maria and had failed to maintain biweekly contact with DHS. At this stage of the proceedings, however, the primary permanent plan for Allen and Maria remained reunification coupled with a secondary permanent plan of guardianship.

After a permanency planning hearing held on 28 March 2019, the trial court entered an order finding that, due to respondent-mother's incarceration, she had not made any progress in complying with the requirements that had been imposed upon her in the initial dispositional order and that it was not possible for the children to be returned to her care within the next six months. In addition, the trial court noted that respondent-mother had entered pleas of guilty to numerous charges on 31 January 2019 and had been sentenced to a term of thirty-two to fifty-six months imprisonment. The trial court changed the primary permanent plan for Allen and Maria to one of adoption, with a secondary permanent plan of reunification.

On 10 July 2019, DHS filed motions seeking to have the parental rights of respondent-mother and the children's unknown father terminated on the basis of neglect, N.C.G.S. § 7B-1111(a)(1); willful failure to pay a reasonable portion of the cost of the care that the children had received while in DHS custody for a continuous period of six months prior to the filing of the termination motions, N.C.G.S. § 7B-1111(a)(3); failure to legitimate the children, N.C.G.S. § 7B-1111(a)(5); dependency, N.C.G.S. § 7B-1111(a)(6); and willful abandonment, N.C.G.S. § 7B-1111(a)(7). The termination motions came on for hearing before the trial court on 14 November 2019. On 27 December 2019, the trial court entered orders terminating respondent-mother's parental rights in the children on the basis of neglect, dependency, and willful abandonment and determining that the termination of respondent-mother's parental rights would be in the children's best interests. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent-mother noted an appeal to this Court from the trial court's termination orders.

In seeking relief from the trial court's termination orders before this Court, respondent-mother challenges a number of the trial court's findings of fact as lacking in sufficient evidentiary support. In addition, respondent-mother challenges the lawfulness of the trial court's conclusion that her parental rights in Allen and Maria were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(1) on the grounds that the trial court's findings and the record evidence did not support a conclusion

that the children were likely to be neglected in the event that they were returned to her care; that her parental rights in the children were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(6) on the grounds that the trial court had failed to explicitly find that her incarceration constituted a condition that rendered her incapable of parenting Allen and Maria for the foreseeable future; and that her parental rights in the children were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(7) on the grounds that the trial court's findings and the record evidence did not support a conclusion that she had willfully abandoned them.

According to well-established North Carolina law, the termination of a parent's parental rights in a juvenile involves 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) (2017)). "If [the trial court] determines that one or more grounds listed in [N.C.G.S. §] 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile[s] to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016).

"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) (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). "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)). In view of the fact 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. 190, 194, 835 S.E.2d 417, 421 (2019), we will focus our attention upon the validity of respondent-mother's challenge to the lawfulness of the trial court's determination that respondent-mother's parental rights in the children were subject to termination on the basis of dependency pursuant to N.C.G.S. § 7B-1111(a)(6).

According to N.C.G.S. § 7B-1111(a)(6), a trial court may terminate a parent's parental rights in a juvenile based upon a finding that

> the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of [N.C.]G.S. [§] 7B-101, and that there is a reasonable probability that 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). A dependent juvenile is one who is "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). "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 K.R.C.*, 374 N.C. 849, 859, 845 S.E.2d 56, 63 (2020) (quoting *In re L.R.S.*, 237 N.C. App. 16, 19, 764 S.E.2d 908, 910 (2014)).

In its termination orders, the trial court found that respondent-mother had been incarcerated during a "majority of this case" and remained imprisoned at the time of the termination hearing.[3] The trial court also found that respondent-mother had been arrested in October 2018 for "habitual felon, resisting public officer (3 counts), fictitious information to an officer, failure to he[e]d light or siren, hit/run fail to stop, flee/elude arrest (3 counts), and reckless driving." In addition, the trial court found that, on 31 January 2019, respondent-mother had been sentenced to a term of thirty-two to fifty-six months imprisonment and had a projected release date of 18 May 2022. The trial court further found that, since January 2019, respondent-mother had identified at least six individuals as potential placements for Allen and Maria

3. The adjudicatory findings of fact and conclusions of law contained in the separate orders terminating respondent-mother's parental rights in Allen and in Maria are substantially similar and will be considered as if they were identical in this opinion in the interests of brevity.

and that all of "these individuals [had either failed to] complete[ ] the information packet or [had] declined to move forward with the [home study] process." Moreover, the trial court found that, even though several home study requests had been submitted relating to potential relative placements, all of them had been rejected "due to either criminal history or unsafe environment or a response was never received from the requested family member." For that reason, the trial court found that there was not a proper alternative care plan in place for the juveniles and that "no other options" for the juveniles aside from adoption were actually available. Based upon these findings of fact, the trial court concluded as a matter of law that respondent-mother was incapable of providing for the proper care and supervision of Allen and Maria so as to make them dependent juveniles as defined in N.C.G.S. § 7B-101(9), that there was a reasonable probability that respondent-mother's incapability would continue for the foreseeable future, and that respondent-mother lacked an appropriate alternative child care arrangement for the children.

Respondent-mother has not challenged the lawfulness of the trial court's determination that she lacked an appropriate alternative child care arrangement in her brief before this Court. Instead, respondent-mother argues that the trial court erred by determining that she was incapable of providing for the care and supervision of Allen and Maria and that this incapability would continue for the foreseeable future. We do not find respondent-mother's arguments to be persuasive.

As an initial matter, respondent-mother argues that the trial court erred by finding that her projected release date was 18 May 2022. According to respondent-mother, awarding credit for the time that she spent in pretrial confinement "results in a release date as early as 24 September 2021," so that, at the time of the termination hearing, respondent-mother had "as little as [twenty-two] months and [ten] days remaining on her sentence, with no other charges pending."

At the 14 November 2019 termination hearing, a social worker testified that respondent-mother's projected release date was May 2022. However, a copy of the criminal judgment that had been entered against respondent-mother was admitted into evidence and shows that respondent-mother had been sentenced to a term of thirty-six to fifty-six months imprisonment and awarded credit against the service of her sentence for 129 days of pretrial confinement. As a result, as DHS now acknowledges, it appears that respondent-mother could possibly be released as early as September 2021, a date which is approximately twenty-two months after the date upon which the termination hearing

was held. Even so, we conclude that any error that the trial court might have committed in determining respondent-mother's expected release date did not prejudice her chances for a more favorable outcome at the termination hearing. *See Starco, Inc. v. AMG Bonding and Ins. Servs., Inc.*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996) (stating that, "to obtain relief on appeal, an appellant must not only show error, but that appellant must also show that the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action." (citation omitted)).

At the time of the termination hearing, respondent-mother was not scheduled to be released from imprisonment for at least twenty-two additional months and potentially faced up to forty-two additional months' imprisonment. The fact that respondent-mother faces an extended period of incarceration regardless of the exact date upon which she is scheduled to be released provides ample support for the trial court's determination that she was incapable of providing for the proper care and supervision of the children and that there was a reasonable probability that her incapability would continue for the foreseeable future. *See In re L.R.S.*, 237 N.C. App. at 21, 764 S.E.2d at 911 (holding that, where the respondent-mother was not scheduled to be released from federal custody for at least an additional thirteen months at the time of the termination hearing and potentially faced another 30 months of imprisonment, her "extended incarceration [was] clearly sufficient to constitute a condition that rendered her unable or unavailable to parent [the juvenile]"); *see also In re N.T.U.*, 234 N.C. App. 722, 760 S.E.2d 49 (2014) (holding that, where the respondent-mother had been incarcerated since the juvenile had initially entered DSS custody, had been awaiting trial upon homicide and bank robbery charges for a period of two years, and did not have a scheduled trial date, the trial court did not err by determining that the respondent-mother was incapable of providing care for the juvenile and that there was a reasonable probability that her incapability to do so would continue for the foreseeable future). For that reason, any error that the trial court might have committed in determining the exact length of respondent-mother's period of incarceration constituted, at most, harmless error, with the trial court having sufficiently tied respondent-mother's incarceration to the relevant statutory standard in its findings.

In addition, respondent-mother argues that the trial court failed to explicitly identify a cause or condition that rendered her unable to provide care for the children as contemplated by N.C.G.S. § 7B-1111(a)(6), with this contention resting upon the decisions of the Court of Appeals in *In re Clark*, 151 N.C. App. 286, 565 S.E.2d 245 (2002), and *In re J.K.C.*, 218 N.C. App. 22, 721 S.E.2d 264 (2012). In *In re Clark*, the Court of

Appeals relied upon a prior version of N.C.G.S. § 7B-1111(a)(6), which provided that a parent's parental rights in a child were subject to termination in the event that the trial court found

> [t]hat the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of [N.C.] G.S. [§] 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other *similar* cause or condition.

*In re Clark*, 151 N.C. App. at 288, 565 S.E.2d at 247 (emphasis added) (quoting N.C.G.S. § 7B-1111(a)(6) (2001)). In light of the applicable statutory language, the Court of Appeals held that the trial court had erred by concluding that the respondent-father was incapable of providing for his daughter's care, despite his incarceration, given that "[t]here was no evidence at trial to suggest that respondent suffered from any physical or mental illness or disability that would prevent him from providing proper care and supervision for [his daughter], nor did the trial court make any findings of fact regarding such a condition," *id.* at 289, 565 S.E.2d at 247–48, and given the absence of "clear and convincing evidence to suggest that respondent was incapable of arranging for appropriate supervision for the child." *Id.* at 289, 565 S.E.2d at 248.

In *In re J.K.C.*, the Court of Appeals relied upon *In re Clark* in affirming the dismissal of a termination petition that rested upon allegations of neglect and dependency. *In re J.K.C.*, 218 N.C. App. at 25, 721 S.E.2d at 266-77. In reaching this conclusion, the Court of Appeals held that, even though the trial court had found that the respondent-father was incarcerated and that no relative was able to provide appropriate care for his children, "the guardian ad litem here did not present any evidence that respondent's incapability of providing care and supervision was due to one of the specified conditions or any other *similar* cause or condition." *Id.* (emphasis added). As a result, in both *In re Clark* and *In re J.K.C.*, the Court of Appeals ruled in favor of the parent based upon the failure of the petitioner to present any evidence that the respondent lacked the ability to provide care for his children as a result of one of the causes or conditions delineated in N.C.G.S. § 7B-1111(a)(6).

The current version of N.C.G.S. § 7B-1111(a)(6) differs from that at issue in *In re Clark* and *In re J.K.C.* by permitting a finding of incapability

based upon "substance abuse, intellectual disability, mental illness, organic brain syndrome, *or any other cause or condition* that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement." N.C.G.S. § 7B-1111(a)(6) (2019) (emphasis added). The current version of N.C.G.S. § 7B-1111(a)(6), unlike the version upon which the Court of Appeals relied in *In re Clark* and *In re J.K.C.*, does not use the word "similar" to describe the other causes or conditions that suffice to support a finding of incapability. In light of this alteration in the relevant statutory language, the trial court in this case was not required to find that respondent-mother was incapable of providing for the children's care based upon of the statutorily enumerated conditions or any other *similar* cause or condition.

As the record reflects, DHS presented evidence tending to show that respondent-mother was incapable of providing for the care and supervision of Allen and Maria based upon a cause or condition encompassed within N.C.G.S. § 7B-1111(a)(6) — the fact that the sentence of imprisonment that had been imposed upon her would not expire until at least twenty-two additional months from the time of the termination hearing. *See In re L.R.S.*, 237 N.C. App. at 21, 764 S.E.2d at 911. Based upon this evidence, the trial court found as a fact that respondent-mother was incarcerated at the time of the termination hearing and would continue to be incarcerated for the duration of her sentence. The trial court's conclusion that respondent-mother was incapable of providing for the proper care and supervision of Allen and Maria for the foreseeable future flows logically from the findings of fact that detail the nature and extent of her continued incarceration. *See Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980) (stating that "[e]vidence must support findings; findings must support conclusions; conclusions must support the [order]" and that "[e]ach 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").

Thus, we hold the trial court did not err by determining that respondent-mother's parental rights in the children were subject to termination for dependency pursuant to N.C.G.S. § 7B-1111(a)(6). In addition, we note that respondent-mother has not challenged the lawfulness of the trial court's conclusion that termination of her parental rights would be in Allen's and Maria's best interests. *See* N.C.G.S. § 7B-1110(a). As a result, for all of these reasons, we affirm the trial court's orders terminating respondent-mother's parental rights in Allen and Maria.

AFFIRMED.

**IN RE A.M.O.**

[375 N.C. 717 (2020)]

IN THE MATTER OF A.M.O.

No. 67A20

Filed 11 December 2020

**Termination of Parental Rights—best interests of the child—abuse of discretion analysis**

The Supreme Court declined to deviate from well-established precedent that a trial court's best interest determination in a termination of parental rights case should be reviewed for abuse of discretion, rather than de novo, as argued by respondent-mother. In this case, the trial court did not abuse its discretion by concluding termination of respondent's parental rights was in the child's best interest based on detailed dispositional findings addressing the statutory factors contained in N.C.G.S. § 7B-1110(a), and that the child's best interests lay in being adopted by his maternal aunt and uncle with whom he had resided for several years.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 6 November 2019 by Judge William F. Brooks in District Court, Wilkes County. This matter was calendared in the Supreme Court on 23 November 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

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

*Keith Karlsson for appellee Guardian ad Litem.*

*Robert W. Ewing for respondent-appellant mother.*

HUDSON, Justice.

Respondent appeals from the trial court's order terminating her parental rights in "Adam,"[1] a minor child born in November 2010. Because we conclude the court did not abuse its discretion by determining that termination of respondent's parental rights was in Adam's best interests, we affirm.

1. A pseudonym.

Wilkes County Department of Social Services (DSS) filed a juvenile petition on 26 July 2017 seeking adjudications of abuse, neglect, and dependency for Adam. The petition alleged respondent was involved in a motor vehicle accident in Stone Mountain State Park on 15 June 2017 while Adam was in the vehicle. Respondent then fled with Adam into the park forest so that rangers were unable to determine if the child needed medical care. When she was located, respondent was arrested and charged with driving while impaired, misdemeanor child abuse, and failure to secure a motor vehicle passenger under sixteen years of age. The petition further alleged respondent was hospitalized with spinal injuries after another motor vehicle accident on 24 July 2017 and was unable to care for Adam.

Following respondent's arrest on 15 June 2017, Adam was moved into a kinship placement with his maternal aunt and uncle. On the day DSS filed its petition, the trial court placed Adam in nonsecure custody with DSS, but he remained in his kinship placement.

The trial court held a hearing on the petition on 11 September 2017 and entered an order adjudicating Adam a neglected juvenile on 20 November 2017. The court made findings consistent with DSS's allegations and noted the agency's "ongoing concerns of both mental health and substance abuse issues for [respondent] based on arrest records, contacts, and a history of traffic accidents."[2] The court awarded legal and physical custody of Adam to DSS and authorized his continued placement with his maternal aunt and uncle. Respondent was granted twice-monthly supervised visitation.

Respondent signed a Family Services Case Plan with DSS on 14 September 2017 in which she agreed to do the following: obtain substance abuse and mental health assessments and follow all treatment recommendations, submit to random drug screens, write a statement explaining why Adam was taken into custody, attend parenting classes, obtain employment and register to pay child support, obtain appropriate housing, maintain weekly contact with the DSS social worker and notify the social worker of any criminal charges, attend all meetings and court proceedings, and comply with all court orders.

At the initial permanency planning hearing on 11 June 2018, the trial court assessed respondent's minimal compliance with her case plan and

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2. Prior to the car accident, DSS had received a report on 14 April 2017 that Adam had witnessed respondent being sexually assaulted by her then-boyfriend while the couple was drinking alcohol and snorting Xanax. When DSS finally located respondent on 31 May 2017, she refused a forensic interview for Adam but agreed to obtain therapy for him.

concluded that further "reunification efforts clearly would be unsuccessful or . . . inconsistent with [Adam's] health, safety or wellbeing and need for a safe, permanent home within a reasonable time." The court relieved DSS of reunification efforts and established a permanent plan for Adam of custody with an approved caretaker with a secondary plan of guardianship. Respondent was granted twice-monthly supervised visitation for a minimum of one hour, conditioned upon her passing a random drug/alcohol screen as a condition of any visitation.

Following a permanency planning review hearing on 1 October 2018, the trial court changed Adam's primary permanent plan to adoption. The court incorporated into its findings reports from DSS and the guardian *ad litem* (GAL) that respondent had accrued new criminal charges, including felony drug possession, "was bonded out of jail in early September[,] . . . [and] will be attending a year-long treatment program in Hickory, NC called Safe Harbor star[t]ing October 1, 2018." The court ordered that respondent, who had not visited Adam since April 2018, "shall have no visitation with the child unless and until [she] is granted such privileges by a Court of competent jurisdiction after proper motion and notice to all other parties."

At a review hearing on 1 April 2019, the trial court found respondent had failed to attend the treatment program in Hickory and had instead absconded from probation which resulted in a period of incarceration. Respondent claimed to have started opioid treatment on 28 February 2019 but had yet to obtain a mental health assessment or address her alcohol abuse and had not visited Adam since April 2018. The court maintained Adam's primary permanent plan as adoption with a secondary plan of guardianship but reinstated respondent's twice-monthly supervised visitation conditioned on the approval of Adam's therapist and respondent passing a drug screen prior to each visit.

DSS filed a petition to terminate respondent's parental rights in Adam on 1 April 2019. After a hearing on 30 July 2019, the trial court entered an order terminating respondent's parental rights (TPR Order) on 6 November 2019.

Based on findings of fact made by clear, cogent, and convincing evidence, the court adjudicated the following statutory grounds for termination: respondent had neglected Adam and was likely to repeat that neglect if the child were returned to her care, *see* N.C.G.S. § 7B-1111(a)(1) (2019); respondent had willfully left Adam in an out-of-home placement for more than twelve months without making reasonable progress to correct the conditions that led to his removal by DSS, *see* N.C.G.S.

§ 7B-1111(a)(2) (2019); and respondent had willfully abandoned Adam for the six-month period immediately preceding DSS's filing of its petition on 1 April 2019, *see* N.C.G.S. § 7B-1111(a)(7) (2019). The court made additional dispositional findings based on the factors in N.C.G.S. § 7B-1110(a) (2019) and concluded it was in Adam's best interests for respondent's parental rights to be terminated.

Respondent filed timely notice of appeal from the termination order pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019). On appeal, respondent does not challenge the trial court's conclusion that grounds exist to terminate her parental rights pursuant to N.C.G.S. § 7B-1111(a)(1)–(2) and (7). However, she contends the court erred at disposition by concluding it was in Adam's best interests that her rights be terminated.

The statute governing the dispositional stage of a termination of parental rights proceeding provides as follows:

> 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). The court must "consider" each of the statutory factors but need only make written findings as to factors for which there is conflicting evidence. *In re A.R.A.*, 373 N.C. 190, 199 (2019).

"The trial court's dispositional findings are binding on appeal if they are supported by any competent evidence" or if they are not specifically contested by the parties. *In re E.F.*, 375 N.C. 88, 91 (2020). The trial

court's determination of "whether terminating the parent's rights is in the juvenile's best interest[s]" under N.C.G.S. § 7B-1110(a) "is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. 3, 6 (2019). Under this deferential standard, we will reverse the court's assessment of a child's best interests only if its decision is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *In re J.S.*, 374 N.C. 811, 822 (2020) (quoting *In re K.N.K.*, 374 N.C. 50, 57 (2020)).

Counsel for respondent anchors his argument on appeal to the premise that the proper standard of review for the trial court's best-interests determination under N.C.G.S. § 7B-1110(a) is *de novo*, rather than abuse of discretion. Respondent contends that a "[p]roper application of a *de novo* standard will result in reversal in this case."

In *In re J.J.B.*, 374 N.C. 787 (2020), this Court was presented with the same argument from counsel in favor of applying a *de novo* review standard to the trial court's best-interests determination under N.C.G.S. § 7B-1110(a). After due consideration of counsel's position, we unanimously "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.]' " *Id.* at 791 (alterations in original) (quoting *In re Z.A.M.*, 374 N.C. 88, 99–100 (2020)). We again decline to alter our longstanding standard of review. *See, e.g.*, *In re L.M.T.*, 367 N.C. 165, 171 (2013); *In re Montgomery*, 311 N.C. 101, 110 (1984).

Having staked her entire appeal on this Court undertaking a *de novo* review of Adam's best interests, respondent offers no argument—even in the alternative—positing that the trial court's decision is so unreasonable or arbitrary as to amount to an abuse of discretion. "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N. Carolina Dep't of Transp.*, 359 N.C. 400, 402 (2005). Given respondent's tactical choice to disregard what she acknowledges to be the existing standard of review in favor of an argument based entirely on this Court's adoption of a new standard, we could conclude our analysis here. *Cf. generally Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606 (2005) ("It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein."). Nevertheless, based on our review of the evidence and trial court's order, we are satisfied the court did not abuse its discretion in determining that Adam's best interests warranted the termination of respondent's parental rights.

The trial court made the following uncontested findings which demonstrate its consideration of the factors in N.C.G.S. § 7B-1110(a):

2. [Adam] is currently eight (8) years old.

3. He is placed in the home of [his maternal aunt and uncle], and has been in that placement since June 16, 2017.

4. [His maternal aunt and uncle] are eager to adopt [Adam].

5. [Adam] is very bonded to his aunt and uncle . . ., and is happy in their home. He is able to maintain contact with his maternal grandmother and other extended family.

. . . .

7. At some visits [Adam] and Respondent Mother would play happily, and he would hug her and hang out with her, but at the end of the visit there were no tears and he appeared ready to return to his aunt's home. At other times he would cry and get angry because he didn't understand why it was taking so long for him to get back to his mother.

8. He is currently in the third grade and doing well. Early in his placement with his aunt and uncle he struggled academically, but has been receiving good grades lately and he has been acting as if education is important to him.

9. When [Adam] was initially placed with his aunt and uncle he had some aggressive behaviors and did not like structure. He did not know how to bathe himself or wipe himself, and would cause himself to throw up after eating.

10. At this time the minor child has made a complete turnaround in his behaviors, and the Social Worker describes him as a "southern gentleman."

. . . .

12. At this time [Adam's] therapist doesn't believe that contact with his mother or [her new husband] would be beneficial for the minor child.

13. [Adam] doesn't speak about his mother much, but when he does he says he loves and misses her, but

> feels safe at his aunt's home. Sometimes he will talk about going fishing with his mom, but will then talk about how she told him to get away from the police. He still asks about his mom and where she is, and if she is okay.
>
> 14. [Adam] expressed he wishes to remain with his aunt and uncle because he feels safe in their home.
>
> 15. There is a high likelihood that [Adam] will be adopted.
>
> 16. Adoption was approved as one of the concurrent Permanent Plans for [Adam] . . . .
>
> 17. Termination of parental rights will aid in the accomplishment of this plan.
>
> 18. [Adam] has spent one quarter of his life in his aunt and uncle's home.
>
> 19. It appears that [Adam] cares for his mother and will always love her as well as his deceased father.
>
> 20. . . . [T]here is a very loving and strong bond with his aunt and uncle. [Adam] feels safe and supported with his aunt and uncle.

We are bound by these findings for purposes of our review. *See In re E.F.*, 846 S.E.2d at 632.

The trial court reached the following conclusions of law based on its dispositional findings of fact:

> 5. That termination of the Respondent's parental rights is in the best interest of [Adam] pursuant to N.C.G.S. § 7B-1110 in that;
>
> a. There is a waning bond between [Adam] and Respondent Mother.
>
> b. There is a strong and loving bond between [Adam] and his aunt and uncle.
>
> c. [Adam] is deserving of permanency and an opportunity to excel.
>
> d. There exists a strong possibility of adoption of [Adam] by his aunt and uncle.

> e. [Adam] is in need of care that Respondent Mother cannot currently provide.
>
> 6. Based on the age of [Adam], his bond with his current foster family, and the need to accomplish a Permanent Plan to provide stability for [him] it is in the best interest of [Adam] and is consistent for his health and safety for the Respondent's parental rights to be terminated so that [he] can proceed with the Permanent Plan of adoption.

In a footnote to her argument, respondent takes exception to the trial court's description of her bond with Adam as "waning" in Conclusion of Law #5(a). She contends "the evidence presented at the termination hearing does not support this conclusion of law."

We view the statement challenged as more properly classified as a finding of fact. *See In re Z.L.W.*, 372 N.C. 432, 437 (2019) ("The trial court also found . . . that the [parent-child] bond had diminished over the long time that [the juveniles] had spent in foster care."). Though included in Conclusion of Law #5, subparts (a)–(e) serve to provide the factual bases for the trial court's conclusion that termination of respondent's parental rights is in Adam's best interests, in accordance with the criteria listed in N.C.G.S. § 7B-1110(a).

Competent evidence, as well as the trial court's uncontested findings of fact, supports the court's finding that Adam and respondent's bond was diminishing over time since Adam entered DSS custody in July of 2017. In addition to dispositional Findings of Fact 7, 13, 14, and 19 quoted above, the trial court's adjudicatory findings show respondent attended just six visits with Adam between January and April of 2018 and had not visited him since 13 April 2018, more than fifteen months before the 30 July 2019 termination hearing. Moreover, respondent had been "allowed weekly phone calls with [Adam] from September 2017 through July 2018. Initially she availed herself of these calls, but when these calls were ceased in July 2018 she had not called [Adam] in over 6 weeks." Each of these findings is supported by the DSS social worker's testimony. As reflected in the trial court's findings, the social worker and GAL reported that Adam still loves respondent but does not "talk about her outside of being asked[.]"Asked directly by the trial court, the maternal aunt testified that Adam spoke "less" about respondent rather than more as time has gone on. Finally, as stated in dispositional Finding of Fact 14, the social worker testified Adam had expressed his desire to remain with his aunt and uncle permanently. Respondent's argument about Conclusion of Law 5(a) is without merit.

Respondent also claims the trial court should have awarded guardianship of Adam to his maternal aunt and uncle pursuant to N.C.G.S. § 7B-600(a) (2019) rather than terminating respondent's parental rights in order to allow the aunt and uncle to adopt Adam. Given Adam's young age and desire to maintain a relationship with his mother, respondent contends guardianship is a superior outcome to adoption, providing Adam with a permanent home without unnecessarily severing the parental bond. *See* N.C.G.S. § 7B-100(4) (2019).

Similar arguments were raised in the recent cases *In re Z.L.W.*, 372 N.C. 432 (2019) and *In re Z.A.M.*, 374 N.C. 88 (2020). In both instances, the trial court concluded that it was in the juveniles' best interests to terminate the respondent-parents' rights despite the existence of a strong parent-child bond. *In re Z.A.M.*, 374 N.C. at 100 ("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."); *In re Z.L.W.*, 372 N.C. at 437 ("[T]he trial court made extensive findings regarding the strong bond between respondent and [the juveniles]. The trial court also found, however, that the bond had diminished over the long time that [the juveniles] had spent in foster care."). The respondent-parents also argued that the trial court should have considered guardianship for the juveniles in lieu of adoption. *In re Z.A.M.*, 374 N.C. at 100 ("Respondents . . . 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."); *In re Z.L.W.*, 372 N.C. at 438 ("Respondent further argues. . . the trial court should have considered other dispositional alternatives, such as granting guardianship or custody to the foster family, thereby leaving a legal avenue by which [the juveniles] could maintain a relationship with their father.").

In both *In re Z.A.M.* and *In re Z.L.W.*, we concluded the trial court did not abuse its discretion in choosing to terminate the respondents' parental rights. While acknowledging the existence of the bond between the respondents and their children, we noted "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.A.M.*, 374 N.C. at 100 (quoting *In re Z.L.W.*, 372 N.C. at 437). Moreover,

> 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)[.]

*Id.* at 100–01 (emphasis omitted) (quoting *In re Z.L.W.*, 372 N.C. at 438).

Here, as in *In re Z.A.M.* and *In re Z.L.W.*, the trial court made detailed dispositional findings regarding the factors in N.C.G.S. § 7B-1110(a) and provided a reasoned basis for its conclusion that it was Adam's best interests to be adopted into the safe and loving home of his maternal aunt and uncle, where he has resided since June 2017. *In re Z.A.M.*, 374 N.C. at 101; *In re Z.L.W.*, 372 N.C. at 437–38. Therefore, we hold the trial court did not abuse its discretion in terminating respondent's parental right and so affirm the termination order.

AFFIRMED.

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IN THE MATTER OF A.P.

No. 208A20

Filed 11 December 2020

**Termination of Parental Rights—no-merit brief—neglect—failure to pay a reasonable portion of the cost of care—personal jurisdiction**

The termination of a mother's and father's parental rights to their daughter on grounds of neglect and willful failure to pay a reasonable portion of the cost of care (N.C.G.S. § 7B-1111(a)(1), (3)) was affirmed where the parents' counsel filed a no-merit brief, the trial court properly exercised personal jurisdiction over the parents (who were served process by publication after diligent but unsuccessful attempts to effect personal service), and the order was supported by clear, cogent, and convincing evidence and based on proper legal grounds.

**IN RE A.P.**

[375 N.C. 726 (2020)]

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 10 February 2020 by Judge Meredith A. Shuford in District Court, Lincoln County. This matter was calendared for argument in the Supreme Court on 23 November 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

*J. Fielding Yelverton for appellee Lincoln County Department of Social Services.*

*Stacie C. Knight for appellee Guardian ad Litem.*

*Leslie Rawls for respondent-appellant father and David A. Perez for respondent-appellant mother.*

NEWBY, Justice.

Respondent-mother and respondent-father appeal from the trial court's order terminating their parental rights in the minor child "Amy."[1] Counsel for respondents have jointly filed a no-merit brief under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. Because we conclude the issues identified by counsel as arguably supporting the appeal are meritless, we affirm.

Amy was born in October 2018 in Lincoln County, North Carolina. On the date of Amy's birth, the Lincoln County Department of Social Services (DSS) received a report that respondent-mother tested positive for amphetamines upon her admission to the hospital, "had been using heroin, Suboxone, and other drugs," and would be involuntarily committed, leaving newborn Amy without a caretaker who could consent to medical treatment. Respondent-father, who claimed to be Amy's biological father, was reportedly "at the hospital 'raising cane' " and had to be escorted from the premises.

A DSS social worker responded to the hospital. Medical staff advised her that respondent-mother was in the critical care unit, that she "would be sedated for three to ten days due to withdrawals," and that Amy "would need to be transferred to another hospital for further treatment." Staff had also observed respondent-father arguing with respondent-mother with his hand around her neck. Respondent-father "admitted that he and [respondent-mother] had been using illegal Subutex" and

1. We use this pseudonym to protect the juvenile's identity and for ease of reading.

stated that they were living in a tent in Lincolnton but planned to move to South Carolina "with a man named Johnny who[m] they had met on Craigslist."

The following day, DSS obtained nonsecure custody of Amy and filed a juvenile petition alleging she was neglected and dependent. In addition to the events described above, the petition alleged respondent-mother and respondent-father had histories with child protective services involving incidents of substance abuse and domestic violence as well as prior criminal convictions for impaired driving and drug offenses and pending felony charges.

Respondents appeared in court for a nonsecure custody hearing held on 6 November 2018 but left before their case was called. They did not attend any subsequent hearings in the case but were represented by counsel throughout the proceedings.

The trial court held a hearing on DSS's petition on 11 December 2018 and entered an order adjudicating Amy a neglected and dependent juvenile on 24 January 2019.[2] DSS maintained custody of Amy, and the trial court granted respondents ninety minutes per week of supervised visitation conditioned upon a weekly drug test. The trial court ordered each respondent to obtain substance abuse assessments and follow all treatment recommendations, to submit to random drug screens as requested by DSS, to obtain and maintain stable housing and employment, and to attend parenting classes. The trial court reiterated these requirements in a review order entered on 19 March 2019.

A permanency planning hearing was held on 4 June 2019. In the resulting order entered on 12 July 2019, the trial court established for Amy a primary permanent plan of adoption with a secondary plan of reunification. The court found respondents had yet to comply with its prior orders, were not cooperating with DSS, and had attended no visits with Amy since 7 December 2018.

On 1 August 2019, DSS filed a petition to terminate respondents' parental rights in Amy. A summons was issued to both respondents the same day. After unsuccessfully attempting to effect personal service upon respondents, DSS filed a motion for leave to serve respondents by publication on 24 September 2019. *See* N.C.G.S. § 7B-1106(a) (2019). The trial court granted the motion after a hearing held on 1 October

2. At the time of the hearing, DSS had not received the results of respondent-father's DNA paternity test, but respondent-father was named on the birth certificate as Amy's father.

2019. In its order, the court detailed the steps undertaken by DSS to ascertain the "current address or whereabouts" of respondents and found the agency "has made diligent efforts to serve a copy of the petition and summons on the parents . . . through multiple addresses, all of which [have] been returned unserved." The court directed DSS to serve respondents by publication in both Lincoln County and McDowell County, North Carolina. Counsel subsequently filed affidavits with the court confirming DSS had served respondent-mother and respondent-father in accordance with the procedures in N.C.G.S. §§ 1-75.10(a)(2) and 1A-1, Rule 4(j1)–(j2)(3) (2019) by publishing a separate "Notice of Service of Process by Publication" addressed to each respondent in the *Lincoln Times-News* newspaper on 14, 21, and 28 October 2019 and in *The McDowell News* on 25 October, 1 November, and 8 November 2019.

The trial court held a termination of parental rights hearing on 21 January 2020. Respondents did not attend the hearing but were represented by counsel, neither of whom objected to the form of service or to the court's exercise of personal jurisdiction over their client. *See generally In re J.T.*, 363 N.C. 1, 4, 672 S.E.2d 17, 18 (2009) (noting that "any form of general appearance 'waives all defects and irregularities in the process and gives the court jurisdiction of the answering party even though there may have been no service of summons' " (quoting *Harmon v. Harmon*, 245 N.C. 83, 86, 95 S.E.2d 355, 359 (1956))).

Based on the evidence adduced by DSS and the guardian *ad litem*, the trial court entered an order on 10 February 2020 terminating respondents' parental rights in Amy. As grounds for termination, the court concluded that respondents had neglected Amy and were likely to subject her to further neglect if she returned to their care and that respondents had willfully failed to pay a reasonable portion of Amy's cost of care for the six-month period immediately preceding the filing of the petition to terminate their parental rights. N.C.G.S. § 7B-1111(a)(1), (3) (2019). The court also considered the dispositional factors in N.C.G.S. § 7B-1110(a) (2019) and determined it was in Amy's best interests that respondents' parental rights be terminated. Respondents each filed and served timely notice of appeal.

Counsel for respondent-mother and respondent-father have jointly filed a no-merit brief on behalf of their clients pursuant to Rule 3.1(e) of the Rules of Appellate Procedure. In their brief, counsel identified three issues arguably supporting an appeal but explained why they believed these issues lacked merit. Counsel also advised respondent-mother and respondent-father of their right to file pro se written arguments with

this Court and provided them with the documents necessary to do so. Neither respondent has submitted written arguments to this Court.

We carefully and independently review the issues identified by counsel in a no-merit brief in light of the entire record. *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). Having undertaken this review, we are satisfied that the trial court properly exercised personal jurisdiction over respondents and that its 10 February 2020 order is supported by clear, cogent, and convincing evidence and based on proper legal grounds. We therefore affirm the order terminating respondents' parental rights.

AFFIRMED.

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IN THE MATTER OF B.E., J.E.

No. 11A20

Filed 11 December 2020

**1. Termination of Parental Rights—grounds for termination—neglect—substance abuse and inappropriate discipline—denial of effect on children**

The trial court properly terminated respondent-mother's parental rights in her children based on neglect where the trial court found, based on sufficient evidence, that respondent-mother was in denial about how alcohol abuse by the children's father and physical abuse he inflicted on them affected the children and that her failure to address past trauma through recommended therapy precluded her from providing her children with proper care and supervision. These and other findings supported the court's conclusion that there was a high likelihood of the repetition of neglect should the children be returned to her care.

**2. Appeal and Error—preservation of issues—termination of parental rights—child's due process rights**

In a termination of parental rights action, respondent-father failed to preserve for appellate review an argument that the trial court failed to protect his fifteen-year-old son's procedural rights—by providing notice and an opportunity to appear and give testimony independent of the court-appointed guardian ad litem, protections

not specifically granted in N.C.G.S. § 7B-1110—where respondent did not raise the issue for the trial court's consideration.

**3. Termination of Parental Rights—best interests of the child—statutory factors—likelihood of adoption—child's wishes**

The trial court did not abuse its discretion by concluding that termination of respondent-father's parental rights was in the best interests of his fifteen-year-old son where the court's findings addressed each of the dispositional factors in N.C.G.S. § 7B-1110(a) and were supported by competent evidence. The findings demonstrated the court's consideration of the son's views on being adopted, and supported the court's determination that the son's best interests would not be served by requiring him to consent to adoption.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 24 September 2019 and 25 October 2019 by Judge William F. Helms III in District Court, Union County. This matter was calendared in the Supreme Court on 23 November 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

*Perry, Bundy, Plyler & Long, LLP, by Ashley J. McBride, for petitioner-appellee Union County Division of Social Services.*

*Winston & Strawn LLP, by John H. Cobb, for appellee Guardian ad Litem.*

*Sydney Batch for respondent-appellant mother.*

*Jeffrey William Gillette for respondent-appellant father.*

BEASLEY, Chief Justice.

Respondent-mother and respondent-father appeal from the trial court's orders terminating their parental rights in the minor children "Justin"[1] and "Billy." We affirm.

## I. Procedural History

Respondents have three children together: Justin, born in 2006; Billy, born in 2004; and Chaz, born in 2003. In November 2016, the Union

1. Pseudonyms are used throughout the opinion to protect the juveniles' identity and for ease of reading. A third child will be referred to by the pseudonym "Chaz."

County Division of Social Services (DSS) obtained nonsecure custody of respondents' children and filed juvenile petitions alleging they were neglected and dependent. The petitions cited a Child Protective Services (CPS) report received on 29 September 2016 stating that Chaz came to school with a "busted lip" and said respondent-father had "backhanded him in the face and repeatedly hit him in the head with a fist" while intoxicated. The report indicated respondent-father regularly drank alcohol and became angry. It also described respondents' children as frequently hungry due to the "minimal food" in the home and described the home as rat-infested and unkempt.

DSS's petitions further alleged that respondent-father admitted striking Chaz and agreed to refrain from physical discipline as part of a safety agreement. However, respondent-father refused to obtain a substance abuse assessment and failed to attend an assessment scheduled for 28 October 2016. After a social worker met with respondents, respondent-father participated in a substance abuse assessment on 3 November 2016 but refused to engage in the recommended treatment to address "his intensive history of abusing alcohol."

Finally, the petitions alleged DSS received another CPS report of respondent-father repeatedly striking Chaz on the head and knocking him to the ground while drinking alcohol on 7 November 2016. When a social worker met with respondents about the report, respondent-father refused to enter into a safety agreement to refrain from physical discipline, abstain from alcohol, or participate in substance abuse treatment. Respondents told DSS that they had no family support or alternative placement options for the children.

Upon the parties' stipulation to facts consistent with the petitions' allegations, the trial court adjudicated respondents' children neglected and dependent juveniles on 7 February 2017. The court maintained the children in DSS custody and ordered respondent-father to abstain from alcohol, attend Alcoholics Anonymous, engage in substance abuse treatment through Daymark Recovery, attend parenting classes, complete the activities in his Out of Home Services Agreement with DSS, maintain a residence separate from respondent-mother, and submit to random alcohol screens. Respondent-mother was ordered to attend parenting classes, complete the activities in her Out of Home Services Agreement, and obtain a psychological and mental health evaluation and comply with any treatment recommendations. The court forbade both respondents to discuss the case with the children "at any time."

While awaiting an appropriate therapeutic placement for Chaz, the trial court authorized a trial home placement for the child with

respondent-mother beginning in March 2017. At the initial review hearing on 3 May 2017, however, the court ordered Chaz removed from respondent-mother's home and returned to foster care. In its review order, the trial court found respondent-mother "was unable to get [Chaz] to the [school] bus on time" and had failed to administer the child's medication properly despite "multiple instructions" and DSS's provision of "medication bags . . . with the correct amount of medication she needed to administer the medication each night." The court further found that, despite receiving food stamps and additional financial assistance, respondent-mother "cannot keep food in the home" and "has demonstrated an inability to manage her finances" to the detriment of the children; that respondent-mother's home "is in poor condition," infested with insects and rodents, and strewn with trash and soiled clothing; that "the clothing in [Chaz's] bedroom had dog feces mixed within it"; and that respondent-mother "sends [Chaz] to school in clothes that are dirty and too small for him." Although respondent-mother had completed a series of parenting classes, the court found she continued to make inappropriate promises and other statements about the case to the children and had otherwise failed to show "she is able to put what she has learned into effect."

With regard to respondent-father, the trial court found that he continued to drink alcohol, that he smelled of alcohol at his visits with the children, and that he had informed DSS "he would cut back on drinking but would never quit completely" but "the changes he would be making would be temporary only because of DSS involvement."

At the initial permanency planning hearing held 21 March 2018, the trial court concluded that further DSS efforts to reunify the children with respondents "clearly would be futile, unsuccessful and inconsistent with the [children's] health and safety and need for a safe, permanent home within a reasonable period of time." The court established a primary permanent plan of adoption for the children with a secondary plan of custody or guardianship with an approved caretaker.

DSS filed a motion for termination of respondents' parental rights on 14 May 2018. After a series of continuances, the trial court held an adjudicatory hearing beginning on 27 February 2019, proceeding over four dates, and concluding on 8 May 2018. On 24 September 2019, the court entered an order adjudicating the existence of grounds to terminate respondents' parental rights for (1) neglect, (2) willful failure to make reasonable progress to correct the conditions that led to the children's removal from the home, and (3) dependency.

The trial court held a dispositional hearing on 27 September 2019. In an order entered on 25 October 2019, the court concluded that terminating respondents' parental rights was in the best interests of Justin and Billy but not in the best interests of Chaz. The court terminated respondents' parental rights in Justin and Billy and dismissed DSS's motion as to Chaz. *See* N.C.G.S. § 7B-1110(a)–(b) (2019).

Respondents each filed timely notice of appeal pursuant to N.C.G.S. § 7B-1001(a1) (2019). We consider their appeals in turn.

## II. Respondent-Mother's Appeal

**[1]** Respondent-mother claims the trial court erred in concluding that grounds exist to terminate her parental rights pursuant to N.C.G.S. § 7B-1111(a)(1)–(2) and (6). "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 A.L.S.*, 374 N.C. 515, 519 (2020) (quoting *In re C.B.C.*, 373 N.C. 16, 19 (2019)). We have held that "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 (2019). Therefore, if we determine that one of the trial court's adjudicated grounds for termination is supported by the findings of fact and conclusions of law, we need not review the remaining grounds. *Id.*

The trial court concluded, *inter alia*, that respondent-mother had neglected the children under N.C.G.S. § 7B-1111(a)(1). A juvenile is "neglected" within the meaning of our Juvenile Code if he does not receive "proper care, supervision, or discipline" from his parents or "lives in an environment injurious to [his] 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 K.L.T.*, 374 N.C. 826, 831 (2020) (quoting *In re Stumbo*, 357 N.C. 279, 283 (2003)).

For purposes of N.C.G.S. § 7B-1111(a)(1),

> "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 S.D.*, 374 N.C. 67, 73 (2020) (quoting *In re N.D.A.*, 373 N.C. 71, 80 (2019)).

In support of its adjudication under N.C.G.S. § 7B-1111(a)(1), the trial court recounted the conditions leading to the children's prior adjudication as neglected on 7 February 2017. As respondent-mother states in her brief, "[t]he children were removed from the custody of their parents primarily due to the father's alcohol abuse and improper discipline. The trial court also noticed issues with the cleanliness of the home." The court also made findings detailing the causes of Chaz's failed trial home placement with respondent-mother in the spring of 2017.[2]

Respondent-mother argues that, given the progress she and respondent-father had made at the time of the termination hearing, the evidence and the trial court's findings of fact do not support the court's conclusion that Justin and Billy were likely to experience further neglect if they were returned to her custody. *See generally In re Z.V.A.*, 373 N.C. 207, 212 (2019) (requiring court to "consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing"). She contends the trial court "relied heavily on circumstances that no longer existed at the time of the [termination] hearing." We disagree.

The trial court made the following additional findings of fact which support its conclusion that "there is a high likelihood of repeated neglect if the juveniles were returned to [respondent-mother]":

> 16. . . .
>
> (A) . . .

---

2. Respondent-mother objects to the trial court's reliance on Chaz's 2017 trial home placement as evidence that she is likely to neglect the children in the future. In the two years since the trial placement, she avers, respondent-father returned to live with her, and they "completed two parenting classes, engaged in therapy, and had maintained a clean and substance free home for an extended period time." However, the trial court was free to consider the results of a prior trial home placement in determining whether, *at the time of the termination hearing*, respondent-mother was likely to subject the children to future neglect. *See In re Ballard*, 311 N.C. 708, 716 (1984) ("[T]he trial court must admit and consider all evidence of relevant circumstances or events which existed or occurred *either before or after* the prior adjudication of neglect.").

i. [Respondent-mother] has been ordered not to discuss this case with the juveniles. . . . She has continued to discuss the case with the juveniles, making them promises about the outcome of the case and telling them what to say to providers and to DSS workers. This has impeded the juveniles[’] ability to make emotional progress in their current placement.

ii. The juveniles have been led to believe that things will get better. They have been told that they would not have to do anything because she would get them back.

. . . .

vii. [Respondent-mother] has failed to understand the impact of her actions or inactions, has had on her children. She fails to understand the importance of maintaining a safe, clean environment for the juveniles.

(B) . . .

i. [Respondent-mother] has not gained insight into the effects of [respondent-]father’s severe alcohol abuse and physical abuse on the children . . . . She minimizes [respondent-]father’s actions and makes excuses for his behavior.

ii. [Respondent-mother] . . . cannot stand without assistance for more than 15 minutes and has difficulty completing basic household tasks. She continues to reside with [respondent-father], who does not help or assist her with the housework.

iii. [Respondent-mother] is in need of counseling for anxiety and depression, in part due to sexual abuse of her as a child and young adult, but she does not believe she needs counseling and will not continue counseling.

17. . . .

(A) . . .

. . . .

iv. [Respondent-father] admits to drinking alcohol since age 9, sometimes as many as 24 beers per day, but

> he does not believe he needs to permanently stop drinking and has not showed insight into his drinking problem after undertaking some treatment through Daymark Recovery Services.
>
> (B) . . .
>
> i. [Respondent-father] has failed to understand [the] impact that improper discipline has on the juveniles, and he has not acknowledged that his discipline was improper, therefore making it likely that he would exercise improper discipline again in the future.
>
> ii. [Respondent-father] says that he has corrected his alcohol use. However, he acknowledges he may drink again at some point in the future.
>
> iii. [Respondent-father] will not complete therapy to address his issues of abandonment, as well as his lack of insight into his own substance abuse issues.

To the extent respondent-mother does not contest these findings, they are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97 (1991).

Respondent-mother challenges the portion of Finding of Fact 16(A)(i) which states her ongoing discussions of the case with the children "impeded the[ir] ability to make emotional progress in their current placement." She acknowledges that, "[a]t some point after the adjudication, [she] was ordered not to discuss the case with her children" and that she "should have refrained from making the comments to her children[.]" However, she insists DSS adduced no evidence that her statements "prevented the children from making emotional progress."

In its initial "Adjudication and Disposition Order" entered in February 2017 and in subsequent review orders, the trial court ordered respondent-mother not to "discuss the case with the juveniles at any time" or "under any circumstances." The DSS social workers who observed respondent-mother's visitations with the children testified respondent-mother routinely flouted this prohibition as reflected in Finding of Facts 16(A)(i)–(ii). Respondent-mother's inappropriate comments to the children were an ongoing problem throughout the case up to the time of the termination hearing.

As for the effect of these comments on the children, a social worker testified that Chaz had "a hard time" and became disruptive in his foster placement after respondent-mother falsely assured him, " 'You're

coming home. Don't worry about it. They can't keep you that long[.]" More recently, respondent-mother had told Billy "she can get the kids back in the snap of a finger," leaving him to wonder why he remained in foster care if his mother "could change the judge's mind with the snap of a finger[.]" Both social workers testified that this type of statement to the children "gets their hopes up" by creating unrealistic expectations and promising outcomes respondent-mother cannot deliver. We find this evidence sufficient to support an inference that the children's emotional progress was at least "impeded" by respondent-mother's actions.

Respondent-mother next objects to Finding of Fact 16(A)(vii) and claims the evidence showed she had come to understand, at the time of the termination hearing, both "the importance of maintaining a clean and safe home for her children" and "how her own actions negatively affected the children."

To the extent respondent-mother's objection concerns her willingness to maintain a clean home, we agree the trial court's finding does not account for her improvement in this area. Respondent-mother acknowledged the home had fallen into "disarray" after her back surgery in 2015 and was "a mess" when the children were removed by DSS in November 2016. However, she testified that she and respondent-father had cleaned up the house after he returned in 2017 with the assistance of the DSS social worker and a "Medicaid nurse" who comes to the residence ten hours per week to assist with cleaning. Respondent-mother introduced photographs of the home taken on the morning of 28 February 2019, depicting "how the house looks now[.]"

The DSS social worker largely corroborated respondent-mother's account of the improvement made to conditions in the state of the home between 2017 and the social worker's final visit to the residence in March 2018. Absent any proffer of evidence contradicting respondent-mother's evidence of her ongoing maintenance of a clean home up to the time of the termination hearing, we deem this portion of Finding of Fact 16(A)(vii) to be unsupported by the record. Therefore, we disregard the finding for purposes of our review. *In re J.M.J.-J.*, 374 N.C. 553, 559 (2020); *In re J.M.*, 373 N.C. 352, 358 (2020).

The remainder of Finding of Fact 16(A)(vii) is amply supported by the evidence, including respondent-mother's own testimony. Despite her completion of two sets of parenting classes in February and May of 2017, respondent-mother continued to exhibit a lack of understanding of her responsibility to ensure a safe home environment for her children. DSS introduced a psychological evaluation of respondent-mother prepared by

Dr. George Popper in November 2017. Dr. Popper described respondent-mother's "insight as to the impact of substance abuse and physical discipline . . . on her children" as "inconsistent." By the time of the termination hearing, respondent-mother no longer accepted that the children were neglected at the time of their removal in November 2016. She denied respondent-father had been intoxicated when he "backhanded" Chaz in the mouth and accused the child of exaggerating the incident and of biting his own mouth on the school bus the following morning in order to draw blood and "make some stuff happen." Respondent-mother also denied respondent-father's alcohol use had caused a disruption in the home and suggested his drinking was "[n]ot necessarily . . . a problem with [the] children being in the home" because respondent-father "was not staggering around falling down drunk."

The evidence also supports the trial court's finding that respondent-mother fails to understand the impact of her actions and inactions on the children. In addition to her failure to recognize how her inappropriate statements affected the children, the evidence showed respondent-mother engaged in inappropriately sexualized contact with the children during visitations, requiring ongoing correction by DSS staff or respondent-father. Moreover, in her hearing testimony, respondent-mother repeatedly disavowed any duty to protect her children from respondent-father's substance abuse, anger issues, or physical disciplining, insisting that she "cannot do nothing about it" and "cannot force [respondent-father] to do anything." We find that respondent-mother's argument as to Finding of Fact 16(A)(vii) lacks merit.

Respondent-mother next challenges the evidentiary support for Finding of Fact 16(B)(i), which states she "has not gained insight into the effects of [respondent-father's] severe alcohol abuse and physical abuse on the children" and "minimizes . . . and makes excuses for his behavior." The evidence, however, supports this finding. Respondent-mother devoted a substantial portion of her hearing testimony to denying that the children had been neglected, downplaying the degree of respondent-father's alcohol consumption, and insisting that the physical discipline respondent-father inflicted on Chaz was entirely appropriate, or at least understandable. Respondent-mother refused to believe respondent-father's own account of his alcohol consumption and claimed to be unaware of any occasion when he had hit the children while drinking. In additional to accurately reflecting respondent-mother's testimony, Finding of Fact 16(B)(i) is supported by Dr. Popper's findings regarding respondent-mother's tendency to defend respondent-father and "minimize his physical abuse of [Chaz]." Respondent-mother's argument lacks merit.

To the extent respondent-mother separately contends that the evidence showed her and respondent-father's mutual "acknowledgment of the importance of maintaining a sober household and refraining from physical discipline," we again find her position without merit.

The evidence did show respondent-father's completion of the Moderate Level Substance Abuse Treatment Program at Daymark Recovery Services in October 2018.[3] On the date of his graduation from Daymark, however, he announced to his group, "My medications allow me to drink beer not liquor. [Respondent-mother] will only be mad if it's liquors. I can't say that I won[']t have another drink but it won't be every day."

By respondent-father's own account, he began drinking alcohol at nine years of age and had continued until November 2017 at age 62. He had completed several previous courses of treatment for alcohol abuse, including inpatient treatment at Black Mountain in 1976 which led to a years-long period of sobriety. Respondent-father then resumed drinking and accumulated multiple convictions for impaired driving. Respondent-father also previously attended outpatient treatment at Daymark in 2012.

More recently, respondent-father claimed to have quit drinking alcohol for a three-year period after hitting respondent-mother and then promising her that he "wouldn't drink anymore."[4] He testified he had resumed drinking after this interval because he "wanted a beer" and "she didn't care if [he] drank beer, just don't drink no liquor." Respondent-father claimed respondent-mother objected to him drinking liquor "simply because she knows [he is] not supposed to be drinking it with [his heart] medicine."

Although respondent-father testified he had not drunk alcohol since November 2017, he refused to acknowledge his alcoholism or commit to refrain from drinking alcohol:

> Q. Okay. You have been told you're an alcoholic, haven't you?
>
> A. Does that make me an alcoholic?
>
> . . . .

3. Respondent-father also completed Daymark's Substance Abuse Intensive Outpatient Treatment Program in February 2017.

4. According to respondent-mother, respondent-father had been arrested for hitting her in "[p]robably 2003."

Q. But you don't believe you are?

A. I like beer.

Q. You're not gonna – you might drink again, right?

A. Well, they ain't gonna quit making it, but I might not quit – might not start back drinking either.

Q. Okay.

A. But there is always that possibility.

. . . .

Q. . . . But you don't admit you're an alcoholic?

A. Well, my – I don't admit that I'm retarded either, but I don't see the point in discussing it.

Q. And you believe you're powerless over alcohol?

A. No.

Respondent-father also insisted that his physical discipline of Chaz was an appropriate response to the child's conduct. He did not commit to refraining from similar discipline in the future. Moreover, respondent-father refused to follow Dr. Popper's recommendation to obtain treatment for his anger issues, believing he did not "have anger issues."

Contrary to her assertion on appeal, respondent-mother did not commit to maintaining a household free from alcohol abuse or physical discipline. She took the position that she was accountable only for her own actions and was powerless to exert any control over respondent-father or "force him to do anything." Asked if she had ever threatened to leave respondent-father if he continued to drink alcohol, respondent-mother replied, "No, not really. I told him that – I have told him straight out that, if he's gonna drink liquor, that I'm not gonna be with him, and I'm – that's the truth, I'm not, because I can't deal with it no more." As respondent-father's beverage of choice was beer, respondent-mother's ultimatum did not in any way amount to a demand for his sobriety. Her objection to Finding of Fact 16(B)(i) on this basis is unfounded.

Respondent-mother also claims the trial court erred in basing its adjudication in part on Finding of Fact 16(B)(iii), which notes her refusal to pursue counseling recommended by Dr. Popper to address the sexual abuse and other trauma she experienced as a child. While acknowledging "it is not unreasonable for the trial court to want [her] to address

her underlying childhood traumas,"[5] respondent-mother contends "DSS failed to provide a nexus between [her] past trauma and how it [sic] neglected her children."

The evidence showed Dr. Popper recommended counseling for respondent-mother "to deal with the emotional trauma she suffered as a child[.]"He found respondent-mother's "parenting role models were obviously quite poor," and "the trauma she experienced growing up has had a lasting impact on her ability to care for herself and for her children." Dr. Popper deemed it likely that the emotional abuse respondent-mother suffered at the hands of her alcoholic mother and the sexual abuse inflicted by her brothers and uncle made her less equipped to assert herself against potential abusers in order to protect her children. Dr. Popper expressed his "concern that [respondent-mother] could be intimidated by a potential abuser" and recommended "this [a]s one of the issues that she should address in counseling."

The nexus between respondent-mother's unresolved childhood trauma and her ability to provide her children with proper care and supervision and a safe environment was laid bare by respondent-mother's hearing testimony. Asked about her reaction to respondent-father's alcohol use in the home, respondent-mother described how she would "shut down" to protect herself, as follows:

> My momma was an alcoholic. After so many drinks, she started hitting, and I had to shield myself, and it was my problem. And every time I seen [respondent-father] drink, after the third beer, I shielded myself. I kept myself in a little box for I cannot get hurt. And I kept the boys – I said, "Okay" – I even made them aware of it. "Do not make anybody mad when they are drinking," because of my past, and I recently got over my past of that, because when you live with an alcoholic or raised by an alcoholic, it is hard. You got to know the boundaries. And I – after three beers – I know he wasn't gonna hurt me or anything, but from my past, I automatically shield myself.

---

5. Insofar as respondent-mother's argument may also be construed to challenge the evidentiary support for the finding that she "does not believe she needs counseling and will not continue counseling," we find her claim refuted by her own testimony as well as the testimony of the DSS social worker. Respondent-mother's argument that an unwillingness to discuss her childhood trauma with a therapist "is not the same as her unwillingness to go [to therapy]" lacks merit. And although respondent-mother offered to resume therapy on the date of the termination hearing, nearly two-and-a-half years into the case, the trial court was free to find her offer neither timely nor credible. *See In re D.L.W.*, 368 N.C. 835, 843 (2016).

Respondent-mother also voiced her helplessness to resolve respondent-father's "anger management problem," explaining she had learned to "back off" when she saw he was getting upset. She also seemed to justify respondent-father backhanding Chaz in the mouth in September 2016 by noting, "If I done that to my daddy, he would have done the same thing to me." Because respondent-mother's testimony vindicates each of Dr. Popper's concerns about her need for treatment to address the impact of her childhood trauma, the trial court did not err in citing this issue as a factor tending to show a likelihood of future neglect.

Having reviewed each of the contested findings of fact, we now turn to respondent-mother's claim that the trial court's findings do not support its conclusion that "there is a high likelihood of repeated neglect if the [children] were returned to her" care. *See generally In re J.O.D.*, 374 N.C. 797, 807 (2020) ("[T]he trial court's determination that neglect is likely to reoccur if [the juvenile] was returned to [the respondent-parent's] care is more properly classified as a conclusion of law."). Respondent-mother asserts the trial court improperly based its conclusion on "circumstances that no longer existed at the time of the [termination] hearing." We disagree.

As the trial court found, when given an opportunity to parent Chaz without respondent-father in the home, respondent-mother was unable to administer his medication or otherwise care for him properly. More significantly, although she had made progress regarding the cleanliness of her residence and had completed parenting classes, respondent-mother had not resolved the primary risk posed to the children—that of respondent-father's continued presence in the home. *See In re Z.V.A.*, 373 N.C. 207, 212 (2019) ("The district court's determination in the present case that neglect would likely be repeated if [the child] was returned to respondent-father was intrinsically linked to respondent-father's inability to sever his relationship with respondent-mother."); *see also In re A.R.A.*, 373 N.C. 190, 198 (2019) ("Respondent-mother's argument disregards the primary reason for the removal of her children—the presence of the father in the home.").

As he had multiple times in the past, respondent-father had completed a course of substance abuse treatment at the time of the termination hearing and claimed to have abstained from alcohol since November 2017. However, he continued to deny his alcoholism and felt at liberty to resume drinking beer provided he abstained from liquor. Respondent-father had failed to recognize or obtain treatment for his anger problem and refused to acknowledge using inappropriate physical discipline on Chaz. He testified that DSS had taken the children into custody because

the social worker "just wanted to show [him] she had the power to do what she said she could do."

At the time of the termination hearing, respondent-mother denied the children had ever experienced neglect or inappropriate discipline in the home and disclaimed any responsibility for respondent-father's alcohol abuse or disciplinary methods. She had further failed to address the psychological issues identified by Dr. Popper which prevented her from recognizing the harm caused to the children by respondent-father's behaviors and from taking the necessary steps to provide the children with a safe home. Therefore, we hold the trial court did not err in adjudicating grounds for termination of her parental rights for neglect under N.C.G.S. § 7B-1111(a)(1).

Because we affirm the trial court's adjudication of neglect, we do not review respondent-mother's arguments regarding the additional grounds for termination found by the trial court. *In re E.H.P.*, 372 N.C. at 395. Respondent-mother does not separately contest the court's dispositional determination that terminating her parental rights is in Justin and Billy's best interests. Accordingly, we affirm the trial court's orders as to respondent-mother.

## III. Respondent-Father's Appeal

Respondent-father does not challenge the trial court's adjudication of grounds to terminate his parental rights under N.C.G.S. § 7B-1111(a). Rather, he argues that the trial court abused its discretion at the dispositional stage of the proceeding by concluding it was in Billy's best interests to terminate respondents' parental rights, thereby "ignoring Billy's expressed wishes not to be adopted[.]"

If the trial court adjudicates the existence of one or more grounds for the termination of parental rights, it must then "determine whether terminating the parent's rights is in the juvenile's best interest" after considering 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 trial court's dispositional findings are binding . . . if they are supported by any competent evidence" or if not specifically contested on appeal. *In re E.F.*, 375 N.C. 88, 91 (2020).

We review the trial court's determination of a juvenile's best interests under N.C.G.S. § 7B-1110(a) only for abuse of discretion. *Id.* "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.' " *In re J.J.B.*, 374 N.C. at 791 (quoting *In re Z.A.M.*, 374 N.C. 88, 100 (2020)). A trial court may also abuse its discretion if it "misapprehends the applicable law," *Chappell v. N.C. Dep't of Transp.*, 374 N.C. 273, 281 (2020), or fails to comply with a statutory mandate, *Harris v. Harris*, 91 N.C. App. 699, 705–06 (1988).

Our adoption statutes require the child's consent to an adoption if he is at least twelve years of age. N.C.G.S. § 48-3-601(1) (2019). Under N.C.G.S. § 48-3-603(b)(2) (2019), however, the trial court is authorized to "issue an order dispensing with the [child's] consent . . . upon a finding that it is not in the best interest of the [child] to require the consent."

The trial court made the following findings of fact regarding the dispositional factors in N.C.G.S. § 7B-1110(a):

> (A) . . . [Billy] is 15-years old. He will not reach the age of majority for three years. The undersigned [j]udge has determined that he does not need [Billy's] consent for adoption based on the evidence and testimony heard throughout the case.
>
> (B) . . . [L]ikelihood of adoption for [Billy] is high.
>
> (C) . . . Termination of Parental Rights would aid in accomplishing the permanent plan for [Billy] which is adoption.
>
> (D) . . . [Billy] has somewhat of a bond with his mother but is afraid of his father. [Billy's] only reason to return home would be to protect his younger brother, [Justin] from [respondent-father] and [Chaz]. [Billy] feels as he is one of the parents in regard to [Justin]. This does not constitute a

positive bond between [Billy] and his parents. [Billy] is afraid of returning home.

(E) [Billy] has an interesting character of wanting to cure his father and take care of his brother, [Justin]. [Billy] needs to discuss with his therapist what he believes his relationship with his family is.

(F) . . . [Billy] has a good relationship with his current placement. His current placement wants to adopt him, although they recognize he may not want to be adopted. [Billy's] current placement providers have taken good care of him. [Billy's] foster parents are sensitive to his wishes and concerns regarding his relationship with his parents. They are willing to provide a permanent home for him and he wants to stay in his current home on a permanent basis.

(G) Other relevant considerations:

1) It has been discussed with [Billy] the difference between adoption and guardianship. [He] reports that he understands some aspects between the two.

2) Based on the evidence and testimony heard throughout this case, pursuant to NCGS 48-3-603(b)(2), it is not in [Billy's] best interest for his consent to be required for adoption.

The court separately concluded it was in Billy's best interests that the parental rights of respondent-mother and respondent-father be terminated.

**[2]** We begin by addressing respondent-father's claim that the trial court "fail[ed] to safeguard [Billy's] statutory due process rights" by providing Billy with notice of the dispositional hearing and affording him the opportunity to attend the hearing and testify on his own behalf, independent of his court-appointed guardian *ad litem* (GAL).[6] Assuming arguendo that respondent-father has standing to assert Billy's procedural rights on appeal, we conclude he has failed to preserve this issue for our review.

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6. Respondent-father also asks this Court to "consider" requiring the appointment of counsel to represent the personal preferences of older juveniles, separate from the GAL attorney advocate who advances the juvenile's best interests. Because we conclude respondent-father failed to preserve these issues for appellate review under N.C. R. App. P. 10(a)(1), we decline to consider this issue.

Under the North Carolina Rules of Appellate Procedure, "[i]n 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." N.C. R. App. P. 10(a)(1). In this case, neither respondent-father nor any other party presented the trial court with the argument that Billy had the right to notice and to appear and testify at the dispositional hearing under N.C.G.S. § 7B-1110(a). Therefore, this issue was not preserved for appeal. *See In re E.D.*, 372 N.C. 111, 116 (2019).

We recognize that "[w]hen a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial." *State v. Braxton*, 352 N.C. 158, 177 (2000) (quoting *State v. Lawrence*, 352 N.C. 1, 13 (2000)). However, while characterizing his claim as sounding in "statutory due process,"[7] respondent-father concedes there is no explicit statutory grant of the procedural rights he would provide to Billy. The absence of clear statutory language directed to the trial court compels our conclusion that respondent-father was required to comply with Rule 10(a)(1) in order to raise this claim on appeal. *See In re E.D.*, 372 N.C. at 117 ("When a statute 'is clearly mandatory, and its mandate is directed to the trial court,' the statute automatically preserves statutory violations as issues for appellate review." (quoting *State v. Hucks*, 323 N.C. 574, 579 (1988)).

As respondent-father observes, the statutes governing juvenile abuse, neglect, and dependency proceedings provide certain procedural rights to juveniles who are at least twelve years old in addition to the general right to representation by a GAL under N.C.G.S. § 7B-601(a) (2019).[8] Section 7B-906.1, for example, requires the clerk of court to provide older juveniles with fifteen days' notice of all permanency planning hearings; it also requires the court to "consider information from . . . the juvenile"[9] in addition to the juvenile's parents, caretaker, and

7. Respondent-father did not raise any issue of constitutional due process in the trial court and thus may not raise such a claim for the first time on appeal. *See State v. Gainey*, 355 N.C. 73, 87 (2002).

8. Though not cited by respondent-father, N.C.G.S. § 7B-1108(b)–(d) (2019) governs the appointment of a GAL to represent a juvenile in a termination of parental rights proceeding.

9. The statute governing the initial dispositional hearing in an abuse, neglect, or dependency proceeding also provides "[t]he juvenile" with "the right to present evidence, and . . . [to] advise the court concerning the disposition[.]" N.C.G.S. § 7B-901(a) (2019). Unlike N.C.G.S. § 7B-906.1(c), however, the statute does not expressly distinguish the juvenile from the GAL. *Id.*

GAL in determining "the needs of the juvenile and the most appropriate disposition." N.C.G.S. § 7B-960.1(b)–(c) (2019). Similarly, juveniles twelve years of age or older are entitled to written notice of hearings to review a voluntary foster care placement under N.C.G.S. § 7B-910(d) (2019), and all post-termination placement reviews under N.C.G.S. § 7B-908(b)(1) (2019).

Conspicuously absent from N.C.G.S. § 7B-1110—the statute governing the dispositional hearing in a termination of parental rights case—is any equivalent language providing juveniles of any age with the right to notice or the right to attend and testify at the hearing. *See* N.C.G.S. § 7B-1110(a); *see also* N.C.G.S. §§ 7B-1106(a)-(a1), -1106.1(a) (2019) (addressing service of process or notice of a petition to terminate parental rights or a motion to terminate parental rights filed in a pending abuse, neglect, or dependency proceeding). Moreover, § 7B-1110 *does* expressly provide juveniles twelve years of age or older with the right to be served with a copy of the order terminating their parent's rights. N.C.G.S. § 7B-1110(d) (2019). Our General Assembly has thus demonstrated its ability to codify special protections for older juveniles in the termination of parental rights statutes when it intends to do so.

Faced with the absence of favorable statutory language, respondent-father infers from other sections of the Juvenile Code the General Assembly's "clear preference that the express wishes of older juveniles be communicated directly to the trial court[,]" rather than through intermediaries such as the GAL. For purposes of issue preservation under Rule 10(a)(1), it suffices to say that an unarticulated legislative "preference" is not a clear statutory mandate directed to the trial court. *See generally In re E.D.*, 372 N.C. at 117 (limiting the statutory mandate exception to Rule 10(a)(1)). Accordingly, we hold respondent-father failed to preserve for appeal his arguments regarding Billy's right to participate in the dispositional hearing under N.C.G.S. § 7B-1110(a).

**[3]** Respondent-father also claims the trial court abused its discretion by "ignoring Billy's expressed wishes not to be adopted and by finding that his consent should be waived based on evidence that was neither relevant nor reliable." We find no merit to this assertion.

The trial court received evidence from both DSS and the GAL that Billy had no desire to return to respondents' home and wished to remain permanently with his current foster parents, with whom he had resided since December 2016. The social worker and GAL both testified that Billy had expressed a preference for a guardianship arrangement with his current foster parents rather than adoption "because of loyalty to his

family" and a concern that, "if he's adopted, the bond [with his family] might be threatened[.]" Both witnesses emphasized the number of conversations they had with Billy about the differences between guardianship and adoption, as well as the difficulty Billy experienced in trying to understand the differences.

The trial court's findings accurately reflect the evidence on Billy's position with regard to being adopted by his foster parents. Furthermore, by finding that it was not in Billy's best interests to require his consent to adoption, and by citing the applicable adoption statute, N.C.G.S. § 48-3-603(b)(2), the court demonstrated its consideration of Billy's stated preference for guardianship in lieu of adoption.[10] Although respondent-father contends the court did not give "proper weight" to Billy's preference, the weight assigned to particular evidence, and to the various dispositional factors in N.C.G.S. § 7B-1110(a), is the sole province of the trier of fact.[11] *See In re A.J.T.*, 374 N.C. 504, 514 (2020) ("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.").

Respondent-father also claims the trial court "abused its discretion when it found the likelihood of adoption was high and that termination of parental rights would aid in the adoption." Rather than challenge the evidentiary support for these findings, respondent-father reiterates the point that Billy's adoption would require the trial court to disregard Billy's stated wishes and waive the consent requirement pursuant to N.C.G.S. § 48-3-603(b)(2). On their face, however, these findings evince the court's full awareness of the legal implications of Billy's opposition to being adopted and the court's determination that it was contrary to Billy's best interests to require his consent to adoption. Given the waiver mechanism in N.C.G.S. § 48-3-603(b)(2), the evidence fully supports a finding that Billy is likely to be adopted. As a matter of law, the termination of respondents' parental rights would further that goal.

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10. Although respondent-father does not challenge the trial court's finding on this basis, we note the finding was not made in the context of a pending adoption proceeding under Chapter 48 and is not binding in any future action for Billy's adoption.

11. Respondent-father also asserts the trial court "ignored all the evidence from the social worker and GAL that Billy clearly understood the difference between adoption and guardianship." However, the social worker testified that Billy had stated his preference for guardianship, "but he's also says [sic] he really doesn't understand the difference." Moreover, the trial court's findings credit Billy with understanding "some aspects" of the distinction between guardianship and adoption. Because these findings are supported by competent evidence, they are binding. *In re E.F.*, 375 N.C. at 91.

Having considered each of respondent-father's arguments, we hold the trial court did not abuse its discretion in concluding it was in Billy's best interests to terminate respondent-father's parental rights. The court's findings address each of the dispositional factors in N.C.G.S. § 7B-1110(a) and support its ultimate determination that adoption will provide Billy with the most stable and enduring permanent plan of care. *See* N.C.G.S. § 7B-1100(2) (2019). Accordingly, we affirm the termination orders as to respondent-father.

AFFIRMED.

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IN THE MATTER OF C.A.H.

No. 188A20

Filed 11 December 2020

**Termination of Parental Rights—grounds for termination—willful abandonment—determinative time period—no contact or support**

The trial court's decision terminating a father's parental rights in his child on the grounds of willful abandonment was affirmed where, during the determinative six-month period, the father had no contact with his child, who had moved to California with the mother, despite having working cell phone numbers for the mother and her husband; had expressed no interest in a relationship with the child; and had sent nothing to or for the child except for one partial child support payment. The trial court was also permitted to consider the father's actions outside of the six-month period to evaluate his intentions—for example, the father's failure to express any interest in seeing the child after learning she was back in North Carolina (after the termination petition was filed).

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 2 January 2020 by Judge Christine Underwood in District Court, Alexander County. This matter was calendared in the Supreme Court on 23 November 2020 but determined on the records and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

*No brief for petitioner-appellee mother.*

*Sydney Batch for respondent-appellant father.*

MORGAN, Justice.

Respondent-father, the biological father of C.A.H. (Charlie)[1], appeals from the trial court's orders terminating respondent-father's parental rights on the grounds of willful failure to pay for the cost of care of the child and willful abandonment. We affirm the trial court's decision to terminate respondent-father's parental rights.

*Factual Background and Procedural History*

Charlie was born in September 2014. Petitioner-mother and respondent-father were in a relationship at the time of her birth, but the parents never married. After Charlie was born, petitioner and respondent briefly resided together at the maternal grandfather's home until their separation sometime around December 2014. During the time that Charlie's parents lived together, respondent assisted petitioner with the care of Charlie and with the purchase of necessities for their child.

On 18 March 2016, petitioner obtained a Domestic Violence Protective Order (DVPO) prohibiting respondent from having contact with petitioner and Charlie for a one-year period. While the DVPO was in effect, the paternal grandmother, while babysitting Charlie, took the juvenile to respondent's house in violation of the order. Petitioner was escorted to respondent's home by law enforcement in order to retrieve Charlie from respondent. This was the last time that respondent saw his daughter.

On 10 September 2016, petitioner married her husband, Mr. I. Mr. I was in the military and was stationed in California at the time of the marriage. Petitioner could not live on the military base with her husband, Mr. I, and her daughter, Charlie, without having full custody of the child. Petitioner filed a child custody action and obtained sole custody of Charlie in an order entered by the trial court on 21 December 2016. Respondent was incarcerated at the time of the hearing and was scheduled to be released in May 2017. The trial court ordered respondent to pay $140.00 per month in child support to begin in June 2017 after respondent's release from imprisonment. Petitioner subsequently moved to California with Charlie after entry of the custody order.

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1. Pseudonyms are used in this opinion to protect the juvenile's identity and for ease of reading.

Respondent was released from incarceration in February 2017. Shortly after his release, he contacted petitioner to request a visit with Charlie. When petitioner gave respondent a California address for the location of the authorized visit, respondent became angry. Respondent did not arrange a trip to California for the scheduled visit and did not tell petitioner that he did not plan to attend it. Petitioner and Charlie waited for two hours for respondent at the restaurant which was the chosen site for the respondent's visit with his daughter in California. When petitioner subsequently communicated with respondent via text message concerning respondent's failure to appear for his planned visit with Charlie, respondent answered that it was not "up to him to come and see [Charlie]. It was up to [petitioner] to bring her to him." Respondent testified at the termination of parental rights hearing that he did not attend the visit in California "because it would cost $1,000.00 to get a ticket to go half way across the world." Respondent's last contact with petitioner regarding Charlie was in February 2017.

Petitioner and Mr. I moved back to North Carolina with Charlie in April 2018. Petitioner did not inform respondent that the three of them had moved back to North Carolina. Respondent did not learn that Charlie had returned to reside in North Carolina until respondent was served with the petition to terminate his parental rights.

On 25 April 2019, petitioner filed a petition to terminate respondent's parental rights, alleging the grounds of willful failure to pay for the care, support, and education of the minor child; willful abandonment; and the earlier involuntary termination of respondent's parental rights with respect to another child. *See* N.C.G.S. § 7B-1111(a)(4), (7), (9) (2019). A hearing on the petition was held on 25 July, 29 August, 27 September, and 6 November of the year 2019. In an order entered 2 January 2020, the trial court found that grounds existed to terminate respondent's parental rights based on respondent's willful failure to pay for Charlie's care and respondent's willful abandonment of Charlie. In a separate disposition order entered on the same day of 2 January 2020, the trial court found that termination of respondent's parental rights to Charlie was in the child's best interests. Accordingly, the trial court terminated respondent's parental rights. Respondent appeals to this Court.

*Analysis*

On appeal, respondent challenges the trial court's conclusions that grounds existed to terminate his parental rights. Respondent first argues that the trial court erred in concluding that grounds existed to terminate his parental rights based on willful abandonment. We disagree.

"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). 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, 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).

The trial court may terminate parental rights when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition[.]" N.C.G.S. § 7B-1111(a)(7) (2019). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re B.C.B.*, 374 N.C. 32, 35, 839 S.E.2d 748, 752 (2020) (quoting *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997)). "[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). "The willfulness of a parent's actions is a question of fact for the trial court." *In re K.N.K.*, 374 N.C. 50, 53, 839 S.E.2d 735, 738 (2020). "[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) (quoting *In re D.E.M.*, 257 N.C. App. 618, 619, 810 S.E.2d 375, 378 (2018)).

In the present case, the determinative six-month period for the alleged ground of willful abandonment is 25 October 2018 to 25 April 2019. In support of its conclusion that grounds existed to terminate respondent's parental rights based on willful abandonment, the trial court made the following pertinent findings of fact:

> 9. The minor child [Charlie] was born of a romantic relationship between Petitioner and Respondent. The two were never married. After the minor child was born, the

parties lived together for a brief period of time. During that time, Respondent did assist Petitioner with her care and with the purchase of necessaries.

10. On March 28, 2016 Petitioner obtained a [DVPO] against Respondent, which prevented them from having contact for 12 months. While this [DVPO] was valid, Respondent's mother, while babysitting the minor child, took [Charlie] to Respondent's house in violation of the order. Petitioner required the assistance of law enforcement to enforce the order and obtain the minor child from Respondent's residence in February 2016. This was the last time Respondent was in the presence of the minor child.

11. Petitioner filed for and obtained sole custody of the minor child in Alexander County File Number 16 CVD 123. Respondent was incarcerated at the time of the entry of the custodial order.

12. Pursuant to this Order, he was required to begin paying child support in the amount of $140.00 each month beginning June 1, 2017. He was entitled to "some regular visitation with the minor child upon his release from custody." His release date was in May 2017. There is a provision in the custody order that provides that either party can notice the matter back on if they cannot agree on a visitation schedule. Respondent has never noticed the custody matter back on for hearing or for a modification.

13. Respondent was in arrears on his child support obligation as of July 31, 2019 in the amount of $3,297.37. His payment history consists of three payments: March 15, 2019 for $114.21; May 3, 2019 for $114.21; and June 7, 2019 for $114.21. As a result of his failure to pay child support, an order to show cause is pending in that action.

14. From June 2017 until April 2019 when this petition was filed, Respondent should have made 23 monthly payments toward his child support obligation. In the 12 months next preceding the filing of this TPR action, the Respondent only made one payment toward his child support obligation. Since its filing, he has made two additional payments. None of these payments was for the full amount of court-ordered support. Aside from these three child support

payments, Respondent has provided the minor child with no monetary support, gifts, cards, or other assistance.

15. Petitioner married [Mr. I] on September 10, 2016. She did not join him in California where he was stationed until after she obtained the custody order. Respondent and Petitioner's husband knew one another prior to Petitioner dating her now husband.

16. February 13, 2017 is the last time Respondent contacted Petitioner regarding the minor child. He had been released from custody and requested a visit. Petitioner and the minor child were residing at Camp Pendleton in California. She offered him the opportunity to choose the day and time for the visit. When she sent him an address in California for the place of visitation, this angered him. It is unclear whether he was aware that the minor child was living in California when he requested the visitation. Nevertheless, he did not arrange a trip to California to visit the minor child and did not make arrangements to visit the minor child in North Carolina. He also did not tell Petitioner that he did not plan to attend the arranged visit. She and the minor child waited at the restaurant for two hours. When Petitioner text[ed] him regarding his failure to show, he responded angrily. He told her it wasn't "up to him to come and see her. It was up to her to bring her to him." When asked during his testimony why he didn't attend the visitation, he stated "because it would cost $1,000.00 to get a ticket to go halfway across the world."

17. The next time Respondent reached out to Petitioner was in September 2017 when his uncle died. He did not ask about [Charlie].

18. Petitioner has maintained the same working telephone number since before the birth of the minor child . . . . Respondent has always had the ability to reach her via this telephone number. Further, the Respondent was aware of her husband's number, having communicated with him via this number in the past, and this number has not changed. She did not give Respondent her physical or mailing addresses in California, and he did not ask her for this information.

> 19. Petitioner, her husband, and the minor child returned to Alexander County, North Carolina in April 2018. Neither Respondent nor any member of the family has made contact with Petitioner or her husband to inquire about the welfare of the minor child since February 2017. Except for one partial-support payment prior to the filing of the petition, the Respondent has not provided for the support of his biological child. He did not learn that the minor child had returned to North Carolina until he was served with the petition to terminate parental rights.
>
> 20. Respondent is employed, but has not sent sufficient money to benefit the minor child as required by the child support order. He has been brought to court on several occasions for failure to pay child support. He does not suffer from any disability. He is able-bodied and capable of working. He has not complied with the court order to pay support for the benefit of his biological child, but he is providing financially for the two children he calls his "step-children." He explains thusly, "They are involved in my life. They aren't being kept from me."
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> 21. Even since the filing of the TPR petition April 25, 2019, Respondent has not communicated with Petitioner to inquire about the welfare of his child or to arrange for visitation with her.
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> . . . .
>
> 23. Grounds exist to terminate the parental rights of Respondent pursuant to N.C.G.S. §7B-1111(a)(7) in that the parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition . . . .

On appeal, respondent acknowledges that the trial court correctly found in Finding of Fact 12 that respondent did not file a motion to modify the child custody order despite his knowledge that he could do so. He attempts to explain, however, that his failure to do so was attributable to his limited financial resources and his financial inability to hire an attorney. Since respondent concedes that the record supports this finding, Finding of Fact 12 is "deemed supported by competent evidence and [is] binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019).

Respondent next challenges Finding of Fact 21, regarding his lack of contact with petitioner since the filing of the termination of parental rights petition, as "not [being] supported by competent evidence."However, petitioner testified at the termination hearing that respondent did not contact her after the filing of the termination petition. Indeed, respondent acknowledged during his testimony that he did not contact petitioner to ask her about Charlie after the termination petition was filed. Thus, this finding is supported by clear, cogent, and convincing evidence.

Respondent also challenges Finding of Fact 23 that grounds exist to terminate his parental rights pursuant to N.C.G.S. § 7B-1111(a)(7) because the determination is "not supported by competent evidence."[2] However, Finding of Fact 23 is not an evidentiary finding of fact, but instead is an ultimate finding of fact. *In re J.D.C.H.*, 847 S.E.2d 868, 874 (N.C. 2020). "[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.' " *See In re N.D.A.*, 373 N.C. at 76, 833 S.E.2d at 773 (quoting *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491, 57 S. Ct. 569, 81 L. Ed. 755, 762 (1937)); *see also In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) ("Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts."). As an ultimate finding of fact, the trial court's determination that respondent's parental rights were subject to termination based on willful abandonment "must have sufficient support in the trial court's factual findings." *In re N.D.A.*, 373 N.C. at 77, 833 S.E.2d at 773. Accordingly, we address respondent's challenge to Finding of Fact 23 in our discussion below regarding whether the trial court erred by concluding that respondent's parental rights were subject to termination based on willful abandonment. *In re J.D.C.H.*, 847 S.E.2d at 874.

Respondent further asserts that the trial court erred in concluding that grounds existed to terminate his parental rights based on willful abandonment. Respondent acknowledges that he did not have any contact with Charlie in the six months immediately preceding the filing of

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2. During his argument regarding the ground of willful abandonment in his brief, respondent contends that Findings of Fact 21 and 22 are "not supported by competent evidence." Finding of Fact 22, however, pertains to the other termination ground found by the trial court; namely, respondent's failure to pay for the child's care. Finding of Fact 23 is the trial court's ultimate finding that grounds existed to terminate respondent's parental rights based on willful abandonment. Therefore, respondent's reference to Finding of Fact 22 during his willful abandonment argument is presumed by this Court to be a typographical error, so we address his argument as to Finding of Fact 23.

the termination petition. Respondent argues, however, that his lack of contact was not willful because petitioner did not provide respondent with an address at which to contact Charlie and did not inform him when petitioner moved back to North Carolina with Charlie. We disagree.

First, although the trial court found that petitioner did not provide respondent with a mailing address for petitioner in California, the trial court also found that respondent never asked for this information. The trial court also found that respondent was in possession of petitioner's telephone number, as well as the telephone number for her husband Mr. I. Respondent cannot rely upon petitioner's lack of provision of her address to him to support his claim that his lack of contact was not willful when respondent never made a request for the contact information. Second, while it is true that petitioner did not inform respondent of her relocation from California when she moved back to North Carolina in April 2018 and that respondent only learned of petitioner's return to North Carolina with Charlie when the termination of parental rights petition was filed a year later, respondent had not had any contact with petitioner or expressed any interest in a relationship with Charlie since February 2017. Moreover, respondent made no attempt to reestablish a relationship with Charlie after he learned that his daughter had returned to reside in North Carolina. Although the statutory determinative period for the ascertainment of willful abandonment is the six months immediately preceding the filing of the petition, as we cited earlier, "the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions." *In re N.D.A.*, 373 N.C. at 77, 833 S.E.2d at 773. Here, the trial court found that even after the filing of the termination petition, respondent "has not communicated with [p]etitioner to inquire about the welfare of [Charlie] or to arrange for visitation with her." Thus, the trial court could properly take into account respondent's lack of contact with petitioner about Charlie after the filing of the termination of parental rights petition and after respondent's discovery that Charlie was back in North Carolina in evaluating respondent's intentions and in making its eventual determination that respondent's lack of contact was willful.

The trial court's findings of fact establish that respondent made no effort to participate in the juvenile Charlie's life during the six-month statutory determinative period at issue for the adjudication of the ground of willful abandonment or for the duration of over two years preceding that period. The trial court found that respondent did not send any cards or gifts to his daughter Charlie, did not contact petitioner to inquire into Charlie's welfare, and except for one partial child support payment

which was made one month prior to the filing of the termination petition, did not provide for Charlie's care. After learning that petitioner had moved to California with Charlie in February 2017, respondent did not attempt to set up any further visitation, did not move to modify the child custody order in an effort to create a visitation schedule, and did not ask petitioner for her address in order to have any contact with Charlie. The trial court further found that respondent possessed petitioner's telephone number and "has always had the ability to reach [petitioner] via this telephone number." Respondent's last contact with petitioner to inquire about Charlie was in February 2017. These findings of fact by the trial court in the instant case demonstrate that respondent "willfully withheld his love, care, and affection from [Charlie] and that his conduct during the determinative six-month period constituted willful abandonment." *In re C.B.C.*, 373 N.C. at 23, 832 S.E.2d at 697.

In contravention of this conclusion, respondent claims that his actions during the determinative period did not demonstrate his intent to "willfully forego his parental duties or desire to have a relationship with his daughter." He asserts that during the statutory stretch of time he tendered a child support payment, made several attempts to contact petitioner through his friends' social media and messaging accounts, and met with two attorneys to discuss the child custody order. Respondent argues that the evidence of such actions by him did not demonstrate his intent to abandon Charlie.

However, in reviewing a trial court's adjudication of grounds to terminate parental rights, our examination is limited to "whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re C.B.C.*, 373 N.C. at 19, 832 S.E.2d at 695. It is the trial court's "responsibility to 'pass [ ] upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom.' " *In re A.R.A.*, 373 N.C. 190, 196, 835 S.E.2d 417, 422 (2019) (alteration in original). Because "the trial court is uniquely situated to make this credibility determination . . . 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). Here, the trial court weighed the evidence and eventually determined that respondent's conduct during the determinative period constituted willful abandonment. *See In re K.N.K.*, 374 N.C. at 53, 839 S.E.2d at 738 ("The willfulness of a parent's actions is a question of fact for the trial court.").

In this matter, the trial court's findings of fact support its ultimate finding and conclusion that respondent willfully abandoned Charlie. The

findings establish that respondent had no contact with Charlie or petitioner for over two years prior to the filing of the termination petition on 25 April 2019 and that respondent had the ability to make at least a modicum of contact during that time span but made no effort to do so. Respondent's sole payment of some child support for less than the court-ordered amount during the six months immediately preceding the filing of the termination petition does not undermine the trial court's ultimate finding and conclusion that respondent willfully abandoned Charlie. *See In re C.J.H.*, 240 N.C. App. 489, 504, 772 S.E.2d 82, 92 (2015) (affirming termination based on abandonment where the respondent "did not visit the juvenile, failed to pay child support in a timely and consistent manner, and failed to make a good faith effort to maintain or reestablish a relationship with the juvenile," despite making a last minute child support payment). Therefore, we hold that the trial court did not err by concluding that grounds existed to terminate respondent's parental rights due to willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7).

The trial court's conclusion that a ground for termination of parental rights existed pursuant to N.C.G.S. § 7B-1111(a) is sufficient to support termination of respondent'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's arguments regarding the ground of willful failure to pay for the cost of Charlie's care as directed in the child custody order. *In re S.E.*, 373 N.C. 360, 367, 838 S.E.2d 328, 333 (2020). Respondent does not challenge the trial court's best interests determination. Consequently, we affirm the trial court's orders terminating respondent's parental rights.

AFFIRMED.

**IN RE D.M.**

[375 N.C. 761 (2020)]

IN THE MATTER OF D.M., M.M., D.M.

No. 339A19

Filed 11 December 2020

**1. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—sufficiency of findings—substance abuse and domestic violence**

There was a reasonable probability that a father with an extensive history of substance abuse and domestic violence would repeat the neglect of his children if they were returned to his care where the trial court found that he was inconsistent with drug screening requirements, failed to establish the status or durability of his sobriety, failed to comply with his recommended long-term individual counseling for domestic violence, and demonstrated no meaningful recognition of the effect of domestic violence on his children.

**2. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—sufficiency of findings—substance abuse and domestic violence**

There was a reasonable probability that a mother with an extensive history of substance abuse and domestic violence would repeat the neglect of her children if they were returned to her care where the trial court found that she was inconsistent with drug screening requirements, failed to establish the status or durability of her sobriety, failed to complete her recommended domestic violence counseling, and demonstrated no meaningful recognition of the effect of domestic violence on her children.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) and on writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review orders entered on 15 April 2019 and 18 June 2019 by Judge Shamieka L. Rhinehart in District Court, Durham County. This matter was calendared for argument in the Supreme Court on 23 November 2020, but was determined upon the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

*Elizabeth Kennedy-Gurnee for petitioner-appellee Durham County Department of Social Services; and William A. Blancato for appellee Guardian ad Litem.*

*Sean P. Vitrano for respondent-appellant father.*

*Christopher M. Watford for respondent-appellant mother.*

ERVIN, Justice.

Respondent-father Marcus B. and respondent-mother Danita M. appeal from orders entered by the trial court terminating their parental rights in their minor children D.M., M.M., and D.M.[1] After careful consideration of the arguments that have been advanced in the parents' briefs in light of the record and the applicable law, we affirm the trial court's termination orders.

## I. Factual Background

On 25 August 2015, the Durham County Department of Social Services filed a petition alleging that David and Michael were neglected juveniles. In its petition, DSS alleged that, from 22 May 2014 to 24 June 2015, the family had received in-home services that were intended to address the parents' problems with domestic violence and substance abuse. However, respondent-father failed to engage in services that were intended to address issues relating to domestic violence, mental health, or substance abuse during this time. Although the last documented incident of domestic violence involving the parents had occurred on 18 January 2015, a social worker observed "aggressive, controlling speech" that respondent-father had directed toward respondent-mother on three separate occasions between 6 July 2015 and 14 August 2015.

DSS further alleged that, on 5 July 2015, it had received a new report that the parents had left David and Michael, who were three and one years old, respectively, at the time, in the family home by themselves. According to DSS, the family home was "regularly filthy, cluttered, and unsanitary with open garbage and roaches on the floor." Respondent-mother told representatives of DSS that she absented herself from the home every evening until it became time for the children to go to bed because respondent-father would drink alcohol, become confrontational, and act in a verbally aggressive manner. Although respondent-mother was five months pregnant with her eleventh child, she admitted to DSS representatives that she had smoked marijuana until relatively recently. On 14 August 2015, respondent-mother left the family home with David and Michael and entered a domestic violence shelter.

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1. D.M., M.M., and D.M. will be referred to throughout the remainder of this opinion as, respectively, "David," "Michael," and "Danielle," which are pseudonyms used to protect the juveniles' identities and for ease of reading.

On 22 October 2015, Judge William A. Marsh, III, entered an order determining that David and Michael were neglected juveniles in that they "are not receiving proper care or supervision or live in an environment injurious to their welfare." Judge Marsh ordered that David and Michael remain in respondent-mother's custody on the condition that she provide them with a safe and stable living environment and abstain from being with respondent-father in the presence of the children. In addition, Judge Marsh prohibited the parents from residing together with the children. As a precondition for allowing the parents to reunify with the children, Judge Marsh ordered respondent-mother to ensure that the children were properly supervised at all times; to participate in and complete domestic violence services and follow all recommendations; refrain from engaging in physical altercations with respondent-father; actively participate in mental health and substance abuse services and comply with all resulting recommendations; submit to random drug screens; complete a parenting program; and obtain and maintain safe and stable housing. Similarly, Judge Marsh ordered respondent-father to ascertain the amount of child support that he should be required to pay through the IV-D program; ensure that the children were properly supervised at all times; participate and complete anger management services through the Duke Addictions program; refrain from engaging in physical altercations with respondent-mother; comply with all substance abuse and mental health recommendations that he received from Duke Addictions; submit to random alcohol screens; complete a parenting program; and obtain and maintain gainful employment or some other lawful source of income.

On 8 December 2015, respondent-mother gave birth to Danielle. On 6 July 2016, respondent-mother was arrested and charged with driving while impaired. As a result, David and Michael were placed in the temporary legal custody of respondent-father by consent on 13 July 2016.

On 20 September 2016, DSS filed a petition alleging that Danielle was a neglected and dependent juvenile and obtained the entry of an order placing David, Michael, and Danielle in nonsecure custody. In its petition, DSS alleged that, on the evening of 19 September 2016, the parents had been drinking and began arguing. At 6:00 a.m., respondent-father awoke and could not locate David and Michael. After law enforcement officers had been notified, David and Michael were found at the home of an individual who had been authorized to supervise respondent-mother's visits with the children and who reported that she had "heard something at the door"; that "it was the children trying to get in"; that, upon opening the door, she saw "a small red car drive away;" and that, while

she could not identify the vehicle's driver, "[respondent-mother] is known to drive a small red car." At the time that the parents arrived at the police station, they were observed to be under the influence of an impairing substance and placed under arrest.

The issues raised in the 20 September 2016 petition came on for hearing before Judge Marsh on 10 November 2016. On 10 November 2016, Judge Marsh entered an order determining that Danielle was a neglected and dependent juvenile. In addition, Judge Marsh found that the parents had completed a parenting program, that respondent-mother was not currently engaged in substance abuse and mental health treatment, and that respondent-father needed to engage in substance abuse treatment. As a precondition for allowing the parents to reunify with Danielle, the trial court ordered respondent-mother to resume her participation in mental health therapy; ensure that Danielle was properly supervised at all times; refrain from engaging in physical altercations with respondent-father; actively engage in mental health and substance abuse services and follow any resulting recommendations; submit to random drug screens; maintain safe and stable housing; and participate in supervised visitation with Danielle. Similarly respondent-father was ordered to ensure that Danielle was properly supervised at all times; refrain from engaging in physical altercations with respondent-mother; maintain gainful employment or some other source of lawful income; maintain stable housing; refrain from the use of impairing substances; and complete services with Duke Addictions.

After a permanency planning hearing held on 2 February 2018 and 27 March 2018, the trial court entered an order on 5 June 2018. In its order, the trial court found that respondent-mother had completed active parenting and anger management classes in September 2017 and that respondent-mother had been referred to a family violence case manager with DSS on 6 September 2017, had been referred for domestic violence counseling, and was awaiting the assignment of a counselor. The trial court further found that respondent-mother had begun participating in Vision's Substance Abuse Comprehensive Outpatient Treatment on 31 October 2016 and that, after several negative urine screens, it had been determined that respondent-mother no longer needed these services. In addition, the trial court found that respondent-mother had been referred to Carolina Outreach on 9 November 2017 with a recommendation that she begin weekly occupational therapy and medication management. However, respondent-mother had only attended three therapy sessions since January 2018 and was not consistently engaged in the medication management process. In view of the fact that respondent-mother

was participating in substance abuse services at Visions, DSS had not received random drug screening information and had referred respondent-mother to Duke Family Care for that purpose. On 26 March 2018, respondent-mother had begun full-time employment as a housekeeper at a hotel. Finally, the trial court found that it was not possible for the children to be returned to respondent-mother in the near future because she was still engaged in mental health treatment and attempting to secure stable housing and employment.

In the same order, the trial court found that respondent-father had been working three days a week at a Bojangles restaurant and was earning a weekly amount of $200 in addition to the $1,060 in Supplemental Security Income that he received each month. Although respondent-father had been participating in the Substance Abuse Comprehensive Outpatient Treatment program, Visions had determined that he was no longer eligible to receive their services for insurance-related reasons in November 2017. In addition, even though respondent-father had been referred to B & D Integrated Solutions, he had not been receiving services from that entity. Respondent-father had completed a domestic violence assessment and active parenting and anger management classes in September 2017. On the other hand, respondent-father had not been attending Alcoholics Anonymous or Narcotics Anonymous meetings. The trial court further found that it was not possible for the children to be returned to respondent-father because he had not been consistently participating in mental health treatment and lacked stable housing. In addition, the trial court expressed "uncertain[ty]" concerning the level of sobriety that respondent-father had achieved and maintained given that respondent-father had not participated in random drug screening. As a result, based upon all of these considerations, the trial court established a primary permanent plan for all three children of reunification, with a secondary permanent plan of adoption. After a permanency planning hearing held on 25 June 2018, the trial court entered an order instructing respondent-mother to present negative drug and alcohol screens and requiring respondent-father to re-engage in substance abuse treatment.

On 20 June 2018, DSS filed a motion seeking to have the parents' parental rights in the children terminated based upon neglect, N.C.G.S. § 7B-1111(a)(1); willful failure to make reasonable progress toward correcting the conditions that had led to the children's removal from the family home, N.C.G.S. § 7B-1111(a)(2); and dependency, N.C.G.S. § 7B-1111(a)(6). The termination petition came on for hearing before the trial court in early 2019, with the adjudicatory phase of the proceeding having been conducted on 20 and 21 February 2019 and 20 and 21 March 2019 and with the dispositional phase of the proceeding having

been conducted on 16 and 17 April 2019. On 15 April 2019, the trial court entered an adjudication order determining that the parents' parental rights were subject to termination on the basis of neglect and willful failure to make reasonable progress toward correcting the conditions that had led to the children's removal from the family home. On 18 June 2019, the trial court entered a dispositional order concluding that termination of the parents' parental rights would be in the children's best interests and terminating the parents' parental rights in the children. *See* N.C.G.S. § 7B-1110(a) (2019).

The parents noted an appeal to this Court from the trial court's termination orders. On 22 November 2019, the trial court entered an order dismissing respondent-mother's appeal on the grounds that she had failed to attach a certificate of service to her notice of appeal. On 11 December 2019, respondent-mother filed a petition seeking the issuance of a writ of certiorari authorizing review of the trial court's termination orders on the merits. On 27 December 2019, this Court allowed respondent-mother's certiorari petition.

II. Substantive Legal Analysis

In seeking relief from the trial court's termination orders before this Court, the parents contend that the trial court erred by determining that their rights in the children were subject to termination for neglect, N.C.G.S. § 7B-1111(a)(1), and willful failure to make reasonable progress, N.C.G.S. § 7B-1111(a)(2). "[A]n 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). For that reason, we begin our analysis by considering whether the trial court erred by determining that the parents' parental rights in the children were subject to termination for neglect pursuant to N.C.G.S. § 7B-1111(a)(1).

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) (2019)). "If [the trial court] determines that one or more grounds listed in [N.C.G.S. §] 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile[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).

"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, 772 (2019) (citations omitted). "Findings of fact not challenged by respondent[s] 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)). "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)).

"[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." *In re M.A.*, 374 N.C. 865, 869, 844 S.E.2d 916, 920 (2020) (citing 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." N.C.G.S. § 7B-101(15) (2019).

> "[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 re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (quoting *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984) (emphasis omitted)). 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.' " *Id.* (citation omitted). 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 D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167 (citation omitted).

*In re N.D.A.*, 373 N.C. at 80, 833 S.E.2d at 775.[2] "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.A.*, 374 N.C. at 870, 844 S.E.2d at 921 (quoting *In re M.J.S.M.*, 257 N.C. App. 633, 637, 810 S.E.2d 370, 373 (2018)).

In Finding of Fact No. 8,[3] the trial court found that the family had received in-home services from 22 May 2014 to 24 June 2015 in order to address the parents' substance abuse and domestic violence problems. Subsequently, all three children were found to be neglected juveniles. In Finding of Fact Nos. 10 and 11, the trial court found that David and Michael had been removed from respondent-mother's care and placed in the temporary custody of respondent-father on 13 July 2016 as a result of the fact that respondent-mother had been charged with driving while subject to an impairing substance. In the aftermath of this determination, the parents were allowed to be in each other's presence as long as they were able to refrain from engaging in domestic violence and utilizing impairing substances. In Finding of Fact No. 12, the trial court found that, on 19 September 2016, the children came into DSS custody based upon improper supervision, the parents' substance abuse problems, and the level of conflict between the parents.

In Finding of Fact Nos. 14 through 25 and Finding of Fact No. 31, the trial court described respondent-mother's progress, or lack thereof, in addressing the barriers to reunification that had been found to exist, which included substance abuse problems, mental health concerns, unstable housing, domestic violence issues, and the lack of appropriate parenting skills. In Finding of Fact Nos. 23 through 32, the trial court described respondent-father's progress, or lack thereof, in addressing

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

3. The references to specific findings of fact contained in the remainder of this opinion are all to the adjudication order that the trial court entered on 15 April 2019 given that all of the parents' challenges to the trial court's decision to terminate their parental rights in the children are directed to that order.

the barriers to reunification that had been found to be exist, which included substance abuse problems, mental health concerns, domestic violence issues, the lack of stable housing and gainful employment, and the absence of appropriate parenting skills. The trial court found that, "[b]ased on the fact of the lack of insight as it relates to [d]omestic [v]iolence issues, inconsistency in mental health services, lack of stable housing and lack of consistency in random drug screens, . . . the risk of harm to these children still exists" and "the children would live in an environment injurious to their welfare if returned to their parents." As a result, the trial court determined that "[t]here is a reasonable probability of repetition of neglect" if the children were returned to their parents' care.

A. Respondent-Father's Appeal

**[1]** Although respondent-father has not questioned the propriety of the trial court's determination that the children had been the subject of a prior adjudication of neglect, he does challenge the lawfulness of the trial court's decision that there was a reasonable probability that the neglect that the children had experienced would be repeated in the event that they were returned to his care in light of his alcohol abuse, the existence of domestic violence concerns, the inconsistent level of mental health services that he had received, and the fact that he lacked stable housing. More specifically, respondent-father asserts that some of the trial court's findings of fact lack sufficient evidentiary support and that the remaining findings do not suffice to establish that there was a reasonable likelihood that the neglect that the children had experienced would be repeated if they were returned to his care.

As the trial court's order reflects, respondent-father has an extensive history of substance abuse and involvement in domestic violence dating back to May 2014. It is undisputed that, in September 2016, all three children were taken into DSS custody as a result of the parents' failure to provide them with proper supervision, the parents' abuse of impairing substances, and the existence of conflict between the parents. After carefully considering the record developed before the trial court, we are satisfied that the trial court's findings suffice to support its determination that there was a likelihood that the children would be neglected in the event that they were returned to the parents' care.

As an initial matter, respondent-father argues that the portion of Finding of Fact No. 36(a) stating that his "last random [drug] screen was back in May 2018 and he is currently not receiving treatment for substance abuse" lacks sufficient record support. Respondent-father argues,

in reliance upon his own testimony at the termination hearing, that he had returned to Visions about three weeks earlier and that he had been participating in a substance abuse aftercare program and drug screens as part of that process. According to respondent-father, the record contains evidence tending to show that his last assessment and alcohol screening, which was negative, had occurred on 10 January 2019.

After carefully reviewing the record evidence, we are unable to conclude that the challenged portion of Finding of Fact 36(a) is supported by clear, cogent, and convincing evidence. As we have already noted, the adjudicatory phase of the termination hearing commenced on 20 February and concluded on 21 March 2019. For that reason, a month elapsed between the date upon which the termination hearing began and the date upon which it concluded. At the 21 February 2019 hearing date, Sheena Wagner, a substance abuse counselor with the Duke Family Care Program, testified that she had last obtained a drug screen from respondent-father in May 2018 and that she had closed respondent-father's case in September 2018 in light of his failure to submit to three random drug screens. A closure report generated by Duke Family Care on 18 September 2018 and admitted into evidence confirmed this portion of Ms. Wagner's testimony. In addition, Ms. Wagner testified that she had conducted a reassessment for respondent-father in January 2019 and that he had reported his participation in the aftercare program at Visions on that occasion. After recommending that respondent-father continue to participate in that aftercare program, Ms. Wagner contacted Visions and learned that respondent-father "had not been engaged for some months."

On the other hand, respondent-father testified at the 20 March 2019 hearing that he had returned to Visions aftercare just a few weeks earlier. The trial court appears to have found this testimony to be credible in Finding of Fact No. 27, in which it stated that respondent-father had "returned [ ] to Visions approximately three weeks ago." In addition, a Duke Family Care progress summary that was accepted into evidence at the termination hearing indicates that respondent-father had submitted to a drug screen in January 2019 and had tested negative for the presence of all substances. The contents of this progress summary were reflected in Finding of Fact Nos. 24 and 29. As a result, in light of the fact that the trial court's findings generally appear to accept the validity of respondent-father's contention that he had recently returned to participation in substance abuse treatment and had tested negatively shortly before the end of the termination hearing, we disregard the challenged portion of Finding of Fact 36(a) in evaluating the validity of the

trial court's determination that respondent-father's parental rights in the children were subject to termination on the basis of neglect in light of his alleged failure to adequately address his substance abuse problems. *See In re J.M.*, 373 N.C. 352, 358, 838 S.E.2d 173, 177 (2020) (disregarding a finding of fact that lacked sufficient evidentiary support in determining whether the trial court had properly found the existence of grounds for terminating a parent's parental rights).

In addition to challenging the sufficiency of the record support for certain of the trial court's findings of fact, respondent-father argues that the trial court's remaining findings of fact do not support the trial court's determination that there is a reasonable probability of repetition of neglect if the children were returned to his care based upon his failure to adequately address his alcohol abuse problems. As the trial court's unchallenged findings and the record evidence reflect, however, respondent-father had an extensive history of substance abuse; the parents had received in-home services from 22 May 2014 to 24 June 2015 for the purpose of addressing problems relating to substance abuse and domestic violence; and the children had been removed from the home on 19 September 2016 after an evening during which the parents had been arguing and drinking alcohol. In addition, the trial court's findings and the record evidence reflect that respondent-father's treatment at Duke Family Care was terminated in September 2018 after Ms. Wagner had been unable to make contact with him for three consecutive months. Although respondent-father does appear to have completed a reassessment and drug screen in January 2019, his most recent drug screen prior to that date had been approximately eight months earlier. In addition, even though the record contains evidence tending to show that respondent-father had begun participating in a substance abuse aftercare program at Visions before the conclusion of the termination proceeding, his involvement in that program had only commenced after the motion to terminate his parental rights in the children had been filed and the termination hearings had actually begun. A careful review of the trial court's findings and the record evidence demonstrates that the record contains ample support for the trial court's determination that, in light of respondent-father's "extensive substance abuse histor[y]" and his inconsistent involvement in the drug screening process, respondent-father had failed to establish "the status or durability" of his sobriety and to mitigate the risks that continued alcohol abuse might pose for the children. *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 responsibility for evaluating the credibility and weight to be afforded to the evidence and to determine the reasonable inferences that should be drawn from the credible evidence).

In addition, respondent-father argues that the trial court had erred by determining that it was likely that the neglect that the children had previously experienced would recur in the event that they were returned to his care on the basis of the trial court's determination that he had failed to adequately address the issue of domestic violence. In respondent-father's view, the trial court lacked any basis in the evidentiary record for making Finding of Fact No 36(b), in which the trial court determined that, even though "there may be no reported domestic violence incidents between these parties since 2016, this does not mean to this Court that the mother or father have expressed meaningful insight about how domestic violence impacts them or could cause harm to their children." More specifically, respondent-father contends that he had not been called upon to testify about his understanding of the impact that domestic violence would have upon the parents or the children, that no expert witness had testified that he was oblivious to the adverse effects that domestic violence could cause, and that the manner in which the trial court had addressed this issue in its order had impermissibly shifted the burden of proof with respect to the domestic violence issue away from DSS and onto him. Once again, we are not persuaded by respondent-father's argument.

In its termination order, the trial court made unchallenged findings that the parents had an extensive history of domestic violence dating back to May 2014, with DSS having taken the children into its custody on 19 September 2016 as the result, in part, of the "arguing of the parents." In addition, the trial court judicially noticed the finding contained in the initial adjudication order "that these children are neglected due to the domestic violence between both the parents." The trial court further found that respondent-father had been referred to Penny Dixon, a contractor for DSS associated with the Durham Crisis Response Center, for a domestic violence assessment and that, even though respondent-father had completed the assessment process on September 2017, he had failed to comply with Ms. Dixon's recommendation that he participate in long-term individual counseling, with respondent-father having claimed in his testimony at the termination hearing that he had been waiting on a return call from Ms. Dixon. As a result of the fact that respondent-father "did not exercise any initiative to follow through with [Ms. Dixon,]" the trial court found that there had been "no expressed insight from the father about how domestic violence impacts him[.]"

Respondent-father's assertion that the trial court had no basis for finding that he had not attained an understanding of the potential ill effects of domestic violence in the absence of an admission on his own

part or testimony to that effect from an expert witness lacks merit. In view of the fact that the record contains evidence tending to show an extensive history of domestic violence between the parties dating back to May 2014, the trial court could have reasonably found that respondent-father's failure to comply with the recommendation that he participate in long-term, individual counseling for the purpose of addressing the issue of domestic violence was tantamount to a failure on his part to adequately recognize and address the role that domestic violence had played in his own life and that of his children. In addition, rather than improperly shifting the burden of proof with respect to domestic violence from DSS to respondent-father, the challenged portion of the trial court's termination order merely noted that respondent-father had failed to successfully rebut the evidence that DSS had presented in support of its contention that he had failed to adequately address his domestic violence issues. *See*, *e.g.*, *In re Clark*, 72 N.C. App. 118, 125, 323 S.E.2d 754, 758 (1984) (holding that, instead of impermissibly shifting the burden of proof from the petitioner to the parent, the challenged finding of fact was "nothing more than an accurate statement of the procedural stance of the case" and simply stated that "the respondents did not produce evidence that contradicted the allegations set forth in the petition").

Similarly, respondent-father contests the validity of the trial court's determination that there was a probability that the neglect that the children had previously experienced would be repeated in the event that they were returned to his care given his failure to adequately address concerns relating to his mental health and housing stability. The trial court's findings concerning respondent-father's failure to address the issues of substance abuse and domestic violence, which were the two central problems that led DSS to intervene in the life of the family beginning in May 2014 and that resulted in the children's removal from the family home in September 2016, are sufficient, standing alone, to support the trial court's determination that there was a likelihood that the children would be neglected in the future in the event that they were returned to respondent-father's care. *See In re M.A.*, 374 N.C. at 870, 844 S.E.2d at 921 (holding that, even though the respondent claimed to have made reasonable progress in addressing the issues of substance use, domestic violence, and income and housing stability, the trial court's findings concerning the respondent's failure to adequately address the issue of domestic violence, which was the primary reason that the children had been removed from the home, were, standing alone, sufficient to support a determination that a repetition of neglect was likely to occur). For that reason, we will refrain from addressing respondent-father's remaining challenges to the trial court's determination that his

parental rights in the children were subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1), including those relating to mental health and housing concerns. As result, given that the trial court did not err by determining that respondent-father's parental rights in the children were subject to termination on the basis of neglect; 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. 190, 194, 835 S.E.2d 417, 421 (2019); and that respondent-father has not challenged the validity of the trial court's best interests determination, we affirm the trial court's termination order with respect to respondent-father.

B. Respondent-Mother's Appeal

**[2]** Like respondent-father, respondent-mother acknowledges that the children had previously been adjudicated to be neglected juveniles while arguing that the trial court erred by finding that there was a likelihood that the earlier neglect would be repeated in the event that the children were returned to her care. In support of this contention, respondent-mother challenges the sufficiency of the evidentiary support for certain of the trial court's findings of fact and asserts that there had been a "marked change in [her] circumstances" from the time of the children's removal from her home to the time of the termination hearing. After a thorough review of the record, we are convinced that the trial court's findings regarding respondent-mother's failure to adequately address the issues of substance abuse and domestic violence have sufficient evidentiary support and support its determination that there was a likelihood of future neglect in the event that the children were returned to her care.

As an initial matter, respondent-mother challenges a portion of Finding of Fact No. 36(c), in which the trial court found that it is "uncertain as to the status and durability of [respondent-mother's] sobriety and . . . that the risk of harm to the children has not been removed by these parents," as lacking in sufficient evidentiary support. According to respondent-mother, the quoted portion of the trial court's adjudication order is "not an actual finding" given that the trial court failed to carry out its duty to "ascertain the truth from the various circumstances" and has done nothing more than state that "the court is not certain as to what to find."

After examining Finding of Fact No. 36(a) in its entirety, we have no hesitation in concluding that the language upon which respondent-mother's argument rests states a logical inference that the trial court

chose to make from other evidentiary facts. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (stating that "[a]ny determination reached through 'logical reasoning from evidentiary facts' is more properly classified a finding of fact"). At the beginning of Finding of Fact 36(a), the trial court provided a detailed discussion of respondent-mother's lack of progress in addressing her substance abuse problems. Among other things, the trial court found that respondent-mother's case at Duke Family Care had been closed in September 2018 after Ms. Wagner had been unable to contact respondent-mother for three consecutive months. In addition, the trial court found that, while respondent-mother tested negatively when screened for alcohol use in January 2019, her most recent test result before that date had been provided in May 2018. Finally, the trial court found as a fact that:

> both of these parents have extensive substance abuse histories and because of a lack of being consistent in participating in random drug screens for alcohol, this Court is uncertain as to the status and durability of their sobriety and finds that the risk of harm to the children has not been removed by these parents; when the parents are under the influence they create an injurious environment where they become incapable of providing proper supervision and care.

Thus, when considered in its entirety, Finding of Fact No. 36(a) consists of (1) a description of respondent-mother's extensive history of substance abuse and her inconsistent record of participating in required drug screens and (2) a reasonable inference that the extent and duration of respondent-mother's sobriety had not been demonstrated. *See In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68 (holding that the trial court "had the responsibility to 'pass upon the credibility of the witnesses and the weight to be given to their testimony and the reasonable inferences to be drawn therefrom' " (quoting *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968))). As a result, we hold that Finding of Fact No. 36(a) constitutes a proper finding on the part of the trial court.

In addition, respondent-mother argues that Finding of Fact No. 36(a) lacks sufficient record support. In support of this assertion, respondent-mother relies upon findings of fact made in the 5 June 2018 permanency planning order that she had several negative urine screens from 31 August 2017 to 20 October 2017, that she had a negative drug screen on 27 March 2018, and that she submitted to drug screens during her period of relapse in April and June 2018 and upon an unchallenged finding of fact contained in the trial court's termination order

that she provided a negative drug screen in January 2019. In further support of her challenge to the sufficiency of the evidentiary support for Finding of Fact No. 36(a), respondent-mother points to the results of drug screens administered by her probation officer in "mid-late 2018" that did not test for alcohol. Finally, respondent-mother directs our attention to testimony from her probation officer that she had regularly met with respondent-mother since September 2018 without detecting any odor of alcohol or seeing any evidence of alcohol use and that the records maintained by DSS concerning her visits with the children from September 2018 to February 2019 did not contain a single indication that respondent-mother smelled of alcohol or appeared to be intoxicated.

The fundamental problem with respondent-mother's challenge to the sufficiency of the evidentiary support for Finding of Fact No. 36(a) is that the trial court never found that respondent-mother had ever failed or refused to submit to drug screens or had ever had negative results during the drug screening process. Similarly, the trial court never found that respondent-mother had or had not been observed to be under the influence of alcohol at any time since September 2018. Instead, Finding of Fact No. 36(a) simply states that respondent-mother had been inconsistent in her participation in the drug screening process. In unchallenged Finding of Fact No. 23, the trial court found that, while respondent-mother participated in two drug screens in April and May of 2018, she "did not get randomly screened from June to December 2018." In addition, respondent-mother missed a drug screening appointment scheduled for 30 July 2018, with her Duke Family Care case having been closed in September 2018 after Ms. Wagner could not contact respondent-mother for three consecutive months. As a result, we conclude that Finding of Fact No. 36(a) has ample evidentiary support. *See In re B.O.A.*, 372 N.C. at 379, 831 S.E.2d at 310 (stating that a "finding that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding) (citing *In re Moore*, 306 N.C. at 403–04, 293 S.E.2d at 132).

Next, respondent-mother argues that the trial court erred by finding that there was a likelihood that the neglect that the children had previously experienced would be repeated in light of the fact that she had demonstrated the existence of a marked change in circumstances relating to her substance abuse problems at the time of the termination hearing. The argument that respondent-mother makes in support of this contention relies upon an attempt to shift the focus from her inconsistency in submitting to random drug screens and a claim that DSS had failed to prove that she had consumed alcohol after the summer of 2018.

The record does, of course, reflect that respondent-mother last tested positive for the presence of alcohol in April of 2018 and that she had tested negative for the presence of all controlled substances, including alcohol, in January 2019. On the other hand, the trial court's unchallenged findings of fact establish that respondent-mother did not submit to random drug screens from June to December 2018 and that her case with Duke Family Care had been closed in September 2018 after she failed to respond to Ms. Wagner's attempts to make contact with her. In light of respondent-mother's extensive substance abuse history and her failure to consistently participate in the drug screening process, we hold that the trial court had an ample evidentiary basis for determining that respondent-mother had failed to achieve a stable or durable state of sobriety sufficient to eliminate the risk of harm to her children.

In addition to her challenge to the trial court's treatment of her struggles with substance abuse, respondent-mother objects to the manner in which the trial court addressed the issue of her involvement with domestic violence. As an initial matter, we note that the trial court's unchallenged findings of fact establish that respondent-mother had completed a domestic violence assessment in September of 2017, at which it had been recommended that respondent-mother complete domestic violence counseling, and that respondent-mother had never presented a certificate of completion indicating that she had obtained the recommended counseling. In addition, the trial court's findings reflect that respondent-mother had received counseling at the Durham Crisis Response Center from May 2018 to December 2018.

According to respondent-mother, Finding of Fact No. 20, in which the trial court stated that the counseling sessions in which respondent-mother participated at the Durham Crisis Response Center "do not contain[ ] counseling particularly on domestic violence," lacks sufficient evidentiary support. Respondent-mother makes a similar challenge to Finding of Fact No. 36(b), in which the trial court found, in pertinent part, that:

> [respondent-mother] has an extensive history of being in domestic violence relationships with her partners which stems from at least 1997 when a former partner fractured her bone. . . . The court takes judicial notice of the findings of fact in the adjudication order that these children are neglected due to the domestic violence between both the parents. The Court finds that there may be no reported domestic violence incidents between these parties since 2016, this does not mean to this Court

> that [respondent-mother] or [respondent-father] have expressed meaningful insight about how domestic violence impacts them or could cause harm to their children. The court reviewed [respondent-mother's exhibit #4 — Assessment from the Durham Crisis Response Center]; [respondent-mother] discussed in one session about maintaining sobriety, the care of her children in foster care, how to handle grief and to get her children back.

In respondent-mother's view, the trial court erred by finding that her counseling sessions at the Durham Crisis Response Center did not address domestic violence issues.

In support of her contention that she had received domestic violence counseling at the Durham Crisis Response Center, respondent-mother points to an intake form in which she indicated that she wanted to address "domestic violence, coping skills" and to counseling notes that mention issues relating to the safety of the children, the management of grief, an analysis of past deficiencies in the decisions that she had made, and the need to control her substance abuse. According to respondent-mother, her counselor at the Durham Crisis Response Center "would have used these topics to relate to domestic violence or would have redirected [respondent-mother.]"

In its adjudication order, the trial court stated that it had reviewed respondent-mother's assessment from the Durham Crisis Response Center and the records relating to respondent-mother that had been generated by that entity relating to respondent-mother through December 2018. The counseling case notes indicate that various topics had been discussed during the counseling that respondent-mother had received at the Durham Crisis Response Center, such as "concerns about safety of [the] children in foster care," respondent-mother's desire for reunification with the children, and the changes that respondent-mother was "making to maintain sobriety." The Durham Crisis Response Center records only contain a single reference to the issue of domestic violence, which appears in a set of case notes that are dated 18 June 2018. For that reason, we hold that the trial court's determination that the counseling that respondent-mother received at the Durham Crisis Response Center did not involve any particular focus upon issues relating to domestic violence had ample evidentiary support and that, even though the record might support 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. at 12, 832 S.E.2d at 704; *see also 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.")

Similarly, respondent-mother argues that the trial court erred by finding that there was a likelihood that the neglect that the children had experienced would be repeated in the event that they were returned to her care given that she had demonstrated that there had been a marked change in her circumstances relating to the issue of domestic violence issues by the time of the termination hearing. In support of this contention, respondent-mother maintains that she had been able to show improvement in her situation as it relates to domestic violence by "refrain[ing]" from respondent-father, having been involved in no reported incident of domestic violence involving respondent-father for three years, obtaining a domestic violence assessment, and engaging in counseling at the Durham Crisis Response Center.

As we have previously indicated, the trial court did not err by finding that the counseling that respondent-mother had received at the Durham Crisis Response Center did not place any particular emphasis upon issues relating to domestic violence. In addition, the trial court acknowledged that there had been no reported incidents of domestic violence involving the parents since 2016 and that respondent-mother had obtained a domestic violence assessment in 2017. Even so, given respondent-mother's extensive history of participation in interpersonal relationships involving domestic violence and her failure to complete the recommended domestic violence counseling, the trial court could have reasonably concluded that respondent-mother had failed to express "meaningful insight about how domestic violence impacts them or could cause harm to their children." For that reason, we hold that the trial court did not err by determining that respondent-mother had failed to adequately address the issue of domestic violence by the time of the termination hearing and that its findings of fact with respect to this issue suffice to support its determination that there was a likelihood of future neglect in the event that the children were returned to her care.

In light of our determination that the trial court's findings with respect to the issues of substance abuse and domestic violence suffice to show the existence of the required likelihood of future neglect in the event that the children were returned to respondent-mother's case, we need not address respondent-mother's challenge to the trial court's determination that she had failed to adequately address her mental health and housing problems. *See In re M.A.*, 374 N.C. at 870, 844 S.E.2d at 921 (holding that a parent's failure to adequately address the issue

of domestic violence can be sufficient to support a determination that there is a likelihood of future neglect). In view of the fact that the trial court did not err by finding that respondent-mother's parental rights in the children were subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1), that the existence of a single ground for termination will suffice 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-mother has not challenged the trial court's determination that the termination of her parental rights would be in the children's best interests, we affirm the trial court's termination order with respect to respondent-mother as well.

AFFIRMED.

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IN THE MATTER OF J.S., J.S., J.S.

No. 92A20

Filed 11 December 2020

**Termination of Parental Rights—no-merit brief—neglect—abandonment—parental rights to another child terminated**

The termination of a mother's parental rights in her three children on grounds of neglect, abandonment, and having her parental rights in another child terminated and lacking the ability or willingness to establish a safe home (N.C.G.S. § 7B-1111(a)(1), (7), (9)) was affirmed where her counsel filed a no-merit brief, the evidence supported termination under subsection (a)(9) (which was sufficient to uphold the order), and the trial court did not abuse its discretion in deciding that terminating her rights would be in the children's best interests.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 26 November 2019 by Judge Aretha V. Blake in District Court, Mecklenburg County. This matter was calendared in the Supreme Court on 23 November 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 Mecklenburg County Department of Social Services, Youth and Family Services Division.*

*Kip David Nelson for appellee Guardian ad Litem.*

*Lisa Anne Wagner for respondent-appellant mother.*

MORGAN, Justice.

Respondent-mother appeals from the trial court's order terminating her parental rights to her minor children, "James," "Jiles," and "Jacyn."[1] Respondent-mother's counsel has filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. After an independent review, we conclude that the issues raised by counsel in respondent-mother's brief do not entitle her to relief and affirm the trial court's decision to terminate respondent-mother's parental rights.

James and Jiles entered the nonsecure custody of Mecklenburg County Department of Social Services, Youth and Family Services Division (YFS) upon the agency's 15 March 2018 filing of a juvenile petition which alleged that the children were neglected and dependent. In the petition, YFS represented that it had been involved with the family for several years, that respondent-mother and the children's father had an extensive history of domestic violence, and that respondent-mother's parental rights to another child had previously been terminated. The petition went on to detail recent incidents of domestic violence perpetrated by the father against respondent-mother, alleging that some of them occurred in the presence of James and Jiles. The trial court entered an order adjudicating the two children as neglected juveniles on 5 June 2018.

Jacyn was born in September 2018. On 31 January 2019, YFS filed a petition alleging that Jacyn was a neglected juvenile. In this petition, YFS alleged that respondent-mother had multiple pending criminal charges, that YFS had received a report regarding another incident of domestic violence between respondent-mother and the children's father, and that the parents had not made progress addressing the issues which led to the previous neglect adjudication regarding James and Jiles. YFS was granted nonsecure custody of Jacyn and the agency placed her with her two brothers. Jacyn was adjudicated as a neglected juvenile by virtue of an order entered by the trial court on 12 March 2019.

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1. We use pseudonyms for respondent-mother's children to protect their privacy and for ease of reading.

YFS filed motions in the cause to terminate respondent-mother's parental rights to Jacyn on 21 June 2019 and to James and Jiles on 28 August 2019. Both motions alleged the same four grounds for termination: (1) neglect, (2) willful failure to pay a reasonable portion of the children's cost of care, (3) abandonment, and (4) respondent-mother's parental rights with respect to another child of hers had been terminated involuntarily and she lacked the ability or willingness to establish a safe home. *See* N.C.G.S. § 7B-1111(a)(1), (3), (7), (9) (2019). The motions were based on substantially the same allegations. In the motions, YFS detailed the circumstances that led to the prior neglect adjudications for the three children and, in light of the submitted information, alleged that respondent-mother had failed to make adequate progress with respect to the case plan requirements that were established to remediate those circumstances.

The motions to terminate respondent-mother's parental rights to the three children were heard on 30 October 2019. Respondent-mother was not present at the hearing. After the evidence was presented, the trial court found that respondent-mother's parental rights were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(1), (7), and (9) (2019): respectively, neglect, abandonment, and the parental rights of respondent-mother with respect to another child of hers had been terminated involuntarily and respondent-mother lacked the ability or willingness to establish a safe home. The trial court found that there was insufficient evidence of the existence of the alleged ground to terminate addressed in N.C.G.S. § 7B-1111(a)(3) that respondent-mother had willfully failed to pay a reasonable portion of the cost of care for the three juveniles. Lastly, the trial court concluded that termination of respondent-mother's parental rights to James, Jiles, and Jacyn was in the children's best interests. The trial court entered its written order memorializing its decision to terminate respondent-mother's parental rights to all three children on 26 November 2019.[2] Respondent-mother appeals.[3]

Respondent-mother's appellate counsel has filed a no-merit brief on respondent-mother's behalf pursuant to Rule 3.1(e) of the North Carolina

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2. The order also terminated the parental rights of the father of James, Jiles, and Jacyn. He did not appeal and therefore is not a party in the matter before this Court.

3. The record on appeal does not include proof that respondent-mother's notice of appeal was served on the other parties as required by N.C. R. App. P. 3.1(b). However, neither YFS nor the guardian *ad litem* raised this issue, and thus it has been waived. *See Hale v. Afro-Am. Arts Int'l, Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993) ("[A] party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal[.]")

Rules of Appellate Procedure. Counsel has also advised respondent-mother of the right to file pro se written arguments on respondent-mother's own behalf with this Court and has provided respondent-mother with the documents necessary to do so. Respondent-mother did not submit any written arguments.[4]

In the no-merit brief, respondent-mother's counsel concedes that there was an adequate basis for the trial court's adjudication regarding the mother's inability to establish a safe home. N.C.G.S. § 7B-1111(a)(9) (providing that a parent's rights can be terminated when parental rights for another child have been terminated and "the parent lacks the ability or willingness to establish a safe home"). Respondent-mother's parental rights to another child had been terminated in an earlier case; the trial court concluded that respondent-mother was unable to establish a safe home in the present case. In light of respondent-mother's history of domestic violence, mental health issues, incarceration, and unstable housing, this determination by the trial court was appropriate. *See In re T.N.H.*, 372 N.C. 403, 412–13, 831 S.E.2d 54, 61–62 (2019) (affirming termination of parental rights pursuant to N.C.G.S. § 7B-1111(a)(9) based on the mother's history of incarceration, unstable housing, and failure to complete a case plan). Accordingly, the trial court did not err in finding and concluding that a basis for termination of respondent-mother's parental rights existed.

As to disposition, counsel for respondent-mother also concedes that the trial court did not abuse its discretion in deciding that termination of respondent-mother's parental rights would be in the children's best interests. This decision can only be reversed if "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). A trial court is required to consider several statutory factors and ultimately determine whether termination is in a child's best interests. N.C.G.S. § 7B-1110(a); *In re C.J.C.*, 839 S.E.2d 742, 746 (2020). The trial court here properly considered the pertinent factors and aptly exercised its discretion.

We conduct an independent review of any issues identified 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 the brief filed on behalf of respondent-mother in this appeal, respondent-mother's counsel discusses four

4. YFS did not submit any appellate materials to this Court, but the guardian *ad litem* did file a brief, agreeing with respondent-mother's counsel that there are no meritorious claims upon which respondent-mother could prevail.

issues that could arguably support an appeal, yet acknowledges that the appeal ultimately lacks merit due to the existence of a ground to allow termination of parental rights under N.C.G.S. § 7B-1111(a)(9). Based upon our review of the issues identified in the no-merit brief, we are satisfied that the trial court's 26 November 2019 order was based on proper legal grounds. Accordingly, we affirm the trial court's order terminating respondent-mother's parental rights.

AFFIRMED.

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IN THE MATTER OF K.D.C. AND A.N.C.

No. 27A20

Filed 11 December 2020

**1. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—incarceration**

The trial court's findings did not support its conclusion that grounds of neglect existed to terminate a mother's parental rights where the trial court erred in determining that there would be a likelihood of future neglect. The finding that the mother, who was incarcerated, had the ability to comply with her case plan during her incarceration was not supported by sufficient evidence; her release date was too remote in time (fifteen months) to expect her to have secured housing and employment; she completed a "mothering" class (in lieu of a required "parenting" class), an anger management class, and a grief recovery class; and she maintained regular contact with her children.

**2. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—incarceration**

The trial court erred by concluding that grounds of failure to make reasonable progress existed to terminate a mother's parental rights where the department of social services failed to carry its burden of proof. The finding that the mother, who was incarcerated, was able to comply with her case plan during her incarceration was not supported by sufficient evidence; her release date was too remote in time (fifteen months) to expect her to have secured housing and employment; and her completion of a "mothering" class was a sufficient attempt to complete a required "parenting" class.

**3. Termination of Parental Rights—grounds for termination—dependency—appropriate alternative child care arrangement—no allegation or findings**

The trial court erred by concluding that grounds of dependency existed to terminate a mother's parental rights in her child where the department of social services made no allegation that the mother lacked an appropriate alternative child care arrangement and the trial court made no findings addressing the issue.

Justice NEWBY concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) and on writ of certiorari pursuant to N.C.G.S. § 7A-32(b) from orders entered on 1 October 2019 by Judge William F. Brooks in District Court, Wilkes County. This matter was calendared in the Supreme Court on 23 November 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.*

*Erica M. Hicks for appellee Guardian ad Litem.*

*Anné C. Wright for respondent-appellant mother.*

MORGAN, Justice.

Respondent-mother appeals from the trial court's orders terminating respondent-mother's parental rights to her children K.D.C. and A.N.C. ("Katie" and "Anna").[1] After careful review, we reverse.

*Factual Background and Procedural History*

On 15 January 2017, the Wilkes County Department of Social Services (DSS) received a report that Katie and Anna were living in an injurious environment due to improper care and supervision, moral turpitude, and substance abuse. At the time, Katie and Anna were living with their father and with K.S., their older brother. Respondent-mother was incarcerated on drug trafficking charges with a projected release date in 2020.

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

A social worker went to the juveniles' home to investigate the report and observed track marks on K.S.'s arms. A drug screen administered to K.S. on the day of the social worker's investigative visit to the residence was positive for methamphetamine and marijuana. The father agreed to a safety plan to ensure that Katie and Anna had sober caretakers, and K.S. agreed to refrain from providing care for, or allowing drugs around, his juvenile siblings. However, shortly thereafter, both the father and K.S. tested positive for the presence of methamphetamine upon their submission of drug screens to DSS. A social worker requested a safety placement for the juveniles, but the father was unable to identify family or friends that could qualify for kinship placements.

On 7 March 2017, DSS obtained non-secure custody of the juveniles and filed petitions alleging that Katie and Anna were neglected. On 24 April 2017, the trial court adjudicated Katie and Anna as neglected juveniles after the parties to the action stipulated to the allegations in the petition. The trial court ordered that custody of the juveniles remain with DSS and set the permanent plan as reunification, with a secondary plan of custody with an approved caretaker.

Following a review hearing held on 21 May 2018, the trial court entered an order in which it found that the father had completed his case plan, and that it was appropriate to begin a trial placement of Katie, along with her older sibling B.C.,[2] with the father. Katie and B.C. were placed with the father in June 2018. The trial placement with the father was ceased, however, after DSS received a report alleging improper supervision and discipline by the father. Upon investigation of the report, DSS determined that B.C. had taken a car on a "joy ride" and had wrecked the vehicle. The father allegedly punched B.C. in the lip after the father learned of these events. Katie and B.C. were removed from the trial placement with the father and placed in foster care.

Following the disrupted trial placement, the father regressed in his behavior. The father tested positive for cocaine on 23 July 2018, did not appear for scheduled drug screens in August 2018, and admitted that he had started drinking alcohol and using cocaine. Additionally, DSS received a report that the father had inappropriately touched Anna and that the report was being investigated by the Wilkes County Sheriff's Department. DSS requested that the father complete an updated case plan, but he failed to do so and fell out of contact with DSS. In December

2. No petition to terminate respondent-mother's parental rights, or order which terminates her parental rights to B.C., appears in the record. Respondent-mother's parental rights to B.C. therefore are not a subject of this appeal.

2018, the father was charged with drug-related offenses. With these developments, in an order entered on 15 January 2019, the trial court changed the permanent plan for the juveniles to adoption, with a secondary plan of custody. DSS was relieved of further reunification efforts.

On 23 April 2019, DSS filed petitions to terminate the parental rights of both respondent-mother and the father to Katie and Anna. DSS alleged that grounds existed to terminate both parent's parental rights on the grounds of neglect, failure to make reasonable progress, failure to pay support for the children, and dependency. N.C.G.S. § 7B-1111(a)(1)–(3), (6) (2019). DSS additionally alleged that grounds existed to terminate the father's parental rights due to abandonment. N.C.G.S. § 7B-1111(a)(7) (2019). On 1 October 2019, the trial court entered orders in which it determined that grounds existed to terminate respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (6). The trial court further concluded that it was in the juveniles' best interests that respondent-mother's parental rights be terminated. Accordingly, the trial court terminated the parental rights of respondent-mother to Katie and Anna.[3]

On 28 October 2019, respondent-mother gave written notice of appeal from the order terminating her parental rights to Katie. The record on appeal does not include proof that respondent-mother's notice of appeal was served on the other parties, as required by N.C. R. App. P. 3.1(b). However, neither DSS nor the guardian ad litem objected to this lack of service, and thus, any issue about the deficiency of service has been waived. *See Hale v. Afro-Am. Arts Int'l, Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993) (stating that "a party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal").

On 17 February 2020, respondent-mother filed a petition for writ of certiorari, seeking review of the order terminating her parental rights to Anna. Respondent-mother attached an affidavit to the petition, explaining that her trial counsel sent her notices of appeal concerning both Katie and Anna and instructed respondent-mother to sign them and then mail them to the Wilkes County Clerk of Court for filing purposes. Respondent-mother inadvertently mailed only the notice of appeal regarding Katie, which was timely filed. A notice of appeal concerning

3. The trial court's orders also terminated the father's parental rights to Katie and Anna, but he did not appeal and therefore is not a party to the proceedings currently before this Court.

Anna was subsequently filed, but it was accomplished after the deadline for giving notice of appeal. On 1 April 2020, we allowed respondent-mother's petition for writ of certiorari as to Anna. Accordingly, we shall address the merits of respondent-mother's appeal as to both juveniles.

*Analysis*

"Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94, 839 S.E.2d 792, 796–97 (2020) (citing 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) (2019)). We review a district court's adjudication 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 Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984). "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).

In this case, the trial court determined that grounds existed to terminate respondent-mother's parental rights based on neglect, failure to make reasonable progress, and dependency. N.C.G.S. § 7B-1111(a)(1), (2), (6). To support its conclusion that these circumstances existed to terminate respondent-mother's parental rights pursuant to these statutory grounds, the trial court found as fact that Katie and Anna were previously adjudicated as neglected in April 2017.[4] The trial court further found that respondent-mother entered into a case plan which required her to (1) complete parenting classes, (2) obtain and maintain employment and housing upon her release from custody, (3) complete a mental health assessment and follow all recommendations, and (4) complete a mental health and substance abuse assessment and follow all treatment recommendations. The trial court also found the following facts:

> 8. The Respondent-Mother was incarcerated in the North Carolina Department of Corrections at the time DSS began

4. We note that the trial court entered separate termination orders regarding the juveniles Katie and Anna. 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 relevant matters pertaining to the adjudication of grounds involving the two juveniles, we shall refer to the findings of fact and conclusions of law as enumerated in the trial court's termination order entered in Katie's case.

its investigation. She was sentenced for drug trafficking in 2015. The Respondent-Mother is serving a seven-year, nine[-]month sentence with a projected release date of December 25, 2020.

. . . .

12. The Respondent-Mother did not complete parenting classes and did not complete her substance abuse assessment or mental health assessment. The Respondent-Mother did complete a "Mothering" class on April 25, 2019. She also completed an anger management class in October 2017 and a grief recovery class in August 2018.

. . . .

21. The Respondent-Mother does not have a plan for employment or housing upon her anticipated release from prison. She believes she may be able to obtain employment at Tyson Foods in Wilkesboro.

. . . .

24. Both Respondents have neglected the minor child. The Respondent-Mother has not provided any care for the minor child since 2015. There is a significant possibility of future neglect by the Respondents.

25. . . . . The Respondent-Mother did not complete her parenting classes. The Respondent-Mother did not provide any verification that she completed her mental health and substance abuse assessments. Although the Respondent-Mother was incarcerated, she had the ability to complete these requirements of her case plan but failed to do so. . . . .

. . . .

27. Neither Respondent has the ability to provide for the proper care and supervision of the minor child due to their incarceration. The Respondents' incapability will continue for the foreseeable future in light of their incarceration. The Respondent-Mother will not be released from custody for over a year. She does not have appropriate plans for housing or employment.

"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).

Respondent-mother challenges two of the trial court's findings of fact—Findings 12 and 25—as being unsupported by the evidence. Regarding Finding of Fact 12, respondent-mother contends that the portion of the finding that she "did not complete parenting classes . . . or a mental health assessment" is not supported by the evidence and should be stricken. Similarly, as to Finding of Fact 25, respondent-mother asserts that the portion of this finding that she failed to complete a parenting class or to document that she completed her required mental health or substance abuse assessments is incorrect; more specifically, she argues that while she did not provide verification of completion of a mental health or substance abuse assessment, there was no evidence presented that she had the ability to participate in a substance abuse assessment while incarcerated or to provide verification of a completed mental health assessment. We agree with respondent-mother that portions of the trial court's Findings 12 and 25 are not supported by clear, cogent, and convincing evidence.

First, with regard to the requirement that respondent-mother must complete parenting classes, we do find that there is clear, cogent, and convincing evidence to support the trial court's finding that respondent-mother did not complete parenting classes. A supervisory social worker with DSS testified that respondent-mother did not complete parenting classes while incarcerated, although respondent-mother had indicated to the social worker that parenting classes were available to respondent-mother in July 2017, shortly after respondent-mother signed her case plan. Since respondent-mother testified that she completed a "Mothering" class, the trial court could reasonably infer from the evidence presented that parenting classes were available, and that the "Mothering" class did not satisfy the requirement that she complete parenting classes. *See In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167–68 (2016) (indicating that it is the trial judge's duty to consider all the evidence and pass upon the credibility of the witnesses, and to 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) (indicating 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 that it is not the role of an appellate court to substitute its judgment for that of the trial court).

Second, we agree with respondent-mother that there was insufficient evidence to support the trial court's finding of fact that respondent-mother failed to obtain a substance abuse assessment or a mental health assessment, or that she had the ability to complete these aspects of her case plan. The supervisory social worker was asked whether respondent-mother had been "able to receive any type of treatment for

any sort of mental health issues or substance abuse issues while she's been incarcerated." The social worker responded that she had received a letter from respondent-mother indicating that respondent-mother had completed a mental health assessment, but the social worker never received verification from the respondent-mother of its completion. The social worker was silent concerning respondent-mother's attainment of a substance abuse assessment or treatment, and the social worker testified that the social worker did not seek verification from the prison system regarding what type of mental health or substance abuse assessments respondent-mother may have received. Although petitioner DSS argues that there was no evidence that respondent-mother completed a substance abuse assessment and that she did not provide verification that she completed either a mental health assessment or a substance abuse assessment, nonetheless the burden was on DSS to prove respondent-mother's non-compliance with her case plan, and was not on respondent-mother to prove such compliance. *See* N.C.G.S. § 7B-1109(f) (2019) ("The burden in [an adjudicatory hearing on termination] shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence."). Thus, we conclude that the trial court's findings of fact that respondent-mother failed to complete her mental health and substance abuse assessments, and that respondent-mother had the ability to fulfill these requirements, are not supported by clear, cogent, and convincing evidence. Therefore, we disregard these portions of Findings of Fact 12 and 25. *See In re J.M.J.-J.*, 374 N.C. 553, 559, 843 S.E.2d 94, 101 (2020) (indicating that findings of fact not supported by clear, cogent, and convincing evidence will be disregarded).

**[1]** Respondent-mother next contends that the trial court's findings of fact do not support its conclusions of law that grounds existed to terminate her parental rights. We begin our analysis of this issue with consideration of whether grounds of neglect existed to terminate respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1).

A trial court may terminate parental rights upon a finding 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). 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 . . . 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).

Katie and Anna were previously adjudicated to be neglected juveniles. Respondent-mother, however, has been incarcerated throughout DSS's involvement in this case. This Court has stated:

> A parent's incarceration may be relevant to the determination of whether parental rights should be terminated, but our precedents are quite clear—and remain in full force—that incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision. 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) (extraneity omitted).

Here, the trial court found that respondent-mother had the ability to comply with her case plan, despite respondent-mother's incarceration, with regard to obtaining mental health and substance abuse assessments and following all treatment recommendations. As previously discussed, however, we have concluded that these findings were not supported by clear, cogent, and convincing evidence, and we have disregarded them in our analysis pursuant to our cited precedent. While we note the trial court's finding that respondent-mother failed to complete a parenting class as required by her case plan, we also acknowledge that respondent-mother completed a "Mothering" class, which appears to be at least a plausible attempt by respondent-mother to complete her case plan and to improve her parenting skills. In addition to the "Mothering" class, respondent-mother completed anger management and grief recovery classes. The trial court further found that respondent-mother had not

secured stable housing or employment in anticipation of her release from incarceration. In light of the fact that the termination of parental rights hearing was held fifteen months prior to respondent-mother's release from incarceration, respondent-mother's inability to secure employment and housing so far in advance is difficult to consider justly as a failure to comply with her case plan. Lastly, the trial court found that respondent-mother maintained regular contact with Katie and Anna. On these facts, this Court concludes that the trial court erred in deciding that there would be a likelihood of future neglect by respondent-mother as the parent of Katie and Anna. Accordingly, we hold that the trial court erred in its determination that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) to terminate respondent-mother's parental rights.

**[2]** Secondly, we examine whether the trial court properly concluded that grounds existed to terminate respondent-mother's parental rights based on her failure to make reasonable progress. 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). "[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 J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (quoting *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996)). "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001).

In determining whether grounds existed to terminate respondent-mother's parental rights pursuant to this statutory basis, we must consider whether respondent-mother had the ability to make reasonable progress while incarcerated. *See In re C.W.*, 182 N.C. App. 214, 226, 641 S.E.2d 725, 733 (2007) (noting that the incarceration of a parent may be considered by a trial court as it determines whether the parent has made reasonable progress toward correcting those conditions which led to the juvenile's removal). As earlier addressed, there was insufficient evidence that respondent-mother failed to complete, or had the ability to complete, the requirements of her case plan that she obtain mental health and substance abuse assessments and follow all recommendations. We also reasoned that although respondent-mother failed to secure employment and housing in anticipation of her release from

incarceration, it is overly rigid here to equate respondent-mother's inability to secure housing and employment with a failure to comply with her case plan when she is not scheduled to be free from incarceration to have a job or a residence for another fifteen months after the trial court's determination was entered on this point. The remaining requirement of respondent-mother's case plan was her completion of parenting classes. Although respondent-mother did not complete a recognized standard parenting class, we deem it to be worthy of acknowledgement, in determining whether she has failed to comply with her case plan in order for us to assess the imposition of N.C.G.S. § 7B-1111(a)(2), that she did complete a "Mothering" class.

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. 372, 385, 831 S.E.2d 305, 314 (2019) (quoting *In re J.S.L.*, 177 N.C. App. 151, 163, 628 S.E.2d 387, 394 (2006)). We have also stated while "[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 order for a respondent's noncompliance with her case plan to support the termination of her parental rights, there must be a nexus between the components of the court-approved case plan with which the respondent failed to comply and the conditions which led to the child's removal from the parental home." *In re J.S.*, 374 N.C. at 815–16, 845 S.E.2d at 71 (extraneity omitted). At the same time however, "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)." *In re B.O.A.*, 372 N.C. at 385, 831 S.E.2d at 314 (quoting *In re S.N.*, 194 N.C. App. 142, 149, 669 S.E.2d 55, 60 (2008)).

Under the circumstances of this case, realizing the petitioning party's responsibility to satisfy the burden of proof in termination of parental rights cases; considering the findings of fact by the trial court that are supported by clear, cogent, and convincing evidence; and appreciating the delicate balance that must be maintained between and among our case precedent, we conclude, based on the facts and circumstances of the present case, that DSS failed to sustain its burden of proving that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(2) to terminate respondent-mother's parental rights. Respondent-mother was separated from the juveniles Katie and Anna when the initial neglect petition was

filed, due to respondent-mother's incarceration on drug charges. It is apparent to us that a primary component of her case plan was obtaining a substance abuse assessment and following all treatment recommendations. As earlier discussed, due to insufficient evidence, we disregard the trial court's finding that respondent-mother failed to comply with this requirement of her case plan. Likewise, due to similar insufficient evidence, the trial court's finding that respondent-mother failed to obtain a mental health assessment is disregarded. The finding of the trial court that respondent-mother failed to secure employment and housing at a juncture fifteen months in the future after respondent-mother has satisfied her term of incarceration is too remote in time to be fairly evaluated as a case plan violation. Finally, although respondent-mother failed to complete parenting classes, her completion of a "Mothering" class is considered by us to be a sufficient attempt by respondent-mother under these facts and circumstances to comply with her case plan. As a result, we reverse the trial court's conclusion that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(2) to terminate respondent-mother's parental rights.

**[3]** The final ground for termination of respondent-mother's parental rights found by the trial court was dependency under N.C.G.S. § 7B-1111(a)(6). A trial court may terminate parental rights based on dependency when "the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of [N.C.G.S. §] 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future." N.C.G.S. § 7B-1111(a)(6). A dependent juvenile is defined as "[a] juvenile 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). The incapability under N.C.G.S. § 7B-1111(a)(6) "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). "In determining whether a juvenile is dependent, 'the trial court 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 B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007) (quoting *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005)).

In the present case, DSS made no allegation in its petition that respondent-mother lacked an appropriate alternative child care

arrangement, and the trial court did not make any findings of fact addressing the issue. DSS contends that although the trial court failed to make a specific finding of fact regarding the matter, there was no evidence in the record that would support a finding that respondent-mother had an alternative caregiver arrangement. Consistent with DSS's assertion, the guardian ad litem represents that it was undisputed that respondent-mother did not have an alternative child care arrangement. We are not persuaded due to our agreement with, and application of, the determination of the Court of Appeals in *In re B.M.* that "[f]indings of fact addressing *both prongs must be made* before a juvenile may be adjudicated as dependent, and *the [trial] court's failure to make these findings will result in reversal of the [trial] court.*" *Id.* (emphasis added) (citing *In re K.D.*, 178 N.C. App. 322, 328, 631 S.E.2d 150, 155 (2006)). Neither DSS nor the guardian ad litem has cited any evidence presented at the termination hearing regarding whether respondent-mother possessed or suggested an alternative child care arrangement. *See* N.C.G.S. § 7B-1109(f) ("The burden in [an adjudicatory hearing on termination] shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence."). As a consequence of the lack of evidence in the record and the lack of a finding of fact by the trial court that respondent-mother lacked an appropriate alternative child care arrangement, we determine that the trial court erroneously decided that the ground of dependency was established pursuant to N.C.G.S. § 7B-1111(a)(6) to justify the termination of respondent-mother's parental rights.

*Conclusion*

Based on this Court's determinations that the trial court erroneously found that grounds existed to terminate respondent-mother's parental rights to the juveniles Katie and Anna pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (6), and that it was in the juveniles' best interests to terminate respondent-mother's parental rights to both of the children, the trial court's orders terminating respondent-mother's parental rights are reversed.

REVERSED.

Justice NEWBY concurring in part and dissenting in part.

Because respondent-mother is scheduled for release from prison this month, and considering the other factors discussed by the majority,

I agree with much of the majority's analysis. I disagree, however, with the majority's decision to reverse the portion of the trial court's orders terminating respondent-mother's parental rights on the dependency ground. My disagreement is based on the same reasons stated in *In re K.C.T.*, No. 461A19 (N.C. Nov. 20, 2020) (Newby, J., dissenting). "While petitioners bear the burden generally to show that respondent's parental rights should be terminated, . . . the burden does not rest solely on petitioners to show that respondent offered no alternative childcare arrangement." *Id.* Respondent-mother is in the best position to show whether an alternative childcare arrangement existed. While the trial court should have made a finding of fact on whether an alternative childcare arrangement existed, failure to make this finding for the dependency ground for termination does not warrant reversal. Instead, the matter should be remanded to the trial court to make the proper finding. *See id.* Therefore, I concur in part and dissent in part.

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IN THE MATTER OF K.P.-S.T. AND B.T.-F.T.

No. 451A19

Filed 11 December 2020

**Termination of Parental Rights—grounds for termination—neglect—non-compliance with case plan**

The trial court's determination that grounds existed to terminate respondent-father's parental rights in his children based on neglect was upheld where it was supported by unchallenged findings of fact and record evidence that respondent failed to comply with numerous requirements of his service plan related to substance abuse, domestic violence, housing, parenting, visitation, and child support.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 23 September 2019 by Judge William B. Davis in District Court, Guilford County. This matter was calendared for argument in the Supreme Court on 23 November 2020, but was determined upon 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.*

*Maggie D. Blair for appellee Guardian ad Litem.*

*Mary McCullers Reece for respondent-appellant father.*

ERVIN, Justice.

Respondent-father B. T., Jr., appeals from an order entered by the trial court terminating his parental rights in his minor children K.P.-S.T. and B.T.-F.T.[1] After careful consideration of respondent-father's challenge to the trial court's termination order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

Kenny and Bill were born on 11 April 2017. The Guilford County Department of Health and Human Services received a report of neglect indicating that the children had tested positive for the presence of cocaine at birth. After the report was closed and the case was transferred to in-home services, the children's mother entered into an updated safety agreement on 21 June 2017. On 26 June 2017, DHHS received another report of neglect alleging that there had been an incident involving domestic violence between the mother and respondent-father that had resulted in the mother's arrest for committing a misdemeanor assault in the presence of a minor.

On 27 June 2017, DHHS filed a petition alleging that Kenny and Bill were neglected and dependent juveniles and obtained the entry of an order placing the children in the nonsecure custody of DHHS. In its petition, DHHS alleged that the parents had violated the safety plan by consuming alcohol in the presence of the children, by abusing other impairing substances, and by engaging in incidents of domestic violence in the presence of the children. The issues raised by the petition came on for hearing before Judge Betty J. Brown on 28 September 2017, at which time the results of paternity testing that established respondent-father's status as the biological father of the children were presented for the court's consideration. On 6 March 2018, Judge Brown entered an order finding Kenny and Bill to be neglected juveniles based upon the information contained in the petition and certain stipulations entered into by DHHS and the parents.[2]

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1. K.P.-S.T. and B.T.-F.T. will be referred to throughout the remainder of this opinion as "Kenny" and "Bill," respectively, which are pseudonyms used to protect the juveniles' identities and for ease of reading.

2. The dependency allegation was voluntarily dismissed by DHHS.

A service agreement proposed by DHHS had been presented to respondent-father on 21 July 2017. At that time, respondent-father declined to sign the proposed service agreement until he had had an opportunity to discuss it with his attorney. Respondent-father failed to attend a meeting that had been scheduled for the purpose of finalizing his service agreement with DHHS in August 2017 on the grounds that he had been unable to get off of work. The service agreement was eventually approved as a result of the 28 September 2017 adjudication and disposition hearing and signed by respondent-father on 16 October 2018. As a result of his service agreement, respondent-father was required to address issues relating to substance abuse; domestic violence; housing, environmental, and other basic physical needs; parenting skills; employment and income management; and visitation and child support.

After a permanency planning hearing held on 2 August 2018, Judge Lora C. Cubbage entered an order on 20 August 2018 that established the permanent plan for the children as one of adoption, with a secondary plan of reunification. On 19 March 2019, DHHS filed a petition seeking to have the parental rights of both parents in the children terminated based upon neglect, N.C.G.S. § 7B-1111(a)(1); willful failure to make reasonable progress toward correcting the conditions that had led to the children's removal from the home, N.C.G.S. § 7B-1111(a)(2); and willful abandonment, N.C.G.S. § 7B-1111(a)(7). The termination petition came on for hearing before the trial court on 5 August 2019, with the hearing having concluded on 6 August 2019. On 23 September 2019, the trial court entered an order terminating respondent-father's parental rights[3] in the children on the basis of a determination that his parental rights were subject to termination for neglect, N.C.G.S. § 7B-1111(a)(1), and willful failure to make reasonable progress toward correcting the conditions that had led to the removal of the children from the home, N.C.G.S. § 7B-1111(a)(2),[4] and a determination that the termination of respondent-father's parental rights would be in the children's best interests. Respondent-father noted an appeal to this Court from the trial court's termination order.

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3. Although the trial court terminated the mother's parental rights in the children in the same order, she did not seek relief from the trial court's order before this Court. As a result, we will refrain from discussing the proceedings relating to the mother in any detail in this opinion.

4. The trial court did not find that respondent-father's parental rights in the children were subject to termination based upon willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7).

In seeking relief from the trial court's termination order before this Court, respondent-father argues that the trial court erred by determining that his parental rights in Kenny and Bill were subject to termination. 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 [N.C.G.S. §] 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile[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 (2015)).

"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) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). "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)). "[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).

In the brief that he has submitted for our consideration on appeal, respondent-father has refrained from challenging the sufficiency of the evidentiary support for any of the trial court's findings of fact. Instead, respondent-father argues that the trial court's findings of fact fail to support its conclusions that respondent-father's parental rights in the children were subject to termination on the grounds of neglect, N.C.G.S. § 7B-1111(a)(1), and willful failure to make reasonable progress toward addressing the conditions that had led to the children's removal from the home, N.C.G.S. § 7B-1111(a)(2). According to respondent-father, both N.C.G.S. § 7B-1111(a)(1) and N.C.G.S. § 7B-1111(a)(2) "require[ ] the court to consider [his] progress in addressing the conditions that led to the children's removal," and that, contrary to the decision that is reflected in the trial court's termination order, he made "reasonable substantive progress in addressing [those] issues."

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." N.C.G.S. § 7B-101(15) (2019).

> [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).[5] "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.A.*, 374 N.C. 865, 870, 844 S.E.2d 916, 921 (2020) (quoting *In re M.J.S.M.*, 257 N.C. App. 633, 637, 810 S.E.2d 370, 373 (2018)).

After acknowledging the existence of a prior adjudication that the children were neglected juveniles, respondent-father asserts that the children were removed from the mother's home as the result of prenatal exposure to cocaine, parental substance abuse, and incidents of

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

domestic violence and argues that he made reasonable progress toward addressing those problems. A careful review of the record and the trial court's unchallenged findings of fact persuades us that the trial court did not err by reaching the opposite conclusion and determining that there was a likelihood that the children would be neglected in the event that they were placed under respondent-father's care.

In Finding of Fact No. 16, the trial court stated that the "current ongoing neglect by [respondent ]father is evidenced by the fact that he has not complied in an adequate and consistent manner with his "service agreement" before describing the deficiencies in the manner in which respondent-father attempted to comply with the obligations that he assumed in accordance with his service agreement. As an initial matter, we note that respondent-father refused to sign the proposed service agreement when it was presented to him on 21 July 2017 and did not do so until 16 October 2018, which was over a year later. On the day upon which he did sign it, respondent-father was encouraged to begin working upon satisfying the requirements of his service agreement immediately in order to prevent the loss of his parental rights in his children.

As far as respondent-father's progress with respect to substance abuse-related issues is concerned, the trial court found that, while respondent-father did complete a substance abuse assessment on 26 June 2017, he had failed to comply with the recommendations that had resulted from that assessment. In addition, respondent-father failed to submit to requested random drug screens between September 2017 and June 2019. Although respondent-father did submit to one drug screen in January 2019, which was negative, he provided the required urine sample more than twenty-four hours after the initial request had been made, an action which precluded this drug screen from being treated as random in nature. Respondent-father also failed to complete the assessment or treatment that was necessary in order for him to regain his driver's license, which remained in a state of suspension as the result of a 2004 conviction for driving while subject to an impairing substance. As a result, the trial court found that respondent-father had not complied with the substance abuse-related component of his service agreement.

After determining that respondent-father had not been the aggressor in the domestic violence incidents in which he had been involved with the mother, DHHS modified the domestic violence-related component of his service agreement so as to require respondent-father to work with a therapist in order to become better educated about the effects of domestic violence upon children. As of February 2019, respondent-father had not begun this educational process. For that reason, the trial

court found that respondent-father had not complied with the domestic violence-related component of his service agreement.

In spite of the fact that the service agreement required him to address housing-related concerns, respondent-father failed to consistently update his social worker concerning his living situation. Although he provided a copy of his lease to his social worker in February 2019, respondent-father failed to act in a similar fashion after he moved during the summer of 2019. Respondent-father also failed to show that he had working utility service at his residence and never submitted to a home visit despite the fact that the social worker made multiple attempts to organize one. As a result, the trial court found that respondent-father had failed to comply with the housing-related component of his service agreement.

As far as the component of his service agreement relating to parenting skills is concerned, respondent-father did not obtain the required parenting evaluation. After failing to respond when efforts were made to schedule the required evaluation in 2017, respondent-father scheduled an appointment for the purpose of obtaining the evaluation in January 2019. However, respondent-father later cancelled this appointment and never rescheduled it. Similarly, after failing to respond when efforts were made to schedule parenting classes for him in 2017, respondent-father did complete an assessment associated with these classes in January 2019 and attended two class sessions. However, respondent-father failed to complete the parenting program. As a result, the trial court found that respondent-father was not in compliance with the parenting-related component of his service agreement either.

In addressing the components of respondent-father's service agreement relating to visitation and child support, the trial court found respondent-father had sporadically visited with Kenny and Bill until November 2017. However, he had not visited with the children since that time. In addition, respondent-father did not send letters, cards, or gifts to the children during the six-month period immediately prior to the filing of the termination petition and did not have consistent contact with the social worker, having had no contact with the social worker between October 2018 and January 2019 and having had only sporadic, bi-weekly contact with the social worker after that time.

On 1 February 2018, respondent-father was ordered to pay $301 each month in child support and an additional $20 each month toward an existing arrearage. Respondent-father paid $73.16 in support in July 2019 and had a $69.83 arrearage. Although respondent-father's fiancée

expressed a willingness to assist him in complying with the requirements of his service agreement, the trial court found that he had been out of compliance with its requirements even after the couple had become engaged in October 2018. As a result, the trial court found that respondent-father had failed to comply with five out of the six components of his service agreement.[6]

In seeking to persuade us that the trial court's findings of fact show that he had complied with the provisions of his service agreement, respondent-father argues that he was no longer having contact with the mother, who had caused the children's prenatal exposure to cocaine and had been the aggressor in the incidents of domestic violence in which he had been involved with the mother. In addition, respondent-father argues that there had been no police reports reflecting domestic violence in his current home. Moreover, respondent-father notes that his substance abuse evaluation indicated that he had nothing more than a "mild" problem with alcohol and cannabis, that he had incurred no new drug or alcohol related charges, and that the drug screen to which he had submitted in January 2019 was negative. Reduced to its essentials, however, respondent-father's argument is tantamount to a request that we reweigh the evidence. As this Court's precedent clearly states, even if the evidence 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. at 12, 832 S.E.2d at 704.

After a careful review of the trial court's findings and the record evidence, we hold that the trial court's findings of fact support its determinations that respondent-father had previously "neglected the juveniles," that it is likely that this earlier neglect would be repeated if respondent-father became responsible for the children's care, that respondent-father is "currently neglecting the juveniles," and that respondent-father's parental rights in the children were subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1). In view of the fact that the trial court did not err by finding the existence of at least one ground for terminating his parental rights in the children and the fact 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, we need not review respondent-father's challenge to the trial court's determination that his parental rights in the

6. The trial court did find that respondent-father had complied with the employment-related component of his service agreement given that he was employed full time and had provided paycheck stubs verifying his employment status to the social worker.

children were also subject to termination for willfully failing to make reasonable progress toward correcting the conditions that had led to the children's removal from the home pursuant to N.C.G.S. § 7B-1111(a)(2). As a result, since at least one ground exists to support the termination of respondent-father's parental rights in the children and since respondent-father has not challenged the lawfulness of the trial court's determination that the termination of his parental rights would be in the best interests of the children, we affirm the trial court's termination order with respect to respondent-father.

AFFIRMED.

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IN THE MATTER OF N.K.

No. 54A20

Filed 11 December 2020

**1. Termination of Parental Rights—competency of parent—appointment of guardian ad litem—trial court's discretion**

In a termination of parental rights case, the trial court did not abuse its discretion by failing to inquire into whether a guardian ad litem should have been appointed for respondent-mother, who had untreated mental health problems and a mild intellectual deficit. The trial court had ample opportunity to observe the mother during the proceedings, and the record tended to show that she was not incompetent.

**2. Termination of Parental Rights—grounds for termination—neglect—failure to address underlying problems—sufficiency of evidence**

A mother's parental rights in her child were subject to termination on the grounds of neglect (N.C.G.S. § 7B-1111(a)(1)) where the child had been adjudicated neglected and the neglect was likely to recur based on the mother's failure to adequately address her substance abuse, mental health, and domestic violence problems and to obtain appropriate housing. Contrary to the mother's argument on appeal, the trial court made an independent determination by taking judicial notice of the underlying adjudicatory and dispositional orders, admitting reports from the department of social services and

the child's guardian ad litem, and hearing testimony from the child's social worker.

**3. Termination of Parental Rights—best interests of the child—sufficiency of dispositional findings—mother's poverty and mental health—dispositional alternatives**

The trial court did not abuse its discretion by concluding that termination of a mother's parental rights would be in her child's best interests where the trial court made sufficient dispositional findings and performed the proper statutory analysis. The trial court was not required to make dispositional findings concerning the mother's poverty and mental health issues, and it also was not required to consider whether an alternative plan of guardianship that included visitation would have been in the child's best interests.

**4. Native Americans—Indian Child Welfare Act—compliance—termination of parental rights**

The trial court's order terminating a mother's parental rights in her child was remanded for further proceedings where the record did not contain sufficient information to show whether the trial court adequately ensured that the notice requirements of the Indian Child Welfare Act were met. The trial court had reason to know that the child might be an Indian child, the notices sent by the department of social services (DSS) to the relevant tribes were not contained in the record, and there was no indication that DSS sought assistance from the Bureau of Indian Affairs after several of the tribes did not respond to the notices.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 12 November 2019 by Judge B. Carlton Terry, Jr., in District Court, Davidson County. This matter was calendared for argument in the Supreme Court on 23 November 2020, but was determined upon the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

*Danielle De Angelis for petitioner-appellee Davidson County Department of Social Services.*

*Chelsea K. Barnes for appellee Guardian ad Litem.*

*Jeffrey L. Miller for respondent-appellant mother.*

ERVIN, Justice.

**IN RE N.K.**

[375 N.C. 805 (2020)]

Respondent-mother Amber K. appeals from the trial court's order terminating her parental rights in her son N.K.[1] After careful review of respondent-mother's challenges to the trial court's order in light of the record and the applicable law, we conclude that, while the trial court correctly applied North Carolina law in terminating respondent-mother's parental rights in Ned, this case should be remanded to the District Court, Davidson County, for further proceedings intended to ensure compliance with the Indian Child Welfare Act.[2]

## I. Factual Background

On 26 February 2018, within a week after his birth, the Davidson County Department of Social Services filed a petition alleging that Ned was a neglected and dependent juvenile and obtained the entry of an order taking Ned into nonsecure custody. In its petition, DSS alleged that respondent-mother had tested positive for the presence of marijuana at the time of Ned's birth; that respondent-mother had a history of substance abuse problems; that respondent-mother had untreated mental health problems; that Ned had an older full sibling and two older half siblings, all of whom had been taken into the custody of the Davie County Department of Social Services based upon reports of improper supervision and abuse; that respondent-mother had been charged with assaulting a child under twelve; and that there were concerns about domestic violence between the parents.

In advance of the hearing to be held for the purpose of considering the merits of the allegations made in the DSS petition, respondent-mother completed an assessment at Daymark in early March 2018 and began recommended mental health and substance abuse treatment. In addition, respondent-mother entered into an Out of Home Family Services Agreement with DSS on 16 March 2018 in which she agreed to complete mental health and substance abuse treatment and to authorize the release of treatment-related information to DSS, to provide verification of her income, to obtain and maintain suitable housing, to visit with Ned and attend his medical and developmental appointment; to complete an updated psychological evaluation or parenting capacity assessment and comply with any resulting recommendations, to refrain from

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

2. The trial court's order also terminated the parental rights of Ned's father. However, since the father is not a party to the present appeal, we will refrain from discussing the proceedings relating to him in any detail in this opinion.

engaging in domestic violence and to participate in a domestic violence treatment program, and to maintain contact with DSS.

The DSS petition came on for an adjudication hearing on 28 March 2018. At that time, DSS and Ned's parents entered into a stipulation with DSS that certain facts existed and that Ned could be adjudicated to be a neglected and dependent juvenile. On 25 April 2018, Judge Mary F. Paul (now Covington) entered an order finding Ned to be a neglected and dependent juvenile. After a dispositional hearing held on 25 April 2018, Judge Paul entered a dispositional order on 29 May 2018 ordering that Ned remain in DSS custody, establishing a visitation plan, and ordering respondent-mother to comply with the provisions of her service agreement.

After a review and permanency planning hearing on 5 September 2018, Judge Covington entered an order on 28 November 2018 finding that respondent-mother had stopped attending mental health and substance abuse treatment in June 2018, had resumed the use of impairing substances, and had not reengaged in mental health and substance abuse treatment despite promising DSS that she would do so. In addition, Judge Covington found that respondent-mother's housing had been unstable; that she had failed to take advantage of referrals relating to housing, income support, and employment; that she had failed to participate in a scheduled parenting capacity assessment; that she had acknowledged the occurrence of incidents of physical aggression against the father that had resulted in the entry of a protective order against her; and that she had violated the protective order, resulting in the institution of new criminal charges against her. On the other hand, Judge Covington found that respondent-mother had attended the majority of her scheduled visits with Ned and had remained in contact with DSS. In light of these findings, Judge Covington ordered that Ned remain in DSS custody, established "a primary plan of termination of parental rights and adoption and a secondary plan of reunification with a parent," reduced the amount of visitation that respondent-mother was entitled to have with Ned, and ordered respondent-mother to comply with the provisions of her service agreement.

Another review and permanency planning hearing was held on 6 March 2019. In an order entered on 18 April 2019, Judge Covington changed the permanent plan for Ned to "a primary plan of termination of parental rights and adoption and a secondary plan of guardianship with a court approved caretaker" and relieved DSS from the necessity for making any further efforts to reunify Ned with respondent-mother.

Finally, Judge Covington reduced the amount of visitation that respondent-mother was entitled to have with Ned even further.

On 23 April 2019, DSS filed a petition seeking to terminate respondent-mother's parental rights in Ned based upon neglect, N.C.G.S. § 7B-1111(a)(1); willful failure to make reasonable progress toward correcting the conditions that had led to Ned's removal from the family home, N.C.G.S. §7B-1111(a)(2); failure to pay a reasonable portion of the cost of the care that Ned had received while in DSS custody, N.C.G.S. § 7B-1111(a)(3); and dependency, N.C.G.S. § 7B-1111(a)(6). Respondent-mother filed a verified answer denying the material allegations contained in the termination petition on 8 May 2019.

The termination petition came on for hearing before the trial court on 24 October 2019. On 12 November 2019, the trial court entered an order terminating respondent-mother's parental rights in Ned. In its termination order, the trial court found that respondent-mother's parental rights in Ned were subject to termination based upon neglect, N.C.G.S. § 7B-1111(a)(1), and willful failure to make reasonable progress toward correcting the conditions that had led to Ned's removal from the family home, N.C.G.S. § 7B-1111(a)(2), and that the termination of respondent-mother's parental rights would be in Ned's best interests. Respondent-mother noted an appeal to this Court from the trial court's termination order.

## II. Substantive Legal Analysis

### A. Competency Inquiry

**[1]** In seeking relief from the trial court's termination order before this Court, respondent-mother begins by arguing that the trial court had abused its discretion by failing to conduct an inquiry regarding her competency on its own motion for purposes of determining whether she was entitled to the appointment of a guardian *ad litem*. A parent's entitlement to the appointment of a guardian *ad litem* in juvenile proceedings, including those involving a request for the termination of parental rights, is governed by N.C.G.S. § 7B-1101.1(c) (2019), which provides that, "[o]n motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent who is incompetent in accordance with [N.C.]G.S. [§] 1A-1, Rule 17." An "incompetent adult" for purposes of N.C.G.S. 1A-1, Rule 17, is an adult "who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy,

cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." N.C.G.S. § 35A-1101(7) (2019).

"A trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention [that] raise a substantial question as to whether the litigant is *non compos mentis*." *In re T.L.H.*, 368 N.C. 101, 106, 772 S.E.2d 451, 455 (2015) (quoting *In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005)). "[T]rial court decisions concerning both the appointment of a guardian *ad litem* and the extent to which an inquiry concerning a parent's competence should be conducted are reviewed on appeal using an abuse of discretion standard." *Id.* at 107, 772 S.E.2d at 455. "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.' " *Id.* (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

In *In re T.L.H.*, this Court specifically addressed "the extent to which a trial court must inquire into a parent's competence to determine whether it is necessary to appoint a guardian *ad litem* for that parent despite the absence of any request that such a hearing be held or that a parental guardian *ad litem* be appointed." *Id.* at 102, 772 S.E.2d at 452. After acknowledging the applicability of the abuse of discretion standard to the issue under consideration, we explained that the trial court should be afforded substantial deference in deciding whether an inquiry into a litigant's competence ought to be undertaken given that it "actually interacts with the litigant whose competence is alleged to be in question and has, for that reason, a much better basis for assessing the litigant's mental condition than that available to the members of an appellate court, who are limited to reviewing a cold, written record." *Id.* at 108, 772 S.E.2d at 456.

> As a result, when the record contains an appreciable amount of evidence tending to show that the litigant whose mental condition is at issue is not incompetent, the trial court should not, except in the most extreme instances, be held on appeal to have abused its discretion by failing to inquire into that litigant's competence.

*Id.* at 108–09, 772 S.E.2d at 456.

In spite of the significant mental health issues disclosed in the record before us in that case, we held in *In re T.L.H.* that "sufficient evidence tending to show that [the] respondent was not incompetent existed to obviate the necessity for the trial court to conduct a competence inquiry

before proceeding with the termination hearing." *Id.* at 109, 772 S.E.2d at 456. In reaching this conclusion, we noted that the respondent "exercised what appears to have been proper judgment in allowing DHHS to take custody of [the child,]" "demonstrated a reasonable understanding of the proceedings that would inevitably result from that decision[,]" provided cogent testimony at a permanency planning hearing that demonstrated her understanding of her case plan and the consequences of her decisions, and took steps to comply with aspects of her case plan. *Id.* at 109, 772 S.E.2d at 456–57. As a result, this Court was "unable to conclude that the apparent failure to conduct such an inquiry constituted an abuse of discretion" given the existence of "ample support for a determination that respondent understood that she needed to properly manage her own affairs and comprehended the steps that she needed to take in order to avoid the loss of her parental rights . . . ." *Id.* at 108, 109, 772 S.E.2d at 456, 457.

In our recent decision in *In re Z.V.A.*, 373 N.C. 207, 835 S.E.2d 425 (2019), this Court applied the framework delineated in *In re T.L.H.* in holding that the trial court "did not abuse its discretion when it did not conduct an inquiry into [the respondent's] competency." *Id.* at 211, 835 S.E.2d at 429. In reaching this result, we reasoned that, despite the respondent's low intelligence quotient, she had been diagnosed with only a "mild intellectual disability" in light of her demonstrated ability to work and to attend school. *Id.* at 210, 835 S.E.2d at 429. In addition, we noted that the existence of sufficient evidentiary support for the trial court's findings that the respondent had developed adaptive skills that lessened the impact of her disability and had engaged in portions of her case plan "d[id] not suggest [the respondent's] disability rose to the level of incompetence so as to require the appointment of a guardian *ad litem* to safeguard [the respondent's] interests." *Id.* at 211, 835 S.E.2d at 429.

In attempting to distinguish this case from *In re T.L.H.* and *In re Z.V.A.*, respondent-mother argues that the reason for our decision to give deference to the trial court, which revolved around the trial court's opportunity to observe the party whose competence is at issue on a first-hand basis, was "not helpful or decisive" in this case because respondent-mother did not testify at the termination hearing. In addition, respondent-mother argues that the record fails to contain sufficient evidence to support a finding that respondent-mother was not incompetent, with respondent-mother emphasizing the existence of evidence tending to show that she had significant mental health problems and failed to comply with the provisions of her service agreement as indicative of her lack of judgment and her inability to manage her own affairs. We do not find respondent-mother's arguments to be persuasive.

As an initial matter, we note that, even though the record contains no indication that respondent-mother testified before the trial court, it clearly shows that respondent-mother was present for the pre-adjudicatory, adjudicatory, and dispositional hearings; for the subsequent review and permanency planning hearings; and for the termination hearing. As a result, Judge Covington and the trial court had ample opportunity to gauge respondent-mother's competence by observing her demeanor and behavior in court throughout the progress of the underlying neglect proceeding and the termination proceeding, making it completely appropriate for us to give deference to their failure to inquire into respondent-mother's competence.

Secondly, in spite of the fact that respondent-mother suffered from untreated mental health problems and had tested "in the range typically associated with a diagnosis of Mild Intellectual Deficits[,]"the record contains an appreciable amount of evidence tending to show that respondent-mother was not incompetent. According to the undisputed evidence and the trial court's unchallenged findings of fact, respondent-mother acknowledged the existence of her mental health and substance abuse problems at a relatively early stage and took steps to begin treatment for those problems. In addition, respondent-mother entered into a service agreement with DSS that was intended to address the reasons that led to Ned's placement in DSS custody and participated in negotiating a stipulation with DSS concerning the existence of certain facts and Ned's status as a neglected and dependent juvenile. Moreover, Judge Covington specifically found in the adjudication order that respondent-mother had appeared in open court and participated in the negotiation of the stipulations, confirmed that she understood them, and had entered into these stipulations freely and voluntarily with the full understanding that they would result in a decision finding Ned to be a neglected and dependent juvenile. In the same vein, we note that respondent-mother verified the answer to the termination petition that was filed on her behalf, served as her own payee for purposes of receiving disability benefits, acknowledged her need for treatment, expressed a preference for participating in certain treatment programs as compared to others, and engaged in various treatment programs during the course of the juvenile proceedings. Finally, the record shows that respondent-mother expressed her preference that Ned be placed with members of her family, attended the majority of her scheduled visits with Ned, had routine contact with DSS, and was consistently available to the court, DSS, and Ned's guardian *ad litem*.

After examining the record before us in this case, we do not believe that this case involves the sort of "extreme instance" in which a trial

judge would have abused his or her discretion by failing to inquire on his or her own motion into the extent, if any, to which respondent-mother was entitled to the appointment of a guardian *ad litem*. *In re T.L.H.*, 368 N.C. at 109, 772 S.E.2d at 456.

> We do not . . . wish to be understood as holding that the trial court would have had no basis for inquiring into respondent[-mother]'s competence in light of her history of serious mental health conditions. A trial court would have been well within the bounds of its sound discretion to conclude that respondent[-mother]'s lengthy history of serious mental illness raised a substantial question concerning her competence sufficient to justify further inquiry. In fact, such an inquiry in this case might well have been advisable.

*Id.* at 111–12, 772 S.E.2d at 458. On the other hand, given the opportunity that Judge Covington and the trial court had to observe respondent-mother in court and the appreciable amount of evidence in the record tending to show that respondent-mother was not incompetent, "we are unable to conclude that the trial court could not have had a reasonable basis for reaching the opposite result[.]" *Id.* at 112, 772 S.E.2d at 458. For that reason, we hold that, in this case, the trial court did not abuse its discretion by failing to conduct an inquiry into the issue of whether a guardian *ad litem* should have been appointed for respondent-mother.

B. Analysis of the Trial Court's Termination Order

A termination of parental rights proceeding is conducted using a two-stage process that consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more 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 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) (2019).

1. Grounds for Termination

**[2]** In respondent-mother's view, the trial court erred by determining that her parental rights were subject to termination for neglect, N.C.G.S. § 7B-1111(a)(1), and failure to make reasonable progress toward

correcting the conditions that had led to the child's removal from the family home, N.C.G.S. § 7B-1111(a)(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). "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)). "[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).

A parent's parental rights in a child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(1) in the event that the parent has neglected the juvenile to such an extent that the juvenile is a "neglected 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 as "[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[.]" N.C.G.S. § 7B-101(15) (2019).

> In deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child at the time of the termination proceeding. In 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. 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. A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect.

*In re M.A.*, 374 N.C. 865, 869–70, 844 S.E.2d 916, 920–21 (2020) (cleaned up).[3]

The trial court concluded that respondent-mother's parental rights in Ned were subject to termination for neglect based upon a determination that respondent-mother "ha[d] neglected [Ned] within the meaning of N.C.[G.S.] § 7B-101(15) and it is probable that there would be a repetition of the neglect of [Ned] if [he] were returned to the care of [respondent-mother]." In support of this determination, the trial court made detailed findings of evidentiary fact, including findings that Ned had previously been determined to be a neglected juvenile on 25 April 2018 and that respondent-mother had made little progress toward completing the requirements of the service agreement that she had entered into with DSS. More specifically, the trial court found that respondent-mother had failed to address her mental health, substance abuse, and domestic violence problems; that she had failed to establish and maintain safe and appropriate housing; and that her failures to adequately address those problems demonstrated that there was a likelihood that Ned would be neglected in the future in the event that he was returned to her care.

Although respondent-mother has not challenged any specific finding of fact contained in the trial court's termination order as lacking in sufficient evidentiary support and, on the contrary, concedes that the trial court's findings are supported by "some form of evidence," she does argue that, since the trial court's findings resemble language found in findings of fact set out in other orders and in the reports that were admitted into evidence at the termination hearing and since these earlier findings and the report language were predicated upon the use of lower standards of proof than the clear, cogent, and convincing standard of proof that is applicable in termination proceedings, they should not have been used to support the findings that the trial court made in the termination order. *See* N.C.G.S. § 7B-1109(f). This argument lacks merit.

As this Court recognized in *In re T.N.H.*, the "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

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

a judge sits without a jury, the trial court is presumed to have disregarded any incompetent evidence and relied upon the competent evidence." 372 N.C. at 410, 831 S.E.2d at 60. On the other hand, we have also held that "the trial court may not rely solely on prior court orders and reports but must receive some oral testimony at the hearing and make an independent determination regarding the evidence presented." *Id.* At the termination hearing, the trial court took judicial notice of the underlying adjudicatory and dispositional orders, allowed the admission of reports from the DSS and Ned's guardian *ad litem* into evidence, and heard live testimony from the social worker responsible for overseeing Ned's case. After carefully reviewing the record, including the orders and reports that were made part of the record and the live testimony that was received at the termination hearing, we are satisfied that the findings of fact addressing the issue of whether respondent-mother's parental rights in Ned were subject to termination are proper in form and have adequate evidentiary support.

In addition, respondent-mother argues that the trial court erred by concluding that her parental rights in Ned were subject to termination for neglect on the grounds that the trial court had failed to consider whether her poverty and mental health difficulties adversely affected her ability to care for Ned. More specifically, respondent-mother argues that the trial court had failed to make adequate findings of fact concerning the issue of whether her poverty and mental health problems were the sole reasons for her neglect of Ned and that the existence of these conditions "explain[s] and excuse[s] the facts used by the court for its grounds in termination." Once again, we do not find this argument persuasive.

Respondent-mother is, of course, correct in arguing 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[.]" *In re M.A.*, 374 N.C. at 881, 844 S.E.2d at 927 (citing 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")). Although the record contains evidence tending to show that respondent-mother had experienced financial difficulties, a careful analysis of the record shows that respondent-mother's inability to care for Ned did not stem solely from her poverty. The prior adjudication of neglect and the trial court's determination that there was a likelihood that Ned would be neglected in the event that he was returned to respondent-mother's care resulted from a combination of factors, including respondent-mother's substance abuse, mental health, and domestic violence problems. The evidence

and the trial court's unchallenged findings of fact tend to show that respondent-mother failed to complete treatment that was intended to assist her in addressing those problems and that respondent-mother disregarded the treatment-related referrals and recommendations that she had received from DSS, that respondent-mother continued to use controlled substances, and that respondent-mother continued to engage in acts of domestic violence against the father. Finally, the record contains evidence tending to show that, even though DSS referred respondent-mother to services that could have alleviated the financial hardships that she was experiencing relating to income, employment, housing, and transportation, respondent-mother refused to take advantage of the opportunities that were made available to her as a result of these referrals. As a result, we are satisfied that the trial court's unchallenged findings of fact and the record evidence establish that the trial court's decision to find that respondent-mother's parental rights in Ned were subject to termination for neglect pursuant to N.C.G.S. § 7B-1111(a)(1) rested upon considerations other than respondent-mother's poverty.

Similarly, respondent-mother asserts that the trial court's findings do not support a determination that her parental rights in Ned were subject to termination on the basis of neglect given that her inability to care for Ned resulted from the existence of her mental health problems. As we understand this aspect of her challenge to the lawfulness of the trial court's termination order, respondent-mother is effectively asserting that termination of parental rights on the grounds of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) is impermissible in the absence of a showing of willfulness.[4] This Court has, however, recently held that "[w]hether the respondent-mother's failure to comply with her case plan was willful is not relevant to establish this ground for termination." *In re Z.K.*, 375 N.C. 370, 373, 847 S.E.2d 746, 748 (2020). On the contrary, we note that this Court held several decades ago 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 Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984), and that, "[w]here the evidence shows that a parent has failed or is unable to adequately provide for his child's physical and economic needs, whether it be *by reason of mental infirmity* or by reason of willful conduct on the part of the parent, and it appears that the parent will not or is not able to

4. The only authority that respondent-mother has cited in support of her contention that a showing of willfulness must be made before a parent's parental rights in a child may be terminated for neglect is an unpublished decision of the Court of Appeals, *see In re M.A.F.*, 2010 WL 2163806 at *6 (N.C. Ct. App. 2010) (unpublished).

correct those inadequate conditions within a reasonable time, the court may appropriately conclude that the child is neglected." *Id.* (emphasis added). As a result, we conclude that respondent-mother's assertion that a parent's parental rights in a child may not be terminated on the basis of neglect in the event that the parent's inability to provide adequate care for that child stems from mental health problems rests upon a misapprehension of well-established North Carolina law.

Thus, we hold that the trial court's unchallenged findings of fact establish that Ned had previously been found to be a neglected juvenile and that the neglect that Ned had previously experienced was likely to recur in the event that he was returned to respondent-mother's care given her failure to adequately address her substance abuse, mental health, and domestic violence problems and to obtain appropriate housing. As a result, given that the existence of a single ground for termination suffices to support the termination of a parent's parental rights in a child, *In re A.R.A.*, 373 N.C. at 194, 835 S.E.2d at 421, we further hold that the trial court did not err as a matter of North Carolina law in determining that respondent-mother's parental rights in Ned were subject to termination for neglect pursuant to N.C.G.S. § 7B-1111(a)(1).

2. Dispositional Determination

**[3]** In her final challenge to the substance of the trial court's termination order, respondent-mother argues that the trial court erred by determining that the termination of her parental rights would be in Ned's best interests. In determining whether the termination of a parent's parental rights would be in a 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.

N.C.G.S. § 7B-1110(a). "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. An "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 (quoting *In re T.L.H.*, 368 N.C. at 107, 772 S.E.2d at 455).

In this case, the trial court made findings concerning each of the factors enumerated in N.C.G.S. § 7B-1110(a) in determining that the termination of respondent-mother's parental rights would be in Ned's best interests. As part of this process, the trial court found that Ned was twenty months old; that the primary permanent plan for Ned was one of adoption; that the termination of respondent-mother's parental rights would aid in the implementation of Ned's permanent plan by freeing Ned for adoption; that Ned's current foster family, with whom he had been placed within six days after his birth, was ready, willing, and able to adopt him; that Ned had a stronger bond with respondent-mother than he did with the father, with whom he had a minimal bond; that the relationship between Ned and respondent-mother was more like that between acquaintances than that between family members; that Ned was very bonded with his foster family, including both the parents and their children; and that all of Ned's needs were being met by his foster family, who had committed to providing him with a permanent home. Finally, the trial court found that Ned's foster parents had worked with the foster parents of Ned's full sibling, who was in foster care in Davie County, for the purpose of arranging visits between Ned and his sibling despite the absence of any court order requiring them to do so.

In view of the fact that respondent-mother has not challenged the trial court's dispositional findings as lacking in sufficient evidentiary support, those findings are binding upon this Court for purposes of appellate review. *In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58. Instead, respondent-mother argues that the trial court abused its discretion at the dispositional phase of this termination proceeding by failing to make findings of fact concerning respondent-mother's poverty and mental

health problems. In addition, respondent-mother argues that the fact that she did not have a strong bond with Ned stemmed from the limited visitation that she had been authorized to have with her child and that the trial court had erred by failing to consider whether the implementation of an alternative plan of guardianship that included continued visitation intended to preserve the family unit would be in Ned's best interests. Once again, we do not find respondent-mother's arguments to be persuasive.

Aside from asserting that her poverty and mental health problems had contributed to the existence of the conditions that had led to the trial court's determination that her parental rights in Ned were subject to termination, respondent-mother has failed to explain how the issues of poverty and mental health were related to the dispositional decision that the trial court was required to make at the second stage of this proceeding. Moreover, we are unable to see how the factors upon which respondent-mother relies in support of this aspect of her argument support a reversal of the trial court's dispositional decision. As an additional matter, we note that this Court has rejected arguments that the trial court commits error at the dispositional stage of a termination of parental rights proceeding by failing to explicitly consider non-termination-related dispositional alternatives, such as awarding custody of or guardianship over the child to the foster family, by reiterating that "the paramount consideration must always be the best interests of the child." *In re J.J.B.*, 374 N.C. 787, 795, 845 S.E.2d 1, 6 (2020); *see also In re Z.A.M.*, 374 N.C. 88, 100–01, 839 S.E.2d 792, 800–01 (2020); *In re Z.L.W.*, 372 N.C. 432, 438, 831 S.E.2d 62, 66 (2019). As we have previously explained,

> [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").

*In re Z.L.W.*, 372 N.C. at 438, 831 S.E.2d at 66.

After having made sufficient findings of fact concerning the dispositional factors enumerated in N.C.G.S. § 7B-1110(a), the trial court determined that "[Ned] is in need of a safe, stable home and a permanent plan of care at the earliest possible age which only can be obtained by the severing of the relationship between the child and [respondent-mother] and by the termination of parental rights[.]" In view of the fact that "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." *In re Z.A.M.*, 374 N.C. at 100, 839 S.E.2d at 801; *see also In re J.J.B.*, 374 N.C. at 796, 845 S.E.2d at 7. As a result, we hold that the trial court did not abuse its discretion by concluding that termination of respondent-mother's parental rights would be in Ned's best interests.

C. Indian Child Welfare Act

**[4]** In her brief before this Court, respondent-mother argues that the trial court erred by terminating her parental rights in Ned in the absence of a showing of compliance with the requirements of ICWA. 25 U.S.C. §§ 1901–1963 (2018).[5] We recently addressed the manner in which ICWA should be applied in *In re E.J.B.*, 375 N.C. 95, 846 S.E.2d 472 (2020). As we recognized in that decision, ICWA, which was enacted by Congress in 1978, "established 'minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes' in order to 'protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.' " *Id.* at 98, 846 S.E.2d at 474 (quoting 25 U.S.C. § 1902 (2018)). In order to achieve that goal, ICWA enacted notice requirements that are applicable to State court child custody proceedings involving Indian children, including proceedings involving requests for the termination of a parent's parental rights. 25 U.S.C. § 1912(a) (2018); *see also* 25 U.S.C. § 1903(1)(ii) (2018) (defining "child custody proceeding" to include requests that a parent's parental rights be terminated). ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]" 25 U.S.C. § 1903(4) (2018). ICWA's notice provisions require that:

5. We use the terms "Indian" and "Indian child" in order that our opinion will be worded consistently with the terminology used in ICWA. *See In re E.J.B.*, 375 N.C. C. at 95, 846 S.E.2d at 473 n.1.

> [i]n any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the . . . termination of parental rights to[ ] an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

25 U.S.C. § 1912(a) (2018).

The Department of the Interior adopted binding regulations in order to ensure the uniform application of ICWA in 2016. *In re E.J.B.*, 375 N.C. at 101, 846 S.E.2d at 476 (citing Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 38,782 (June 14, 2016) (20 be codified at 25 C.F.R. pt. 23)). As we explained in *In re E.J.B.*, these regulations updated the existing notice provisions and added Subpart I, *see* 25 C.F.R. §§ 23.101–.144; *see also* Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,867–68, pursuant to which "state courts bear the burden of ensuring compliance with the Act." *In re E.J.B.*, 375 N.C. at 101, 846 S.E.2d at 476 (citing 25 C.F.R. § 23.107(a)–(b); *see also In re L.W.S.*, 255 N.C. App. 296, 298 n.4, 804 S.E.2d 816, 819, n.4 (2017)). Among other things, the 2016 regulations provide that "[s]tate courts must ask each participant in a child custody proceeding, on the record, whether that participant knows or has reason to know that the matter involves an Indian child" and "inform the parties of their duty to notify the trial court if they receive subsequent information that provides reason to know the child is an Indian child." *In re E.J.B.*, 375 N.C. at 101, 846 S.E.2d at 476 (citing 25 C.F.R. § 23.107(a)).

> If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an "Indian child," the court must:

> (1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership) . . . .

25 C.F.R. § 23.107(b). Although "[s]tate courts should seek to allow tribes to determine membership . . . ," *In re E.J.B.*, 375 N.C. at 102, 846 S.E.2d at 476 (citing 25 C.F.R. § 23.108(a)–(b) (providing that, except as otherwise required by federal or tribal law, the determination of whether a child is a member of a tribe or eligible for membership in a tribe is solely within the jurisdiction and authority of the tribe, with a state court lacking the authority to substitute its own membership determination for that of a tribe)), the trial court may make an independent determination concerning a child's status as an Indian child based upon the available information in the event that the relevant tribes repeatedly fail to respond to written membership inquiries in spite of diligent efforts to obtain a response made by the petitioner. Indian Child Welfare Act Proceedings 81 Fed. Reg. at 38,806; *In re E.J.B.*, 375 N.C. at 102, 846 S.E.2d at 476. However, in the event that "a tribe fails to respond to multiple written requests, the trial court must first seek assistance from the Bureau of Indian Affairs," *In re E.J.B.*, 375 S.E.2d at 102, 846 S.E.2d at 476 (citing 23 C.F.R. § 23,105(c) (providing that, if "the Tribe contacted fails to respond to written inquiries," the requesting party "should seek assistance in contacting the Indian Tribe from the" Bureau of Indian Affairs), before making its own independent determination.

In her brief, respondent-mother argues the trial court failed to comply with requirements of ICWA in light of the fact that it had been reported at an early stage of the proceedings that Ned might be an Indian child through his maternal grandmother in upstate New York. Although respondent-mother acknowledges that DSS sent inquiries to a number of tribes and received a response from the Eastern Band of Cherokee Indians that Ned was neither a member nor eligible for membership in the tribe, she argues that the question of whether Ned was an Indian child by virtue of his New York ancestry remained unresolved throughout the entire course of the proceedings before the trial court and that, until a determination has been made concerning the issue of whether Ned is an Indian child as a result of his potential affiliation with a tribe in New York, the trial court had failed to comply with the requirements of ICWA. We conclude that respondent-mother's argument has merit.

As the record reflects, Judge Jimmy L. Myers, who addressed the issue of whether Ned should be held in nonsecure custody early in the juvenile proceedings, was aware that Ned had "possible Native American heritage through [respondent-mother's] maternal grandmother" as early as the date upon which the 28 February 2018 order addressing the need for Ned to remain in nonsecure custody was entered. In that order, Judge Myers found that "[r]espondents report Native American Heritage" and that the parties "have reason to know that the juvenile is an Indian Child." As a result, Judge Myers ordered DSS to "make diligent efforts to verify the juvenile's status as an Indian Child and notify the tribe that the respondents believe to be a member of . . . and/or contact the Bureau of Indian Affairs[.]"

A nonsecure custody report submitted by DSS on 7 March 2018 indicated "[an] Indian Child Welfare Act application has been submitted in reference to the respondent[-]mother's grandmother's Indian heritage." In a report submitted on 25 April 2018 in connection with the initial dispositional hearing, DSS stated that Ned was not subject to ICWA given that DSS had "sent the necessary ICWA inquiry letters," that it had received a response from the Eastern Band of Cherokee Indians indicating that Ned was neither a registered member nor eligible to register as a member of the tribe, and that DSS was "waiting for responses to the remaining inquiries." The same information was contained in reports that DSS submitted in connection with permanency planning and review hearings held in August 2018 and March 2019.

In an order entered following the 6 March 2019 review and permanency planning hearing, Judge Covington found that "[t]he minor child is not an Indian child according to the information reported by [DSS,]" that "[t]he minor child is not a member of the Eastern Band of Cherokee Indians," and that "[DSS] is awaiting responses from other tribes." The report that DSS submitted in connection with a May 2019 permanency planning and review hearing contained no additional information, so the trial court reiterated Judge Covington's earlier finding that "[t]he minor child is not an Indian child" in the order that was entered as a result of the 29 May 2019 hearing. The trial court's termination order did not address the extent to which the efforts in which DSS had engaged resulted in adequate compliance with ICWA's notice requirements.

As was the case in *In re E.J.B.*, 375 N.C. at 103, 846 S.E.2d at 477, "the trial court had reason to know that an Indian child might be involved" in this case. In addition, given that the notices that DSS sent to the relevant tribes are not contained in the record, we have no basis for determining whether they complied with the requirements for the contents of such

notices set out in 25 U.S.C. § 1912 and 25 C.F.R. § 23.111(d). Finally, given the absence of a response from any of the tribes to which DSS sent notice other than the Eastern Band of Cherokee Indians and given the absence of any indication that, following the failure of these other tribes, which are not specifically identified in the record, to respond, DSS sought "assistance from the Bureau of Indian Affairs prior to making its own independent determination" of whether Ned was an Indian child as required by 25 C.F.R. § 23.105(c), the record fails to contain sufficient information to permit a determination that the trial court adequately ensured that compliance with the notice requirements of ICWA actually occurred. As a result, we hold that this case should be remanded to the District Court, Davidson County, for further proceedings concerning the issue of whether the notice requirements of ICWA were complied with prior to the entry of the trial court's termination order and whether Ned is an Indian child for purposes of ICWA. In the event that the trial court concludes upon remand, after making any necessary findings or conclusions, that the notice requirements of ICWA were properly complied with or that Ned was not an Indian child, it shall reaffirm the trial court's termination order. In the event that the trial court determines on remand that Ned is, in fact, an Indian child, it shall vacate the trial court's termination order and "proceed in accordance with the relevant provisions of" ICWA. *In re E.J.B.*, 375 N.C. at 106, 846 S.E.2d at 479.

## III. Conclusion

Thus, for the reasons set forth above, we hold that the trial court did not err by failing to make inquiry on its own motion into the issue of whether a guardian *ad litem* should have been appointed for respondent-mother and that the trial court did not err in making the findings of fact, conclusions, and discretionary determinations contained in the trial court's adjudication and dispositional decisions. However, given the absence of any indication that the trial court complied with the notice provisions of ICWA, this case is remanded to the trial court for further proceedings not inconsistent with this opinion.

REMANDED.

**IN RE Q.B.**

[375 N.C. 826 (2020)]

IN THE MATTER OF Q.B.

No. 59A20

Filed 11 December 2020

**1. Termination of Parental Rights—competency inquiry—parental guardian ad litem**

In a termination of parental rights proceeding, the trial court did not abuse its discretion by failing to conduct a second inquiry into whether respondent-mother was entitled to a guardian ad litem despite respondent being adjudicated incompetent and appointed a guardian of the person in a separate adult protective services proceeding. Although these events occurred after the trial court's first determination that respondent was not entitled to a Rule 17 guardian, the trial court was not required to hold another competency hearing before proceeding with termination where there was sufficient evidence that respondent was competent to take part in the proceedings without the aid of a guardian ad litem.

**2. Termination of Parental Rights—competency inquiry—parental guardian ad litem—obligation of petitioning agency to request**

In a termination of parental rights proceeding, the petitioning department of social services was not obligated to request the appointment of a guardian ad litem for respondent-mother if there was reason to believe she was incompetent where Civil Procedure Rule 17(c) imposed no such requirement.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 22 November 2019 by Judge Lee F. Teague in District Court, Pitt County. This matter was calendared for argument in the Supreme Court on 23 November 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

*Timothy E. Heinle for petitioner-appellee Pitt County Department of Social Services.*

*R. Bruce Thompson II for appellee Guardian ad litem.*

*Christopher M. Watford for respondent-appellant mother.*

DAVIS, Justice.

The issue in this case is whether the trial court abused its discretion by failing to reconsider whether respondent-mother (respondent) was entitled to the appointment of a guardian *ad litem* (GAL) to assist her in her termination of parental rights proceeding. Because we conclude that the trial court did not abuse its discretion in failing to sua sponte conduct such an inquiry, we affirm the trial court's order terminating respondent's parental rights.

**Factual and Procedural Background**

This case involves a termination of parental rights proceeding initiated by petitioner Pitt County Department of Social Services (DSS) against respondent on the basis of neglect and dependency of her minor child "Quanna."[1] On 20 September 2017—approximately one month before the birth of Quanna—DSS received a report regarding respondent and her family. DSS had prior involvement with respondent dating back to 2012 due to reports concerning respondent's alleged neglect of Quanna's three older siblings.

The 2017 report alleged that respondent was unable to properly care for herself and for her existing three children. The report stated that respondent was selling her food stamps, she was unable to provide proper housing, food, and other necessities for her children, and the home was uninhabitable due to a lack of utilities and rat infestation.

DSS visited the home to investigate and found it to be uninhabitable with no indoor plumbing, no functioning utilities, a partially caved-in ceiling, no food in the home, and a rat and cockroach infestation. The DSS visit also revealed that respondent "appeared to be limited" intellectually, that she had a learning disability and various health issues, and that the monthly social security income that the household received was not being used to meet the basic needs of respondent or her children. Accordingly, DSS began two simultaneous investigations into the household—a DSS Child Protective Services investigation regarding respondent's three children and a DSS Adult Protective Services investigation into respondent's ability to care for herself and meet her own basic needs.

As part of the latter investigation, an Adult Protective Services petition was filed after DSS substantiated caretaker neglect "as a result of

1. A pseudonym is used to protect the identity of the juvenile.

[respondent] being a disabled adult and her caretakers not meeting her basic needs." Respondent's primary caretaker was her sister, who was also the designated payee for respondent's social security income. The investigation found that despite receiving $448 monthly in food stamps and $735 monthly in social security income, respondent and her children were not having their basic needs met.

Respondent gave birth to Quanna in November 2017. While respondent was in the hospital, she became belligerent with hospital staff and demanded to be released with Quanna, despite having no plans for transportation and having obtained no crib, formula, diapers, or other necessities for the child. Moreover, after Quanna's birth the social security checks that the entire household had depended upon for income were suspended. Accordingly, on 1 December 2017 DSS filed a petition alleging that Quanna was a neglected and dependent juvenile and obtained nonsecure custody of her.

Pursuant to a request by DSS, respondent completed a psychological evaluation on 10 January 2018. The examiner, psychologist Rhonda Cardinale, reported that respondent had an IQ score of 63, which fell within the low functioning range of clinical impairment. Cardinale stated her opinion that respondent's evaluation "reflects that her overall level of intellectual functioning as well as her overall level of adaptive behavior skills falls into the range of clinical impairment." Cardinale opined that due to respondent's cognitive defects, she "would have difficulty independently and adequately making positive decisions for herself" and would "require assistance in ensuring that her basic needs are adequately met." Cardinale accordingly recommended that "the appointment of a guardian and/or legal decision maker be considered" for respondent.

On 25 January 2018, the District Court, Pitt County, conducted a hearing at the request of DSS to determine whether to appoint a GAL for respondent pursuant to Rule 17 of the North Carolina Rules of Civil Procedure with regard to the juvenile proceeding involving Quanna. The trial court subsequently entered an order on 15 February 2018 finding that although respondent was "low-functioning," she "underst[oo]d the role of the Court and the parties in the Courtroom as well as the Court's function in determining the status of the Juveniles." The trial court concluded that respondent was "not incompetent in accordance with Rule 17" and was "not therefore entitled to a substitutive Rule 17 Guardian."

An adjudication hearing was conducted on the juvenile petition regarding Quanna on 1 February 2018. Respondent stipulated to the facts

alleged in the petition. The trial court entered an order on 22 February 2018 determining that Quanna was a neglected and dependent juvenile. The trial court ordered DSS to retain custody of Quanna and granted respondent weekly supervised visitation sessions. Respondent was also ordered to obtain appropriate housing, complete a parenting program and demonstrate skills learned, submit to drug screens, maintain communication with DSS, comply with all recommendations made by Adult Protective Services, and submit to a psychological evaluation.

On 25 April 2018, respondent was adjudicated to be incompetent in a separate proceeding brought by DSS Adult Protective Services in Superior Court, Pitt County. As a result, the Beaufort County DSS was appointed to serve as the guardian of her person pursuant to Chapter 35A of the General Statutes.[2] In addition, respondent was assigned a Pitt County Adult Protective Services counselor, Priscilla Delano, to help her manage her bills and healthcare needs. Delano also became the payee for respondent's social security checks.

Respondent underwent a parenting capacity evaluation with a psychologist, Dr. Robert Aiello, on 5 April 2019. Dr. Aiello recommended that (1) respondent be referred for individual counseling; (2) she submit to random drug tests to ensure she refrained from using marijuana; (3) parties working with respondent "review written documents with her carefully and in simple terms;" (4) respondent continue her payee arrangement with Delano because she "should not be expected to manage funds independently;" and (5) Adult Protective Services continue to monitor and assist respondent to see to her medical needs and ensure she was taking her prescribed medications.

The trial court held permanency planning hearings in October 2018, January 2019, and May 2019. The resulting permanency planning orders concluded that although respondent had completed parenting classes and attended visitation sessions, she was still unable to properly parent Quanna independently due to her mental deficiencies, inability to manage her finances, and lack of appropriate support. The trial court consequently ordered that DSS cease reunification efforts with respondent and adopted a primary permanent plan of guardianship with a court-approved caretaker and a secondary plan of adoption for Quanna.

On 13 June 2019, DSS filed a petition to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) and (a)(6) on the

2. According to the superior court's order, respondent's guardian of the person was authorized to maintain "the custody, care and control of the ward, but has no authority to receive, manage or administer the property, estate or business affairs of the ward."

grounds of neglect and dependency. A termination hearing was held on 24 October 2019. On 22 November 2019, the trial court entered an order concluding that the termination of respondent's parental rights in Quanna was warranted based on both grounds alleged by DSS. The trial court entered a separate dispositional order that same day concluding that it was in Quanna's best interests that respondent's parental rights be terminated.[3] Respondent appealed to this Court from both orders on 19 December 2019.

## Analysis

**[1]** Respondent's primary argument on appeal is that the trial court abused its discretion by failing to sua sponte conduct a second inquiry into whether she should be appointed a GAL under Rule 17 to assist her during the termination proceeding. Section 7B-1101.1(c) of the Juvenile Code provides that a trial court may appoint a GAL "[o]n motion of any party or on the court's own motion" when a parent is "incompetent in accordance with . . . Rule 17." N.C.G.S. § 7B-1101.1(c) (2019). In essence, respondent's argument is that although a Rule 17 hearing already took place in January 2018, by the time the termination hearing occurred in October 2019 new events had occurred that rendered it necessary for the trial court to re-examine respondent's competency. In support of her argument, respondent relies heavily on *In re T.L.H.*, 368 N.C. 101, 772 S.E.2d 451 (2015)—the leading decision from this Court discussing the need for the appointment of a GAL under Rule 17 in a termination proceeding.

*In re T.L.H.* concerned the circumstances under which a trial court is obligated to sua sponte "inquire into a parent's competence to determine whether it is necessary to appoint a guardian *ad litem* for that parent" in the context of a termination proceeding. *Id.* at 102, 772 S.E.2d at 452. The respondent-mother in that case had voluntarily placed her newborn child in the custody of the Guilford County Department of Health and Human Services (DHHS) shortly after the child's birth in April 2013, due to her concerns regarding the presence of illegal drugs in her residence and the unsafe behavior of her romantic partner. She also acknowledged that she suffered from mental health problems and she had not been taking her prescribed psychotropic medications. *Id.*

DHHS subsequently filed a petition in April 2013 alleging that the child was neglected and dependent based, in part, upon allegations that the respondent "ha[d] been to the hospital on several occasions in the

3. The trial court also terminated the parental rights of Quanna's father, who is not a party to this appeal.

last year due to mental health complications" and that she "ha[d] diagnoses of schizoaffective disorder, bipolar, cannabis abuse and personality disorder." *Id.* The petition also noted that the respondent's sole source of income was a monthly social security disability check "that had been awarded based on her diagnosed mental conditions." *Id.* at 103, 772 S.E.2d at 453.

Later that same month, the trial court—at the request of DHHS—appointed the respondent a GAL under Rule 17 on a "provisional/interim basis." *Id.* at 103, 772 S.E.2d at 452. The GAL ultimately served as respondent's advocate throughout the spring and summer of 2013, appearing on respondent's behalf at adjudication and disposition hearings and at a subsequent permanency planning hearing. *Id.* at 104, 772 S.E.2d at 453. In September 2013, DHHS filed a petition to terminate the respondent's parental rights and also requested that the trial court make an inquiry as to whether the respondent "need[ed] to have a Guardian ad Litem appointed for purposes of the [termination] proceeding." *Id.*

The trial court conducted a pretrial hearing in November 2013. At this hearing, the trial court released the respondent's GAL "[w]ithout making any specific findings concerning respondent's mental condition or the reasons underlying [the GAL's] initial appointment." *Id.* The termination hearing (at which the respondent did not appear) occurred in January 2014, and the trial court entered an order terminating respondent's parental rights. *Id.* at 104–05, 772 S.E.2d at 453–54. On appeal, the respondent argued that the trial court had abused its discretion by "failing to conduct an inquiry concerning whether she was entitled to the appointment of a [GAL under Rule 17]" in connection with her termination proceeding. *Id.* at 105, 772 S.E.2d at 454. We disagreed, holding that no abuse of discretion by the trial court had occurred. *Id.*

Initially, we noted that "[a] trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention [that] raise a substantial question as to whether the litigant is *non compos mentis*." *Id.* at 106–07, 772 S.E.2d at 455 (citing *In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005)). Because such judgments are discretionary in nature, we explained that "both the appointment of a [GAL] and the extent to which an inquiry concerning a parent's competence should be conducted" are reviewed for abuse of discretion. *Id.* at 107, 772 S.E.2d at 455.

We ultimately held that the trial court's failure to conduct a Rule 17 competency inquiry did not amount to an abuse of discretion. *Id.* at 108, 772 S.E.2d at 456. We explained our reasoning as follows:

> As an initial matter, we note that the standard of review applicable to claims like the one before us in this case is quite deferential. Affording substantial deference to members of the trial judiciary in instances such as this one is entirely appropriate given that the trial judge, unlike the members of a reviewing court, actually interacts with the litigant whose competence is alleged to be in question and has, for that reason, a much better basis for assessing the litigant's mental condition than that available to the members of an appellate court, who are limited to reviewing a cold, written record.
>
> Moreover, evaluation of an individual's competence involves much more than an examination of the manner in which the individual in question has been diagnosed by mental health professionals. Although the nature and extent of such diagnoses is exceedingly important to the proper resolution of a competency determination, the same can be said of the information that members of the trial judiciary glean from the manner in which the individual behaves in the courtroom, the lucidity with which the litigant is able to express himself or herself, the extent to which the litigant's behavior and comments shed light upon his or her understanding of the situation in which he or she is involved, the extent to which the litigant is able to assist his or her counsel or address other important issues, and numerous other factors. A great deal of the information that is relevant to a competency determination is simply not available from a study of the record developed in the trial court and presented for appellate review. As a result, when the record contains an appreciable amount of evidence tending to show that the litigant whose mental condition is at issue is not incompetent, the trial court should not, *except in the most extreme instances*, be held on appeal to have abused its discretion by failing to inquire into that litigant's competence.

*Id.* at 108–09, 772 S.E.2d at 456 (emphasis added).

After carefully reviewing the record in *In re T.L.H.*, this Court held that there was sufficient evidence in the record to allow the trial court to reasonably conclude that the respondent was competent. *Id.* at 109, 772 S.E.2d at 456. For example, we noted that the respondent had exercised "proper judgment" in allowing DHHS to take custody of her child shortly

after his birth and had demonstrated a "reasonable understanding of the proceedings" when she informed DHHS that—despite her relinquishment of custody—she still wished to preserve her right to be reunified with her child. *Id.* We also observed that the testimony the respondent had provided at her permanency planning hearing was "cogent and gave no indication that she failed to understand the nature of the proceedings." *Id.* For instance, the respondent testified that she had obtained medication to treat her mental conditions, discussed the need for budgeting and careful management of her income, demonstrated an understanding of the need to apply for subsidized housing, and testified that she had moved into a new apartment after realizing that "obtaining an independent place to live would allow her to become drug-free." *Id.* at 109, 772 S.E.2d at 456-47. This Court concluded that this evidence suggested that the respondent "understood that she needed to properly manage her own affairs and comprehended the steps she needed to take in order to avoid the loss of her parental rights." *Id.*

In the present case, respondent asserts that these principles from *In re T.L.H.* support the proposition that the trial court abused its discretion in failing to sua sponte conduct a second Rule 17 competency hearing. She argues that at the time of the 24 October 2019 termination hearing there was new evidence before the trial court showing her diminished capacity that had not been available to the trial court at the time of her initial Rule 17 competency hearing on 25 January 2018. Namely, respondent points to (1) the results of her January 2018 cognitive evaluation (which found her to have borderline intellectual functioning); (2) her official adjudication of incompetency in April 2018; (3) the appointment of a legal guardian and an Adult Protective Services counselor to manage her finances and medical decisions; and (4) the results of her April 2019 parenting capacity evaluation (which recommended against independent parenting).

We disagree with respondent's argument, because we believe that here—as in *In re T.L.H.*—the record contains "an appreciable amount of evidence tending to show that [respondent] was not incompetent" at the time of the termination hearing. *Id.* at 108–09, 772 S.E.2d at 456. First, we note that respondent received a competency hearing on 25 January 2018 in order to determine whether the appointment of a GAL for her under Rule 17 was necessary. During this hearing, respondent was represented by her attorney, and the trial court heard testimony from several witnesses, including respondent, respondent's sister, and several different social workers connected to the case. The trial court also had access to the results of respondent's cognitive evaluation, which was conducted

several weeks prior to the hearing. In its order entered 15 February 2018, the trial court found that although respondent was "low-functioning," she nevertheless "underst[oo]d the role of the Court and the parties in the Courtroom as well as the Court's function in determining the status of the Juveniles." The trial court concluded that respondent was "not incompetent in accordance with Rule 17" and was therefore not entitled to a GAL under Rule 17.

Second, respondent's competency is supported by the fact that she attended all hearings related to this matter (including three permanency planning hearings that took place after January 2018), which gave the trial court a sufficient opportunity to continue to observe her capacity to understand the nature of the proceedings. *See In re J.R.W.*, 237 N.C. App. 229, 235, 765 S.E.2d 116, 121 (2014) ("[T]he fact that Respondent attended all but one of the hearings . . . gave the trial court ample opportunity to observe and evaluate her capacity to act in her own interests.").

Third, respondent's testimony during the termination hearing on 24 October 2019 demonstrates that she understood the nature of the proceedings and her role in them as well as her ability to assist her attorney in support of her case. Respondent's testimony indicated that she was able to comprehend all questions posed to her and that she responded appropriately in a lucid and cogent manner. Her testimony suggested that she understood (1) how her lack of contact with Quanna could impact the strength of the bond between them; (2) how mental health issues can affect a person's parenting abilities; (3) the importance of attending court proceedings consistently and the effect that might have on her reunification efforts; (4) the importance of complying with DSS recommendations and attending all DSS appointments; (5) the correlation between her medications and her health along with the importance of following her doctor's recommendations; (6) the details of her payee arrangement with DSS as the recipient of her social security income; (7) the need to budget and manage money appropriately; (8) the importance of finding appropriate housing if her children were to be returned to her care; and (9) how to obtain emergency and medical care for her children.

The testimony offered by respondent here is similar to the testimony that was given by the respondent in *In re T.L.H.* There, we determined that the respondent's testimony was cogent because it demonstrated that she (1) had a "reasonable understanding of the proceedings" and their consequences; and (2) understood the need to "properly manage her own affairs and comprehended the steps she needed to take in order to avoid the loss of her parental rights," such

as consistently taking her medications, properly managing her money, applying for subsidized housing, and moving into a new apartment that would provide a drug-free environment. *In re T.L.H.*, 368 N.C. at 109, 772 S.E.2d at 456–47.

Moreover, as in *In re T.L.H.*, the testimony of DSS social workers during respondent's termination hearing here demonstrated that she had the ability to exercise "proper judgment" by finding appropriate housing on her own, completing a parenting program, maintaining contact with DSS, complying with recommendations made by Adult Protective Services, submitting to psychological and parenting evaluations, and attending all scheduled visits with Quanna. *See id.* at 109, 772 S.E.2d at 456. This evidence demonstrates that respondent understood the steps she needed to take to reunify with Quanna and had the ability to complete the majority of her case plan.

Respondent, however, attempts to distinguish her circumstances from those in *In re T.L.H.*, contending that there existed far more evidence in her case tending to show a lack of competence. Specifically, respondent argues that—unlike the mother in *In re T.L.H.*—(1) she received a great deal of assistance and government services stemming from her cognitive limitations; (2) the results of her cognitive evaluation showed that she had significantly diminished intellectual capacity; and (3) she was formally adjudicated to be incompetent prior to the termination hearing. Respondent thus argues that substantial evidence existed by the time of the termination hearing that her mental state had deteriorated to the point that a re-examination of her competency was necessary. We are not persuaded.

Admittedly, the record contained some evidence tending to cast doubt on respondent's competency, which may have supported a decision to conduct a second Rule 17 competency inquiry had the trial court elected to do so. However, given our deferential standard of review, we are unable to conclude that the trial court abused its discretion by failing to sua sponte conduct another hearing on the issue of whether respondent was entitled to a GAL pursuant to Rule 17. *See In re T.L.H.*, 368 N.C. at 108–09, 772 S.E.2d at 456 ("[T]he standard of review applicable to claims like the one before us in this case is quite deferential . . . . the trial court should not, *except in the most extreme instances*, be held on appeal to have abused its discretion by failing to inquire into [a] litigant's competence.") (emphasis added).

It is true that respondent's cognitive evaluation demonstrated that she had an IQ score of 63, which fell within the low functioning range of

clinical impairment and suggested that she may have difficulty in independent decision-making. It is also true that respondent received various government services in connection with her mental limitations, such as social security disability income and healthcare/money-management assistance from Adult Protective Services.

However, as our case law demonstrates, neither mental health limitations nor a low IQ constitute per se evidence of a lack of competency for purposes of Rule 17. *See In re T.L.H.*, 368 N.C. at 110, 772 S.E.2d at 457 (holding that a trial court is not required to "inquire into a parent's competency solely because the parent is alleged to suffer from diagnosable mental health conditions"); *see also In re Z.V.A.*, 373 N.C. 207, 210, 835 S.E.2d 425, 429 (2019) (holding that although the respondent had an IQ of 64, the evidence did not suggest that her disability "rose to the level of incompetence so as to require the appointment of a [GAL under Rule 17] to safeguard [her] interests"); *In re J.R.W.*, 237 N.C. App. at 234, 765 S.E.2d at 120 ("[E]vidence of mental health problems is not *per se* evidence of incompetence to participate in legal proceedings.").

It is also true that on 25 April 2018 respondent was adjudicated to be incompetent by the Superior Court, Pitt County, and as a result was appointed a guardian of her person and an Adult Protective Services counselor. However, we are unable to agree with respondent that these facts mandated a sua sponte competency determination.

Adjudications of adult incompetency are governed by Chapter 35A of our General Statutes. N.C.G.S. § 35A-1102. An adult guardian appointed under Chapter 35A generally has a broad range of powers with respect to the ward's person and property, N.C.G.S. § 35A-1241, whereas the duties of a GAL under Rule 17 appointed solely for purposes of assisting a parent during a particular juvenile proceeding are much more limited. *See* N.C.G.S. § 1A-1, Rule 17(e) (stating that a GAL "shall file and serve such pleadings as may be required" to assist the parent).

Accordingly, in determining whether the appointment of a GAL under Rule 17 is necessary in a termination proceeding, our courts have typically limited the scope of our examination to a determination of whether the parent is able to comprehend the nature of the proceedings and aid her attorney in the presentation of her case. *See In re T.L.H.*, 368 N.C. at 108, 772 S.E.2d at 456 (finding that a litigant's competence may be demonstrated by her "reasonable understanding of the proceedings" and by "the extent to which the litigant is able to assist his or her counsel"); *In re J.A.A.*, 175 N.C. App. at 71, 623 S.E.2d at 48 (stating that when a court inquires into the competency of a parent under Rule 17, the

court must "determine whether . . . the individual would be unable to aid in their defense at the termination of parental rights proceeding"). Thus, it follows that an individual can simultaneously be found incompetent under Chapter 35A yet not require a GAL under Rule 17.[4]

Furthermore, we note that in August 2019 (two months prior to the termination hearing), respondent's guardianship was changed to a limited guardianship. During the August 2019 guardianship hearing, the court found that respondent "understands conversation and communicates personal leads," "has the capacity to communicate important decisions," "[h]as capacity to appropriately relate to friends and family members, has capacity to make decisions without undue influence from others . . . and can utilize familiar community resources" for assistance. The court therefore determined that respondent's guardianship should be changed from a full guardianship to a limited guardianship. As a result, her "rights and privileges were increased," and she was granted authority to "participate in residential planning," handle larger amounts of money, "maintain her personal property," and independently make "decisions regarding any legal, medical, or social issues pertaining to her children."

Therefore, despite respondent's prior adjudication of incompetency under Chapter 35A, we nevertheless conclude that the trial court did not abuse its discretion by failing to sua sponte conduct a second inquiry into the need to appoint a GAL for her under Rule 17.

**[2]** In her final argument on appeal, respondent contends that when DSS filed its termination petition it was under an obligation to request the appointment of a GAL on her behalf. In making this argument, respondent cites Rule 17(c), which she interprets as imposing a requirement that a petitioner seek the appointment of a GAL if the petitioner has reason to believe that the respondent-parent is incompetent. *See* N.C.G.S. § 1A-1, Rule 17(c). She argues that DSS knew she was incompetent based upon the allegations contained in its termination petition, which described her limited capacity to care for Quanna, her inability to manage her funds appropriately, her low IQ, and her impaired adaptive behavior skills.

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4. In fact, at least one commentator has acknowledged this precise scenario. *See* Janet Mason, Guardian ad Litem for Respondent Parents in Juvenile Cases, Univ. of N.C. Sch. of Gov., 2014 Juvenile Law Bulletin 1, 20 (January 2014) (noting that "[a]ssessing competence in relation to a person's ability to participate meaningfully in the litigation also leaves open the possibility that someone who could be adjudicated incompetent in a proceeding under G.S. Chapter 35A . . . could participate meaningfully and assist the attorney in a juvenile case without the involvement of a guardian ad litem").

This argument is unavailing. We do not discern any language in Rule 17(c) that actually imposes a requirement on a county department of social services to request the appointment of a GAL for a parent believed to be incompetent. Although DSS did request in January 2018 that the trial court conduct an inquiry into the need for appointment of a GAL for respondent, the making of such a request—while salutary—was not expressly required under Rule 17(c). Accordingly, this argument is likewise without merit.

## Conclusion

For the reasons set out above, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

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IN THE MATTER OF R.L.D.

No. 122A20

Filed 11 December 2020

**Termination of Parental Rights—grounds for termination—neglect—private termination**

In a private termination of parental rights action where the child had not been in respondent-mother's physical custody for several years, the trial court properly terminated respondent's rights based on neglect where its unchallenged findings established that the child was previously neglected, supporting a conclusion that the child was likely to be neglected again if returned to respondent's care.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 9 December 2019 by Judge S. Katherine Burnette in District Court, Franklin County. This matter was calendared for argument in the Supreme Court on 23 November 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 for petitioner-appellees.*

*Edward Eldred for respondent-appellant mother.*

HUDSON, Justice.

Respondent-mother appeals from the trial court's orders terminating her parental rights to R.L.D. ("Robin").[1] After careful review, we affirm.

Robin was born to respondent-mother in Illinois in 2006. After Robin was born, respondent-mother and Robin's father resided together in a motel in Kankakee, Illinois. During this time, in November 2007, Robin's leg was broken, and respondent-mother and the father were investigated by Child Protective Services. Robin's paternal aunt, G.D., testified that she visited the motel and observed that Robin did not have a crib to sleep in, that there was never any food in the room, that the room did not have a stove, and that respondent-mother and the father "were constantly doing drugs and [the father] was drinking a lot." In 2008, respondent-mother and the father were evicted from the motel and they, along with Robin, moved into the home of the paternal uncle, R.D., and G.D.

Respondent-mother and Robin lived with R.D. and G.D. only for a short period of time before leaving. The father remained with R.D. and G.D. In 2009, respondent-mother requested that R.D. and G.D. pick up Robin because respondent-mother was living with another man and Robin "was not safe around [respondent-mother's] boyfriend due to domestic violence and the boyfriend's insistence that [Robin] sleep in the same bed as the adults."

Robin lived with R.D. and G.D., along with the father, until December 2011. In December 2011, the father and Robin moved out of R.D. and G.D.'s home and moved in with the father's girlfriend. However, in August 2012, Robin was exposed to domestic violence between the father and his girlfriend. The girlfriend called respondent-mother, and respondent-mother subsequently called G.D. to pick up Robin. In 2012, respondent-mother signed a notarized statement in which she granted custody of Robin to R.D. and G.D. Respondent-mother also signed a separate document authorizing R.D. and G.D. to approve any medical treatment deemed necessary for Robin.

In 2014, with respondent-mother's permission, R.D. and G.D. relocated with Robin to North Carolina, where they moved in with their daughter and son-in-law, the petitioners, who are also Robin's cousins by marriage. In January 2015, R.D. and G.D. moved out of petitioners'

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

home and into their own residence. However, due to their own health issues, they decided along with petitioners that Robin would remain in petitioners' home. Robin has remained in petitioners' care since that time. In June 2015, respondent-mother signed an agreement granting petitioners "guardianship" of Robin.

On 15 March 2019, petitioners filed a petition to terminate respondent-mother's and the father's parental rights to Robin. Petitioners alleged that grounds existed to terminate respondent-mother's and the father's parental rights on the grounds of neglect, dependency, and willful abandonment. N.C.G.S. § 7B-1111(a)(1), (6), (7) (2019). On 11 June 2019, respondent-mother filed a response to the petition in which she opposed termination of her parental rights. On 9 December 2019, the trial court entered an order in which it determined grounds existed to terminate respondent-mother's parental rights pursuant to the grounds alleged in the petition. On the same day, the trial court entered a separate disposition order in which it concluded it was in Robin's best interests that respondent-mother's parental rights be terminated. Accordingly, the trial court terminated respondent-mother's parental rights.[2] Respondent-mother appeals.

Respondent-mother argues that the trial court erred by adjudicating that grounds existed to terminate her parental rights. "Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94 (2020) (citing 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 (2019) (quoting N.C.G.S. § 7B-1109(f) (2019)). We review a trial court's adjudication 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 Montgomery*, 311 N.C. 101, 111 (1984). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

In this case, the trial court determined that grounds existed to terminate respondent-mother's parental rights based on neglect, dependency, and willful abandonment. N.C.G.S. § 7B-1111(a)(1), (6), (7). We begin

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

our analysis with consideration of whether grounds existed to terminate respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1).

A trial court may terminate parental rights if it concludes the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is defined, in pertinent part, as a juvenile

> whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or the custody of whom has been unlawfully transferred under [N.C.]G.S. 14-321.2; or who has been placed for care or adoption in violation of law.

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 . . . a likelihood of future neglect by the parent.

*In re D.L.W.*, 368 N.C. 835, 843 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15 (1984)).[3] "When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212 (2019) (citing *In re Ballard*, 311 N.C. at 715).

Here, Robin was not in respondent-mother's physical custody at the time of the termination hearing and had not been since 2012. Additionally, because the Department of Social Services was not involved in this case, no petition alleging neglect was ever filed, and Robin had not been adjudicated neglected. Therefore, we examine whether the trial court's

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3. The Court in *In re Ballard* held that an adjudication of past neglect is admissible in subsequent proceedings to terminate parental rights, but is not, standing alone, enough to prove that a ground exists to terminate parental rights on the basis of neglect. 311 N.C. at 713–15. The Court in *In re Ballard* did not suggest that a showing of past neglect is necessary in order to terminate parental rights in every case. Indeed, N.C.G.S. § 7B-1111(a)(1) does not require a showing of past neglect if the petitioner can show current neglect as defined in N.C.G.S. § 7B-101(15). To the extent other cases have relied upon *In re D.L.W.* as creating such a requirement, we disavow such an interpretation.

findings support the conclusion that Robin is likely to be neglected again if returned to respondent-mother's care.

Respondent-mother argues that the trial court's orders fail to establish that Robin is neglected. We disagree. The trial court made the following findings:

> 6. While pregnant with [Robin], G.D. saw [respondent-mother] smoking marijuana. G.D. saw the [respondent-mother] smoking marijuana every weekend.
>
> . . . .
>
> 8. In November, 2007, [Robin's] leg was broken and [respondent-mother was] investigated by Child Protective Services in Kanakee, Illinois. G.D. saw [Robin] with a cast on her leg and was concerned that there was a lack of food and the room in which they stayed was dirty. . . . .
>
> . . . .
>
> 10. In April, 2009, [respondent-mother] asked G.D. and R.D. to pick up [Robin] because [Robin] was not safe around [respondent-mother's] boyfriend due to domestic violence and the boyfriend's insistence that [Robin] sleep in the same bed as the adults.
>
> . . . .
>
> 23. [Respondent-mother] has not seen [Robin] since June, 2015.
>
> 24. [Respondent-mother] traveled to North Carolina in June, 2015, at the invitation and at the expense of the petitioners so that she could see where the petitioners and the juvenile lived in North Carolina.
>
> 25. At the time of her week's visit with petitioners, [respondent-mother] entered into an agreement with the petitioners that they would take "guardianship" of [Robin].
>
> 26. In the agreement, dated [29 June 2015], [respondent-mother] agreed that the petitioners could have guardianship of [Robin], and said agreement was to ". . . remain effective indefinitely unless otherwise notified in writing by the undersigned . . ."

27. Some of the decisions that [respondent-mother] specified that the petitioners could make for [Robin] related to her medical treatment, school, education, "decisions regarding all well-being including clothing, bodily nourishment, and shelter."

28. Another agreement provision is that the petitioners are to "accept all financial obligations associated with caring for [Robin]."

29. The petitioners have abided by the terms of the agreement and provided care for [Robin].

30. [Respondent-mother has not] provided financial support for [Robin] since 2012.

31. The petitioners have provided financial support for [Robin], including therapy sessions needed by [Robin].

32. [Robin] is being treated for anxiety and depression, ADHD and PTSD.

33. [Robin] has not lived independently with [respondent-mother] since 2012.

34. At no time since August, 2012, has [respondent-mother] had physical custody of the child.

. . . .

38. [Respondent-mother] has intermittently texted [petitioner] F.J. and asked to talk to [Robin] which has been facilitated.

39. [Respondent-mother's] conversations are monitored by petitioner F.J. to make sure that the conversations are appropriate. In the past, [respondent-mother] has called [Robin] "fat" and blamed [Robin] for not calling [respondent-mother]. [Respondent-mother] also cursed and screamed at [Robin] when [respondent-mother] received the notice of the petitioners' intended adoption of [Robin].

40. [Respondent-mother] currently is living in a hotel room in Illinois and has a job at the hotel cleaning rooms. She needs more rooms to clean in order to make more money.

41. Most recently, [petitioner] F.J. heard that [respondent-mother] was renting a room from a man.

. . . .

44. [Respondent-mother] has taken no steps to provide for [Robin's] physical and economic needs.

. . . .

46. [Respondent-mother] took no steps to correct the conditions that led to the removal of [Robin] from her care.

47. [Respondent-mother did not take] any steps to remedy the conditions that led to [Robin] being placed first with G.D. and later with the petitioners.

48. [Respondent-mother's] contact with [Robin] has been sporadic. It has consisted of her texting [petitioner] F.J. to put [Robin] on the phone.

49. [Respondent-mother] has sent a total of three packages to [Robin] since she has been in the care of petitioners. The first one had candy and clothes that did not fit [Robin]. The second one had a $20 gift card. The final one was for Christmas 2018, and arrived in January, 2019.

50. The contents of the last package that [respondent-mother] sent to [Robin] were age inappropriate and inappropriate in all regards as it primarily contained expired food and expired medications.

51. [Robin] is learning to cope with the trauma that she has experienced.

. . . .

65. Respondent-mother has not] put in place the support system that [she] need[s] in order to create an environment where [Robin] will not be neglected in the future.

66. [Robin] is at a substantial risk of harm and of impairment if she is removed from the petitioners' home and is returned to [respondent-mother's] care.

Respondent-mother does not challenge these findings, and they are binding on appeal. *See In re T.N.H.*, 372 N.C. 403, 407 (2019) ("Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal."). It is clear from these findings

that when Robin was in respondent-mother's care nearly a decade ago, Robin was "in an environment injurious to [her] welfare," and that those risks continue. N.C.G.S. § 7B-101(15).

In addition to the findings shown above, the trial court also found the following:

> 42. [Respondent-mother] does not have stable housing at this time.
>
> 43. [Respondent-mother] does not have a stable job in that her most recent job at the wage of $2.00 [per hour] provides her with bare subsistence.

Respondent-mother argues that these findings are not supported by clear, cogent, and convincing evidence. However, petitioner F.J. testified that respondent-mother texted her that "she was living in the motel again, and she makes . . . $2.00 per room. And that . . . she doesn't get a lot of rooms so she doesn't work a lot." Petitioner F.J. additionally testified that "at one point" respondent-mother had moved in with "some other guy" and was "renting a room from him." Thus, we conclude there was clear, cogent, and convincing evidence that respondent-mother had neither stable housing nor employment.

Consequently, we conclude the trial court's findings support its conclusion that there was a substantial risk of harm or impairment to Robin and a likelihood of future neglect should she be removed from petitioners' care and returned to respondent-mother. Therefore, we affirm the trial court's conclusion that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) to terminate respondent-mother's parental rights.

The trial court's conclusion that one statutory 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-mother's parental rights. *In re E.H.P.*, 372 N.C. 388, 395 (2019). As such, we need not address respondent-mother's arguments regarding N.C.G.S. § 7B-1111(a)(6) and (7). Furthermore, respondent-mother does not challenge the trial court's conclusion that termination of her parental rights was in Robin's best interest. *See* N.C.G.S. § 7B-1110(a) (2019). Accordingly, we affirm the trial court's order terminating respondent-mother's parental rights.

AFFIRMED.

**IN RE S.D.H.**

[375 N.C. 846 (2020)]

IN THE MATTER OF S.D.H. AND S.J.J.

No. 231A20

Filed 11 December 2020

**Termination of Parental Rights—no-merit brief—termination on multiple grounds—substance abuse**

The termination of a father's parental rights in his two children on multiple statutory grounds (he had a history of substance abuse, which the children were exposed to at home, and he made minimal progress in addressing the problem) was affirmed where the father's counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 12 December 2019 by Judge Mary F. Covington in District Court, Davidson County. This matter was calendared for argument in the Supreme Court on 23 November 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

*Danielle De Angelis for petitioner-appellee Davidson County Department of Social Services.*

*Eric H. Cottrell for appellee Guardian ad Litem.*

*Mary McCullers Reece for respondent-appellant father.*

NEWBY, Justice.

Respondent-father appeals from the trial court's orders terminating his parental rights to the minor children S.D.H. (Sam), born in August 2011, and S.J.J. (Shannon), born in October 2014.[1] Although the orders also terminated the parental rights of the children's mother (respondent-mother), she is not a party to this appeal. Counsel for respondent-father has filed a no-merit brief under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude the issues identified by counsel as arguably supporting the appeal are meritless and therefore affirm the trial court's orders.

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

Davidson County Department of Social Services (DSS) obtained nonsecure custody of Sam and Shannon on 4 May 2017 and filed juvenile petitions the same day alleging they were neglected and dependent. The petitions stated the children were exposed to respondents' substance abuse in the home, including an incident in March 2017 when a friend of respondent-father overdosed in the residence while respondent-father was using Xanax and a second occasion on 8 April 2017 when police responded to the residence and found "a needle with heroin in it behind a teddy bear." Respondent-father subsequently tested positive for amphetamines, marijuana, and methamphetamine, and respondent-mother tested positive for these substances as well as codeine, morphine, and opiates.

The petitions further alleged that Sam had numerous unexcused absences from school "due to the family instability, homelessness, and the parents' drug use," and that respondents both had pending criminal charges. At the time the petitions were filed, respondent-mother had not had contact with DSS since signing her In-Home Services Agreement (IHSA) on 21 April 2017. Respondent-father had failed to attend scheduled appointments with the social worker or enter into an IHSA.

After a hearing on 7 June 2017, the trial court adjudicated Sam and Shannon as neglected and dependent on 1 August 2017. At the time of the dispositional hearing on 28 June 2017, respondents were both incarcerated and had more charges pending. In its initial disposition entered on 19 September 2017, the trial court maintained the children in DSS custody and ordered respondents to obtain a substance abuse assessment and comply with all treatment recommendations; submit to random drug screens and remain drug free; obtain and maintain housing and income suitable for the children; and cooperate with DSS to establish and pay child support in accordance with state guidelines.

On 29 November 2017, the trial court established reunification as the primary permanent plan for Sam and Shannon with a secondary plan of guardianship. At the next permanency planning hearing, however, the trial court relieved DSS of further reunification efforts toward respondent-mother and changed the children's permanent plan to reunification with respondent-father with a secondary plan of termination of parental rights and adoption. DSS and the trial court continued to work with respondent-father to achieve reunification until the permanency planning hearing held on 27 February 2019. Citing respondent-father's minimal progress on his case plan and his recent positive drug screens for opiates, heroin, and amphetamines, the trial court entered an order on 2 April 2019, relieving DSS of reunification efforts and changing the

primary permanent plan to termination of parental rights and adoption with a secondary plan of guardianship.

DSS filed petitions to terminate respondents' parental rights in Sam and Shannon on 23 May 2019. The trial court heard the petitions on 14 November 2019 and entered orders terminating respondents' parental rights on 12 December 2019. As to each respondent, the trial court concluded DSS had established four statutory grounds for termination: (1) neglect; (2) willful failure to make reasonable progress to correct the conditions which led to the children's removal from the home; (3) willful failure to pay a reasonable portion of the children's cost of care; and (4) dependency. N.C.G.S. § 7B-1111(a)(1)–(3), (6) (2019). The court further concluded it was in the children's best interests that respondents' parental rights be terminated. N.C.G.S. § 7B-1110(a) (2019). Respondent-father appealed from the termination orders.

Counsel for respondent-father has filed a no-merit brief on her client's behalf under Rule 3.1(e) of the Rules of Appellate Procedure. Counsel identified three issues that could arguably support an appeal but also explained why she believed these issues 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 under 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 12 December 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 T.N.C.**

[375 N.C. 849 (2020)]

IN THE MATTER OF T.N.C., D.M.C.

No. 88A20

Filed 11 December 2020

**Termination of Parental Rights—effective assistance of counsel—brief cross-examination—conciliatory closing argument**

A mother received effective assistance of counsel at a termination of parental rights hearing, even though her attorney only conducted a brief cross-examination of the department of social service's (DSS) key witness and gave a closing argument in which he largely agreed with DSS's presentation of facts that were unfavorable to the mother. Despite the conciliatory tone of his closing argument, the attorney sufficiently advocated for the mother by mentioning several positive facts in her favor, expressing that she did not want to lose her parental rights, and asking the court to rule against terminating her rights.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 24 October 2019 by Judge David V. Byrd in District Court, Wilkes County. This matter was calendared in the Supreme Court on 23 November 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.

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

*Matthew P. McGuire for appellee Guardian ad Litem.*

*Mary McCullers Reece for respondent-appellant mother.*

MORGAN, Justice.

Respondent-mother appeared and was represented by counsel at a termination of parental rights hearing held 5 June 2019. Respondent-mother contends that her counsel's brief cross-examination of a witness for the Wilkes County Department of Social Services (DSS) during the termination hearing and her counsel's acquiescent closing arguments constituted ineffective assistance of counsel. Because respondent-mother has not shown how she was prejudiced by the allegedly ineffective assistance of her counsel, we affirm the trial court's

orders terminating respondent-mother's parental rights to the two juveniles who are the subject of this appeal.

*Factual and Procedural Background*

Respondent-mother is the mother of four children. Two of respondent-mother's children are the juveniles involved in this termination of parental rights matter: T.N.C. (Tammy) and D.M.C. (Dan). [1] DSS became involved with Tammy and Dan in May 2016, after receiving reports of improper supervision of the children by the parents, substance abuse by the parents, incidents of domestic violence between the parents, and a lack of food within the family home. The children were placed initially with a safety resource on 2 July 2016 and DSS began to offer case management services to the family on 13 September 2016. At this point, however, respondent-mother became incarcerated on methamphetamine-related charges. On 29 December 2016, DSS filed a petition alleging that Tammy, Dan, and their two stepsiblings were neglected juveniles based on respondent-mother's incarceration, and the failure of the father of Tammy and Dan to make timely progress on his case plan. The trial court adjudicated the children to be neglected juveniles and placed them in the custody of DSS by court order entered on 20 April 2017.

Upon her release from incarceration, respondent-mother entered into her own case plan on 11 April 2017 which required respondent-mother to attend parenting classes, obtain substance abuse and mental health assessments and follow any recommended treatments, obtain and maintain appropriate housing, establish and maintain employment, and submit to drug screens when requested by DSS. However, following respondent-mother's absconsion from probation and subsequent conviction for additional drug charges on 31 October 2018, DSS filed petitions to terminate respondent-mother's parental rights to Tammy and Dan on the ground of neglect and the ground of willfully leaving the children in a placement outside the home for more than twelve months without making reasonable progress toward correcting the conditions that led to their removal from the home pursuant to N.C.G.S. § 7B-1111(a)(1)–(2). The trial court held a hearing on the termination petitions on 5 June 2019. Although respondent-mother was still in custody, she was present for the proceedings and was represented by counsel.

During the termination of parental rights hearing, the active participation of respondent-mother's counsel consisted of a short cross-examination of one of DSS's witnesses in the course of the adjudication

1. Pseudonyms are substituted for the juveniles' real names to protect their identities and for ease of reading.

stage, along with the presentation of a conciliatory closing argument after both the adjudication and disposition stages. For the hearing's adjudication phase, DSS presented the testimony of its social worker who was assigned to the underlying neglect case. The social worker was the agency's sole adjudication witness. The cross-examination of the social worker by respondent-mother's counsel during adjudication focused upon the "significant amount of time that [respondent-mother has] been incarcerated" and its prevention of respondent-mother's ability from attending approximately 60% of her allotted visitations with Tammy and Dan. The total exchange between respondent-mother's counsel and DSS's social worker during cross-examination of the witness consisted of the following:

> Q: And unfortunately the real[i]ty was if I'm doing my math right, [respondent-mother] has been incarcerated for approximately 60 percent of this case. Does that sound about any [sic] accurate number?
>
> A: I haven't done the math, but she's been in and out. We had a stretch kind of from January until she, you know, absconded, that we had a potential period to get some things done but we were not able to maintain the housing or employment; things of that type.
>
> Q: Well, I'm just doing percentages based on the number of visits you said she couldn't have because she was incarcerated. So it's been a significant amount of time that she's been incarcerated?
>
> A: Uh hum. She's been in jail or incarcerated quite a lot.
>
> Q: And obviously it's true that the mother hasn't been out since last September?
>
> A: That's correct.
>
> Q: I will state the obvious, she's not done anything on her plan that she could do during that nine months?
>
> A: I don't know what's offered at that facility. I've not had any contact with her since July 3rd, of 2018.
>
> [Respondent-Mother's Counsel]: No further questions, Your Honor.

As for his closing argument on adjudication, respondent-mother's counsel offered this presentation:

> Well, Your Honor, unfortunately I cannot disagree with most of the facts that [DSS's counsel] has outlayed regarding [respondent-mother's] incarceration. I mean it's accurate. She was incarcerated when this started. She's incarcerated now. She's going to be incarcerated for the next three months. Obviously when she was out she did make some progress. Parenting classes, never failed drug tests, and I understand she had some -- but obviously, you know, as I kind of discussed this with her with this stage of the proceeding and her current situation, the court will apply the law and obviously I would ask you not to find the grounds but again I think you are someone as aware of the laws in regards to this situation.

Seizing upon the conciliatory tone of this closing argument, the guardian ad litem's counsel subsequently argued that, "by [respondent-mother's] own admission they [DSS representatives] have proven the grounds that DSS has alleged." At the conclusion of the adjudication stage of the proceedings, the trial court announced its determination of the existence of both grounds for termination of respondent-mother's parental rights which were alleged in DSS's petitions. The hearing then moved to the disposition phase, in which DSS presented two witnesses in an effort to substantiate the agency's position that it was in the best interests of the juveniles Tammy and Dan to terminate respondent-mother's parental rights.

Following DSS's presentation of its case during the disposition stage, respondent-mother's counsel ended the closing argument on behalf of respondent-mother with these observations:

> As [the father's counsel] said, these are always difficult cases for a lot of reasons. One, and similarly as [DSS's counsel] outlined, obviously I represent [respondent-mother] who is sitting here behind me and [respondent-mother] one thing, I would actually echo this. [Respondent-mother has] always been easy to deal with. [Respondent-mother has] always been pretty good about what she wants to do and so [respondent-mother is] not making any excuses for where she's at. It was her own actions that got her there and as you heard, time has gone by and the kids have been in custody for a while. The silver lining there which I like to tell parents is and as we go through this, as we're trying to go through this, you always want your kids to land somewhere good, land somewhere decent, where they're

> going to be happy, where they're going to be taken care of. Because no matter what [respondent-mother's] situation is or anybody's situation is at the end of the day that's fine -- it's about the kids being happy and taken care of. So [respondent-mother] is certainly very appreciative that they've landed in the spot that they are. She has told the words she actually said to me -- I'm not putting this in her mouth. This is her exact words to me. That she has a lot of respect for what they do and what they've done for her and her children. It's -- it's something she very much appreciates and she likes hearing her children are happy and they're taken [sic] of, they're protected, and they are -- I guess as much as I'm sure it hurts, they're where they want to be at this point in time. I find it encouraging that they still ask about her. I agree with [DSS's counsel] to some extent. I think some of the questions are of concern. I think that would be natural. But I also think some of it is that there is a bond there and there is an affection with the parents and I agree with [the father's counsel], I can't remember the last time I heard the question asked are either of these kids in therapy and the answer was no. So there is some positives. Obviously the court has to make -- has to make the decision what is in the best interest of the children. I can't stand here and change the facts. I can't change the facts that [respondent-mother] is in custody and won't be out for three months. And in all candor I think in being honest with herself and I [sic] least I would probably tell her, I think it could take [respondent-mother] a little while to get back on her feet and get herself set up and try to basically take care of herself after the pain of that but that's going to take some time. Obviously she wants her children. Obviously she never wanted her rights terminated. But again, I'm not making any excuses for her current situation. Because it's -- even though it hurts on this side, again, the kids are in a good situation. That's all anybody wants for their kids. Obviously, I'm ethically bound -- I'm duty bound to ask you not to terminate her rights. But obviously I understand the court is well versed along those lines.

On 24 October 2019, the trial court entered orders in which it found the existence of both alleged grounds for termination of the parental rights of respondent-mother by clear, cogent, and convincing evidence

and concluded that termination of respondent-mother's parental rights was in the best interests of both juveniles. The trial court then terminated the parental rights of respondent-mother to the children Tammy and Dan through entry of the termination orders.

Respondent-mother appeals to this Court from the trial court's orders. Before us, respondent-mother does not challenge the substance of the trial court's termination of parental rights orders. Instead, she contends that her trial counsel provided ineffective assistance, thus rendering the termination proceedings fundamentally unfair.

*Analysis*

North Carolina General Statutes Section 7B-1101.1(a) provides that a parent in a termination of parental rights proceeding "has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right." N.C.G.S. § 7B-1101.1(a) (2019). Counsel necessarily must provide effective assistance, as the alternative would render any statutory right to counsel potentially meaningless. *See State v. Sneed*, 284 N.C. 606, 612, 201 S.E.2d 867, 871 (1974) (stating that the right to counsel "is not intended to be an empty formality but is intended to guarantee effective assistance of counsel."); *see also In re Bishop*, 92 N.C. App. 662, 664, 375 S.E.2d 676, 678 (1989) ("By providing a statutory right to counsel in termination proceedings, our legislature has recognized that this interest must be safeguarded by adequate legal representation."). "To prevail on a claim of ineffective assistance of counsel, respondent must show that counsel's performance was deficient and the deficiency was so serious as to deprive her of a fair hearing." *In re Bishop*, 92 N.C. App. at 665, 375 S.E.2d at 679 (citing *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985)). To make the latter showing, the respondent must prove that "there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

Respondent-mother contends in the instant case that the totality of counsel's actions during the termination of parental rights hearing "highlighted [respondent-mother]'s weaknesses and extolled the reasonableness of an order terminating her parental rights. [Respondent-mother] would have been better served by silence." She claims that her counsel violated his duty of zealous advocacy and implies that his tempered representation of respondent-mother's interests was "so deficient as to amount in every respect to no representation at all," quoting *State v. Davidson*, 77 N.C. App. 540, 546, 335 S.E.2d 518, 522 (1985), *disc. review denied*, 315 N.C. 393, 338 S.E.2d 882 (1986).

While a substantial amount of the tone of the advocacy of respondent-mother's counsel could reasonably be described as acquiescent in nature, nonetheless it is implausible to categorize counsel's statements here with the characterizations of the accused by his defense counsel in *Davidson*, who made the following comments about the defendant to the trial court during the sentencing phase of the case:

> Your Honor, every now and then you get appointed in a case where you have very little to say and this is one of them. I have talked to [the defendant] in the jail on three or four occasions. I talked to him, as you know, in the lock up before the trial began. The information that he has furnished me is not consistent with other information available to the State and information furnished me by [the prosecuting attorney] with regard to the man's criminal record. He has just completed doing a ten year sentence, he tells me, for armed robbery and he did not make me aware of that until after [the prosecuting attorney] had furnished me certain materials that he had available to him.
>
> As you very well know, I begged and pleaded with him to take a negotiated plea. He was not willing to do that. I informed this Court before the trial began and the record reflects that I did not think that he had any available, reasonable defense under the law of this state; consequently, I had very little to say.
>
> And, unless he would care to make a statement, I've said all I care to.

*Id.* at 545, 335 S.E.2d at 521 (alterations in original). The Court of Appeals explained that in its opinion in *Davidson* that defense counsel's argument "consisted almost exclusively of commentary entirely negative to defendant," and the lower appellate court expressed dismay that counsel "disparage[ed the defendant] before the court." *Id.* at 545, 335 S.E.2d at 521–22. The counsel's advocacy at issue in *Davidson*, which presented his client "in an entirely negative light," created "a considerable probability" that the statement "had an adverse impact" on the defendant's treatment by the tribunal. *Id.* at 546–47, 335 S.E.2d at 522. The defendant in *Davidson*, therefore, was entitled to a new sentencing hearing accompanied by representation that would not "undermine . . . confidence in the outcome." *Id.* at 547, 335 S.E.2d at 522.

By contrast, counsel's actions and arguments in the case at bar were not "altogether lacking in positive advocacy." *Id.* at 545, 335 S.E.2d at 521. Respondent-mother's counsel mentioned multiple facts in her favor during closing arguments, specifically noting that respondent-mother "did make some progress" on her case plan, that she still had a bond with her children, and that she did not want her rights to be terminated. Respondent-mother's counsel spoke favorably of his client, emphasizing her positive traits that she has "always been easy to deal with" and "always been pretty good about what she wants to do and so [she]'s not making any excuses for where she's at." Moreover, respondent-mother's counsel unequivocally asked the trial court to rule in his client's favor during his closing arguments at the close of both the adjudication and disposition phases of the hearing. Although respondent-mother challenges the moderate tone of her counsel's presentation on her behalf, it strains credibility to characterize her counsel's representation of her interests as the equivalent of "no representation at all." *Id.* at 546, 335 S.E.2d at 522 (citation omitted); *see also In re C.D.H.*, 265 N.C. App. 609, 613, 829 S.E.2d 690, 693 (2019) (explaining that a lack of positive advocacy does not necessarily equate to ineffective assistance because "it is possible that 'resourceful preparation reveal[ed] nothing positive to be said for' Mother" (alteration in original) (citation omitted)).

Furthermore, unlike defense counsel's negative representations of defendant during the sentencing phase of *Davidson* after the accused's determination of guilt, the observations by respondent-mother's counsel of respondent-mother in the course of both the adjudication and disposition phases in the case sub judice were positive depictions of her. Any candor, acceptance, or recognition regarding respondent-mother's circumstances in her situation as a parent which her counsel strategically elected to intersperse among his overt statements to trumpet and preserve respondent-mother's parental rights cannot be deemed by this Court to rise to the level of ineffective assistance of counsel as demonstrated in *Davidson*.

As we earlier recognized in the recitation of the guidelines addressed in our decision in *Braswell* which was applied by the Court of Appeals in its *Bishop* opinion, in order to prevail on a claim of ineffective assistance of counsel, a party in the position of respondent-mother here must show both that counsel's performance was deficient and that this deficiency was so serious as to deprive the party of a fair hearing. We further instructed in *Braswell* that the gauge for the deprivation of a fair hearing in this regard is the existence of a reasonable probability that, but for the errors of the party's counsel, there would have been a different result in

the proceedings. In the case before us, respondent-mother has failed to show deficient performance by her counsel in the representation of her interests in either the tone or content of the closing arguments, or in the brevity of the cross-examination by respondent-mother's counsel of the testifying witness for DSS during the adjudication phase of the hearing. In light of the insufficient establishment of a deficient performance by her counsel to amount to ineffective assistance of counsel, consequently respondent-mother cannot show any prejudice suffered by her as to the result in the proceedings.

The undisputed evidence presented at the termination of parental rights hearing supports the trial court's conclusions that at least one ground existed to terminate the parental rights of respondent-mother and that termination was in Tammy and Dan's best interests. In the face of the strength of this evidence, respondent-mother has not shown a reasonable probability that the outcome of the termination hearing would have been different if her counsel's representation of her interests had been different.

This Court has addressed and resolved the only issue which respondent-mother has brought before us in this appeal, which is whether she received ineffective assistance from her counsel during the adjudication and disposition phases of the hearing which led to the termination of respondent-mother's parental rights to the juveniles Tammy and Dan. We have determined that respondent-mother's counsel did not render ineffective assistance and consequently there was no prejudice to her in the proceedings of the hearing. Respondent-mother has not challenged the trial court's findings of fact or conclusions of law in her pursuit of this appeal. As a result, having found that respondent-mother did not receive ineffective assistance of counsel, and having recognized that the trial court's findings of fact and conclusions of law remain intact and binding by virtue of their unchallenged nature, we affirm the trial court's decision to terminate the parental rights of respondent-mother.

*Conclusion*

Based upon the foregoing facts, circumstances, and analysis, we affirm the orders of the trial court which terminate the parental rights of respondent-mother.

AFFIRMED.

**IN RE Z.O.G.-I.**

[375 N.C. 858 (2020)]

IN THE MATTER OF Z.O.G.-I.

No. 41A20

Filed 11 December 2020

**1. Termination of Parental Rights—grounds for termination—failure to make reasonable progress**

The trial court properly terminated respondent-father's parental rights in his child based on grounds of failure to make reasonable progress to correct the conditions which led to the removal of the child where respondent was put on notice of the requirements of his case plan but failed to consistently submit to drug screens or to demonstrate maintained sobriety, failed to obtain income either through employment or disability benefits, failed to participate in individual therapy, and delayed starting his visitation schedule with the child until over a year after he was released from incarceration.

**2. Termination of Parental Rights—best interests of the child—misapprehension of law—co-parenting inconsistent with termination**

The trial court's disposition order concluding that termination of respondent-father's parental rights in his son was in the son's best interests was vacated and remanded for reconsideration where the court's order—directing the department of social services to continue to allow respondent-father to co-parent his son and to honor the son's request not to be adopted by his foster parents—indicated a misapprehension of the law regarding the effect termination would have on the parental-child relationship.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 17 October 2019 by Judge Angela C. Foster in District Court, Guilford County. This matter was calendared for argument in the Supreme Court on 23 November 2020 but determined on the records and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

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

*Womble Bond Dickinson (US) LLP, by Lawrence F. Matthews, for appellee Guardian ad Litem.*

*Christopher M. Watford for respondent-appellant father.*

NEWBY, Justice.

Respondent, the father of fifteen-year-old minor child Z.O.G.-I. (Zander),[1] appeals from the trial court's order terminating his parental rights based on the grounds of neglect and willful failure to make reasonable progress to correct the conditions that led to the child's removal from his care. Because the trial court determined that termination of respondent's parental rights was in Zander's best interests due in part to a misapprehension of the legal effects of the termination, we vacate the dispositional portion of the trial court's order and remand for entry of a new dispositional order.

On 14 October 2016, the Guilford County Department of Health and Human Services (DHHS) obtained nonsecure custody of Zander and filed a petition alleging that he was a neglected and dependent juvenile. The petition alleged that Zander's mother had a history with Child Protective Services due to issues with mental health, substance abuse, and housing. In-home services had been provided to the mother on multiple occasions with the most recent case being closed in June 2016. The petition alleged that the mother had been diagnosed with schizoaffective disorder, bipolar disorder, and depression and that she was not complying with her mental health and substance abuse treatment. At the time of the filing of the petition, respondent was incarcerated and scheduled to be released in the Spring of 2017. DHHS spoke with respondent on 13 October 2016, and respondent requested that Zander be placed with his paternal grandmother, Ms. R., but she had already declined to care for Zander several months earlier.

Following a 3 March 2017 hearing, the trial court entered an order on 11 April 2017 adjudicating Zander to be a dependent juvenile. The trial court found that the mother consented to a finding of dependency based on stipulated facts regarding her noncompliance with her mental health and substance abuse treatment and found that DHHS dismissed the neglect allegation. Respondent was incarcerated at the time of the hearing but was scheduled to be released a few months later.

Respondent was released from incarceration on 15 June 2017. Due to scheduling conflicts, a Child and Family Team Meeting was not held until 10 October 2017. Respondent entered into a case plan with DHHS

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

on 11 October 2017 which required him to maintain suitable housing for himself and Zander and provide documentation of a lease or rental agreement and all utilities; complete a parenting/psychological evaluation and follow all recommendations; participate in shared parenting with Zander's caregivers; attend all scheduled visitations and demonstrate appropriate parenting skills; comply with child support requirements; obtain adequate income to meet the basic needs of his family through employment or disability, and provide DHHS with verification of his income; complete a substance abuse assessment and follow all recommendations; and submit to random drug screens within twenty-four hours of a request. A permanency-planning order was entered on 21 November 2017 setting the primary permanent plan as reunification with a concurrent secondary plan of adoption. The trial court ordered respondent to comply with the components of his case plan and allowed him four to five hours of supervised visits with Zander per month.

Following a 2 March 2018 review hearing, the trial court changed the permanent plan to adoption with a concurrent secondary plan of reunification on 12 April 2018 but stayed the filing of a petition for termination of parental rights until the next court hearing on 25 April 2018. The trial court found that respondent obtained housing with his girlfriend on 15 December 2017 and submitted a copy of a lease at the court hearing. The trial court found that he was employed but needed to provide documentation of his employment to DHHS. The trial court also found that respondent had not yet scheduled his parenting/psychological evaluation and was not participating in shared parenting. Respondent also tested positive for marijuana in August and October 2017. Respondent completed a substance abuse assessment on 12 November 2017, and no substance abuse diagnosis was made. Respondent had been incarcerated from 25 January 2018 to 27 February 2018, but the charges were later dismissed. The trial court found that neither parent was making adequate progress on their case plans within a reasonable time period, but that respondent was making some progress. The trial court ordered respondent to comply with his case plan and cooperate with DHHS and allowed him one hour of supervised visits per week.

The trial court entered another permanency planning order on 24 May 2018 lifting the stay on the termination of parental rights and ordering DHHS to file a petition within sixty days. The trial court found that respondent was not participating in shared parenting, had not yet set up his visitation with Zander, was not complying with requested drug screens, and was unemployed due to an alleged medical injury. Although

respondent had submitted a lease agreement at the previous hearing, he did not know his address, and a home study could not be completed by DHHS. DHHS filed a petition to terminate respondent's parental rights on 18 July 2018 alleging the grounds of neglect and willful failure to make reasonable progress to correct the conditions that led to Zander's removal from the home. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019).

A subsequent permanency planning order was entered on 7 August 2018. The trial court found that respondent had not scheduled his parenting/psychological evaluation, had not submitted to any drug screen, had not attended any visits with Zander, and was not participating in shared parenting. Respondent had also been unemployed since March 2018 due to a purported back injury but had not provided any documentation of the injury. A completed home study found the home to be appropriate, but DHHS did not approve the home study due to respondent's lack of compliance with his case plan.

The hearing on the petition to terminate parental rights began on 30 April 2019 and, after multiple continuances, concluded on 17 September 2019. In an order entered on 17 October 2019, the trial court concluded that grounds existed to terminate respondent's parental rights based on N.C.G.S. § 7B-1111(a)(1) and (2). The trial court also concluded that termination of respondent's parental rights was in Zander's best interests. *See* N.C.G.S. § 7B-1110(a) (2019). Accordingly, the trial court terminated respondent's parental rights. Respondent appeals, challenging the trial court's adjudication that grounds existed to terminate his parental rights and its dispositional determination under N.C.G.S. § 7B-1110(a) that termination of his parental rights was in Zander's best interests.

We review a trial court's adjudication that grounds existed 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 (1984)). "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)). "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).

Under 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 trial 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). "[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 J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (quoting *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996)). "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001). " '[A] respondent's prolonged inability to improve [his or] her situation, despite some efforts in that direction, will support a finding of willfulness "regardless of [his or] 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.S.*, 374 N.C. at 815, 845 S.E.2d at 71 (first and fourth alterations in original) (citations omitted).

> According to N.C.G.S. § 7B-904(d1)(3)[ (2019)], a trial judge has the authority to require the parent of a juvenile who has been adjudicated to be abused, neglected, or dependent to "[t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent, guardian, custodian, or caretaker."

*In re B.O.A.*, 372 N.C. 372, 381, 831 S.E.2d 305, 311–12 (2019) (second alteration in original). This Court has consistently recognized

> that parental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2) even when there is no direct and immediate relationship between the conditions addressed in the case plan and the circumstances that led to the initial governmental intervention into the family's life, as long as the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home.

*Id.* at 384, 831 S.E.2d at 313–14.

I.

**[1]** In determining that respondent failed to make reasonable progress, the trial court found respondent "had the opportunity to correct the conditions that led to the juvenile's removal from the home, including but not limited to being offered a service agreement," which he entered into on 11 October 2017. The trial court made the following findings of fact addressing respondent's progress in complying with his service agreement:

> 20. . . . [Respondent] agreed to address the following conditions:
>
> a. Housing – [Respondent] agreed to obtain suitable housing for himself, his child and provide documentation of his lease/rental agreement and utilities. [Respondent] provided what he reported was a copy of his lease to the [c]ourt and [DHHS] on March 2, 2018 with sufficient address information. The assigned social worker made a referral to Catawba County to complete a home study on [respondent's] home, which he reported was in Catawba County. The home study was denied because he was not taking drug screens.
>
> b. Income – [Respondent] agreed to have adequate income to meet the basic needs of his family through employment or disability, and provide proof of income to [DHHS]. [Respondent] remains unemployed. He reports that this is a result of a back injury, but he has not provided any verification of the injury and is not receiving disability income. He has not filed for disability and does not have a doctor's note stating he is unable to work. The source of [respondent's] income is his girlfriend who pays the bills and provides for all of his needs. He stated that he is unemployed due to visits with the juvenile and that his girlfriend agreed he would take care of their kids while she worked. He does not know his girlfriend's income and, therefore, the [c]ourt cannot determine if there is sufficient income in the home to support this juvenile in the home as he already has three other kids in the home. [Respondent] quit

his job in 2018 and has applied to work at four or five temporary agencies but states he cannot take positions due to visits that occur one day per week. [Respondent] remains unemployed.

c. Parenting – [Respondent] agreed to complete a parenting/psychological evaluation, to follow all recommendations, participate in shared parenting, and attend visits as scheduled. [Respondent] attended a parenting psychological on January 3, 2019, with Agape Psychological Consortium, LLC. [Respondent] agreed to take Parenting Assessment Training Education (PATE) Program classes and has met with Demetria Powell-Harrison twice. [Respondent] completed his test and assessment received by [DHHS] on March 6, 2019. Social Worker discussed the results with [respondent] on March 8, 2019. [Respondent] is allowed supervised visits once a week for one hour per visit. [Respondent's] visits were originally inconsistent, however, since September 21, 2018, [respondent] began being very consistent with his visits and is participating in shared parenting with the foster parents. He has participated in a meeting with Milicent Day and requested that the foster parents be included in those sessions. He has failed to obtain individual therapy which was recommended by Dr. Morris in his parenting psychological evaluation. [Respondent] thought therapy was only optional though the social worker had informed him he was required to attend individual therapy.

d. Substance Abuse – [Respondent] agreed to participate in a substance abuse assessment and follow all recommendations, and submit to random drug screens in order to demonstrate his sobriety. [Respondent] has a significant substance abuse history. He was convicted of Felony Possession Controlled Substance with Intent to Sell (four counts) in 2016 and has a misdemeanor conviction of Possession of Drug Paraphernalia from 2012. [Respondent] completed a substance

> abuse assessment on November 12, 2017 with Joe Fortin. Mr. Fortin did not make a substance abuse diagnosis at that time. [Respondent] had not been complying with drug screen requests and has not demonstrated his sobriety in 2017.
>
> On November 2, 2018, [respondent] completed a second assessment with Joe Fortin, and he was diagnosed with Cannabis Use Disorder, mild and he ruled out Cocaine Use Disorder. As of February 1, 2019, [respondent] has met with Joe Fortin six out of 8 times. However he missed a session on February 8, 2019. Social Worker inquired about this and [respondent] reported that he did not know the time his classes were being held. However, classes are the same each week and Social Worker again informed him of this.

The trial court also found that respondent tested negative on at least twenty-three drug screens requested between April 2018 and April 2019. But, he tested positive for cocaine and marijuana on 10 October 2018 and tested positive for marijuana on 5 March 2019. Additionally, the trial court found that DHHS requested a drug screen on 18 February 2019 and, although respondent tested negative, he did not comply with DHHS's policy of completing the drug screen within twenty-four hours of the request. The trial court also found that respondent admitted to using marijuana twice in the months before the termination hearing, including three weeks before the 17 September 2019 hearing date, and that respondent's substance abuse counseling had not been effective. Finally, the trial court found that respondent "made only minimal progress in demonstrating that he can provide adequate care and supervision and a safe home to [Zander]." Respondent does not challenge any of these findings, and they are binding on appeal. *See In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58.

Respondent first argues that "[t]he trial court never provided formal guidance on what was required of [respondent] to demonstrate a change of conditions" or the reasons for Zander's removal. Respondent further claims he had made reasonable progress at the time of the termination hearing on 17 September 2019 because he had maintained a residence with his girlfriend and their children for over two years; he participated in substance abuse programs and produced multiple negative drug screens throughout the case; and he improved his parenting

skills, was participating in co-parenting with the foster parents, and was consistently visiting with Zander.

Respondent also asserts that he did not willfully leave Zander in foster care and that his progress was reasonable under the circumstances given his challenges with finances and transportation. Respondent argues that the trial court did not make a finding that he maintained the ability to comply with the case plan or that he was "unwilling to make the effort." *See In re McMillon*, 143 N.C. App. at 410, 546 S.E.2d at 175.

Here Zander was adjudicated to be a dependent juvenile based, in part, on respondent's inability to care for Zander due to his incarceration and his lack of an appropriate alternative child care arrangement. Respondent's case plan was designed to address his ability to appropriately care for Zander by obtaining a stable home and income, learning appropriate parenting skills, and addressing his substance abuse issues. Respondent was clearly put on notice of the conditions he needed to address when he entered into the service agreement. Indeed, the trial court consistently ordered him to comply with the requirements of his service agreement in each of its permanency planning orders. Therefore, respondent's argument that he was never provided formal guidance on what he was required to do to demonstrate changed conditions is without merit.

At the termination hearing, respondent testified that he was not able to start the parenting/psychological evaluation before January 2019 due to transportation issues. He also testified that he asked to take the evaluation in Catawba County, but he was told that he would have to pay for it himself, and that he did not have a job to earn money to pay the fee. Nonetheless, he acknowledged on cross-examination that he never inquired into what it would have cost to have the evaluation done in Catawba County. Respondent also testified that he quit his job in 2018 due to a reoccurring back injury; he also acknowledged that he did not apply for disability in order to obtain income. Respondent did not testify that his proposed issues with finances and transportation prevented him from participating in individual therapy, applying for disability, providing DHHS with verification of his injury, or abstaining from drug use.

The trial court found that respondent failed to obtain sufficient income to support Zander, failed to comply with the individual therapy recommendations of his parenting/psychological evaluation, and failed to address his substance abuse issues. The findings show that respondent did not obtain income through employment or disability. He quit his job in 2018 due to an alleged back injury and had not worked since. He

did not provide verification of his injury and did not apply for disability benefits. Respondent instead relied on his girlfriend's income but did not know how much money she made, leaving the trial court unable to determine if her income was sufficient to support the family.

The unchallenged findings also show that although respondent was consistently visiting with Zander at the time of the termination hearing, he did not do so until over a year after he was released from incarceration and two months after the petition was filed. Respondent continued to use marijuana after the filing of the termination petition and after the termination hearing had started. Respondent admitted to using marijuana twice in the months leading up to the September 2019 hearing date and as recently as three weeks before the hearing. Respondent has not specifically challenged any of the above findings, rendering them binding on appeal. *See In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58. These unchallenged findings support the trial court's ultimate finding and conclusion that respondent failed to make reasonable progress under the circumstances to correct the conditions that lead to removal.

As the fact-finder, the trial court was entrusted with evaluating the credibility of respondent's testimony and the weight it is afforded. *See In re S.C.R.*, 198 N.C. App. 525, 531–32, 679 S.E.2d 905, 909 (2009). Although respondent made some progress on his case plan, the findings in the trial court's order and unchallenged findings support the trial court's ultimate finding and conclusion that respondent willfully failed to make reasonable progress to correct the conditions that led to Zander's removal. Here the trial court weighed the evidence and ultimately determined that respondent "made only minimal progress in demonstrating that he can provide adequate care and supervision and a safe home to [Zander]," and therefore he willfully failed to make reasonable progress under the circumstances to correct the conditions that led to Zander's removal. Therefore, we affirm the trial court's adjudication of grounds under N.C.G.S. § 7B-1111(a)(2). As such, we need not address respondent's arguments regarding the ground of neglect. *In re S.E.*, 373 N.C. 360, 367, 838 S.E.2d 328, 333 (2020).

II.

**[2]** Respondent also challenges the trial court's dispositional determination under N.C.G.S. § 7B-1110(a) that termination of his parental rights was in Zander's best interests. Respondent does not contend that the trial court failed to consider and make findings on the relevant statutory factors. Instead, he argues the trial court erred because the trial court's

decision to terminate respondent's parental rights is inconsistent with its conclusion about Zander's best interests.

In determining whether termination of parental rights is in the juvenile's best interests,

> 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). "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. 3, 6, 832 S.E.2d 698, 700 (2019). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *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)).

Zander, who was approaching his fourteenth birthday at the time, testified that his placement with his foster parents was "wonderful[,]" but that he did not want to be adopted and wanted to live with respondent because he felt that he "need[ed] [respondent] in [his] life." Zander also testified that he would "be devastated" if the court were to terminate respondent's parental rights. In the termination order, the trial court found that there was a strong bond between Zander and respondent and that Zander had testified he wanted to live with respondent and did not want to be adopted. The trial court also found as follows: Zander was 13 years old; there was a high likelihood of adoption; the primary permanent plan was adoption; terminating respondent's parental rights would aid in accomplishing that plan; the relationship between Zander and his foster parents was stable, and they wished to adopt him; and the foster

parents had agreed to allow respondent to continue to contact Zander and to continue co-parenting. Respondent does not challenge these findings and, therefore, they are binding on appeal. *In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58.

In the order terminating respondent's parental rights, the trial court also decreed that "[DHHS] shall ensure that [respondent] is allowed continued co-parenting of [Zander]" and that it "hereby honors the request of [Zander] not [to] be adopted pursuant to N.C.G.S. § 48-3-603(b)." Respondent argues that this is "contrary to" the legal consequences of a termination of parental rights under section 7B-1112, which "call[s] for a complete and total severance" of the parent-child relationship. *See* N.C.G.S. § 7B-1112 (2019). According to respondent, the trial court's decree "effectively frustrates the permanent plan of adoption and creates the prospect that Zander is now a 'legal orphan.' " We agree the matter should be remanded for a proper best interests determination.

Section 7B-1112 provides that

> [a]n 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, except that the juvenile's right of inheritance from the juvenile's parent shall not terminate until a final order of adoption is issued.

N.C.G.S. § 7B-1112; *see also Owenby v. Young*, 357 N.C. 142, 145, 579 S.E.2d 264, 267 (2003) ("With the exception of a child's right to inherit from a parent, a termination of parental rights order completely and permanently severs all rights and obligations of the parent to the child and the child to the parent."). The "[t]ermination of parental rights makes a child available for adoption by another person, rendering the child a legal stranger to the biological parent." *Huml v. Huml*, 264 N.C. App. 376, 398, 826 S.E.2d 532, 547 (2019) (citing *In re Estate of Edwards*, 316 N.C. 698, 706, 343 S.E.2d 913, 918 (1986)). A decree that a biological parent be allowed to continue to co-parent a minor child is at odds with the determination that the complete and permanent severance of parental rights and obligations is in the juvenile's best interests.

The trial court's decision here to order both that respondent's parental rights be terminated and that DHHS ensure respondent is allowed to continue co-parenting Zander suggests a misapprehension of the legal effects attendant to terminating parental rights. Perhaps the trial court had in mind a type of guardianship arrangement, which does not require termination of parental rights. In such a situation, the proper remedy

is to remand for reconsideration. *Cf. In re Estate of Skinner*, 370 N.C. 126, 146, 804 S.E.2d 449, 462 (2017) ("It is well-established in this Court's decisions that a misapprehension of the law is appropriately addressed by remanding the case to the appropriate lower forum in order to apply the correct legal standard."). Therefore, we remand this case to the trial court for reconsideration of its decision that the termination of respondent's parental rights was in Zander's best interests.

In conclusion, we affirm the trial court's adjudication that grounds existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(2); however, we vacate the dispositional portion of the trial court's order and remand the matter to the trial court for a new dispositional determination. The trial court may, in the exercise of its discretion, receive additional evidence on remand if it elects to do so. *See In re K.N.*, 373 N.C. 274, 285, 837 S.E.2d 861, 869 (2020).

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

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STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; DUKE ENERGY PROGRESS, LLC, APPLICANT; AND DUKE ENERGY CAROLINAS, LLC, APPLICANT

v.

ATTORNEY GENERAL JOSHUA H. STEIN; PUBLIC STAFF – NORTH CAROLINA UTILITIES COMMISSION; NORTH CAROLINA JUSTICE CENTER, NORTH CAROLINA HOUSING COALITION, NATURAL RESOURCES DEFENSE COUNCIL, SOUTHERN ALLIANCE FOR CLEAN ENERGY, AND NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION; AND SIERRA CLUB, INTERVENORS

Nos. 271A18 and 401A18

Filed 11 December 2020

**1. Utilities—general rate case—coal ash spill—return on coal ash remediation costs—sufficiency of findings**

In two general rate cases (consolidated on appeal), where the Utilities Commission allowed two electric companies to include certain coal ash remediation costs in the cost of service used to establish their retail rates, the Commission entered sufficient findings of fact pursuant to N.C.G.S. § 62-79(a) to enable the Court of Appeals to discern the bases for also allowing the companies to earn a return on the unamortized balance of those costs. Although intervenors in both cases argued that the Commission made contradictory findings about how it classified the coal ash-related costs

under the ratemaking statute (N.C.G.S. § 62-133), the Commission clearly decided that it had authority to allow the return on those costs regardless of the classification issue.

**2. Utilities—general rate case—coal ash spill—inclusion of coal ash remediation costs in rate base calculation—reasonableness of the costs**

In two general rate cases (consolidated on appeal), where the Utilities Commission allowed two electric companies to include certain coal ash remediation costs in the cost of service used to establish their retail rates, the Commission properly found the companies "reasonably and prudently incurred" these costs in compliance with the Coal Ash Management Act (CAMA), which was enacted shortly after the companies faced criminal charges for a coal ash spill at one of their facilities. The Attorney General failed to rebut the presumption of reasonableness by failing to produce evidence showing the companies should have begun the remediation process sooner than they did or that the companies' coal ash spill was the main reason for CAMA's enactment. Further, the intervenors in both cases failed to identify which specific costs were unreasonable.

**3. Utilities—general rate case—coal ash spill—return on coal ash remediation costs—consideration of "other material facts"**

In two general rate cases (consolidated on appeal), where the Utilities Commission allowed two electric companies to defer certain coal ash remediation costs and to include those costs in the cost of service used to establish their retail rates, the Commission properly allowed the companies to earn a return on the unamortized balance of those costs. Although this decision represented a departure from ordinary ratemaking procedures, it was nevertheless lawful where the Commission properly exercised its authority under N.C.G.S. § 62-133(d) to "consider all other material facts of record" apart from those specifically mentioned throughout section 62-133 (the ratemaking statute) when determining what rates would be "just and reasonable."

**4. Utilities—general rate case—coal ash spill—coal ash remediation costs—rejection of equitable sharing proposal—reversed and remanded**

In two general rate cases (consolidated on appeal), where the Utilities Commission entered orders allowing two electric companies to include certain coal ash remediation costs in the cost of service used to establish their retail rates, the orders were reversed and

remanded because the Commission failed to consider all "material facts in the record," pursuant to N.C.G.S. § 62-133(d), before rejecting an equitable sharing arrangement proposed by the Public Staff in response to the companies' numerous environmental violations. Specifically, the Commission failed to evaluate the extent to which the companies committed environmental violations relating to coal ash management before deciding whether the companies' coal ash-related costs were reasonable or whether equitable sharing of those costs between shareholders and ratepayers was necessary.

**5. Utilities—general rate case—coal ash spill—inclusion of coal ash remediation costs in rate base calculation—section 62-133.13—applicability**

In two general rate cases (consolidated on appeal), the Utilities Commission properly allowed two electric companies to include certain coal ash remediation costs in the cost of service used to establish their retail rates because N.C.G.S. § 62-133.13 (forbidding utilities from recovering costs related to unlawful discharges of coal combustion residuals into surface waters) did not preclude it from doing so. Although the companies had recently faced criminal charges when a burst pipe at one of their facilities emitted large quantities of coal ash into a local river, the Commission found the companies incurred their coal ash remediation costs to comply with federal and state environmental law rather than as the result of that coal ash spill.

**6. Utilities—general rate case—increase in basic facilities charge—for one class of ratepayers**

In a general rate case, the Utilities Commission did not err by authorizing an electric company to increase the basic facilities charge for the residential rate class while leaving the facilities charges against other classes of ratepayers unchanged. Evidence in the record supported the increase, as well as the exact dollar figure the Commission chose and the methodology used to generate that figure, and the Commission properly balanced competing policy goals when approving the increase. Further, the Commission adequately considered any adverse effects of the increased facilities charge on low-income customers and showed that the increase was not "unduly discriminatory" under N.C.G.S. § 62-140.

Justice NEWBY concurring in part and dissenting in part.

Justice EARLS concurring in part and dissenting in part.

Consolidated appeals as of right pursuant to N.C.G.S. § 62-90 and N.C.G.S. § 7A-29(b) from final orders of the North Carolina Utilities Commission entered on 23 February 2018 in Docket Nos. E-2, Sub 1131, 1142, 1103, and 1153, and on 22 June 2018 in Docket Nos. E-7, Sub 1146, 819, 1152, and 1110. Heard in the Supreme Court on 11 March 2020.

*Troutman Sanders LLP, by Kiran H. Mehta, Molly McIntosh Jagannathan, and Christopher G. Browning, Jr., for Duke Energy Carolinas, LLC, and Duke Energy Progress, LLC.*

*Attorney General Joshua H. Stein, by Assistant Attorney General Margaret A. Force, Solicitor General Matthew W. Sawchak, Deputy Solicitor General James W. Doggett, Solicitor General Fellow Matt Burke, and Special Deputy Attorneys General Jennifer T. Harrod and Teresa L. Townsend.*

*Lewis & Roberts, PLLC, by Matthew D. Quinn, and Bridget M. Lee and Dorothy E. Jaffee, for appellant Sierra Club.*

*Southern Environmental Law Center, by Gudrun Thompson and David Neal, for North Carolina Justice Center, North Carolina Housing Coalition, Natural Resources Defense Council, and Southern Alliance for Clean Energy, and North Carolina Sustainable Energy Association, by Benjamin W. Smith and Peter H. Ledford, intervenor-appellants.*

*Public Staff – NCUC, by Chief Counsel David T. Drooz and Staff Attorneys Chris Ayers, Layla Cummings, Megan Jost, and Nadia Luhr, intervenor-appellant.*

*North Carolina Department of Justice, Environmental Division, by Special Deputy Attorney General Marc Bernstein and Senior Deputy Attorney General Daniel S. Hirschman, for North Carolina Department of Environmental Quality, amicus curiae.*

ERVIN, Justice.

These cases arise from appeals taken from orders entered by the North Carolina Utilities Commission addressing applications filed by Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC, both of which are wholly owned subsidiaries of Duke Energy Corporation, by various intervenors representing the utilities' consumers that focus upon

the lawfulness of the Commission's decisions concerning the extent to which the utilities are entitled to reflect costs associated with the storage, disposal, and removal of ash resulting from the production of electricity in coal-fired electric generating units in the cost of service used to establish the utilities' North Carolina retail rates. Among other things, various intervenors assert that the Commission erred by allowing the deferral of certain coal ash remediation costs and the inclusion of those costs in the cost of service used to establish the utilities' North Carolina retail rates, that the Commission erred by allowing the utilities to earn a return upon the unamortized balance of the deferred coal ash remediation costs, and that the Commission erred by approving an increased Basic Facilities Charge for Duke Energy Carolinas' North Carolina retail residential customers. After careful consideration of the parties' challenges to the Commission's orders, we conclude that the challenged orders should be affirmed, in part, and reversed and remanded, in part.

## I. Factual Background

### A. Substantive Facts

In the early part of the twentieth century, when the utilities began providing electric service in North Carolina, they used coal as the primary means of generating electric power. The burning of coal produces by-products known as coal combustion residuals, which include fly ash, bottom ash, boiler slag, and flue gas desulfurization material.[1] At present, Duke Energy Progress owns eight coal-fired electric generating facilities and nineteen unlined coal ash basins, while Duke Energy Carolinas owns eight coal-fired electric generating facilities and seventeen unlined coal ash basins.

In the early years during which the utilities operated coal-fired electric generating facilities, coal ash was either emitted through generating facility smokestacks or stored in on-site landfills. In the 1950s, the utilities began to store coal ash in unlined basins located at generating facility sites. As part of this process, the utilities mixed coal ash with water to form a "sluice," which would be piped from the generating facility to these unlined basins. The practices that the utilities employed in disposing of coal ash during this time were consistent with contemporaneous standard industry practices and with the concept of least cost planning as currently embodied in state law. *See* N.C.G.S. § 62-2(a)(3a) (2019).

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1. The term "coal ash" is used throughout the remainder of this opinion to refer to coal combustion residuals and the by-products resulting from the combustion of coal in electric generating facilities.

The harmful effects of coal ash on human and environmental health were not fully understood at the time that the utilities began to dispose of it in unlined basins. Over time, however, pollutants emanating from the unlined coal ash basins began to contaminate nearby groundwater. In the 1970s, concerns developed about the manner in which coal ash was handled and stored. For that reason, the United States Environmental Protection Agency began to regulate unlined coal ash basins in accordance with the Clean Water Act and initiated a permitting program known as the National Pollutant Discharge Elimination System, pursuant to which the EPA delegated authority to the states to issue permits allowing the discharge of a specific amount of pollutants into nearby water sources, subject to certain terms and conditions, and authorizing the processing, incineration, placement in a landfill, or other beneficial uses of contaminated sludge. *See* 33 U.S.C. § 1251 *et seq.* (1972). In 1979, the North Carolina Department of Environmental Quality[2] adopted Groundwater Classification and Standards (2L Rules) requiring the taking of preventative and corrective measures relating to groundwater contamination associated with coal ash. *See* 15A N.C. Admin. Code 02L §§ .0100–.0515.

In the aftermath of a 2008 incident, during which more than five million cubic yards of coal ash spilled into the Emory River from the Tennessee Valley Authority's Kingston Fossil Plant, the effect of storing coal ash in unlined basins upon human and environmental health became a focus of additional attention at the EPA and in the electric power industry. On 17 April 2015, the EPA promulgated the Hazardous and Solid Waste Management System—Disposal of Coal Combustion Residuals from Electric Utilities (CCR Rule), *see* 80 Fed. Reg. 21301 (April 17, 2015), which established a "maximum contaminant level" for certain contaminants, prohibited "[a]n increase in the concentration of that substance in the ground water where the existing concentration of that substance exceeds" a prescribed maximum level, and required that groundwater monitoring be undertaken at existing coal ash basins by no later than 17 October 2017, with reporting of the results to begin by no later than 31 January 2018. 40 C.F.R. § 257.3–4; § 257.90(b), (e) (2019).

On 2 February 2014, a stormwater pipe that ran beneath an unlined coal ash basin located at Duke Energy Carolinas' Dan River generating facility burst, resulting in the emission of approximately 27,000 million gallons of wastewater and between 30,000 and 39,000 tons of coal ash

2. The Department of Environmental Quality was known as the Department of Environmental and Natural Resources in the 1970s.

into the Dan River, affecting river conditions for up to sixty miles below the discharge site. The utilities entered pleas of guilty in federal court to nine criminal violations of the Clean Water Act relating to the Dan River facility and four additional power plants. In accordance with their plea agreements, the utilities agreed to pay a $68 million fine and were placed on probation for a five-year period pursuant to 18 U.S.C. § 3561(c)(2).

On 20 September 2014, the General Assembly enacted the North Carolina Coal Ash Management Act, N.C. Sess. L. 2014-122, which was subsequently amended in the Mountain Energy Act, N.C. Sess. L. 2015-110, and the Drinking Water Protection/Coal Ash Cleanup Act, N.C. Sess. L. 2016-95. CAMA, as amended, required a comprehensive assessment of groundwater and surface water discharges at coal ash basins, the taking of corrective action to address such discharges, and the closure of all of the utilities' unlined coal ash basins by no later than 2029 in accordance with a statutorily prescribed timeline. N.C.G.S. §§ 130A-309.211–.214 (2019). The utilities began closing their unlined coal ash basins pursuant to the requirements of the CCR Rule and CAMA in 2015.

## B. Procedural History

At the beginning of the closure process, the utilities estimated that their collective coal ash cleanup costs would exceed $4.5 billion. On 21 December 2015, Duke submitted a letter to the Commission outlining the manner in which the utilities intended to account for ongoing and anticipated coal ash management and basin closure costs. In this letter, Duke explained that the utilities planned to create an Asset Retirement Obligation, which is an account associated with the retirement of a tangible long-lived asset, on their balance sheets in accordance with their understanding of Financial Accounting Standards Board (FASB) Accounting Standards Codification for Asset Retirement Environmental Obligations (ASC) 410-20, Federal Energy Regulatory Commission (FERC) General Instruction No. 25, and Generally Accepted Accounting Principles (GAAP). According to Duke, the creation of these Asset Retirement Obligations was triggered by the fact that the CCR Rule and CAMA required the closure of the utilities' unlined coal ash basins. Although Duke initially estimated that these Asset Retirement Obligations would involve approximately $2.13 billion for Duke Energy Progress and $1.84 billion for Duke Energy Carolinas, it noted that the utilities' actual compliance costs might be "materially different from these estimates based on the timing and requirements of the final regulations."

In accordance with fundamental principles of double-entry accounting, the utilities planned to record their coal ash management and ash

basin closure costs as both a liability and an asset. In the event that these costs were associated with generating facilities that were still in active service, the costs, inclusive of associated depreciation expense, would be placed in the relevant property, plant and equipment account. In the event that these costs were associated with a retired facility, they would be placed in a regulatory asset account. After noting that "[t]he Commission ha[d]," in prior matters, "issued orders allowing the [utilities] to defer all impacts of establishing an [Asset Retirement Obligation] until these costs [could] be considered in future rate making decisions," Duke stated that, since "actual costs incurred to comply with the federal and state regulations regarding closure of ash basins are being deferred," "all associated coal ash [Asset Retirement Obligation] deferrals [are being excluded] for earnings surveillance reporting," and that the utilities "are funding these expenditures with its debt and equity capitalization" and "are recording a debt and equity return (carrying charge) on the aforementioned net asset for regulatory purposes" given that "GAAP requires the equity return to be deferred . . . until rate recovery has begun." Finally, Duke pointed out that this letter had been sent for purely informational purposes and expressed the intention of "bring[ing] this matter before the Commission for ultimate disposition" after "sufficient clarity in North Carolina regarding the closure of ash basins"[3] had been obtained.

On 28 March 2016, the Commission determined that there was "good cause to establish formal dockets for [the utilities] in this matter" and "place[d] a copy of Duke's letter in each" of these dockets. Although it took no further action at that time, the Commission noted that its "inaction should not be construed as agreement or disagreement with the substance of Duke's analysis or the conclusions [that] Duke [had] reache[d]" and that it "reserve[d] the right, once a record [had been] established, to agree or disagree in whole or in part" with Duke's proposed accounting practices.

On 30 December 2016, the utilities filed a joint petition seeking the entry of an accounting order "authorizing the [utilities] to defer in a regulatory asset account (until the [their] next base rate cases) certain costs incurred in connection with compliance with federal and state environmental requirements" relating to coal ash management and coal ash basin closures. More specifically, Duke "request[ed] that the

3. Subsequently, Duke explained that "the [utilities] did not file a deferral request at [this] time due to significant [unresolved] litigation and reconsiderations related to CAMA, the now-defunct Coal Ash Management Commission, and numerous other outstanding issues."

Commission allow [the utilities] to establish a regulatory asset account for the deferral of all non-capital costs as well as the depreciation expense and cost of capital at the weighted average cost of capital for all capital costs related to activities required under [the CCR Rule and CAMA]" and deferral of "a cost of capital on the deferred costs at the weighted average cost of capital" for costs incurred from 1 January 2015 until the approval of new rates in the utilities' next general rate cases.

As of 30 September 2016, Duke Energy Progress had recorded an Asset Retirement Obligation of $2.4 billion and Duke Energy Carolinas had recorded an Asset Retirement Obligation of $2.1 billion, while acknowledging that its actual compliance costs might be "materially different" based upon the timing and requirements of the final environmental regulations. In addition, Duke pointed out that Duke Energy Progress had already incurred $291.9 million in coal ash management and coal ash basin closure costs and that Duke Energy Carolinas had already recorded $434.4 million in such costs, with these costs including monies associated with engineering and regulatory compliance, mobilization for and the commencement of the closure process, the construction of rail infrastructure for coal ash excavation, dewatering activities, ash excavation, and plant closure.

Duke asserted that "noteworthy circumstances" justified the entry of the proposed accounting order and alleged that, "absent approval of this request, [both utilities'] return on equity for [their] North Carolina retail operations [was] expected to be well below the return last authorized by the Commission." More specifically, Duke alleged that the authorized return on equity that had been established in the utilities' last general rate cases was 10.2 percent and that, in the absence of the requested accounting order, Duke Energy Progress' earned return on equity would fall to 7.47 percent and that Duke Energy Carolinas' earned return on equity would fall to 7.61 percent. After emphasizing that the utilities were not seeking a rate change at that time, Duke stated that each utility intended to file a general rate case application within the next twelve months and pointed out that none of the fines, penalties, or costs associated with the Dan River spill had been included in the costs that either utility had deferred to date or would be included in the costs upon which any future general rate increase request would be predicated.

Duke asserted that "[c]losing ash basins is part of the life cycle of the [utilities'] coal plants," that "compliance with state and federal regulatory requirements is part of the normal operation of a utility," and that "[c]osts related to the operation of a power plant, including decommissioning costs, are typically paid for by customers." In light of the

"extraordinary and unprecedented" "magnitude, scope, duration and complexity of compliance," the utilities requested the Commission to enter the requested accounting order "so that all complexities may be adequately reviewed by the Commission and stakeholders at an appropriate time." Duke claimed that "[a]pproval of this deferral request [would] benefit the [utilities] and the customers by helping to assure investor confidence in" both utilities and ensuring that "needed capital [would be available] on reasonable terms." Unless the Commission approved its request, Duke argued that "the [utilities] may have to write off billions of dollars of costs for accounting purposes, which . . . would severely impair the [utilities'] financial stability and ability to attract capital on reasonable terms."

Various parties[4] submitted comments in response to Duke's filing. The Attorney General argued that the public interest would not be served by deciding the issues raised by Duke's filing outside the context of a general rate case. The Public Staff asserted that the relevant costs "generally satisfy the criteria for deferral for regulatory accounting (but not necessarily ratemaking) purposes" and reserved the right to litigate the amount of deferred costs used to set the utilities' rates in future general rate cases, the method that would be used to include the relevant costs in North Carolina retail rates, the length of any applicable amortization period, and the extent to which an equitable sharing of these costs between the ratepayers and shareholders should be implemented. Other parties contended that costs should be fully analyzed and categorized before the amount of deferred costs to be included in North Carolina retail rates was established.

### 1. General Rate Case Applications

#### a. Duke Energy Progress

On 1 June 2017, Duke Energy Progress filed an application requesting authorization to adjust and increase its North Carolina retail rates and the entry of an accounting order approving the establishment of certain regulatory assets and liabilities. In its application, Duke Energy Progress sought additional annual North Carolina retail revenues of approximately $477.5 million,[5] resulting in an overall increase of approximately

4. The parties submitting comments in response to Duke's filing included the North Carolina Waste Awareness and Reduction Network, Inc.; Appalachian State University; the Cities of Concord and Kings Mountain; the Carolina Utility Customers Association, Inc.; the Attorney General; and the Public Staff. The utilities and the Sierra Club submitted reply comments.

5. In subsequently filed supplemental testimony and exhibits, Duke Energy Progress reduced its proposed rate increase to $425.6 million.

14.9 percent. Duke Energy Progress requested that rates be established based upon coal ash basin closure costs of approximately $66 million per year for a period of five years and ongoing coal ash-related compliance costs of approximately $129 million per year. In addition, Duke Energy Progress sought the establishment of "a regulatory asset [and] liability for coal ash basin closure costs over or under the amount established in this proceeding and for those costs incurred between the cut-off date for this rate case and the effective date of new rates." A number of entities intervened in the proceeding initiated by the filing of Duke Energy Progress' application.[6]

On 20 June 2017, the Commission entered an order in which it: (1) declared that the application filed by Duke Energy Progress had initiated a general rate case pursuant to N.C.G.S. § 62-137; (2) suspended the proposed rates for a period of up to 270 days pursuant to N.C.G.S. § 62-134; and (3) established the applicable test year as the twelve-month period ending 31 December 2016. On 10 July 2017, the Commission entered an additional order consolidating the utilities' request to defer environmental compliance costs in Docket No. E-2 Sub 1103, and Duke Energy Progress' request to defer incremental storm damage expenses in Docket No. E-2, Sub 1131, with Duke Energy Progress' general rate proceeding. On 12 July 2017, the Commission entered an order requiring Duke Energy Progress to provide public notice of the filing of its application and the schedule of public hearings to be held in connection with that proceeding. A number of hearings were held before the Commission between 12 September to 7 December 2017, at which interested members of the public were allowed to testify and the parties were given the opportunity to present the testimony of various expert witnesses.

**b. Duke Energy Carolinas**

On 25 August 2017, Duke Energy Carolinas filed an application requesting authorization to increase its North Carolina retail rates and

6. The Public Staff intervened as a matter of right pursuant to N.C.G.S. § 62-15(d) and Commission Rule R1-19, while the Attorney General's intervention was recognized pursuant to N.C.G.S. § 62-20. The Commission allowed additional intervention petitions filed by the Carolina Utility Customers Association, Inc.; the Carolinas Industrial Group for Fair Utility Rates II; the North Carolina Waste Awareness and Reduction Network, Inc.; the North Carolina Sustainable Energy Association; the Fayetteville Public Works Commission; the Commercial Group; the North Carolina Electric Membership Corporation; the Environmental Defense Fund; the Kroger Company; the Sierra Club; Haywood Electric Membership Corporation; the United States Department of Defense and All Other Federal Executive Agencies; the Rate-Paying Neighbors of Duke Energy Progress, LLC's Coal Ash Sites; the North Carolina Farm Bureau Federation, Inc.; the North Carolina Justice Center, the North Carolina Housing Coalition, the Natural Resources Defense Council, and the Southern Alliance for Clean Energy, jointly (collectively, the Justice Center, et al.); and the North Carolina League of Municipalities.

the entry of an accounting order authorizing the establishment of certain regulatory assets and liabilities. In its application, Duke Energy Progress sought additional annual North Carolina retail revenues of approximately $611 million,[7] which resulted in an overall increase of approximately 12.8 percent, and the approval of an increase in the residential Basic Facilities Charge from $11.80 to $17.79 per month. Duke Energy Carolinas also requested that rates be established based upon coal ash basin closure costs of approximately $135 million per year for a period of five years and ongoing coal ash-related compliance costs of approximately $201 million per year. In addition, Duke Energy Carolinas sought the establishment of a "regulatory asset [and] liability for coal ash basin closure costs over or under the amount established in this proceeding and for those costs incurred between the cut-off date for this rate case and the effective date of new rates." A number of other entities intervened in the proceeding resulting from the filing of Duke Energy Carolinas' application.[8]

On 19 September 2017, the Commission entered an order in which it: (1) declared that Duke Energy Carolina's application had initiated a general rate case pursuant to N.C.G.S. § 62-137; (2) suspended the proposed rates for a period of up to 270 days pursuant to N.C.G.S. § 62-134; and (3) established that the applicable test year would be the twelve-month period ending 31 December 2016. On 13 October 2017, the Commission entered an order requiring Duke Energy Carolinas to provide public notice of the filing of its application and the times, dates, and locations at which hearings for the receipt of public witness testimony would be held. A number of hearings were held before the Commission between

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7. Subsequently, Duke Energy Carolinas filed supplemental testimony and exhibits changing its proposed rate increase to an annual amount of approximately $701 million.

8. Once again, the Public Staff intervened as a matter of right pursuant to N.C.G.S. § 62-15(d), while the Attorney General's intervention was recognized pursuant to N.C.G.S. § 62-20. The Commission allowed additional intervention petitions filed by the North Carolina Sustainable Energy Association; the Environmental Defense Fund; the North Carolina Waste Awareness and Reduction Network; the Carolina Utility Customers Association, Inc.; the Carolinas Industrial Group for Fair Utility Rates III; the Rate-Paying Neighbors of Duke Energy Carolinas, LLC's Coal Ash Sites; the North Carolina Farm Bureau Federation, Inc.; the Sierra Club; the Kroger Company; the North Carolina League of Municipalities; Appalachian State University; Piedmont Electric Membership Corporation; Rutherford Electric Membership Corporation; Haywood Electric Membership Corporation; Blue Ridge Electric Membership Corporation; the Commercial Group; Apple, Inc., Facebook, Inc., and Google, Inc., jointly; the Cities of Concord and Kings Mountain; the City of Durham; and the North Carolina Justice Center, the North Carolina Housing Coalition, the Natural Resources Defense Council, and the Southern Alliance for Clean Energy (collectively, the Justice Center, et al.).

16 January to 22 March 2018, at which interested members of the public were allowed to testify and the parties were given the opportunity to present the testimony of various expert witnesses.

**2. The Commission's Orders**

**a. Duke Energy Progress**

On 23 February 2018, the Commission entered an order allowing Duke Energy Progress to include $232.39 million in net additional coal ash-related costs, less a $30 million mismanagement penalty, to be amortized to North Carolina retail rates over a five-year period in its North Carolina retail cost of service and authorizing Duke Energy Progress to recover a return on the unamortized balance of these costs. In its order, the Commission found as fact that:

> 51. [Duke Energy Progress] expects to incur substantial costs related to [coal ash] in future years. It is just and reasonable to allow deferral of those costs, with a return at the overall cost of capital approved in this [o]rder during the deferral period. Ratemaking treatment of such costs will be addressed in future rate cases.
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> . . . .
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> 53. Since its last rate case, [Duke Energy Progress] has become subject to new legal requirements relating to its management of coal ash. These new legal requirements mandate the closure of the 19 coal ash basins at [Duke Energy Progress'] coal-fired power plants. Since its last rate case, [Duke Energy Progress] has incurred significant costs to comply with these new legal requirements.
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> 54. On a North Carolina retail jurisdiction basis, the actual coal ash basin closure costs [that Duke Energy Progress] has incurred (netted against the amount already included in [Duke Energy Progress'] rates following its last rate case) during the period from January 1, 2015, through August 31, 2017, amount to $241,890,000. [Duke Energy Progress] is entitled to recover these coal ash basin closure costs, less a disallowance of $9.5 million, for a total amount of $232,390,000. . . . The actual coal ash basin closure costs incurred by [Duke Energy Progress], less the $9.5 million, are known and measurable, reasonable and prudent, and used and useful in the provision of service to [Duke Energy Progress'] customers.

> [Duke Energy Progress] is entitled to recover these costs through rates. Further, [Duke Energy Progress] proposes that these costs be amortized over a five-year period and that it earn a return on the unamortized balance. Under normal circumstances, the five-year amortization period proposed by [Duke Energy Progress] is appropriate and reasonable, and absent any management penalty should be approved, and under normal circumstances [Duke Energy Progress] is entitled to earn a return on the unamortized balance.
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> 55. Under the present facts, a mismanagement penalty in the approximate sum of $30 million is appropriate with respect to [Duke Energy Progress'] [coal ash] remediation expenses accounted for in the earlier established asset retirement obligation . . . with respect to costs incurred through the end of the test year, as adjusted. Through its use of available ratemaking mechanisms, the Commission is effectively implementing an estimated $30 million penalty by amortizing the $232,390,000 over five years with a return on the unamortized balance and then reducing the resulting annual revenue requirement by $6 million for each of the five years.
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> 56. [Duke Energy Progress] further proposes that it recover on an ongoing basis $129,115,000 in annual coal ash basin closure costs, subject to true-up in future rate cases. The amount sought by [Duke Energy Progress] is based upon its actual test year (2016) spend. [Duke Energy Progress'] proposal to recover these ongoing costs as a portion of the rates approved in this [o]rder is not approved. Rather, [Duke Energy Progress] is authorized to record its September 1, 2017, and future [coal ash] costs in a deferral account until its next general rate case.

In discussing the evidentiary support for these findings of fact, the Commission noted that cost deferral "is a recognized practice that allows recovery of expenditures that might otherwise constitute impermissible retroactive ratemaking," that the regulations requiring Duke Energy Progress to remediate the environmental risks associated with its unlined coal ash basis "were not in effect ten or fifteen years ago," that these regulations "[have] arisen in 2014 and 2015," and that Duke Energy Progress "is taking appropriate actions to comply" with all such requirements.

The Commission determined that it "[could not] agree with the ultimate positions of any party" with respect to the manner in which coal ash-related costs should be included in the cost of service used to establish Duke Energy Progress' North Carolina retail rates. In rejecting a proposal advanced by Public Staff witness Jay Lucas, who suggested that $88,000 in legal expenses associated with litigation relating to alleged coal ash-related environmental violations and $6.7 million in groundwater extraction and treatment costs, most of which related to the utility's Sutton facility, should be excluded from the company's North Carolina retail cost of service, citing *State ex rel. Utilities Commission v. Public Staff*, 317 N.C. 26, 343 S.E.2d 898 (1986) (*Glendale Water*) (holding that legal fees incurred as a result of the utility's failure to provide adequate service "could have been avoided" and should have been excluded from the utility's operating expenses for ratemaking purposes), the Commission noted that, in this instance, unlike the situation at issue in *Glendale Water*, there had been no finding or admission that any violation had occurred. In addition, the Commission pointed to the testimony of Duke Energy Progress witness James Wells that not all 2L Rule exceedances result in NPDES permit violations and that DEQ had never issued a notice of violation directed toward Duke Energy Progress based upon groundwater testing results. Instead, the Commission noted that Mr. Wells had testified that "the 2L [R]ules' correct[ive] action provisions are designed around the idea that older facilities, built before liners were a regulatory obligation, were likely to have associated groundwater impacts, that such impacts were not the result of regulatory noncompliance, and that they should be addressed in a measured process." According to Mr. Wells, the utility's use of unlined coal ash basins was "consistent with the industry standard" and "considered by the EPA to be the best available control technology" at the time that the facilities in question were constructed. The Commission added that, even though Duke Energy Progress had agreed to incur certain groundwater extraction and treatment costs pursuant to a settlement agreement with DEQ, that agreement "merely accelerated work that would have been required under CAMA" given that, unlike the 2L Rules, "CAMA's groundwater assessment and corrective action provisions are triggered by *exceedances*—not *violations*—of the 2L [Rules]."

The Commission stated that it was not persuaded by the Public Staff's contention that Duke Energy Progress should have "tak[en] steps that were not in accord with steps most of the industry was following," such as lining ash ponds or creating dry coal ash basins, while "disregarding responsibility of paying for that which [the Public Staff]—in 20/20 hindsight—wish[ed that Duke Energy Progress] had done" or by the

arguments advanced by several intervenors that Duke Energy Progress "should have done more than just comply with the current environmental regulations" given the testimony of Attorney General witness Dan Wittliff that "the definition of industry standards is compliance with the law." In addition, the Commission determined that the actions suggested by the Public Staff would have "cost money which would have been charged to customers" or exposed Duke Energy Progress "to credible claims of 'gold-plating,' and therefore cost disallowance, which would have prevented [Duke Energy Progress] from moving forward with these suggested improvements in the first place." In the Commission's view, the extent to which "seeps" constituted a violation of the law or required the issuance of an NPDES permit remained unresolved by DEQ.

The Commission rejected the Public Staff's contention that the Commission should disallow $109.8 million relating to the costs of off-site transportation and disposal of coal ash from the Sutton and Asheville plants on the theory that the coal ash in question should have been placed in on-site facilities given that acting in such a fashion would not have been feasible given the basin closure deadlines imposed by CAMA. In the Commission's view, "once CAMA became law, prudent planning required [Duke Energy Progress] to meet 'real world' difficulties as and when they arose, to ensure that the legislatively fixed . . . deadline would be met," and, "[h]ad [Duke Energy Progress] not arranged for off-site disposal, it would have been required" to undertake transportation measures which would have involved an "unreasonable task," with one exception.[9]

The Commission stated that the Public Staff's proposed "equitable sharing" arrangement, pursuant to which Duke Energy Progress' coal ash basin closure costs would be amortized to rates over a twenty-six year period without the inclusion of any return on the unamortized balance, resulting in a fifty-fifty sharing of those costs between the ratepayers and the shareholders, rested upon "[Duke Energy Progress'] alleged past failures . . . to prevent environmental contamination from its coal ash basins" and "an asserted [Commission] 'history of approval of sharing of extremely large costs that do not result in any new generation of electricity for customers.' " However, the Commission determined that the Public Staff had "provid[ed] insufficient justification" for its proposal, that it lacked "[a] 'determining principle' or prudency standard,"

9. Duke Energy Progress "essentially agreed" that an adjustment in the amount of $9.5 million relating to the increased coal ash moving expenses at its Asheville plant associated with a contract involving Waste Management, Inc., should be made.

and that, if "the Commission [were] to adopt it, the Commission very well could be found to be acting arbitrarily and capriciously, and subject itself to reversal."

In addition, the Commission determined that the Public Staff's argument that the Commission had the authority to institute its equitable sharing proposal rested upon an "overly broad" view of the Commission's authority that lacked support in the applicable legal authorities. In rejecting the Public Staff's argument that the applicable legal support for its equitable sharing proposal could be found in this Court's decision in *State ex rel. Utilities Commission v. Thornburg*, 325 N.C. 463, 476–81, 385 S.E.2d 451, 458–61 (1989) (*Thornburg I*) (affirming a Commission decision that nuclear plant abandonment costs constituted a utility "expense" for purposes of N.C.G.S. § 62-133(b)(3) and N.C.G.S. § 133(c) and that a decision to allow the amortization of these abandonment costs without a return upon the unamortized balance was permitted by N.C.G.S. § 62-133(d)), the Commission noted that the present case involved " 'reasonable and prudent' and 'used and useful' expenditures by [Duke Energy Progress]" rather than " 'abandoned plant' or cancellation costs." Instead, the Commission relied upon this Court's decision in *State ex rel. Utilities Commission v. Thornburg*, 325 N.C. 484, 486, 385 S.E.2d 463, 464 (1989) (*Thornburg II*) (reversing a Commission decision providing for an equitable sharing between customers and shareholders of approximately $570 million in construction costs associated with a new unit even though some portion of the relevant costs had been incurred in connection with the construction of certain abandoned facilities), and determined that the adoption of the Public Staff's equitable sharing proposal would be "unfairly punitive."

The Commission concluded that its determination that the relevant coal ash disposal costs were "used and useful" and "prudent and reasonable" was consistent with its own earlier decision in Docket No. E-22, Sub 532, which addressed costs that had been incurred for the "identical purpose" and rested upon a determination that such costs were "used and useful." In rejecting the Public Staff's argument that Duke Energy Progress should have put the relevant costs into rate base rather than "cho[osing]" to defer these costs and attempt to have them amortized to rates, the Commission determined that Duke Energy Progress had treated these costs as "[w]orking [c]apital" and that "no party [had] taken the position that [this] inclusion . . . was inappropriate." Similarly, in rejecting the Attorney General's assertion that Duke Energy Progress had "failed to request in advance permission to create a deferred account," the Commission found that Duke Energy Progress "had no choice in the matter" in light of the applicable regulatory accounting rules, that "it is

not necessary that something be classified as 'plant' in order to be properly included in rate base," and that, instead, "the issue is the source of the funds," citing *Utilities Commission v. Virginia Electric & Power Co.*, 285 N.C. 398, 206 S.E.2d 283 (1974) (*VEPCO*). In view of the fact that the relevant funds had been provided by investors, the Commission held that the funds were "used and useful" even though they did not result in "plant in service," so that Duke Energy Progress was "entitled to earn a return on those funds over the period in which the costs are amortized." In addition, the Commission held that, even if the costs in question did not relate to "used and useful" property, "the Commission would nevertheless approve [Duke Energy Progress'] cost recovery proposal in all respects, and would exercise its discretion to achieve that result" pursuant to N.C.G.S. § 62-133(c) and N.C.G.S. § 62-133(d).

The Commission further determined that the "disallowance methodologies" proposed by the intervenors "fail[ed] to comply with the Commission's prudence framework," in which a utility's costs "are presumed reasonable and prudent unless challenged" and any prudence-related challenges "must (1) identify specific and discrete instances of imprudence; (2) demonstrate the existence of prudent alternatives; and (3) quantify the effects by calculating imprudently incurred costs," citing its prior decisions in Docket No. E-2, Sub 537 and E-2, Sub 333. According to the Commission, the proposed disallowances would be "unjust and unreasonable," with a decision to place the entire cost of coal ash disposal upon shareholders having the ultimate effect of harming ratepayers given the increased capital costs that would result from such an action. In the same vein, the Commission rejected the Sierra Club's contention that the coal ash disposal costs that Duke Energy Progress sought to have included in the cost of service resulted from unlawful discharges and had to be disallowed pursuant to N.C.G.S. § 62-133.13 (providing that a utility is not entitled to have "costs resulting from an unlawful discharge to the surface waters of the State from a coal combustion residuals surface impoundment" included in the cost of service used to establish the utility's rates) on the grounds that the relevant costs related to "compl[iance] with the federal CCR [R]ule and CAMA." The Commission also rejected intervenor-proposed disallowances related to expenditures incurred to meet CAMA deadlines on the grounds that "[t]he Commission is unable to recreate the past and place a price tag on remediation costs that might have been incurred in anticipation of environmental requirements."

On the other hand, after determining that it was "unable to conclude that [Duke Energy Progress] mismanagement [was] the primary cause of

CAMA," the Commission concluded that it was also "unable to conclude that [the] mismanagement to which [Duke Energy Progress] admitted in the federal criminal court proceeding was not at least a contributing factor" to the incurrence of the relevant coal ash disposal costs. In light of its "admi[ssion] to pervasive, system-wide shortcomings such as improper communication among those responsible for oversight of coal ash management," the Commission concluded that Duke Energy Progress "ha[d] placed its consumers at risk of inadequate or unreasonably expensive service" by failing to "assur[e] safe operation of its coal-burning facilities so as not to render the environment unsafe," "result[ing] in cost increases greater than those necessary to adequately maintain and operate its facilities." As a result, the Commission imposed a $30 million mismanagement penalty "arising primarily from [Duke Energy Progress'] admissions of mismanagement in the federal criminal case."

Commissioner ToNola D. Brown-Bland dissented from the Commission's decision "that [Duke Energy Progress] is entitled to full recovery of all coal ash expenses subject to a one-time mismanagement penalty." In Commissioner Brown-Bland's view, the imposition of a $30 million mismanagement penalty did "not reasonably assure that the rates fixed for [Duke Energy Progress'] service are 'fair to both the public utilit[y] and to the consumer,' and that the rate set by the Commission and to be received by [Duke Energy Progress] is just and reasonable," quoting N.C.G.S. § 62-133(a) and citing N.C.G.S. § 62-131(a). According to Commissioner Brown-Bland, when Duke Energy Progress was notified that NPDES permit violations and unlawful groundwater exceedances had occurred in 2007, Duke Energy Progress was placed "on notice" that its existing unlined coal ash basins "were not compliant with the environmental regulations of the day," that their contents were leaching into the groundwater, and that Duke Energy Progress "had available to it a number of specific alternative actions that represented reasonable optional pathways to coal ash management compliance." As a result, Commissioner Brown-Bland determined that Duke Energy Progress' decision to store additional coal ash in unlined basins after 2007 was imprudent and resulted in a situation in which the company was required to handle a considerable quantity of coal ash twice—once when it was initially stored in an unlined basin and again when it was excavated and moved to a lined facility. As a result, Commissioner Brown-Bland concluded that it was "not fair to burden the consumers with rates that include costs attributable to [Duke Energy Progress'] imprudence" in dewatering, excavating, and moving coal ash waste that had been produced in or after 2007 and that the prudently incurred portion of Duke Energy Progress' coal ash costs should be amortized over a seven year period, with the unamortized balance being included in rate base.

Similarly, Commissioner Daniel G. Clodfelter concurred, in part, and dissented, in part. After stating that that he "[could not] concur" in the Commission's decision to impose a $30 million mismanagement penalty while simultaneously allowing Duke Energy Progress to earn a return on the unamortized balance of the relevant coal ash disposal costs, Commissioner Clodfelter described the mismanagement penalty imposed by the Commission as lacking "any clear connection between the amount selected for the penalty . . . and any particular actions or omissions by [Duke Energy Progress]." Instead, Commissioner Clodfelter would have disallowed certain costs which had, in his view, been imprudently incurred at the Sutton, Asheville, H.V. Lee, and Cape Fear facilities and would have placed certain costs incurred at the Mayo and Roxboro facilities into a regulatory asset account for consideration in Duke Energy Progress' next general rate case. After noting that the record did not allow a determination as to "what portion, if any, of [Duke Energy Progress'] future coal ash disposal expenditures may require an increase in investor-provided working capital," Commissioner Clodfelter concluded that he could not "support the accrual of a rate of return on amounts recorded to the regulatory asset account for future coal ash disposal costs."

On 2 April 2018, the Public Staff filed a motion seeking clarification "with respect to whether the unamortized balance of deferred coal ash costs is 'entitled' to a return as a matter of law, or is 'eligible' for a return as a matter of Commission discretion." More specifically, the Public Staff sought clarification concerning: (1) the Commission's conclusion that Duke Energy Progress' coal ash compliance costs constituted investor-funded working capital for purposes of this Court's decision in *VEPCO*; (2) the Commission's conclusion that Duke Energy Progress was "entitled to earn a return on those funds over the period in which the costs are amortized"; and (3) the Commission's statement that "costs placed in an [Asset Retirement Obligation] account are eligible for deferral and amortization and for earning on the unamortized balance" and that, "even if the remediation costs are [Asset Retirement Obligation] expenditures, they are eligible for ratemaking treatment as though they are used and useful assets." On 17 April 2018, the Commission entered an order stating that:

> [The Public Staff's concern] is a misinterpretation of the Commission's order when viewed in the context of the entirety of the order. The *holding* of the order is that but for a management penalty, the Commission in its discretion would have allowed amortization of historical

> deferred [coal ash] costs over five years with full return on the unamortized balance, but to implement the penalty, the return is to be reduced by $30 million. Relying on this logic, the Commission could have imposed a different penalty that could have reduced the return further or eliminated it altogether. As such the holding belies the Public Staff's reading of the order to be that the deferred [coal ash] costs are to be included in rate base with a return to be paid as a matter of law. The holding is not based on a determination that [Duke Energy Progress] is authorized to earn a return on the deferred balance of the [coal ash] historical remediation costs as a matter of law. Consequently, even if use of the word "entitled" were precedent setting, in a legislative ratemaking order, which it is not . . . , as the holding is not dependent on the interpretation of the word as the Public Staff reads it, the Public Staff's concerns are misplaced. In the context of the order taken as a whole, the Commission does not use the word "entitled" in contradistinction with the word "eligible" as the Public Staff reads it, nor, as the Commission stated in its February 23, 2018 order, does the Commission find it necessary to resolve the dispute between [Duke Energy Progress] and the Public Staff as to whether the deferred [coal ash] costs at issue in this case "may" vs. "must" be added to rate base as a matter of law and earn a return. Such determination is not necessary in establishing rates in this case.[10]

**b. Duke Energy Carolinas**

On 22 June 2018, the Commission entered an order allowing Duke Energy Carolinas to include $545.7 million, less a $70 million mismanagement penalty, in the cost of service used to establish its North Carolina retail rates; allowing Duke Energy Carolinas to recover a return on the unamortized balance of the deferred coal ash costs; and increasing its residential Basic Facilities Charge from $11.80 to $14.00 per month. In its order, the Commission found as fact that:

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10. Commissioner Clodfelter dissented from the Commission's clarification order on the grounds that the portions of the rate order to which the Public Staff's motion was directed were the same portions of the order with which he expressed disagreement in his partial dissent. For that reason, Commissioner Clodfelter would have allowed the Public Staff's clarification motion.

36. [Duke Energy Carolinas] shall increase the monthly [Basic Facilities Charge] for the residential rate class (Schedules RS, RT, RE, ES, and ESA) to $14.00. The increase in the [Basic Facilities Charge] for the residential rate class schedules is just and reasonable. The [Basic Facilities Charge] for other rate schedules shall be left unchanged from the current rates.

. . . .

66. [Duke Energy Carolinas] expects to incur substantial costs related to [coal ash] in future years. It is just and reasonable to allow deferral of those costs, with a return at the net-of-tax overall cost of capital approved in this Order during the deferral period. Ratemaking treatment of such costs will be addressed in future rate cases.

. . . .

69. Since its last rate case, [Duke Energy Carolinas] has become subject to new legal requirements relating to its management of coal ash. These new legal requirements mandate the closure of the coal ash basins at all of [Duke Energy Carolinas'] coal-fired power plants. Since its last rate case, [Duke Energy Carolinas] has incurred significant costs to comply with these new legal requirements.

70. On a North Carolina retail jurisdiction basis, the actual coal ash basin closure costs [Duke Energy Carolinas] has incurred during the period from January 1, 2015, through December 31, 2017, amount to $545.7 million. [Duke Energy Carolinas] is eligible to recover these coal ash basin closure costs. The actual coal ash basin costs incurred by [Duke Energy Carolinas] are known and measurable, reasonable and prudent, and, to the extent capital in nature, used and useful in the provision of service to the Company's customers. Further, [Duke Energy Carolinas] proposes that these costs be amortized over a five-year period, and that it earn a return on the unamortized balance. Under normal circumstances, the five-year amortization period proposed by [Duke Energy Carolinas] is appropriate and reasonable, and absent any management penalty, should be approved, and under normal circumstances the Commission within

> its discretion would allow [Duke Energy Carolinas] to earn a return on the unamortized balance.
>
> 71. Under the present facts, a management penalty in the approximate sum of $70 million is appropriate with respect to [Duke Energy Carolinas'] [coal ash] remediation expenses accounted for in the earlier established Asset Retirement Obligation . . . with respect to costs incurred through the end of the test year, as adjusted. Through its use of available ratemaking mechanisms, the Commission is effectively implementing an estimated $70 million penalty by amortizing the $545.7 million over five years with a return on the unamortized balance and then reducing the resulting annual revenue requirement by $14 million for each of the five years.
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> 72. [Duke Energy Carolinas] further proposes that it recover on an ongoing basis $201 million in annual coal ash basin closure costs, subject to true-up in future rate cases. The amount sought by [Duke Energy Carolinas] is based upon its actual test year (2016) spend. [Duke Energy Carolinas] proposal to recover these ongoing costs as a portion of the rates approved in this [o]rder is not appropriate. Rather, it is appropriate to allow [Duke Energy Carolinas] to record its January 1, 2018, and future [coal ash] costs in a deferral account until its next general rate case.

In support of these findings, the Commission noted that an increase in the residential Basic Facilities Charge from $11.80 to $14.00 would be "just and reasonable and [would] strike[ ] the appropriate balance [by] providing rates that more clearly reflect actual cost causation" given that "[t]he increase . . . minimizes subsidization and provides more appropriate price signals to customers in the rate class, while also moderating the impact of such increase on low-income customers to the extent that they are high-usage customers such as those residing in poorly insulated manufactured homes." The Commission further stated that a failure to "properly recover customer-related cost via a fixed monthly charge provides an inappropriate price signal to customers and fails to adequately reflect cost causation" and that "shifting customer-related cost to kWh energy rate further exacerbates these concerns." The Commission determined that Duke Energy Carolinas' proposal to increase the residential Basic Facilities Charge to $17.79, which reflects approximately fifty percent of the difference between the current rate and the purported

$23.78 customer-related cost identified in Duke Energy Carolinas' cost of service study lacked sufficient support in the utility's cost-of-service study and that, while the evidence "would support a higher charge" than $14.00 per month, "cost causation analyses are inherently subjective," so that "selecting a charge within the range advocated [by the parties] based on differing cost causation models [would be] appropriate." After acknowledging the effect that this increase would have upon customers, "especially low-income households," the Commission noted that Duke Energy Carolinas used "other means to address the financial needs of low-income customers which are more effective than biasing the rate design." The Commission left the basic facilities charges applicable to non-residential rate schedules "unchanged" on the grounds that non-residential rate schedules "are more complex" and "allow[ ] for the minimization of cost-subsidization issues" while "ensuring greater consistency with cost causation and allocation principles" and that "a greater amount of fixed costs in the residential rate schedule, as opposed to non-residential rate schedules, presently are recovered through variable energy rates, which is inconsistent with basic cost allocation principles that fixed costs should be recovered through fixed charges, whereas variable costs should be recovered through variable charges."

The Commission further noted that Duke Energy Carolina's request to defer the costs associated with the remediation of conditions at the existing unlined coal ash basins "was generally unopposed" and had the support of the Public Staff. The Commission also concluded "that deferral in a regulatory asset for previously incurred coal ash environmental costs [was] consistent with the Commission's criteria for deferrals and [was] reasonable" in light of the fact that the costs "were extraordinary when incurred," "were not being recovered in rates in effect at the time incurred," and would be difficult to quantify until a later time, when the costs were better understood.

In the Commission's view, N.C.G.S. § 62-133 "requires the Commission to determine the utility's rate base," which is defined as "the reasonable original cost of the public utility's property used and useful . . . less that portion of the cost . . . recovered by depreciation expense," "its reasonable operating expenses," "and a fair rate of return on the [utility's] capital investment" before multiplying the rate base by the rate of return and adding the operating expenses to produce the utility's "revenue requirement," quoting *Thornburg I*, 325 N.C. at 467 n.2, 385 S.E.2d at 453. The Commission held that, once a utility has demonstrated that "the costs it seeks to recover are (1) 'known and measurable'; (2) 'reasonable and prudent'; and (3) where included in rate base 'used and useful' in

the provision of service to customers," quoting Jonathan A. Lesser & Leonardo R. Giacchino, *Fundamentals of Utility Regulation* 39, 41–43 (Pub. Utils. Reports, Inc., ed., 2007) (Lesser & Giacchino), "the utility should have the opportunity to recover the costs so incurred" in order to avoid "an unconstitutional taking."

The Commission stated that the "seminal treatment of 'reasonable and prudent' costs" was set forth in its 1988 order in Docket Nos. E-2, Sub 537 and E-2, Sub 333, in which it determined that "the standard for judging prudence is 'whether management decisions were made in a reasonable manner and at an appropriate time on the basis of what was reasonably known or reasonably should have been known at the time," with this determination to "be based on a contemporaneous view of the action or decision under question," so that "[p]erfection . . . [was] not [ ] required," and with "[h]indsight analysis—the judging of events based on subsequent developments— . . . not [being] permitted." In the Commission's view, "[a] decision cannot be imprudent if it represents the only feasible way to accomplish a necessary goal," so that, "if expenditures . . . support and provide service to customers, the costs are 'used and useful,' " citing our decisions in *Thornburg II* and *State ex rel. Utilities Commission v. Carolina Water Service*, 335 N.C. 493, 439 S.E.2d 127 (1994) (*Carolina Water*).

In rejecting the Attorney General's contention that Duke Energy Carolinas "bore the burden of quantifying the disallowances [that] the [Attorney General] deems appropriate" given the utility's alleged "fail[ure] to act appropriately before 2015," the Commission stated that a utility need not "disprove [i]ntervenor allegations unsupported by evidence" and that, on the contrary, "the [Attorney General] must quantify what the costs of the actions not taken should have been." The Commission further concluded that "most of the costs being challenged are questioned on the theory that [Duke Energy Carolinas] is in breach of a standard classified as a 'duty to exercise due care,' " a standard that is more appropriately utilized in the tort context and which environmental regulators and courts of general jurisdiction are better positioned than the Commission to apply. The standard typically employed by the Commission in resolving cost recovery challenges "has elements qualitatively and quantitatively distinct and more rigorous than a tort standard of due care," with the "[t]he expert witnesses sponsored [by the intervenors] in this case" having "failed to show what [Duke Energy Carolinas] should have done differently," "when it should have acted," or "what the cost of such alternative conduct should have been." In the Commission's view, "[a]ttempts to identify years-old hypothetical past

costs" would be a "fruitless endeavor" that created an "insurmountable obstacle" to acceptance of the intervenors' positions, particularly given the lack of "statutory or regulatory standards and guidelines to follow" in determining which actions should have been taken. In view of the fact that "[i]ntervenors may not rest merely on arguments and theories" and "must adduce actual evidence challenging some aspect of [Duke Energy Carolinas'] cost recovery case," the Commission determined that the intervenors had failed to successfully challenge the reasonableness of Duke's coal ash costs.

In addition, the Commission concluded that Duke Energy Carolinas had "met its burden—both the *prima facie* burden of production and the ultimate burden of persuasion"—of demonstrating that its coal ash costs should be included in the cost of service for ratemaking purposes and that it should be allowed to earn a return upon these costs. In reaching this conclusion, the Commission placed substantial reliance upon the testimony of Duke Energy Carolinas witness Jon Kerin, who asserted that Duke Energy Carolinas' historic coal ash management practices "generally comported with industry practices and then-applicable regulations." After noting that Mr. Wittliff had admitted that the costs that Duke Energy Carolinas had incurred in complying with the CCR Rule were prudent, the Commission rejected the Attorney General's contention that Duke Energy Carolinas should not be permitted to include the costs associated with CAMA compliance—a statute which, in the Attorney General's view, required "a more aggressive coal ash basin closure schedule for certain of [Duke Energy Carolinas'] basins than would have been set under the CCR Rule alone"—given that Mr. Wittliff "did not identify any specific costs that could have been lower or should be disallowed" and did not "know quantitatively" which costs would have eventually been required by the CCR Rule and CAMA in the absence of mismanagement "because [he] didn't do that kind of analysis." Furthermore, the Commission determined that there was "no evidence" that Duke Energy Carolinas' mismanagement was the "direct cause of CAMA"; that, even if it was, "such direct causation alone is not sufficient legal basis for disallowing otherwise recoverable costs" given that CAMA "operates within the context of [N.C.G.S. §] 62-133"; and that, "had [the General Assembly] intended to disavow the routine cost recovery standard, it can be expected that the legislature would have had to do so explicitly."

The Commission rejected the Public Staff's equitable sharing proposal, which was similar to the proposal that it had advocated in the Duke Energy Progress case with the exception of the use of a twenty-seven,

rather than a twenty-six year amortization period, for essentially the same reasons that it had cited in rejecting the Public Staff's equitable sharing proposal in that case. According to the Commission, the record contained "[n]o persuasive evidence" that any of the allegedly imprudent actions or inactions "caused discrete expenditures" by Duke Energy Carolinas and that "identification of an imprudent action or inaction is not by itself sufficient; rather, there must be a demonstration of the economic impact."

The Commission further noted that, because the relevant coal ash costs had been covered by investor-supplied, rather than ratepayer-supplied, funds, such funds are, "under principles of equity, law and fairness," "eligible for a return" because to hold otherwise would "deprive[ ]" "the investor supplying these funds . . . of the time value of money," "inadequately compensate [the investor] resulting in an increased risk, and "ultimately increase[e] [Duke Energy Carolinas'] cost of capital." The Commission held that the extent to which certain costs would, "had they not been accounted for in an [Asset Retirement Obligation] and deferred," have "been operating or other expenses" did not matter given that, once they had been capitalized and deferred, those costs "los[t] for ratemaking purposes the attributes of . . . 'expenses' deemed recoverable through [rates] then in effect that do not qualify for a return." Moreover, the Commission further determined that many of the relevant costs were, "[u]nder any analysis, . . . not expenses but capital items"; that, "[h]ad [Duke Energy Carolinas] not sought establishment of an [Asset Retirement Obligation] and deferral, it is incorrect that they would not have been added" to rate base; and that the Public Staff was "unable" "to support its position that deferred [Asset Retirement Obligation] costs are 'expenses.' " The Commission stated that it was "unnecessary to determine" whether the costs in question would have been eligible for inclusion in rate base in light of ordinary ratemaking principles and concluded that, "[i]n its discretion, as expressly authorized by [N.C.G.S. §] 62-133(d)," it had the authority to allow Duke to earn a return on the unamortized balance of its deferred coal ash costs.

As it had in the related Duke Energy Progress case, the Commission determined that "both GAAP and FERC accounting guidance require the recognition of a liability (the [Asset Retirement Obligation]) upon the requisite triggering event—the legal obligation to retire the [Duke Energy Carolina's] coal ash basins"—and that "[r]ecognition of the liability carries with it recognition of a corresponding asset—the capitalized cost of settling the liability, which under both GAAP and FERC rules is considered part of the property, plant and equipment for the assets that

must be retired." In addition, the Commission concluded, in reliance upon this Court's decision in *VEPCO*, that the costs in question were properly included in rate base as working capital. In view of the fact that the relevant costs were "intended to provide utility service in the present or in the future through achieving their intended purpose," which was "environmental compliance," "the retirement of the ash impoundments," and "the final storage location of the residuals from the generation of electricity," the Commission concluded that the costs associated with the coal ash basins at issue in this case, including those that will close as a result of the CCR Rule and CAMA (with the exception of the high priority sites), "will remain," which means that "they will remain used and useful, because they will still store coal ash, a byproduct of electricity generation."

The Commission disagreed with the Public Staff's determination that $2.1 million in legal expenses associated with the defense of coal ash-related environmental litigation and $1.5 million in groundwater extraction and treatment costs associated with the Belews Creek facility should be disallowed based upon the same reasoning that led the Commission to reach a similar conclusion in the Duke Energy Progress case. The Commission rejected the Public Staff's proposal that the Commission disallow $98 million in compliance costs which the Public Staff contended exceeded the cost of other reasonable alternatives on the grounds that the testimony of the Public Staff witnesses in support of these proposed disallowances "missed or overlooked pertinent facts and real world conditions," "lack[ed] . . . credibility," and failed to "effectively [ ] support their positions."

The Commission determined that "[t]he vast majority of these costs would have been incurred irrespective of management inefficiency in order to comply with [the CCR Rule] requirements" and "would have been required irrespective of the harms that constitute other alleged mismanagement." The Commission noted that "[Duke Energy Carolinas] undertook steps toward CCR remediation and incurred costs in anticipation of impending closure" while hesitating "to spend substantial sums until the requirements became clearer" and that, "[h]ad [Duke Energy Carolinas] acted in compliance with assertions that it act more aggressively sooner, it would have cost its consumers" more than the costs that resulted from the course of conduct in which it actually engaged. For that reason, the Commission concluded that, "from a ratemaking perspective," "the question of when the remediation should have taken place . . . is not determinative of whether the costs of the remediation should be recovered through rates and to what extent." In view of the

fact that "establishing a past cost in this case would be a near impossibility," the Commission declined to penalize Duke Energy Carolinas for its decision to wait until the adoption of the CCR Rule before undertaking the coal ash basis closure process, particularly given that "no attempt ha[d] been made by any party" to determine what the costs would have been if remediation had been undertaken at an earlier time.

Finally, in addressing Duke Energy Carolinas' alleged violations of the 2L Rules, the Commission determined that DEQ "does not agree that the existence of exceedances without evidence that they are caused by coal ash contamination pose[s] a risk to environment or human health so as to require immediate remediation." For that reason, the Commission concluded that Duke Energy Carolinas' "failure to take the costly actions" suggested by the intervenors "falls well short of mismanagement." On the other hand, the Commission determined that a mismanagement penalty in the amount of $70 million was appropriate in this case for reasons similar to those that underlay the imposition of a similar penalty in the Duke Energy Progress proceeding.

Once again, Commissioners Brown-Bland and Clodfelter dissented, in part, from the Commission's decision. As an initial matter, Commissioner Clodfelter stated that he would have disallowed "a substantial amount of [coal ash] costs" in determining Duke Energy Carolinas' cost of service for North Carolina retail ratemaking purposes on the grounds that they had either been imprudently incurred or had not, as the result of the utility's negligence, been included in the cost of service in prior general rate cases. Secondly, Commissioner Clodfelter would have refrained from allowing Duke Energy Carolinas to earn a return on the unamortized balance of the deferred coal ash costs on the grounds that the relevant statutory provisions did not authorize the allowance of such a return and that "the record presented in this case does not and cannot support allowance of a return as a matter of Commission discretion." Finally, Commissioner Clodfelter opposed the proposed increase in the residential Basic Facilities Charge on the grounds that there was "no evidence in the record to support any such increase" and that the increase "unfairly discriminates among different classes of customers."

Similarly, Commissioner Brown-Bland expressed opposition to the approval of the increased residential Basic Facilities Charge. Aside from her belief that the record did not support the approved increase and that this increase was "unfairly and discriminatorily upon only the residential class of customers," Commissioner Brown-Bland noted that the Commission had arbitrarily chosen "a random number between the

two ends offered" by the parties and that the approved residential Basic Facilities Charge "just happen[ed] to be the same as the fixed residential [Basic Facilities Charge] adopted in" the Duke Energy Progress order despite the fact that the two utilities had different cost structures and the fact that Duke Energy Progress' cost of service exceeded that of Duke Energy Carolinas. Commissioner Brown-Bland echoed Commissioner Clodfelter's concerns regarding the Commission's "fail[ure] to engage in the exercise of determining waste coal ash removal costs directly (much less indirectly) attributable to instances of imprudence on [Duke Energy Carolinas'] part," stating that the record "permit[ted] identification and disallowance of specific discrete costs and/or cost increases caused by identifiable and known acts of imprudence" and that the "better course of action" would have been for the Commission to undertake the difficult task of determining which expenses were and were not prudently incurred instead of "avoid[ing] the exercise" altogether. According to Commissioner Brown-Bland, the Commission's approach resulted in an "arbitrary monetary amount without rational basis" given that "a one-time management penalty does not provide an adequate substitute for the exercise of the Commission's" statutory ratemaking authority.

### 3. Appellate Proceedings

The Attorney General and the Sierra Club noted an appeal to this Court from the Commission's orders in both cases, while the Justice Center, et. al., and the Sustainable Energy Association (collectively, the environmental intervenors) noted an appeal from the Commission's order in the Duke Energy Carolinas proceeding. The Public Staff noted a cross-appeal to this Court from both of the Commission's orders. At the request of all parties, the two cases were consolidated for purposes of briefing and argument by order of this Court.

## II. Substantive Legal Analysis

### A. Standard of Review

In an appeal taken from an order entered by the Commission, "the rates fixed or any . . . order made by the Commission under the provisions of [Chapter 62] shall be *prima facie* just and reasonable." N.C.G.S. § 62-94(e). A reviewing court is limited to "decid[ing] all relevant questions of law, interpret[ing] constitutional and statutory provisions, and determin[ing] the meaning and applicability of the terms of any Commission action." N.C.G.S. § 62-94(b). The reviewing court "may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have

been prejudiced because the Commission's findings, inferences, conclusions or decisions are: (1) [i]n violation of constitutional provisions," "(2) [i]n excess of statutory authority or jurisdiction of the Commission," "(3) [m]ade upon unlawful proceedings," "(4) [a]ffected by other errors of law," "(5) [u]nsupported by competent, material and substantial evidence in view of the entire record as submitted, or (6) [a]rbitrary or capricious," *id.*, with "due account [to] be taken of the rule of prejudicial error." N.C.G.S. § 62-94(c).

The Commission is responsible for determining the weight and credibility to be afforded to the testimony of any witness, including any expert opinion testimony, *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 575, 584, 232 S.E.2d 177, 182 (1977), with the Commission's decision being entitled to great deference given that its members possess an expertise in utility ratemaking that makes them uniquely qualified to decide the issues that are presented for their consideration. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48, 103 S. Ct. 2856, 2869, 771 L. Ed. 2d 443, 461 (1983) (stating that "[e]xpert discretion is the lifeblood of the administrative process"). "Assuming adequate findings of fact, supported by competent, substantial evidence," "[t]he Commission's determination, reached pursuant to the mandate of [N.C.G.S. §] 62-133 and to the statutory procedural requirements, may not be reversed" even if "we would have reached a different conclusion upon the evidence." *State ex rel. Utils. Comm'n v. Morgan*, 277 N.C. 255, 266–67, 177 S.E.2d 405, 412–13 (1970). The Commission's conclusions of law, on the other hand, are reviewed *de novo*. *State ex rel. Utils. Comm'n v. N.C. Waste Awareness & Reduction Network*, 255 N.C. App. 613, 615, 805 S.E.2d 712, 714 (2017), *aff'd per curiam*, 371 N.C. 109, 812 S.E.2d 804 (2018).

## B. Coal Ash Costs

The briefs submitted by the parties debate: (1) whether the coal ash costs at issue in these proceedings are properly classified as property used and useful or as operating expenses; (2) whether these costs were reasonably incurred; and (3) whether the Commission's decision to award a return on the unamortized balance of the costs in both of these cases was lawful. We will address each of these issues turn.

### 1. Sufficiency of the Commission's Factual Findings

**[1]** The Public Staff, the Attorney General, the Sierra Club, and the utilities have advanced a number of arguments for the purpose of challenging the lawfulness of the Commission's decisions regarding the amount of coal ash costs that should be included in the cost of service used to

establish the utilities' North Carolina retail rates. However, before we address the parties' substantive arguments, we must address the validity of the Public Staff's contention that, in light of its failure to properly classify the costs at issue in these cases, the Commission's orders fail to contain sufficient findings of fact to satisfy the requirements of N.C.G.S. § 62-79(a) (providing that the Commission's orders must "be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings" and "shall include" "[f]indings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record").

In its brief, the Public Staff contends that the Commission made "inconsistent," "contradictory," and "mutually exclusive" conclusions concerning whether the utilities' coal ash-related costs constituted property "used and useful" upon which a return could be earned in accordance with N.C.G.S. § 62-133(b) or deferred operating expenses upon which, in the Public Staff's view, a return could be earned in the Commission's discretion pursuant to N.C.G.S. § 62-133(d). According to the Public Staff, the Commission's inconsistent reasoning "makes it impossible to know the true basis for the decision to deny equitable sharing and allow a return on coal ash costs." In addition, the Public Staff contends that the Commission erroneously determined in the Duke Energy Progress order that, even without a determination of the nature of the relevant coal ash costs, a return could be earned upon them as a matter of law or, in the alternative, in the exercise of the Commission's discretion pursuant to N.C.G.S. § 62-133(d) given that this decision did not constitute a proper "exercise of discretion" and was nothing more than "a mechanism to circumvent judicial review." Moreover, the Public Staff argues that the Commission contradicted itself in the clarification order that it entered in the Duke Energy Progress case, in which it stated that its decision to allow a return upon the unamortized balance of the relevant coal ash costs rested upon an exercise of the Commission's discretion pursuant to N.C.G.S. § 62-133(d), and had committed a similar error in the Duke Energy Carolinas order by deciding to allow a return upon the unamortized balance of the deferred coal ash costs on the grounds that, "to the extent" that the costs in question constituted capital expenditures, they amounted to property that was "used and useful" for purposes of N.C.G.S. § 62-133(b)(1) and that it had the authority to authorize the utility to earn a return upon the remaining coal ash-related costs pursuant to N.C.G.S. § 62-133(d). According to the Public Staff, treating the unamortized balance of the deferred coal ash costs as both property used and useful and as reasonable operating expenses constitutes "a direct violation of the ratemaking process," quoting *State ex rel.*

*Utilities Commission v. Public Staff*, 333 N.C. 195, 202, 424 S.E.2d 133, 137 (1993) (*Carolina Trace*). In response, the utilities argue that "this distinction is essentially academic" and "is not material to the outcome of this appeal."

The language in which the traditional ratemaking formula set forth in N.C.G.S. § 62-133(b) is couched has led the parties to raise a number of issues concerning how the coal ash costs at issue in these cases should be classified for ratemaking purposes. The Commission resolved the classification issue in the Duke Energy Progress case by deciding, in its discretion, that it had the authority to allow the utility to earn a return upon the unamortized balance of the relevant coal ash costs pursuant to either N.C.G.S. § 62-133(b)(1) or N.C.G.S. § 62-133(d) and by deciding in the Duke Energy Carolinas case that, regardless of whether the relevant coal ash costs constituted property "used and useful or operating" expenses, it had the authority to allow the company to earn a return upon the unamortized balance of those costs pursuant to N.C.G.S. § 62-133(d). In view of the fact that "[t]he purpose of the findings required by [N.C.G.S.] § 62-79(a) is to provide the reviewing court with sufficient information to allow it to determine the controverted questions presented in the proceedings," *State ex rel. Utilities Commission v. Conservation Council of North Carolina*, 312 N.C. 59, 62, 320 S.E.2d 679, 682 (1984), and the fact that we are able discern the nature and extent of the Commission's decision from its findings and conclusion, we hold that the Commission's findings in both orders are sufficiently specific to satisfy the requirements of N.C.G.S. § 62-79(a).

**2. Reasonableness of the Costs**

**[2]** The Attorney General[11] argues that "utilities have the burden to show that their costs were reasonably incurred," citing N.C.G.S. §§ 62-75 and 134(c), and asserts that, once another party has offered "affirmative evidence . . . that challenges the reasonableness of [the utility's] expenses," quoting *Conservation Council*, 312 N.C. at 64, 320 S.E.2d at 683, "the utility must prove that its costs were reasonably incurred." As a precondition for the inclusion of any particular cost in the regulated cost of service, the Attorney General contends that the utility must show that the costs in question are "known and measurable" and "reasonable and prudent," citing N.C.G.S. § 62-133(b)(1) and *Thornburg I*.

11. The Sierra Club "adopts and incorporates by reference" the arguments advanced by the Attorney General relevant to the reasonableness of the utilities' coal ash-related costs, as will be discussed in more detail below.

In the Attorney General's view, the Commission erred by concluding that the intervenors had failed to adequately challenge the reasonableness of the costs at issue in these cases. According to the Attorney General, the intervenors presented affirmative evidence demonstrating that the utilities had, for decades, unreasonably placed coal ash in unlined basins, resulting in "nearly 6000 test results that showed violations of 2L [R]ules." The Attorney General argues that such violations "could have been prevented" given that the utilities "[have known] for years how to stop [their] ash from contaminating groundwater: putting the ash in *lined* landfills, as opposed to unlined ponds," and that, by failing to act upon the basis of such "insights," the utilities had incurred costs which "could have [been] avoided," such as the cost of excavating coal ash that "could have already [been] put in lined landfills years earlier" and transporting such coal ash to off-site landfills.

In addition, the Attorney General asserts that the record contains evidence tending to show that the utilities had failed to manage their unlined coal ash basins in a reasonable manner so as to "eventually result[ ] in the spill at [the] Dan River plant" and the enactment of CAMA, which was introduced a mere three months after the Dan River spill and "singles out" the coal ash basins associated with the utilities' coal-fired generating facilities for accelerated closure. According to the Attorney General, the enactment of "CAMA caused [the utilities] to incur costs that [they] would not otherwise have incurred, such as the cost of complying with CAMA's basin-closure deadlines." The Attorney General asserts that the Commission *agreed* that Duke Energy Carolinas' mismanagement of the coal ash basins at its Dan River plant contributed to the enactment of CAMA before stating that it was unable to "precisely 'identify and quantify' how many of [the utilities'] costs were unreasonable," with this "inconclusiveness mean[ing] that [the utilities] did not meet [their] burden to show that [the] costs were reasonable," citing *State ex rel. Utilities Commission v. Duke Power Co.*, 285 N.C. 377, 389, 206 S.E.2d 269, 277–78 (1974) (*Duke Power Co. I*).

The Attorney General further contends that, although the evidence elicited by the intervenors was "more than enough to require [the utilities] to prove that [they] incurred [their] coal ash costs reasonably," the Commission erroneously required the intervenors to "identify specific and discrete instances of imprudence"; "identify prudent alternatives to the [utilities'] actions"; and "quantify the precise economic effect of the [utilities'] imprudence" before determining that the intervenors had failed to satisfy this standard. In spite of the fact that the standard upon which the Commission relied "flowed from this Court's decision" in

*Thornburg II*, the Attorney General asserts that the costs in question in that case had been developed by an independent auditor assigned to scrutinize the challenged utility costs with the agreement of the utility and the Public Staff and had not been used to determine whether other intervenors had adduced sufficient evidence to require the utility to affirmatively establish the reasonableness of the costs that it sought to have included in the regulated cost of service.

The Attorney General argues that the Commission committed various errors in determining that the utilities had managed their coal ash basins in a reasonable manner. The Attorney General cites *Glendale Water*, 317 N.C. at 40–41, 343 S.E.2d at 907–08, for the proposition that "breaking environmental laws is unreasonable," arguing that the Commission had improperly failed to acknowledge that the utilities had committed thousands of documented "violations of the 2L [R]ules" based upon an erroneous determination that an exceedance of limitations specified in the 2L Rules does "not [constitute] proof of illegality" and that the "2L [R]ules are violated only when a polluter fails to clean up contaminated groundwater." In the Attorney General's view, an exceedance for the purpose of the 2L Rules, which he describes as "strict liability regulations," citing *Rudd v. Electrolux Corp.*, 982 F. Supp. 355, 365 (M.D.N.C. 1997), results in a violation of 15A N.C. Admin. Code 2L.0103(d) (stating that"[n]o person shall conduct . . . any activity which causes the concentration of any substance" in groundwater to exceed the limitations set out in the 2L Rules).

The Attorney General asserts that the Commission's conclusion that it "lack[ed] authority to assess independently whether a utility has acted unreasonably by breaking the law" given that the utilities had neither admitted to violating nor had been found in violation of the 2L Rules constituted an "erroneous[ ] abdicat[ion] [of] its dut[ies]" pursuant to N.C.G.S. §§ 62-133(b)(3), (c), citing *State ex rel. Utilities Commission v. N.C. Power*, 338 N.C. 412, 419–22, 450 S.E.2d 896, 900–02 (1994); *Carolina Water*, 335 N.C. at 503, 439 S.E.2d at 132; *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 464, 232 S.E.2d 184, 191–92 (1977). According to the Attorney General, the only reason that the utilities were not found to have violated the 2L Rules was the enactment of CAMA, which resulted from the utilities' mismanagement of their coal ash basins and obviated the necessity for the environmental regulators to determine whether violations had occurred as long as the utilities complied with CAMA and the applicable implementing regulations.

In the Attorney General's view, the mismanagement penalties imposed upon the utilities were not adequate "substitute[s]" for a

disallowance of challenged coal ash costs given that the Commission's authority to sanction a utility for mismanagement "is distinct from the Commission's duty under [N.C.G.S. §] 62-133(b)(3) to protect consumers by disallowing costs that are not reasonable." On the contrary, the Attorney General argues that "a utility's misconduct can serve as a basis *both* for penalizing the utility *and* for separately reducing rates on other statutory grounds," citing *State ex rel. Utilities Commission v. General Telephone Co.*, 285 N.C. 671, 684, 208 S.E.2d 681, 698 (1974).[12]

Similarly, the Public Staff argues that the Commission failed to adequately consider certain environmental violations in determining the reasonableness and prudence of the utilities' costs for North Carolina retail ratemaking purposes. After referencing the disallowances that it had proposed relating to groundwater extraction and treatment costs at the Sutton and Belews Creek facilities, the Public Staff argues that the Commission erred by failing to adequately consider the record evidence concerning these and other environmental violations and by failing to make findings and conclusions relating to that evidence in violation of N.C.G.S. § 62-79(a)(1). More specifically, the Public Staff contends that the record contained ample evidence that the utilities had committed environmental violations, with that evidence including: (1) the testimony of certain Public Staff witnesses that the costs to remediate off-site groundwater contamination at the Sutton and Belews Creek facilities would not have been incurred "*but for* the environmental violations"; (2) the text of a settlement agreement between DEQ and the utilities in which the latter agreed to remediate "offsite groundwater impacts" at the Sutton facility "consistent with 15A [N.C. Admin. Code §] 2L.106"; (3) groundwater monitoring data provided by Duke Energy Progress; (4) testimony by Mr. Wells and Duke Energy Carolinas witness Julius A. Wright that certain extraction and treatment costs were the direct result of environmental violations; (5) a Notice of Violation issued to Duke Energy Progress by DEQ asserting that the utility had committed environmental violations; (6) a DEQ press release announcing that Duke Energy Progress was being held accountable for coal ash-related groundwater pollution by means of a settlement agreement; and (7) the text of the Joint Factual Statement signed by Duke Energy Progress in the federal criminal case "acknowledg[ing]" certain environmental impacts of the Sutton facility on a nearby community. According to the Public Staff, the Commission failed to make the required findings

12. The Attorney General also argues that the Commission's mismanagement penalties against both utilities were "illusory" given that they "simply reduced a return that [the utilities] never should have received in the first place."

and conclusions concerning the extent to which environmental violations had occurred on the grounds that such findings would be inappropriate "in the absence of a guilty finding against the [utilities] or an admission of guilt by the [utilities]," with the Commission's decision to "simply defer[ ] to another state agency on a matter that relates to an issue properly before the Commission," citing *Carolina Trace* and *State ex rel. Utilities Commission v. Cooper*, 366 N.C. 484, 489–91, 494–95, 739 S.E.2d 541, 545–48 (2013) (*Cooper I*), constituting a failure to comply with the relevant ratemaking statutes.

The Public Staff contends that the Commission also erred by concluding that CAMA would have required groundwater extraction and treatment at the Sutton and Belews Creek facilities regardless of the extent to which environmental violations had actually occurred at those locations. In the Public Staff's view, exceedances of the limitations set out in the 2L Rules become violations pursuant to 15A N.C. Admin. Code § 02L.0106 only if their existence was the fault of the utility, with the utility only being required to perform "corrective action" or "remediation" in the event that the exceedance constitutes a violation. As a result, the Public Staff contends that, to the extent that the utilities were required to extract and treat groundwater that was contaminated as the result of an exceedance, those costs would not have otherwise been required pursuant to CAMA and should not be recouped in rates.

In response, the utilities argue that the correct legal standard for purposes of determining the reasonableness and prudence of costs pursuant to N.C.G.S. § 62-133(b) is the one that the Commission articulated in its 1988 order in Docket Nos. E-2, Subs 333 and 537, and that this Court upheld in *Thornburg II*, which focuses upon "whether management decisions were made in a reasonable manner and at an appropriate time on the basis of what was reasonably known or reasonably should have been known at the time." In addition, the utilities assert that, "[e]ven if there is evidence in the record" that rebuts the presumption that the coal ash costs at issue in these cases had been reasonable and prudently incurred, they had elicited "substantial" and "compelling" evidence demonstrating that: (1) they "had managed [their respective] coal ash basins in the manner required by applicable regulations and consistent with industry standards prior to the promulgation of the CCR Rule and the enactment of CAMA"; (2) "the change in law wrought by the CCR Rule and CAMA caused [them] to manage coal ash differently"; (3) "[they] prudently and at reasonable cost conformed [their] practices to the new legal requirements"; and (4) no intervenor had "specif[ied] how the Compan[ies] should have acted differently in managing [their]

coal ash, at which sites it should have taken those actions, and how much those actions would have cost the [utilities]." In view of the fact that the Commission found in their favor with respect to this issue, the utilities argue that the task of a reviewing court is "not to determine whether there is evidence to support a position the Commission did not adopt" but, instead, to determine "whether there is substantial evidence, in view of the entire record, to support the position that the Commission *did* adopt," quoting *State ex rel. Utilities Commission v. Eddleman*, 320 N.C. 344, 355, 358 S.E.2d 339, 347 (1987).

Similarly, the utilities argue that the Attorney General "did not and could not allege that [they] had committed any act of imprudence related to the actual costs being sought for recovery in the proceedings before the Commission given that Mr. Wittliff, an expert witness testifying on behalf of the Attorney General, had stated that the relevant costs had been reasonably and prudently incurred and had failed to "identify any specific costs that could have been lower or should be disallowed." The utilities assert that the Attorney General's contention that they should have installed liners at their unlined coal ash basins before being required to do so "put [them] in an impossible position" given that any such action "could have been called into question" as "premature" prior to a complete understanding of the applicable environmental requirements. In addition, the utilities contend that the Attorney General's claim that they had the burden of disproving the appropriateness of the proposed cost disallowances constituted a "remarkable position" unsupported by any legal authority. Finally, the utilities dispute the validity of the Attorney General's contention that, since imprudent action on the part of Duke Energy Carolinas "caused the enactment of CAMA," the cost of complying with CAMA should be excluded from the cost of service for ratemaking purposes on the grounds that "legislative intent can only be determined from the legislation itself," citing *Electric Supply Co. of Durham v. Swain Electrical Co.*, 328 N.C. 651, 657, 403 S.E.2d 291, 295 (1991), and *Styres v. Phillips*, 277 N.C. 460, 472, 178 S.E.2d 583, 590 (1971), and that no such intent can be discerned from an examination of the relevant statutory provisions.

According to the utilities, the Commission was free to reject the remaining prudence challenges raised by the Public Staff as well. For instance, the utilities contend that the Commission properly determined that a number of the Public Staff's disallowance recommendations were "infected by hindsight" and "unfeasible" and that a settlement agreement with an environmental regulator was not tantamount to an admission of liability. In the utilities' view, the Commission addressed the Public

Staff's evidence concerning alleged environmental violations without "erroneously abdicat[ing] its duty to assess whether illegal conduct is unreasonable and disallow costs related to illegal conduct." In fact, the utilities assert that the Commission "expressly rejected" the Public Staff's proposed disallowances after giving "careful[ ] consideration" to the relevant evidence.

In spite of the fact that North Carolina utilities have the burden of proving that the costs upon which their rates are based are reasonable and prudent, the reasonableness and prudence of those costs is "presumed" unless the Commission or an intervenor adduces sufficient evidence to cast doubt upon their reasonableness or prudence, at which point the burden to make an affirmative showing of the reasonableness of the costs in question shifts to the utility. *State ex rel. Utils. Comm'n v. Intervenor Residents of Bent Creek/Mt. Carmel Subdivisions*, 305 N.C. 62, 76, 286 S.E.2d 770, 779 (1982) (*Bent Creek*). In order to satisfy this burden of production, an intervenor must offer affirmative evidence tending to show that the expenses that the utility seeks to recover "are exorbitant, unnecessary, wasteful, extravagant, or incurred in abuse of discretion or in bad faith or that such expenses exceed either the cost of the same or similar goods or services on the open market or the cost similar utilities pay to their affiliated [utilities] for the same or similar goods or services." *Id.* at 76–77, 286 S.E.2d at 779. If a utility expense is "properly challenged," "[t]he Commission has the *obligation* to test the reasonableness of such expenses." *Id.* at 76, 286 S.E.2d at 779. In addition, "[i]f there is an absence of data and information from which either the propriety of incurring the expense or the reasonableness of the cost can readily be determined, the Commission may require the utility to prove their propriety and reasonableness by affirmative evidence." *Id.* at 75, 286 S.E.2d at 778.

The essential thrust of the intervenors' challenge to the validity of the Commission's determination with respect to the reasonableness of the utilities' coal ash costs varies from one party to the other. On the one hand, the Attorney General's "reasonableness" argument rests upon the existence of evidence tending to show that the utilities should have begun to eliminate the use of unlined coal ash basins earlier than they actually did. On the other hand, the Public Staff's "reasonableness" argument rests upon those portions of the record that depict specific instances of what the Public Staff contends to be environmental noncompliance. We do not find either of these arguments persuasive given the state of the record and the findings and conclusions contained in the Commission's orders.

In addressing the Attorney General's contention that the utilities unreasonably polluted groundwater in violation of the 2L Rules by placing coal ash in unlined basins, the Commission found the testimony of Mr. Wells to be instructive in the Duke Energy Progress order. Mr. Wells testified that the utilities' "ash basins were built between 1956 and 1985" and that, "[a]t that time, unlined basins were the primary technology for treating ash transport water throughout the country." In addition, Mr. Wells noted that "[i]nitially, ash basins were not regulated under federal or state solid waste laws"; that "[u]tility surface impoundments eventually became regulated as wastewater treatment units under the Clean Water Act after it was significantly reorganized and expanded in 1972"; and that DEQ's predecessor promulgated the 2L Rules in 1984. According to Mr. Wells, "there was no obligation in the 2L [R]ules to *monitor* groundwater quality," with those rules only imposing an obligation "to take corrective action once exceedances had been identified." As a result, according to Mr. Wells, Duke Energy Progress "was under no universal obligation to monitor for groundwater impacts" associated with coal ash basins pursuant to the 2L Rules. Mr. Wells testified that, in the mid-2000s, Duke Energy Progress "began more comprehensively sampling groundwater resulting in the identification of more exceedances" while DEQ "began systematically adding groundwater to NPDES permits as they were reissued or modified" starting around 2008. Based upon this and similar evidence, the Commission rejected the intervenors' assertions that the utilities should have begun the coal ash remediation process prior to the adoption of the CCR Rule and the enactment of CAMA, a decision that was well within the scope of its statutory authority in light of the record evidence.

Similarly, in rejecting the Attorney General's argument that Duke Energy Progress had failed to satisfy evolving industry standards and should have done more than merely comply with the environmental regulations as they existed at the time, the Commission noted that Mr. Wittliff, who presented testimony on behalf of the Attorney General, had testified that "industry standard is compliance." Although Mr. Wittliff admitted that "there were a number of [utilities] that were doing exactly what [Duke Energy Progress] did," he also stated that "it was clear in the '80s that the trend was towards lined ponds" and that, by 1988, forty percent of coal ash basins had been lined even though that approach was not "a cheap solution" and could "be fairly pricy." Upon being pressed to identify "any other ways that [Duke Energy Progress] did not comply with industry standards," Mr. Wittliff reiterated his emphasis upon the necessity for compliance with the requirements of its NPDES permits and then stated that "that's where I would leave it." As a result, we

hold that the Commission's determination that the Attorney General had failed to adduce sufficient evidence to rebut the presumption that Duke Energy Progress' coal ash costs were reasonably and prudently incurred on the grounds that it should have begun using lined coal ash basins earlier than it did had adequate evidentiary support.[13]

The Commission relied heavily on the testimony of Mr. Kerin in addressing a similar issue in the Duke Energy Carolinas proceeding. Mr. Kerin testified that, "[u]ntil recently, coal has been the historic 'go-to' fuel choice for base-load, least-cost reliable service," with the industry standard being the use of unlined basins for the purpose of storing coal ash. Mr. Kerin stated that, "from 1974 to 2015, ash basins were a lawful and effective way of meeting the wastewater treatment requirements under the [Clean Water Act]" and "[had] been effective at treating wastewater to meet NPDES permit limits." For that reason, Mr. Kerin asserted that, "[i]n the absence of any regulatory directive to do so, [Duke Energy Carolinas] reasonably did not pursue and should not have pursued regulatory closure or retrofitting for any site that was still generating ash and that maintained its NPDES permit." At the time that the CCR Rule was promulgated and CAMA was enacted, Duke Energy Carolinas began preparing to comply with the new requirements.

In rebutting Mr. Wittliff's contention that the number of lined basins had been increasing by 1988 and 1999, Mr. Kerin testified that Duke Energy Carolinas last constructed a new coal ash basin in 1982. In addition, Mr. Kerin stated that, "while [Mr. Wittliff had] cite[d] an increase in the percentage of basins that were lined from 17 to 28 percent between 1975 and 1995, that [figure] still represents a minority of the new basins being constructed that were lined." In response to Mr. Wittliff's suggestion that Duke Energy Carolinas should have built new lined impoundments to store its coal ash, Mr. Kerin stated that this suggestion "ignores the fact that the construction of new lined impoundments would have entailed significant expense to [Duke Energy Carolinas], while not

13. The fact that the record contains evidence that it would have been advisable for a utility to have taken specific action relating to a particular generating facility at an earlier time than that action was actually taken does not require us to make a different decision with respect to the "reasonableness" issue. Aside from the fact that evidence relating to a specific generating facility has no logical relation to the reasonableness of costs incurred at other facilities and would not, for that reason, support a finding that the utility's coal ash costs, considered in their entirety, were unreasonable, the ultimate question raised by such evidence is simply whether the utility should have made a different policy-based decision than the one that it actually made. As has been discussed in the text of this opinion, the Commission adequately addressed this policy-related "reasonableness" issue in its order in these cases.

removing the need to maintain the existing unlined impoundments." In Mr. Kerin's opinion, acting on the basis of Mr. Wittliff's suggestion "before [such measures] [were] consistent with industry standards" "would have put [Duke Energy Carolinas] at risk of disallowance of those costs." Mr. Kerin also pointed to Mr. Wittliff's testimony in the Duke Energy Progress case in which he responded in the negative when asked if Duke Energy Progress had acted imprudently when it began sluicing coal ash to unlined impoundments in view of the fact that "[t]he law allowed them to do it, and the law continued to allow them to do it, even though there was . . . concern." As a result, the record contains ample evidentiary support for the Commission's determination in the Duke Energy Carolinas proceeding that the intervenors had failed to elicit sufficient evidence to satisfy the burden of production imposed upon them in *Bent Creek*.

In spite of the fact that, as the Commission put it, the utilities' actions constituted "at least a contributing factor" to enactment of CAMA, we are unable to hold that, as a matter of law, utility mismanagement constituted the "primary cause of CAMA" or that "CAMA would not have been passed or that its requirements other than accelerated deadlines would have been less onerous but for [the utilities'] mismanagement." As this Court has stated on many occasions, "the cardinal principle of statutory construction is that the words of the statute must be given the meaning which will carry out the intent of the Legislature" and that the legislative "intent must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied." *Milk Commission v. Food Stores*, 270 N.C. 323, 332–33, 154 S.E.2d 548, 555 (1967). CAMA simply does not contain any language from which we can determine that the General Assembly's decision to enact its provisions stemmed from mismanagement on the part of either utility. Had the General Assembly wished to make such a statement, it certainly could have done so. As a result, we are unable to accept the Attorney's General invitation to require the disallowance of all of the coal ash-related costs at issue in these proceedings on the grounds that they necessarily resulted from utility imprudence.

We reach a similar conclusion with respect to the more nuanced "reasonableness" argument advanced in the Public Staff's brief. As the record reflects, Public Staff witness Jay Lucas testified in the Duke Energy Progress case, even though "some environmental violations are clearly due to [Duke Energy Progress'] negligence or mismanagement,

there are other actual and potential environmental violations that are not easily characterized as either plainly imprudent or plainly reasonable on [Duke Energy Progress'] part." In Mr. Lucas' view, any attempt to calculate the incurred costs associated with environmental violations "could be extremely complex and somewhat speculative" given that doing so would involve "a lot of estimations and assumptions over a long period of time, leaving doubts about accuracy." For this reason, the Public Staff concluded that, despite the fact that "there is some degree of [Duke Energy Progress] culpability for costs" "due to non-compliance with environmental violations," for "most" of the costs at issue in that case, such culpability "may fall short of imprudence." In light of this set of circumstances, the Public Staff advanced its equitable sharing proposal rather than attempting to contest the reasonableness and prudence of most of the coal ash-related costs that are at issue in these cases.

The "reasonableness" test enunciated by this Court in *Bent Creek* focuses upon whether the challenged utility costs were "exorbitant, unnecessary, wasteful, extravagant, or incurred in abuse of discretion or in bad faith or that such expenses exceed either the cost of the same or similar goods or services on the open market or the cost similar utilities pay to their affiliated [utilities] for the same or similar goods or services." *Bent Creek*, 305 N.C. at 76–77, 286 S.E.2d at 779. As a result, the required legal analysis is clearly focused upon the extent to which specific costs that the utility seeks to utilize in establishing its North Carolina retail rates are excessive rather than upon general policy questions of the sort that underlie the Attorney General's broad-based "reasonableness" argument. We have no hesitation in recognizing that it would be difficult, if not impossible, to quantify, in even the most general sense, the costs which the utilities would have incurred had they handled the coal ash stored at their facilities in a manner that differed from what they actually did or if specific alleged environmental violations had not occurred. As the testimony of Mr. Lucas suggests, the Public Staff placed principal reliance upon its "equitable sharing" proposal for this very reason. However, with the exception of the Public Staff's suggested disallowances relating to costs incurred at the Sutton and Belews Creek facilities, we are compelled to agree with the Commission that the intervenors failed to identify and quantify the specific costs that should have been disallowed as unreasonable and imprudently incurred in these cases. In the absence of such evidence, we cannot say that the Commission erred by holding that the intervenors had failed to make a sufficient showing to require the utilities to demonstrate the reasonableness and prudence of their coal ash-related costs in detail.

**3. Return on the Unamortized Balance**

**[3]** The Public Staff argues that, in order for costs to be includable in rate base and eligible to earn a return, those costs must be for "used and useful" property, which "primarily means 'utility plant' that consists of long-lived physical assets used to provide utility service" and is "largely funded by capital investment," including "brick and mortar buildings, generators and turbines, poles, meters, and conductors such as transmission, distribution, and service wires that carry electricity from generators to customers." Similarly, the Attorney General argues that the concept of "property" involves "the rights in a valued resource such as land, chattel, or an intangible," and includes "[a]ny external thing over which the rights of possession, use, and enjoyment are exercised," quoting *Property*, BLACK'S LAW DICTIONARY 1410 (10th ed. 2014). Although the Public Staff points out that working capital "has been judicially accepted as an intangible form of 'property' " that may be appropriately included in rate base, citing *VEPCO*, 285 N.C. at 414–15, 206 S.E.2d at 295–96, the Attorney General contends that working capital may only be included in rate base where it "qualifies as used and useful," so that all working capital does not necessarily qualify for inclusion in rate base, citing *Morgan*, 277 N.C. at 273, 117 S.E.2d at 417; *Thornburg II*, 325 N.C. at 486, 385 S.E.2d at 464; *Carolina Water*, 335 N.C. at 507, 439 S.E.2d at 135, given that "this Court has never recognized any exceptions to the 'used and useful' requirement" and that "there is no working-capital exception" or any exception "for funds supplied by investors" to the definition of "rate base" embodied in N.C.G.S. § 62-133(b)(1).

According to the Public Staff, property is "used and useful" if it is "in service for the production or delivery of utility service," citing *Carolina Water*, and is not "excess or overbuilt for the needs of current customers" so as to be "greater than necessary to provide service even if it is being used," citing *Carolina Trace*. In the same vein, the Attorney General contends that property is not used and useful if it is not used to provide *current* service or has been abandoned, citing *Carolina Trace* and *Carolina Water*. On the other hand, the Public Staff contends that costs that are properly categorized as operating expenses, rather than as property "used and useful," include "payments for goods or services that are consumed at or close to the time payment is made," "the depreciation of used and useful property at a rate corresponding to its useful life," and "income tax expense." Among other things, the Public Staff points out that operating expenses include "wages, salaries, fuel, maintenance, advertising, research and charitable contributions" and "annual charges for depreciation and operating taxes," quoting Charles

F. Phillips, Jr., *The Regulation of Public Utilities* 177 (1993). On the basis of similar logic, the Attorney General asserts that costs such as dewatering coal ash basins, treating contaminated water from coal ash basins, excavating coal ash, and putting excavated coal ash in landfills constitute operating expenses rather than the cost of property "used and useful." Although both of them agree that the utilities are entitled to earn a return on the reasonable original cost of "used and useful" property, the Public Staff and the Attorney General differ with respect to the issue of whether the Commission possesses the authority to award a return on deferred operating expenses.

In arguing that the Commission has the statutory authority to allow a utility to earn a return on the unamortized balance of costs that would ordinarily be categorized as operating expenses, the Public Staff suggests that N.C.G.S. § 62-133(d) allows the Commission, in the exercise of its discretion, to allow utilities to earn a return upon such costs, citing *Thornburg I* and *State ex rel. Utilities Commission v. Carolina Utility Customers Ass'n*, 348 N.C. 452, 458–59, 500 S.E.2d 693, 698–99 (1998) (*CUCA*). In the Public Staff's view, this Court's decisions in *Thornburg II*, *Carolina Trace*, and *Carolina Water* do not deprive the Commission of the right to allow a utility to earn a return upon the unamortized balance of deferred operating expenses given that "the extent of [N.C.G.S. §] 62-133(d) discretion does not appear to have been an issue directly before the Court in those cases." As a result, the Public Staff contends that the discretion granted by N.C.G.S. § 62-133(d) provides a separate basis for allowing a utility to earn a return on the unamortized balance of deferred operating expenses as long as the Commission considers all relevant facts and circumstances, including whether certain costs should be disallowed and as long as the Commission's order complies with the findings requirement enunciated in N.C.G.S. § 62-79(a) and reflects "a logical sequence of evidence supporting findings that in turn support conclusions."

The Attorney General, on the other hand, argues that "North Carolina law makes clear that the Commission has no discretion to give [a return on costs which are] not used and useful for providing service to customers now or within a reasonable time," citing *Carolina Trace*, *Carolina Water*, and *Thornburg II*. After acknowledging that N.C.G.S. § 62-133(d) "gives the Commission discretion on certain other issues," the Attorney General argues this "discretion . . . does not extend to the makeup of a utility's rate base," "is not a grant to roam at large in an unfenced field," quoting *State ex rel. Utilities Commission v. Public Service Co.*, 257 N.C. 233, 237, 125 S.E.2d 457, 460 (1962), and "is not nearly as broad as the discretion the Commission purported to exercise" in these cases.

According to both the Public Staff and the Attorney General, the Commission failed to determine which coal ash-related costs were properly characterized as property used and useful and which should be treated as deferred operating expenses.[14] In the Public Staff's view, "[t]he record evidence shows that coal ash costs at issue in this case are largely in the nature of operating expenses" given that they consist of costs "associated with operating, maintaining, and upgrading environmental equipment," with the Commission, in the words of Commissioner Clodfelter's dissent, having "lump[ed] all tasks, all waste units, all time periods, and all plants together and allow[ed] a return on the expenditures without further qualification." Although the Commission provided an example of a cost that was properly considered capital in nature, consisting of the cost of the landfill constructed by Duke Energy Progress at the Sutton facility, the Public Staff contends that this "isolated example . . . does not support a universal conclusion that all [coal ash-related] costs are capital costs" and argues that costs associated with inspections, maintenance, well sampling, coal ash processing, "[d]ewatering, excavation, transport, and offsite disposal at another company's facility are on their face operational activities" rather than "investments in plant or facilities used or useful to provide electric service to present and future customers."[15]

Similarly, the Attorney General argues that the costs associated with the closure of the unlined coal ash basins "mainly involve preparing closure plans for coal-ash impoundments, treating contaminated groundwater, excavating coal ash, transporting it to landfills, and disposing of it." According to the Attorney General, the Commission and the utilities both recognized that "a significant portion" of their coal ash costs consisted of operating expenses. After failing to "explain its reasons for concluding that [the utility's] coal-ash costs are used and useful" in the Duke Energy Progress order, the Attorney General contends that the Commission erred by determining in the Duke Energy Carolinas order that the relevant costs were "used and useful" given that those costs were associated with "property [which] might have been used and useful for past service" rather than property that was "used and useful" in

14. The Public Staff notes that, in the Duke Energy Progress order, the Commission concluded that all closure costs were property "used and useful," while it concluded in the Duke Energy Carolinas order that some closure costs related to property "used and useful" without specifying which costs fell into which category.

15. The Public Staff also notes that, in the Duke Energy Progress proceeding, the utility failed to "itemize the costs in any detail" and that "this lack of detail alone means there is not substantial evidence in the record for the Commission to decide that *all* the coal ash costs are 'property used and useful.' "

providing current service. According to the Attorney General, nine of the utilities' sixteen coal-fired electric generating facilities had been retired by the time that the applications in these cases were filed, with "more than half" of the costs that the utilities sought to include in cost of service in these cases being related to retired generating facilities. Moreover, the Attorney General contends that many of the costs relating to facilities that continue to operate are used to store coal ash which was created "years or decades ago" or to coal ash ponds that "have been closed for years."

The Attorney General argues that the Commission's orders reflect a "confus[ion]" about the nature of the applicable legal standard and a failure to distinguish between the legal principles applicable to the inclusion of operating expenses, which must merely be reasonable, and costs associated with "used and useful" property, which must satisfy a higher legal standard, in the cost of service used to establish the utilities' rates, citing *Thornburg II*, 325 N.C. at 493, 385 S.E.2d at 468. In other words, the Attorney General argues that, even "reasonable" costs may not be included in rate base if they were not expended to procure property "used and useful" in providing current service. *Id.*

The Attorney General[16] and the Public Staff[17] both take issue with the Commission's determination that some or all of the relevant coal ash-related costs constituted working capital. According to the Public Staff, Duke Energy Progress witness Laura Bateman sponsored an exhibit that labeled certain costs as working capital in reliance upon the testimony of Dr. Wright, who had previously stated that the relevant costs constituted "used and useful" "utility plant." The Public Staff contends that the testimony of Dr. Wright and Ms. Bateman are contradictory given that "utility plant" and "working capital" are two separate and distinct categories of "used and useful" property. In addition, the Public Staff contends that the Commission "shifted to a different legal conclusion" with respect to this issue in the Duke Energy Carolinas order by determining that the relevant coal ash costs were "just like 'classic' working capital" given that these funds "were furnished by [Duke Energy Carolinas] and

16. According to the Attorney General, it is "[un]clear whether the Commission actually concluded that [the utilities'] coal-ash costs were working capital."

17. The Public Staff disputed the validity of the Commission's determination that no party challenged the inclusion of coal ash costs in "working capital" given that its equitable sharing proposal, "which depends on no return for unamortized coal ash costs," is "legally incompatible" with treating the relevant costs as working capital and that Public Staff witness Michael A. Maness testified in the Duke Energy Carolinas proceeding that labeling the relevant costs in that manner did not convert them into working capital.

its investors." According to the Public Staff, "classic working capital is entitled to a return" pursuant to N.C.G.S. § 62-133(b)(1) while "expenses that are 'like' working capital only in the sense that they may be paid from investor-supplied funds" could only be eligible to earn a return in the exercise of the Commission's discretion pursuant to N.C.G.S. § 62-133(d). The Public Staff asserts that "the nature of past coal ash expenditures is incompatible with the definition of 'working capital' " in light of the fact that the monies in question do not represent "funds needed to finance ongoing utility service" or "relate to the carrying cost for funding of future utility operations."

The Attorney General contends that the fact that the coal ash costs at issue in these cases "have nothing to do with 'the Compan[ies'] forward-looking obligation to provide utility service' " compels the conclusion that "the Commission's analysis of working capital here negates the statutory command that only used and useful assets may be included in a utility's rate base," citing N.C.G.S. § 62-133(b)(1). Furthermore, the Attorney General notes that any determination that some or all of the relevant costs constitute working capital lacks sufficient evidentiary support given that "no witness for [either utility] actually testified that its coal-ash expenditures were funded by working capital"; that the Commission had relied upon Duke Energy Progress' placement of the relevant costs "in a working-capital section in [its] books"; and that one of Duke Energy Carolinas' own witnesses "testified directly that the company does not believe that booking coal-ash costs in a working-capital account, by itself, is enough to turn those costs into part of [Duke Energy Carolinas'] rate base." According to the Attorney General, the utilities "offered no evidence that [they] needed to draw on working capital to fund [their] post-2014 coal-ash costs."

The Public Staff and the Attorney General each contend that the Commission erred by concluding that the accounting method utilized by the utilities in recording their coal ash costs automatically "converted" those costs into amounts eligible for inclusion in rate base. In the Public Staff's view, "many of the expenditures made by [the utilities] for coal ash compliance are fundamentally operating expenses" that are not "transformed into property used and useful that *must* be allowed to earn a return just because FERC and GAAP guidance" provides for capitalizing the costs in question in an Asset Retirement Obligation. On the contrary, the Public Staff argues that "the statutory classification of 'property used and useful' is independent of GAAP and FERC accounting guidance," citing to a section of Commissioner Clodfelter's dissent in the Duke Energy Carolinas order in which Commissioner Clodfelter

expressed the opinion that the Commission had "conflated concepts of financial statement presentation with the classification of costs for ratemaking purposes," that the language from ASC 410-20 upon which the Commission and the utilities had relied was "irrelevant," and that nothing in the FERC Uniform System of Accounts "compel[s] inclusion of the capitalized amount of the [A]sset [R]etirement [O]bligation in rate base; quite the contrary."

The Public Staff contends that the fact that the costs at issue in these cases had been deferred for accounting purposes did not convert the resulting asset that was shown on the utilities' books into property "used and useful" for ratemaking purposes and that the Commission's decision to the contrary conflicts with our decision in *Thornburg I*.[18] Instead, the Public Staff contends that "it is proper ratemaking to treat deferred costs as a form of operating expense," which *could* be amortized in the future rather than "as rate base," citing *Thornburg I* and the Commission's decision in Docket No. G-5, Sub 327. The Public Staff argues that "many" of the costs at issue in this case "are costs of operating the sites in compliance with environmental regulations" that "do[ ] not become 'property used and useful' simply because [the costs] ha[ve] been incurred for environmental compliance."

Finally, the Public Staff argues that a capitalized expense remains an operating expense for ratemaking purposes, with the fact that the capitalization process changes the timing with which the costs in question are included in cost of service for ratemaking purposes being irrelevant to the question of whether those costs constitute "used and useful" property. According to the Public Staff, "nothing in the law . . . requires a return on such costs to protect investors from being deprived of the time value of money" despite the Commission's numerous contrary conclusions. For that reason, the Public Staff suggests that the Commission must determine if there are "other material facts of record" that call for the denial of a return in order to achieve just and reasonable rates, with the utilities' environmental violations being the sort of facts that the Commission should have considered in determining the level of coal ash costs that should have been included in the utilities' North Carolina retail rates.

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18. The Public Staff acknowledges that it never disputed the utilities' contention that Asset Retirement Obligation accounting was mandatory for its coal ash costs; instead, it simply took issue with their decision to "opt for special ratemaking treatment (deferral) after the [Asset Retirement Obligation] was created," which the Public Staff described as a "depart[ure] from the method that has been approved by the FASB and FERC."

In the Attorney General's view, ASC 410-20 merely "requires publicly traded companies to record an [Asset Retirement Obligation] whenever they have a legal obligation to incur costs to retire a long-lived asset and that obligation can be quantified," such as the coal ash costs at issue in these cases. The Attorney General contends that "the existence of an [Asset Retirement Obligation] does not require a finding that [the utilities'] coal-ash removal costs are 'property used and useful . . . in providing the service to be rendered to the public' " and that, even if it did, such a result would be "in conflict with the statutory language and structure of [N.C.G.S. §] 62-133."

According to the utilities, the Public Staff has provided an overly narrow definition of "property," with a more accurate definition sweeping in "all assets necessary to provide electricity to the public" and including "cash that should be kept on hand to pay the utility's bills as they become due." In the utilities' view, the extent to which property is "used and useful" "does not turn on whether the property generates electricity"; instead, the critical factor is "whether it serves the public and was paid by debt or equity investors" rather than "through rates that were set in anticipation of normal operating expenses."

Even though operating expenses are typically recovered through established rates and are not statutorily entitled to a return, the utilities contend that the Commission may, in its discretion, allow a return when "extraordinary expenses arise that justify deferral accounting" in the next general rate case when those costs were initially covered by shareholder funds, citing *VEPCO*. According to the utilities, "[a] substantial difference exists between operating expenses that are built into rates and are paid by customers," which cannot receive a return given that "the utility does not need to attract investor capital to fund those expenses," as compared to "extraordinary costs that must be advanced by debt and equity investors" and upon which a return could be authorized in the Commission's discretion in order to avoid a "competitive disadvantage in raising investment funds in the future."

The utilities argue that "the modification of the coal ash basin system" at issue in these cases "was paid for with shareholders' funds" and that these funds constituted working capital that was "necessary and appropriate for providing electricity to customers" and was, for that reason, properly deemed "used and useful" pursuant to *VEPCO*. According to the utilities, the cases upon which the Attorney General relies relate to abandoned power plants while the present proceedings have nothing to do with "excessive facilities tied to nuclear units that were never completed and never used to generate[ ] electricity (e.g., *Thornburg*)" and

"do[ ] not involve abandoned utility plants and equipment that no longer result in costs to the utility (e.g., *Carolina Trace* and *Carolina Water*)." On the contrary, the utilities argue that these cases involve capital funds advanced by investors that "have a direct relationship to power generation—the [utilities'] system[s] to address coal ash residue resulting from electricity generation."

As a separate matter, the utilities contend that "the vast majority" of the costs at issue in these proceedings "stand as long-term assets" and "improvements to real property," including new or modified coal ash basins that are "directly related to . . . power generation" and that "benefit the utility's customers." According to the utilities, 18 C.F.R. § 101, Electric Plant Instruction No. 3, provides that many construction costs constitute "capital costs because they are associated with the system being built," including "contract work, labor, materials and supplies, transportation of employees and equipment, general administration attributable to the construction, engineering services, insurance, legal costs and environmental studies." The utilities contend that "much of [the] construction costs for the coal ash basins" are contained within these categories, such as those relating to "environmental, health and safety studies associated with the construction, infrastructure costs, landfill construction, engineering closure plans, modification to power plants to accommodate basin modifications, mobilization costs and installation of water treatment systems."

The utilities argue that their accounting practices ensure that the costs at issue were "eligible for deferral and amortization and for earning on the unamortized balance" and that, "even if the remediation costs are [Asset Retirement Obligation] expenditures, they are eligible for ratemaking treatment as though they are used and useful assets." According to the utilities, the accounting and reporting requirements prescribed by the FERC and the Securities and Exchange Commission require utilities to record Asset Retirement Obligations "when a change in the law creates a legal obligation to perform the retirement activities," quoting 68 Fed. Reg. 19610, 19611 (April 21, 2003). In the event that a utility records an Asset Retirement Obligation, that amount is treated as "electric utility plant" and is shown as both an asset and a liability on the utility's balance sheet, citing 68 Fed. Reg. at 19611. The utilities contend that these principles allow them to "capitalize the asset retirement costs" given that those costs constitute an "integral part of the costs of the particular asset that gives rise to the asset retirement obligations, rather than separate and distinct assets," quoting 68 Fed. Reg. at 19615. In view of the fact that the new regulations governing the disposal of coal ash

required them to close their existing coal ash basins, the utilities claim that they were "required to follow the accounting requirements relating to [Asset Retirement Obligations]." As a result, given that "the expenditures at issue are no different from the costs to build the utility plant and . . . stand as the 'public utility's property used and useful,' " quoting N.C.G.S. § 62-133(b)(1), and the fact that the relevant costs constituted capitalized amounts funded by the shareholders, the utilities contend that the Commission properly allowed them to earn a return upon the unamortized balance of the deferred coal ash-related costs.

The "ultimate question for determination" in any utility case is what "a reasonable rate to be charged by the particular utility company for the service it proposes to render in the immediate future" would be in light of the statutory procedures prescribed for the Commission in N.C.G.S. § 62-133. *Morgan*, 277 N.C. at 267, 177 S.E.2d at 413. As a general proposition, the procedures delineated in N.C.G.S. § 62-133(b), in which a test period is established, the utility's investment in utility plant and working capital as of the end of the test period is determined, the utility's reasonable operating expenses during the test period are ascertained, and a reasonable return upon the utility's rate base is identified, provide a workable framework that can be used to establish just and reasonable rates. The circumstances revealed by the record in these cases are, however, anything but ordinary, with the coal ash-related costs that the utilities incurred between 1 January 2015 and 31 December 2017 not being readily susceptible to traditional ratemaking analysis for a number of reasons.[19] As a result, these cases compel us to definitively determine the scope of the authority granted to the Commission pursuant to N.C.G.S. § 62-133(d), which the Commission used as the ultimate justification for its decision to allow the utilities to earn a return upon the unamortized portion of the deferred coal ash costs at issue in these cases.

This Court has, of course, discussed the manner in which N.C.G.S. § 62-133(d) should be interpreted and applied in several prior cases, a

19. Although we need not examine this issue in any detail, we note that the costs at issue in these cases do not appear to relate to a single test period as defined in N.C.G.S. § 62-133(c) and seem to consist of a combination of both costs associated with the decommissioning and construction of new utility facilities includable in rate base pursuant to N.C.G.S. § 62-133(b)(1) and costs that relate to the operation of those facilities that would ordinarily be treated as operating expenses pursuant to N.C.G.S. § 62-133(b)(3). While the Commission appears to have accepted the argument that these costs could be treated as working capital, the costs at issue in these cases, unlike the items traditionally treated as working capital, do not relate to a single test period. As a result, for all of these reasons, we have no hesitation in concluding that the costs in question do not readily fit within the confines of the traditional ratemaking principles enunciated in N.C.G.S. § 62-133.

number of which are discussed in detail in the parties' briefs. After carefully reviewing the relevant decisions of this Court, we have been unable to find anything that precludes the Commission from deferring certain extraordinary costs, amortizing them to rates, and allowing the utility, in the exercise of the Commission's discretion, to earn a return upon the unamortized balance in reliance upon N.C.G.S. § 62-133(d) in circumstances like those revealed by the present record.

Although the Attorney General contends that the approach adopted by the Commission in these cases is precluded by our prior decisions in *Thornburg II*, *Carolina Trace*, and *Carolina Water*, we agree with the Public Staff that the extent to which the Commission had the discretion to act as it did in these cases was not before the Court in any of those decisions. In *Thornburg II*, for example, we held that certain deferred nuclear plant cancellation costs had to be removed from rate base and treated in the same way that other abandoned plant costs had been treated, a process that involved the amortization of the related costs without a return on the unamortized balance. 325 N.C. at 497–98, 385 S.E.2d at 470–71. *Thornburg II* did not, however, make any reference to the application and interpretation of N.C.G.S. § 62-133(d).

Similarly, in *Carolina Trace*, we held that "[t]here is no statutory authority anywhere within Chapter 62 that permits the Commission *to include in rate base* any completed plant (as opposed to construction work in progress) that is not 'used and useful' within the meaning of this term as determined by our case law" (emphasis added). 333 N.C. at 203, 424 S.E.2d at 137. However, the dispute between the parties in *Carolina Trace* revolved around the application and interpretation of N.C.G.S. § 62-133(b)(1) rather than N.C.G.S. § 62-133(d).

Finally, in *Carolina Water*, we stated that, "[i]f facilities are not used and useful, they cannot be included in rate base," 335 N.C. at 508, 439 S.E.2d at 135, and that "[c]osts for abandoned property may be recovered as operating expenses through amortization" even though "a return on the investment may not be recovered by including the unamortized portion of the property *in rate base*." (emphasis added). *Id.* Once again, however, our decision in *Carolina Water Service* made no mention of the Commission's authority pursuant to N.C.G.G. § 62-133(d). As a result, given that none of these decisions and others like them involved the interpretation or application of N.C.G.S. § 62-133(d), they shed no light upon the extent of the Commission's authority pursuant to that specific statutory provision.

Our decisions interpreting and applying N.C.G.S. § 62-133(d) set out some of the principles that underlie this portion of North Carolina's

statutory ratemaking framework. The first occasion upon which we had an opportunity to interpret and apply what is now N.C.G.S. § 62-133(d) came in *Public Service Co.*, 257 N.C. 233, 125 S.E.2d 457, which was decided pursuant to former N.C.G.S. § 62-124. Former N.C.G.S. § 62-124 (1960) stated that, "[i]n fixing any maximum rate or charge," the Commission "shall" consider "all other facts that will enable it to determine what are reasonable and just rates." In *Public Service Co.*, we reversed a trial court judgment that affirmed an order in which the Commission refused to allow a natural gas utility to increase its rates in the face of a price increase by the utility's sole supplier of natural gas. In reaching this result, we stated that "[t]he Legislature properly understood that, at times, other facts may exist, bearing on value and rates, which the Commission should take into account in addition to those specifically detailed in" the ratemaking statute and that former N.C.G.S. § 62-124 "[gave] the Commission the right to consider *all other facts* that will enable it to determine what are reasonable and just rates" (emphasis in original), citing N.C.G.S. § 62-124. *Id.* at 237, 125 S.E.2d at 460. We did, however, caution the Commission that "[t]he right to consider 'all other facts' is not a grant to roam at large in an unfenced field" and determined that the "other facts" upon which the Commission was entitled to rely had to "be established by evidence, be found by the Commission, and be set forth in the record to the end the utility might have them reviewed by the courts." *Id.*

Similarly, in *State ex rel. Utilities Commission v. Edmisten*, we recognized that, "[w]hile the Commission is limited, particularly by [N.C.G.S. § 62-133(b)], to a consideration of certain ultimate facts, it may consider many other evidentiary facts relevant thereto which may not be specifically listed in this section" pursuant to N.C.G.S. § 62-133(d). 291 N.C. 327, 345, 230 S.E.2d 651, 662 (1976). In upholding the Commission's authority to allow an electric utility to implement a temporary fuel adjustment clause in the exercise of its discretion, we recognized that "[N.C.G.S. § 62-133(d)] expressly empowers the Commission to 'consider all other material facts of record that will enable it to determine what are reasonable and just rates.' " *Id.* (citing *Morgan*, 277 N.C. 255, 177 S.E.2d 405).

Shortly thereafter, in *State ex rel. Utilities Commission v. Edmisten*, 299 N.C. 432, 437, 263 S.E.2d 583, 588 (1980), in reversing the Commission's refusal to adopt rolled-in rates for an electric utility, we recognized that, "[a]lthough it is not for an appellate court to dictate to the Commission what weight it should give to material facts before it" in accordance with N.C.G.S. § 62-133(d), "a summary disposition which indicates that

the Commission accorded only minimal consideration to competent evidence constitutes error at law and is correctable on appeal," citing *Utilities Commission v. Piedmont Natural Gas Co.*, 254 N.C. 536, 119 S.E. 2d 469 (1961) and N.C.G.S. § 62-94. In light of that basic principle, we held that the Commission erred by failing to "consider whether a rate schedule computed as if" two wholly owned subsidiaries of the same parent company were one utility "would be in the best interests of the customers." *Id.* at 438, 263 S.E.2d at 588.

A few years later, this Court stated in *State ex rel. Utilities. Commission v. Duke Power Co.*, that, in N.C.G.S. § 62-133(d), that "the legislature recognized and understood that there would be other facts and circumstances of record which the Commission might rightly consider in addition to those specifically detailed in [N.C.G.S. § 62-133]," 305 N.C. 1, 26, 287 S.E.2d 786, 801 (1982) (*Duke Power Co. II*), before indicating that "the 'other material facts of record' considered by the Commission in fixing reasonable and just rates must be found and set forth in its order so that the reviewing court may see what these elements are." *Id.* at 27, 287 S.E.2d at 801. In the same vein, we opined in *State ex rel. Utilities Commission v. Nantahala Power & Light Co.*, that "N.C.G.S. § 62-133(d) has been construed as a device permitting the Commission to take action consistent with the overall command of the general rate statutes, but not specifically mentioned in those portions of the statute under consideration in a given case," citing *Duke Power Co. II* and *Utilities Commission v. Public Staff*, 58 N.C. App. 453, 293 S.E. 2d 888 (1982), *modified and aff'd*, 309 N.C. 195, 306 S.E.2d 435 (1983), and that "the fixing of 'reasonable and just' rates involves a balancing of shareholder and consumer interests," *State ex rel. Utilities Commission v. Nantahala Power & Light Co.*, 313 N.C. 614, 690–91, 332 S.E.2d 397, 442 (1985). As a result, we held that the Commission was entitled to treat "the effect of the FERC-filed power supply contracts on Nantahala's costs of service" and "the entire historical development of the Nantahala-Tapoco electric system and the intercorporate allocation of the costs and benefits associated therewith" as material facts of record pursuant to N.C.G.S. § 62-133(d) in determining the utility's rates. *Id.* at 701, 332 S.E.2d at 448.

Finally, in *Thornburg I*, we cited N.C.G.S. § 62-133(d) in determining that the Commission was entitled to allow a utility to include abandoned nuclear plant costs in rates as an operating expense, 325 N.C. at 478, 385 S.E.2d at 459, noting that the Commission's decision was supported by N.C.G.S. § 62-133(d), which ensured that "the Commission would not be bound by a strict interpretation of the operating expense component"

set forth in N.C.G.S. § 62-133(c). *Id.* Thus, this Court's prior decisions, while failing to delineate the exact contours of the Commission's authority pursuant to N.C.G.S. § 62-133(d), have clearly indicated that N.C.G.S. § 62-133(d) is available to the Commission for the purpose of dealing with unusual situations and that the authority granted to the Commission pursuant to N.C.G.S. § 62-133(d) is not limited by the more specifically stated ratemaking principles set out elsewhere in N.C.G.S. § 62-133(b).[20] Simply put, if the Commission's authority pursuant to N.C.G.S. § 62-133(d) could only be exercised in a manner that coincided with the Commission's authority as delineated in the other provisions of N.C.G.S. § 62-133, the enactment of N.C.G.S. § 62-133(d) would have been a purposeless undertaking.

After carefully examining our reported decisions construing N.C.G.S. § 62-133(d), we conclude that this statutory provision provides the Commission with an opportunity to consider facts that, while not specifically relevant to the ordinary ratemaking determinations required by N.C.G.S. § 62-133(b), should necessarily be considered in establishing rates that are just and reasonable to both the utility and the using and consuming public. For that reason, we reject the notion that the traditional rules governing the inclusion of costs in a utility's rate base pursuant to N.C.G.S. § 62-133(b)(1) and in a utility's operating expenses pursuant to N.C.G.S. § 62-133(b)(3) limit the scope of the Commission's authority pursuant to N.C.G.S. § 62-133(d), with any such determination being fundamentally inconsistent with the apparent legislative intent to use N.C.G.S. § 62-133(d) to provide a "safety valve" available to the Commission when ordinary ratemaking standards prove inadequate. However, as our earlier admonition that the predecessor to N.C.G.S. § 62-133(d) did not allow the Commission to "roam at large in an unfenced field" clearly indicates, N.C.G.S. § 62-133(d) does not give the Commission license to ignore the ordinary ratemaking standards set out elsewhere in N.C.G.S. § 62-133 in cases in which the use of those principles, without the necessity to consider "other facts," allows for the establishment of just and reasonable rates for the utility in question. Instead, N.C.G.S. § 62-133(d) provides the Commission with limited authority to take a holistic look at the cases that come before it in order

20. As we acknowledge in more detail below, the Commission's authority to pursuant to N.C.G.S. § 62-133(d) is not unlimited. Any attempt to restrain the Commission's discretion pursuant to N.C.G.S. § 62-133(d) by confining its use to narrow deviations from the ordinary ratemaking processes set out in the remainder of N.C.G.S. § 62-133 strikes as unworkable given the difficulty of determining when such a departure would be sufficiently limited as to be permissible and when it would not.

to ensure that the limitations inherent in the ordinary ratemaking standards enunciated in N.C.G.S. § 62-133 do not preclude the Commission from carrying out its ultimate obligation to establish rates that are just and reasonable in extraordinary instances in which the traditional ratemaking standards set out in N.C.G.S. § 62-133 are insufficient. As a result, consistently with the results reached in the decisions that we have summarized above, we hold that the Commission may employ N.C.G.S. § 62-133(d) in situations involving (1) unusual, extraordinary, or complex circumstances that are not adequately addressed in the traditional ratemaking procedures set out in N.C.G.S. § 62-133; (2) in which the Commission reasonably concludes that these circumstances justify a departure from the ordinary ratemaking standards set out in N.C.G.S. § 62-133; (3) determines that a consideration of these "other facts" is necessary to allow the Commission to fix rates that are just and reasonable to both the utility and its customers; and (4) makes sufficient findings of fact and conclusions of law supported by substantial evidence in light of the whole record explaining why a divergence from the usual ratemaking standards would be appropriate and why the approach that the Commission has adopted would be just and reasonable to both utilities and their customers.

An examination of the extensive record that is before us in these cases satisfies us that the Commission did not, with a single exception set out in more detail below, err in using its authority to consider "other facts" pursuant to N.C.G.S. § 62-133(d) by allowing the amortization of deferred coal ash costs to rates and to allow the utilities to earn a return on the unamortized balance. The Commission's findings, which have adequate evidentiary support, establish that the enactment of CAMA forced the utilities to confront an "extraordinary and unprecedented" issue involving the potential expenditure of billions of dollars in order to address a significant environmental problem. In light of the "magnitude, scope, duration and complexity" of the anticipated costs, the Commission determined that deferral of the necessary compliance costs would be appropriate and that these costs, including a return on the unamortized balance, should be amortized to rates over a period that the Commission deemed to be reasonable. In view of the unusual nature and complexity of the costs at issue in this proceeding and the circumstances under which they were incurred, the usual ratemaking standards set out in N.C.G.S. § 62-133 did not readily lend themselves to a decision that resulted in the establishment of just and reasonable rates for both the utilities and their customers. Finally, the Commission made detailed findings and conclusions explaining the nature of the manner in which it proposed to consider the relevant "other facts" and the reasons

that it believed that its decision was fair to both the utilities and their customers. As a result, we hold that, in light of the specific facts and circumstances disclosed by the record developed before the Commission in these cases and the detailed explanation that the Commission gave for reaching its decision, the Commission did not err in approving the basic ratemaking approach that was utilized in these proceedings.

### 4. Equitable Sharing

**[4]** The Public Staff contends that the Commission failed to address all of the material facts relating to the reasonableness of the utilities' coal ash costs for purposes of N.C.G.S. § 62-133(d) before rejecting its "equitable sharing" proposal. As part of this process, the Public Staff urged the Commission to adopt its equitable sharing proposal in order to adequately address the utilities' "culpability for extensive environmental violations resulting from its coal ash management." The Public Staff argues that, even though the utilities' culpability for environmental violations was a material fact of record that the Commission should have addressed in the course of deciding whether to adopt its equitable sharing proposal, the Commission failed to make findings and conclusions that adequately addressed its equitable sharing proposal.

The Public Staff begins by noting that, while the Duke Energy Progress order describes the Public Staff's equitable sharing proposal as resting upon the utilities' extensive "history of approval of sharing of extremely large costs that do not result in any new generation of electricity for customers," its "repeated references" to the utilities' environmental violations should have "le[ft] no doubt that [the existence of these violations] was a material reason for [its] equitable sharing proposal." Similarly, the Public Staff contends that, in its Duke Energy Carolinas order, the Commission erroneously concluded that the utilities' alleged environmental violations did not constitute part of the "real rationale for equitable sharing" and "that environmental violations [could] only be relevant to prudence" even though a finding of imprudence would have "justif[ied] a total disallowance of the associated costs" pursuant to N.C.G.S. § 62-133(b).

In addition, the Public Staff asserts that the Commission evaluated its equitable sharing proposal by considering "whether the costs were reasonable and prudent," "whether they were used and useful," and "what outcome would be fair and equitable." According to the Public Staff, the use of this standard precluded the implementation of an equitable sharing arrangement pursuant to N.C.G.S. § 62-133(d) given that the approach adopted in the Commission's order would appear to make

"full cost recovery with a return . . . mandatory as a matter of law (apart from mismanagement penalties) once costs have been determined to be prudent and 'used and useful.' "[21] Although both orders "hint[ed]" at the possibility of adjusting rates in its discretion pursuant to N.C.G.S. § 62-133(d), "other parts of the [o]rders reject[ed] that possibility as a legal conclusion."

In the Public Staff's view, the Commission's determination that the concept of equitable sharing had no support in the decisions of this Court rested upon a misinterpretation of *Thornburg I* and *Thornburg II*. More specifically, the Public Staff asserts that the Commission misinterpreted *Thornburg I* to mean that "equitable sharing applies *only* to costs that are not 'used and useful' and that equitable sharing therefore does not apply to coal ash costs" in spite of the fact that "[n]othing in *Thornburg I* or *Thornburg II* suggests that] N.C.G.S. § 62-133(d) limits the type of 'material facts' or remedies that may be considered to achieve reasonable and just rates."

The Public Staff contends that our decision in *Thornburg II* "support[s]" the idea of equitable sharing of excess plant costs which were not properly deemed to be "used and useful." According to the Public Staff, this Court did not reject the Commission's equitable sharing decision in *Thornburg II* on the grounds that the Commission lacked the authority to implement such a proposal; instead, the Public Staff contends that we rejected the specific equitable sharing arrangement that was at issue in that case, which involved the inclusion of nuclear plant cancellation costs in rate base on the grounds that such a regulatory treatment of those costs violated N.C.G.S. § 62-133(b)(1). In other words, the Public Staff contends that "*Thornburg II* does not stand for the proposition that the Commission lacks the discretionary authority to effectuate an equitable sharing between ratepayers and shareholders" and actually "upholds [the existence of] that authority," a result "which is consistent with N.C.G.S. § 62-133(d) and the Public Staff's equitable sharing recommendation."

The Public Staff contends that, contrary to the Commission's conclusion that allowing equitable sharing in these cases would result in an unconstitutional taking of utility property, there are "instances where the utility is not allowed full cost recovery or is required to share

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21. In the Public Staff's view, the mismanagement penalties imposed in these cases "remed[y] a different problem" —the acts which resulted in federal criminal plea—and are "no alternative" to the Public Staff's equitable sharing proposal, which was based upon "separate and more extensive state law violations."

revenues with its ratepayers," a result that is "within the police power of the state," citing *State ex rel. Utilities Commission v. N.C. Natural Gas Corp.*, 323 N.C. 630, 642–45, 375 S.E.2d 147, 154–56 (1989) and *State ex rel. Utilities Commission v. Carolina Water Service*, 225 N.C. App. 120, 135–36, 738 S.E.2d 187, 197–98 (2013). According to the Public Staff, "[u]tility shareholders . . . are not guaranteed a return on their money," with "equitable sharing [serving to] balance the interests of [the utilities] who bear some responsibility for coal ash costs due to their years of non-compliance with groundwater and surface water environmental regulations, against the interests of ratepayers who are being asked to pay a second time for disposal of coal ash after the [utilities'] initial disposal efforts proved inadequate for environmental protection."

According to the Public Staff, the Commission failed to make findings relating to numerous environmental violations, including: (1) at least 2,857 groundwater exceedances caused by Duke Energy Progress' coal ash basins that the Public Staff claimed to have resulted from violations of the applicable DEQ regulations; (2) the existence of "unauthorized seeps that [Duke Energy Carolinas] has admitted and 3,091 groundwater violations confirmed by [Duke Energy Carolinas'] own groundwater monitoring data"; (3) admissions to "nearly 200 distinct seeps" that the Public Staff claims to constitute unpermitted discharges in violation of N.C.G.S. § 143-215.1; (4) the presence of "seventeen admittedly engineered toe drains" that were not authorized by NPDES permits and that had been "deliberately constructed by [Duke Energy Progress] to allow drainage from its ash basins without regulatory approval and in violation of [N.C.G.S.] § 143-215.1"; (5) the presence of "twelve engineered seeps at [Duke Energy Carolinas'] coal-fired plants for which [it] did not yet have NPDES permits"; and (6) admissions by Duke Energy Carolinas that unauthorized seeps had occurred at four of its coal-fired plants.

In response, the utilities argue that the Commission had properly rejected the Public Staff's equitable sharing proposal for two separate reasons. First, the utilities aver that N.C.G.S. § 62-133(d) "does not give the Utilities Commission unbridled discretion to reduce rates" and must be read "in light of the other subsections of the statute" which, collectively, provide the Commission with "a specific formula for setting rates for a public utility," citing N.C.G.S. §§ 62-133(b) and (c). According to the utilities, the adoption of the position advanced by the Public Staff would "eviscerate" the guiding standards set forth by N.C.G.S. §§ 62-133(b) and (c) so as to "rais[e] grave constitutional concerns." Moreover, the utilities argue that the evidence upon which the Public Staff has relied in support of its equitable sharing proposal "bear on the elements of the

ratemaking formula or other specific provisions of [the] Public Utilities Act," with the facts upon which the Public Staff relies being "not material." Instead, the utilities contend that the Public Staff's equitable sharing proposal was "arbitrary" and "devoid of any determining principle," citing *Sanchez v. Town of Beaufort*, 211 N.C. App. 574, 580, 710 S.E.2d 350, 354 (2011), a conclusion with which the Commission agreed in finding that the Public Staff's proposal was "standard-less" and "insufficient[ly] justif[ied]." The utilities point to the Public Staff's "dramatic departure" from the position that it took in Docket No. E-22, Sub 532, in which the Public Staff "stipulated that, because [the utility's] expenditures had been prudently incurred and were investor-funded, [the utility] should be entitled to recover these costs through rates over a five-year period and also receive a rate of return on the unamortized balance."

According to the utilities, neither *Thornburg I* nor *Thornburg II* support the Public Staff's equitable sharing proposal. The utilities argue that, in *Thornburg I*, this Court rejected an intervenor's argument that operating expenses must have a nexus to property used and useful and that, as long as the expenses were "reasonable," the Commission has the authority to allow their inclusion in the cost of service for ratemaking purposes. Although this Court upheld the Commission's decision in *Thornburg I*, that case involved an entirely different category of costs from those at issue here. The utilities contend that, in *Thornburg II*, this Court held that expenditures relating to "excessive" facilities "were not 'used and useful' and could not be included in rate base," with its decision in that case being susceptible to the interpretation that the Commission is entitled to "abandon[ ] the precise directives of [N.C.G.S. §] 62-133," "which require a return on property used and useful."

Secondly, the utilities contend that the Commission properly rejected the Public Staff's equitable sharing proposal on the grounds that the Commission did not abuse its discretion by determining that a further downward adjustment in the utilities' rates would not be reasonable and appropriate. In the utilities' view, the Commission simply "declined in these cases to exercise whatever discretion the Public Staff insists it possesses" to order an additional downward adjustment beyond the mismanagement penalty and explained throughout "[v]irtually the entire[ty]" of both order's majority decisions "why the circumstances of these cases do not make a further downward adjustment appropriate."

As we have already noted, our prior decisions clearly indicate that N.C.G.S. § 62-133(d) "expressly empowers" the Commission to consider all material facts of record in setting just and reasonable rates, *Edmisten*, 291 N.C. at 345, 230 S.E.2d at 662, with the existence of this authority

being coupled with a concomitant obligation on the Commission's part to consider all potentially relevant facts in formulating its decision. *See State ex rel. Utils. Comm'n v. General Tel. Co.*, 12 N.C. App. 598, 611, 184 S.E.2d 526, 534 (1971), *modified*, 281 N.C 318, 189 S.E.2d 705 (1972); *Duke Power Co. II*, 305 N.C. at 18, 287 S.E.2d at 796–97; *Edmisten*, 299 N.C. at 438, 263 S.E.2d at 588. After carefully reviewing the record, we are not persuaded that the Commission fulfilled its duty to consider *all* of the material facts of record revealed in the record in determining whether to adopt the ratemaking approach proposed by the utilities and to reject the Public Staff's equitable sharing proposal utilizing the authority granted to it pursuant to N.C.G.S. § 62-133(d). More specifically, the Public Staff expressly requested the Commission to consider evidence of environmental violations in evaluating its equitable sharing proposal in accordance with N.C.G.S. § 62-133(d). However, the Commission declined to adopt the Public Staff's equitable sharing proposal on the grounds, at least in part, that it had no role in determining whether the alleged environmental violations upon which the Public Staff's proposal rested had actually occurred. Instead, the Commission appears to have refused to consider the alleged environmental violations upon which the Public Staff's proposal rested, at least in part, on the grounds that the Commission's role was limited to making cost of service-related determinations and did not extend to ascertaining whether environmental violations had occurred, with the making of this determination having been left, in the Commission's view, to environmental regulators and courts of general jurisdiction unless a showing of management imprudence had been made.

Although the Commission is not, of course, statutorily charged with making definitive decisions concerning the extent, if any, to which the utilities committed environmental violations, we do believe that it was required, for ratemaking purposes, to evaluate the extent to which the utilities committed environmental violations in determining the appropriate ratemaking treatment for the challenged coal ash costs even if any such environmental violations did not result from imprudent management. In other words, given that the Commission decided to invoke its statutory authority to consider "other facts" in determining the rates that should be established for the utilities, it was required to consider *all* material facts of record in making that determination including, in these cases, facts pertaining to alleged environmental violations such as non-compliance with NPDES permit conditions, unauthorized discharges, and groundwater contamination from the coal ash basins in violation of the 2L Rules and to incorporate its decision with respect to the nature and extent of the utilities' violations, if any, in determining the

appropriate ratemaking treatment for the challenged coal ash costs.[22] Instead of conducting the required evaluation, the Commission appears to have determined that it lacked the authority to comment upon the nature and extent of any environmental violations that the utilities may or may not have committed. Moreover, even though the utilities are correct in noting that the Public Staff's equitable sharing proposal was not consistent with or subject to the detailed standards set out in the ordinary ratemaking procedures prescribed by N.C.G.S. § 62-133, the same is true of the Commission's decisions to allow the deferral of the relevant coal ash costs and the amortization of the deferred costs, including a return on the unamortized balance, to rates despite the fact that some percentage of those costs would not be eligible for inclusion in rate base pursuant to N.C.G.S. § 62-133(b)(1). Although the Commission remains free, at the conclusion of the proceedings on remand and after complying with the limitations upon its authority pursuant to N.C.G.S. § 62-133(d) set forth above, to reject the Public Staff's equitable sharing proposal, it may only do so after considering all of the potentially relevant facts and circumstances, *see Duke Power II*, 305 N.C. at 21, 287 S.E.2d at 798, and explaining the manner in which it has chosen to exercise its discretion by making appropriate findings and conclusions that have adequate evidentiary support.[23] In the event that the Commission concludes, on remand, to adopt the Public Staff's equitable sharing proposal, either as proposed or in some modified form, it may adjust other portions of its order including those relating to the proposed management penalty, in order to ensure that the utilities' rates are "just and reasonable" as that term is used in the Public Utilities Act and satisfy applicable constitutional standards, which set an absolute floor under and ceiling upon the Commission's authority. As a result, those portions of the Commission's orders rejecting the Public Staff's equitable sharing

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22. We agree with the Commission's determination that the fact that the utilities entered into a settlement agreement with the Department of Water Quality does not, standing alone, constitute evidence that an environmental violation had occurred. *See* N.C. R. Evid. 408. Similarly, we agree with the Public Staff and the Commission that the existence of a settlement agreement which does not speak to the issue of liability does not constitute evidence of wrongdoing.

23. For this reason, the fact that the Commission may have had other criticisms of the Public Staff's "equitable sharing" proposal does not support a decision to affirm this portion of the Commission's orders given the Commission's failure to consider all relevant "material facts" as required by N.C.G.S. § 62-133(b)(1). In other words, the Commission is not entitled to consider the potential adverse impacts upon a utility's capital costs in applying N.C.G.S. § 62-133(d) without also considering other all of the potentially relevant facts, such as whether the manner in which the utility managed and operated its coal ash facilities resulting in environmental violations.

proposal are reversed and these cases are remanded to the Commission for further proceedings consistent with this opinion, including consideration of the Public Staff's equitable sharing proposal.

**5. Discharges to Surface Waters**

**[5]** In addition to adopting the arguments advanced by the Attorney General in challenging the Commission's decision with respect to the ratemaking treatment of the utilities' coal ash costs, the Sierra Club contends that the costs in question cannot be included in the cost of service used for North Carolina retail ratemaking purposes pursuant to N.C.G.S. § 62-133.13 given that those costs resulted from discharges to the surface waters of North Carolina in violation of State or federal surface water quality standards. According to the Sierra Club, the record contained "overwhelming evidence" establishing that: (1) "seeps at [the utilities'] coal ash ponds discharged polluted wastewater into adjacent surface waters"; (2) that "discharges from unauthorized seeps contained coal ash constituents at concentrations above water quality standards"; and (3) that "dewatering and pond closure would abate the illegal discharges," so that the costs in question "are not recoverable from ratepayers."

The Sierra Club urges this Court to reject the Commission's determination that N.C.G.S. § 62-133.13 did not apply to the costs at issue in these cases on the grounds that those costs had been incurred to comply with federal and State law rather than as the result of unlawful discharges as "unsupported by any evidence in the record, let alone competent, material, and substantial evidence," citing N.C.G.S. § 62-94(b)(5) and *CUCA*, 348 N.C. 452, 460, 500 S.E.2d 693, 699 (1998), and as an "arbitrary and capricious" decision, citing *State ex rel. Utilities Commission v. NUI Corp.*, 154 N.C. App. 258, 266, 572 S.E.2d 176, 181–82 (2002). In addition, the Sierra Club argues that the utilities "did not present evidence that the closure of any of its ponds was required by the CCR Rule" and that, "[i]rrespective of CAMA," the closure costs had been incurred in accordance with Special Orders on Consent addressing discharges from unpermitted seeps and a Superior Court determination that the closure of the utilities' ponds would eliminate these seeps. The Sierra Club further asserts that a determination to the contrary would have the effect of "nullify[ing] the applicability of" N.C.G.S. § 62-133.13, given that "the legislature knew full well that all of [the utilities'] ponds would be required to close" at the time that it enacted N.C.G.S. § 62-133.2 as part of CAMA. In the Sierra Club's view, the enactment of CAMA was a "direct response" to the utilities' "failure to operate its coal ash ponds in a safe and reasonable manner."

In response, the utilities argue that N.C.G.S. § 62-133.13 has no application to these cases given that it relates to unlawful discharges that "result[ed] in a violation of state or federal *surface* water quality standards" that occurred on or after 1 January 2014. In essence, the utilities contend that, while such prohibitions ensured that the costs relating to the Dan River spill were not included in the cost of service used for ratemaking purposes, the General Assembly did not intend to preclude the inclusion of the cost of abating the seeps associated with the utilities' coal ash basins in the costs upon which their rates were based. The utilities note that "the Commission went to great lengths to identify expenditures resulting from seeps that were alleged to have resulted in water quality issues" and that any such costs "independent of the requirements of the CCR Rule and CAMA" had been "expressly disallowed." Accordingly, the utilities assert that, with the exception of the costs reflected in these disallowances, "no seepage caused [the utilities] to incur any 'unjustified costs to comply with current laws and regulations.' "

We agree with the Commission's determination that N.C.G.S. § 62-133.13 does not bar the inclusion of the costs at issue in these cases in the utilities' cost of service for North Carolina ratemaking purposes given that the relevant statutory provision specifically defines "unlawful discharges" as "a discharge that results in a violation of State or federal surface water quality standards" and that the Commission determined, on the basis of adequate evidentiary support, that the costs at issue in these cases stemmed from the utilities' compliance with the CCR Rule, CAMA, and certain consent agreements requiring them to take corrective actions that were consistent with one or both of those regulatory requirements. In addition, the Commission determined in the Duke Energy Carolinas order that it "is a function of basic science" that "there will be a natural flow from an unlined basin into groundwater" as part of the "normal operation" of the basins so that, "except in limited fashion," "[Duke Energy Carolinas'] past coal ash management practices did not cause it to incur in the [relevant timeframe] unjustified costs to comply with current laws and regulations." In its Duke Energy Carolinas order, the Commission identified expenditures related to seeps and water quality issues associated with the coal ash basins located at the Dan River, Riverbend, Allen, Marshall, and Cliffside facilities and determined that the abatement of these seeps had been handled through the judgment entered in the federal criminal case or consent orders entered as the result of agreements between the utilities and DEQ. As a result, the Commission properly determined that the costs to which the Sierra Club's argument is directed were "independent of the requirements of the CCR Rule and CAMA," that the Commission had

expressly disallowed "any activities employed to resolve these seeps," and that N.C.G.S. § 62-133.13 does not preclude the inclusion of the relevant coal ash costs in the cost of service used to establish the utilities' North Carolina retail rates.

## C. Basic Facilities Charge

**[6]** The environmental intervenors contend that the Commission erred by authorizing Duke Energy Carolinas to increase the Basic Facilities Charge for the residential rate class from $11.80 to $14.00 while leaving the facilities charges against other classes unchanged. Among other things, the environmental intervenors argue that this component of the Commission's order was not supported by competent, material, and substantial evidence so as to be subject to reversal pursuant to N.C.G.S. § 62-94(b)(5). According to the environmental intervenors, since no party advocated the establishment of a $14.00 per month customer charge, that figure constituted an arbitrary number that "most likely" was adopted because it was identical to the figure incorporated into a joint stipulation that the Commission approved in the Duke Energy Progress proceeding, so that the Commission's decision to utilize that figure reflected a failure to weigh the testimony of each witness concerning the amount of the charge and to explain the weight that should be given to that testimony, citing *State ex rel. Utilities Commission v. Cooper*, 367 N.C. 644, 649, 766 S.E.2d 827, 830 (2014) (*Cooper II*). The environmental intervenors claim that, even though "each link in the chain of reasoning must appear in the order itself," quoting *Eddleman*, 320 N.C. at 352, 358 S.E.2d at 346, "[t]here is no such chain linking evidence in the record to the Commission's decision to set the [c]harge at $14.00," a fact that establishes that the Commission erroneously afforded "only minimal consideration to competent evidence," quoting *State ex rel. Utilities Commission v. Thornburg*, 314 N.C. 509, 511, 334 S.E.2d 772, 773 (1985).

In addition, the environmental intervenors argue that the Commission's decision to increase the residential Basic Facilities Charge contravened various provisions of the Public Utilities Act, citing N.C.G.S. § 62-2(a)(3a), (4), (5); N.C.G.S. § 62-155(a) (stating that "[i]t is the policy of the State to conserve energy through efficient utilization of all resources"); and *State ex rel. Utilities Commission v. Simpson*, 295 N.C. 519, 524, 246 S.E.2d 753, 757 (1978). According to the environmental intervenors, the Commission's decision was "inconsisten[t]" with the statutory "policy directives" contained in the Public Utilities Act, which state that rates should "promote conservation," "demand reduction," and encourage efficiency, and failed to "consider" intervenor

testimony explaining that the residential Basic Facilities Charge should remain unchanged in order to avoid "penaliz[ing] customers who have taken steps to conserve energy." The environmental intervenors argue that the increased residential Basic Facilities Charge "unfairly impacts low-income and minority ratepayers," who "tend to use less electricity than the average household," citing *Cooper I*, 366 N.C. at 495, 739 S.E.2d at 548 and N.C.G.S. § 62-133(a), with the Commission having treated these considerations as nothing more than "a mere afterthought." The environmental intervenors assert that the Commission's finding that the approval of a $14.00 residential Basic Facilities Charge would "moderat[e] the impact of [the] increase on low-income customers to the extent that they are high-usage customers such as those residing in poorly insulated manufactured homes" was merely "conclusory" and devoid of "evidentiary support in the record," quoting Commissioner Clodfelter's dissent, and had been "refuted by the testimony of [environmental intervenor witness John] Howat" "that low-income customers tend to have lower-than-average electricity usage."

The environmental intervenors take issue with the Commission's decision to utilize the Minimum System Methodology proposed by Duke Energy Carolinas in determining the level at which the residential Basic Facilities Charge should be established. According to the environmental intervenors, the Minimum System Methodology approach "resulted in hypothetical grid cost estimates that do not comport with [Duke Energy Carolinas'] actual, original costs of used and useful property" given its assumption " 'that a minimum system . . . would have the same number of poles, conductor feet, and transformers' as installed in the real-world grid" when, in fact, "the equipment imagined under [that methodology] would be capable of serving more than the minimal demand of customers" and that "the customer-related percentage of the distribution system [derived using the Minimum System Methodology] is effectively driven by . . . *non-existent facilities*." As a result, the environmental intervenors argue that the Minimum System Methodology "turns foundational ratemaking principles upside down"; "serves as a poor proxy for the actual, used and useful distribution grid"; and "violate[s] [Duke Energy Carolinas'] obligation to base rates on an ascertainment of the original costs of utility property that is used and useful in providing service to the public," citing N.C.G.S. § 62-133(b)(1). The environmental intervenors contend that the Commission has, in prior decisions, rejected the use of the Minimum System Methodology, with its failure to "acknowledge[e] or explain[ ] its prior, contrary decisions" demonstrating "lack of careful consideration" and "reasoned judgment" and rendering its decision to adopt that methodology in this case "arbitrary

and capricious," citing *Thornburg*, 314 N.C. at 515, 334 S.E.2d at 776. The environmental intervenors argue that "there was not even a scintilla of evidence to support" the Commission's decision with respect to the Basic Facilities Charge issue, particularly given that it ordered an overall revenue reduction for Duke Energy Carolinas, citing *Cooper II*, 367 N.C. at 438, 758 S.E.2d at 640, pointing to the "common-sense principle that an adjustment to the Basic Facilities Charge should bear some logical relationship to the overall change in rates."

Finally, the environmental intervenors argue that the Commission's order was "unduly discriminatory" given that it approved an increase in the residential Basic Facilities Charge while leaving similar rates for other customer classes unchanged, citing N.C.G.S. § 62-140(a); *State ex rel. Utilities Commission v. North Carolina Textile Manufacturers Ass'n*, 313 N.C. 215, 222, 328 S.E.2d 264, 269 (1985); and *CUCA*, 348 N.C. at 468, 500 S.E.2d at 704. According to the environmental intervenors, "[t]he Commission did not point to any competent, material and substantial evidence of a difference in conditions between customer classes to support its determination to increase the residential [c]harge while leaving the non-residential [c]harges the same" and only offered "murky generalizations and a vague reference to evidence in the record" in support of this decision.

In response, the utilities argue that Commission's decision to increase the residential Basic Facilities Charge to $14.00 had the necessary evidentiary support given that the figure adopted by the Commission was within the range recommended by the various witnesses and the fact that the Commission "is not limited to specific rates advocated by the parties and is," instead, "allowed to fix a rate based on the evidence presented, just as a jury in assessing an amount of damages is not limited to only specific amounts demanded by a plaintiff or defendant," citing *Duke Power Co. II*, *State ex rel. Utilities Commission v. Public Staff*, 323 N.C. 481, 493, 374 S.E.2d 361, 367 (1988), and *Legacy Data Access, Inc. v. Cadrillion, LLC*, 889 F.3d 158, 168 (4th Cir. 2018). In the utilities' view, the environmental intervenors seek to "box in the Commission and take away any room for the Commission as a regulatory body to use its expertise, discretion, or subjective judgment," a result which is "simply not the law in the State of North Carolina," citing *Duke Power Co. II*, 305 N.C. at 7, 287 S.E.2d at 790. On the contrary, the utilities contend that "the Commission does not have to provide an equation or create a graph on how it set the [Basic Facilities Charge] for the residential rate classes at $14.00" and point out that, "[i]n *Duke Power Co. [II]*, this Court did not require that the Commission provide a direct link or detail" as to the

specific return on equity that it approved in that proceeding, citing *id.* at 30, 287 S.E.2d at 803.

The utilities contend that the record contained "overwhelming evidence" supporting the Commission's decision to increase the residential Basic Facilities Charge, with this evidence resting upon Duke Energy Carolinas' cost of service study, which indicated that the charge in question should be set at $23.78 even though Duke Energy Carolinas only proposed to increase it to $17.79 in order "to moderate any effect of the increase on low-usage customers." In addition, the utilities point to the fact that Duke Energy Carolinas witness Michael Pirro testified that an increase in the residential Basic Facilities Charge was necessary because "it is important that [Duke Energy Carolinas'] rates reflect cost causation to minimize subsidization of customers within the rate class."

The utilities deny that the validity of the Commission's determination with respect to the appropriate level of the residential Basic Facilities Charge is controlled by this Court's decision in *Eddleman* on the grounds that, in *Eddleman*, this Court rejected an argument that the Commission's mislabeling of findings and conclusions did not constitute prejudicial error "so long as the order reflected a basic understanding of how the decision-making process is supposed to work." The utilities argue that, in this case, there is "no issue about whether the Commission . . . mislabel[ed] its findings of fact and conclusions of law." Similarly, the utilities deny that this case is controlled by *Cooper II*, in which this Court required the Commission to demonstrate that it had actually weighed the evidence and exercised its independent judgment without adopting any requirement that the Commission explain the weight to be given to the testimony of any specific witness.

The utilities acknowledge that the record contains considerable evidence concerning the potential effect of the proposed increase in the residential Basic Facilities Charge upon energy conservation and upon low-income households. On the other hand, the utilities note that the Commission also heard extensive evidence regarding "the need for the rates in the residential rate classes to more adequately reflect cost causation" and point out that, "[a]s the administrative agency vested by the General Assembly with 'broad powers to regulate public utilities and to compel their operation in accordance with the policy of the State,' these are the kinds of policy choices the Commission has been entrusted to make," citing *State ex rel. Utilities Commission v. Public Staff*, 123 N.C. App. 623, 625, 473 S.E.2d 661,663 (1996). For that reason, the utilities contend that the Commission "must have room to exercise its discretion and judgment," quoting *Eddleman*, 320 N.C. at 379, 358 S.E.2d at 361,

and did so in this case, having fully considered the policy pronouncements set forth in N.C.G.S. § 62-2(a), 3(a), (4), and (5) and N.C.G.S. § 62-155(a) and the evidence presented by the environmental intervenors in the course of determining that the importance of adopting residential rates that reflect the underlying cost of service outweighed the concerns expressed by the environmental intervenors.

The utilities argue that the Commission "clearly considered the impact of any increase . . . on low-income customers because it authorized a lesser increase" than the one that had been proposed by Duke Energy Carolinas "to moderate the impact of such increases" upon the affected customers. The utilities claim that the Commission simply "gave greater weight" to the evidence presented by Duke Energy Carolinas' witnesses than it did to the evidence supported by the environmental intervenors. In addition, the utilities argue that the Commission's decision to decrease the overall revenue that Duke Energy Carolinas was entitled to collect from customers was "primarily due to the impact of the Federal Tax Cuts and Jobs Act of 2017 lowering the corporate income tax rate," a consideration that "ha[d] no effect on the underlying cost to serve customers or the significant gap between that cost to serve and the [Basic Facilities Charge] for the residential rate classes."

The utilities also argue that the Minimum System Methodology "has served as a foundation for establishing the flat monthly [Basic Facilities Charge] by electric utilities since the early 1970s" and that "the Commission ha[d] never rejected the use" of this methodology in supporting its Basic Facilities Charge decisions. On the contrary, the Commission "simply did not award . . . the full amount of costs designated as customer-related by the cost of service study using [the Minimum System Methodology]" in previous orders given Duke Energy Carolinas' failure to request approval for a residential Basic Facilities Charge that mirrored the amount shown to be appropriate in its cost of service study. In addition, the utilities argue that the environmental intervenors had "completely miscast the nature of the [Minimum System Methodology,]" deny that it "is . . . an appraisal mechanism or determinant of the costs or value of utility assets," and contend that it "is a method for allocating the actual distribution system costs into the portion of those costs that are customer related . . . and the portion that are demand related" that did not violate N.C.G.S. § 62-133(b)(1).

Finally, the utilities argue that the Commission's decision to approve an increase in the residential Basic Facilities Charge was not unduly discriminatory and rested upon "reasonable differences between the residential and non-residential rate classes," citing N.C.G.S. § 62-140(a)

(stating that "[n]o public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage" and that "[n]o public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service"). According to the utilities, N.C.G.S. § 62-140(a) does not prohibit mere "preferences, advantages, prejudices, disadvantages, differences or discrimination in setting rates," citing *State ex rel. Utilities Commission v. Bird Oil Co.*, 302 N.C. 14, 22, 273 S.E.2d 232, 237 (1981), with the real question being "not whether the differential is merely discriminatory or preferential," but rather "whether the differential is an unreasonable or unjust discrimination." The utilities note that this Court held in *State ex rel. Utilities Commission v. Nello L. Teer Co.*, 266 N.C. 366, 146 S.E.2d 511 (1966), that the charging of different rates for services rendered did not constitute a per se violation of N.C.G.S. § 62-140 and stated in *State ex rel. Utilities Commission v. Carolina Utilities Customers Ass'n*, 351 N.C. 223, 524 S.E.2d 10 (2000), that utilities may treat customers differently "so long as the variance in charges bears a reasonable proportion to the variance in conditions," quoting *id.* at 243, 524 S.E.2d at 24, based upon the quantity of use, the time of use, the manner of service, and the cost of rendering the various services, citing *id.* at 244, 524 S.E.2d at 24, coupled with a consideration of competitive conditions, the consumption characteristics of the several classes, and the value of service to each class, citing *North Carolina Textile Manufacturers Ass'n*, 313 N.C. at 222, 328 S.E.2d at 269. After noting that the burden lies with the party seeking to challenge the validity of a Commission-approved rate, citing *id.*; *State ex rel. Utilities Commission v. Edmisten*, 314 N.C. 122, 132, 333 S.E.2d 453, 460 (1985), *vacated sub nom. Nantahala Power & Light Co. v. Thornburg*, 477 U.S. 902, 106 S. Ct. 3268, 91 L. Ed. 2d 559 (1986), the utilities argue that the environmental intervenors had failed to satisfy the applicable burden of proof given the presence in the record of evidence demonstrating the existence of "material differences" between the rate classes in this case and the "greater disparity between the [Basic Facilities Charge] and the true cost of service in the residential rate schedules as compared to the non-residential rate schedules."

We do not find the environmental intervenors' challenge to the lawfulness of the Commission's decision to authorize Duke Energy Carolinas to increase its residential Basic Facilities Charge to $14.00 to be meritorious. Duke Energy Carolinas witness Janice Hager testified that the Minimum System Methodology was "one of two [methodologies set out] in the [National Association of Regulatory Utility Commissioners] Cost

of Service manual for allocation of distribution costs," both of which "result in the assignment of distribution costs to customers." Ms. Hager emphasized that each of North Carolina's three major electric utilities "have a long history of using minimum system studies to identify the portion of distribution costs that are customer related" and opined that the "theory" underlying the Minimum System Methodology is "sound and consistent with cost causation which is the bedrock of [cost of service] studies." According to Ms. Hager, the Minimum System Methodology "allowed [Duke Energy Carolinas] to classify the distribution system into the portion that is customer-related (driven by number of customers) and the portion that is demand-related (driven by customer peak demand levels)" based upon the assumption that "[e]very customer requires some minimum amount of wires, poles, transformers, etc. to receive service."

Ms. Hager testified that Duke Energy Carolinas "develop[ed] its minimum system study . . . to consider what distribution assets would be required if every customer had only some minimum level of usage," thereby allowing "the utility to assess how much of its distribution system is installed simply to ensure that electricity can be delivered to each customer, regardless of the customer's frequency of use." Ms. Hager stated that, unless a minimal component of the utility's distribution system was treated as a customer-related cost, "low use customers could avoid paying for the infrastructure necessary to provide service to them which is counter to cost causation principles." In the event that these minimum system costs were allocated on a demand, rather than a customer-related, basis, Ms. Hager contended that "customers with higher usage [would be] subsidizing those with lower usage."

According to Mr. Pirro, "[t]he [proposed] base rate increase [was] allocated to the rate classes on the basis of rate base," an "allocation methodology [that] distributes the increase equitably to the classes while maintaining each class' deficiency or surplus contribution to return." Mr. Pirro testified that, in designing the proposed rates, Duke Energy Carolinas took into consideration "concern[s] regarding the size of the increase and . . . the impact of the [increase] on its customers" while "better reflect[ing] all customer-related costs" in order to reduce "customer cross-subsidization." According to Mr. Pirro, Duke Energy Carolinas' "current rates significantly understate the current cost of service related to the customer component of cost."

In Mr. Pirro's view, the proposed increase in Duke Energy Carolinas' residential Basic Facilities Charge would "better recover customer-related cost identified in the unit cost study for the residential rate

class." According to Mr. Pirro, "[c]ustomer-related costs are unaffected by changes in customer consumption and therefore should be paid by each participant, regardless of their consumption." Mr. Pirro asserted that "[r]esidential customer-related revenue not recovered in the Basic Facilit[ies] Charge is shifted to energy rates causing high usage customers to subsidize rates of lower usage customers," with a decision to leave these costs in the energy charges serving to "overinflate" the savings resulting from the energy-related component of the utility's rates. Mr. Pirro disputed the validity of any assertion that the proposed increase in the residential Basic Facilities Charge would discourage appropriate energy efficiency efforts in light of the fact that a failure "to properly recover customer-related cost via a fixed monthly charge provides an inappropriate price signal to customers and fails to adequately reflect cost causation" and that "[s]hifting customer-related cost to the [kilowatt-hour] energy rate [would] further exacerbate[ ] this concern and over-compensate[ ] energy efficiency and distributed generation for the cost avoided by their actions."

Mr. Pirro testified that the "goal" that Duke Energy Carolinas sought to achieve with its proposed rate design, which increased the residential Basic Facilities Charge by "approximately 50 percent of the difference between the current rate . . . and the customer-related cost . . . identified in the unit cost study," was to "use cost causation" along with "the concept of gradualism to effectively recover costs as they are incurred," with any decision to "defer[ ] a larger increase at this time merely shift[ing] the need to increase the Basic Facilit[ies] Charge to a future rate case proceeding." In addition, Mr. Pirro stated that, while the utility was "mindful of the impact of any rate increase on our customers, particularly low-income customers," it "applies cost causation principles to the extent possible" and believes that "[t]here are other means of addressing the financial needs of low-income customers which are more effective than biasing the rate design."

In light of the great deference that we owe to the Commission's decisions with respect to rate design issues, *North Carolina Textile Mfrs. Ass'n*, 313 N.C. at 222, 328 S.E.2d at 269, we hold that the record evidence is more than sufficient to support the Commission's decision to increase the residential Basic Facilities Charge from $11.80 to $14.00 in order to more accurately reflect cost-causation principles by removing a certain level of fixed costs from energy-related charges and assigning them among customers on a per customer rather than a per kilowatt hour basis. Although the environmental intervenors challenge the Commission's decision to approve the use of the Minimum

System Methodology for cost assignment purposes, the testimony of Ms. Hager provides ample justification for the decision in question. In deciding to approve the use of the Minimum System Methodology, the Commission "recognize[d] that any approach to classifying costs has virtues and vices" while noting that it "[was] not persuaded . . . that the minimum system analysis employed by [Duke Energy Carolinas] [was] flawed in a way that preclude[d] the Commission from accepting it as appropriate for cost allocation in this proceeding." Similarly, while the environmental intervenors urged the Commission to utilize a cost allocation methodology that assigned no portion of the utility's distribution system costs on a per customer, rather than a demand or energy-related basis, the Commission was well within the scope of its statutory authority in determining that a portion of the cost of its distribution system should be assigned on a per customer basis in light of the existence of record evidence tending to show that no customer could receive service in the absence of a minimal level of distribution facilities. The record also reflects that the Commission gave further heed to the concerns expressed by the environmental intervenors relating to the use of the Minimum System Methodology by concluding that "a more focused and explicit evaluation of options for distribution system cost allocation and an assessment of the extent to which any single allocation methodology is being consistently applied by the utilities" should be conducted in future general rate proceedings and directing the Public Staff "to facilitate discussions with the electric utilities to evaluate and document a basis for continued use of minimum system," "to identify specific changes and recommendations as appropriate," and to "submit a report on its findings and recommendations to the Commission" by the end of the first quarter of 2019.

At the end of the day, "[i]t is not this Court's duty to evaluate the accuracy of complex statistical models, conflicting methodologies, and the opposing expert opinions drawn therefrom," with this being, instead, "the duty of the Commission which has special knowledge, experience and training best suited to make such determinations." *State ex rel. Utils. Comm'n v. Carolina Utility Customers Ass'n*, 323 N.C. 238, 251, 372 S.E.2d 692, 699–700 (1988). In the event that this Court was to determine, as a matter of law, that the Commission is required to adopt a cost allocation methodology that refrained from assigning a portion of the cost of Duke Energy Carolinas' distribution system on a customer-related, rather than a demand or energy-related basis, on the basis of the evidentiary record developed in this case, we would be trespassing into territory that the General Assembly has assigned to the Commission and depriving that body of its statutorily-required

opportunity to use its expertise in determining such technical issues as whether a portion of the cost of the utility's distribution system should be treated as customer-related or demand-related costs and how best to assign those costs among the various components of individual rate schedules at the conclusion of the ratemaking process. As a result of the fact that the arguments for and against the use of the Minimum System Methodology "are essentially fact based and are more properly made to the Commission than to this Court," *id.* at 251, 372 S.E.2d at 699, we find no error of law in the Commission's decision to use that approach in designing Duke Energy Carolinas' residential Basic Facilities Charge.

The environmental intervenors' remaining challenges to the Commission's decision to approve an increase in the residential Basic Facilities Charge are equally unavailing. Although the General Assembly has stated that "it is declared to be the policy of the State of North Carolina" to "promote adequate, reliable, and economical utility service, N.C.G.S. § 62-2(a)(3); to "avoid[ ] wasteful, uneconomic, and inefficient use of energy," N.C.G.S. § 62-2(a)(4); to "encourage and promote harmony between public utilities, their users, and the environment," N.C.G.S. § 62-2(5); and "to conserve energy through efficient utilization of all resources," N.C.G.S. § 62-155(a), the General Assembly has also stated that it is the policy of the State of North Carolina to "[t]o provide just and reasonable rates and charges for public utility services without unjust discrimination, undue preferences, or advantages," N.C.G.S. § 62-2(4). An examination of the relevant statutory provisions, which are couched as policy pronouncements rather than specific statutory mandates, demonstrates that the Commission is required to attempt to further multiple, potentially conflicting, policy goals in carrying out its work. In view of the fact that the Commission is frequently called upon to choose between regulatory alternatives that further differing policy objectives, the ultimate question is whether the Commission appropriately balanced the competing regulatory policy goals that it is required to further in exercising its regulatory discretion given the state of the evidentiary record rather than whether its decision furthered a particular policy goal to the maximum extent possible. Thus, the Commission would not have committed any error of law in the event that it elected, based upon adequate evidentiary support, to place principal emphasis upon the need to eliminate existing cross-subsidies among customers and customer classes as compared to placing maximum price pressure upon energy use in making any particular ratemaking decision.

In addition, the Commission did not commit any error of law by adopting a specific dollar figure for Duke Energy Carolinas' residential

Basic Facilities Charge that was not advocated for by any particular party to this proceeding. In this case, the record reflects that the $14.00 per month figure to which the environmental intervenors object had the effect of moving the utility's residential Basic Facilities Charge what the Commission believed to a more cost-justified level in a gradual way in an attempt to reduce the amount of cross-subsidization inherent in the existing rate structure while mitigating the practical concerns that led the environmental intervenors to object to Duke Energy Carolinas' original proposal. The adoption of such an approach is well within the confines of the Commission's statutory authority. Similarly, the fact that the exact dollar figure at which the Commission established Duke Energy Carolinas' residential Basic Facilities Charge was identical to the dollar value set out in the stipulation between Duke Energy Progress and the Public Staff does not show the existence of any legal defect in the Commission's decision given that the evidence would have supported a higher residential Basic Facilities Charge than the Commission actually adopted and given that the figure chosen by the Commission represented a gradual increase in the residential Basic Facilities Charge toward a more cost-justified level in an effort to effectuate multiple regulatory goals, including the avoidance of overly drastic changes in a utility's rate structure at any single point in time.

As the Commission's decision to refrain from setting the utility's residential Basic Facilities Charge at the exact figure shown in the cost of service study suggests, the Commission's order demonstrates that it was well aware of the potential impact of this rate change upon certain categories of residential customers, particularly low-income customers. However, the determination that the benefits to be obtained as the result of the establishment of what it believed to be a more cost-justified rate schedule outweigh other relevant considerations is a decision that the Commission, in the exercise of its regulatory discretion, is entitled to make as long as its order contains adequate findings and conclusions and as long as those findings and conclusions have sufficient evidentiary support. In further recognition of the concerns expressed by the environmental intervenors, the Commission also concluded that there are "more effective" means of managing low-income customers' needs and "encourage[d] [Duke Energy Carolinas] . . . to identify low-income customers" who were likely to have difficulty with the increased rates "in order to provide assistance." As a result, the record reflects that the Commission adequately considered the interests of adversely affected customers in deciding to approve the establishment of a $14.00 per month Basic Facilities Charge for Duke Energy Carolinas' residential customers.

The Commission also adequately addressed the environmental intervenors' argument that its decision to increase the residential Basic Facilities Charge while leaving the Basic Facilities Charges for other customer classes unchanged was unduly discriminatory in violation of N.C.G.S. § 62-140. In response to this contention, the Commission noted that the utility's non-residential rate schedules were more complex than its residential rate schedules, with this statement being supported by evidence tending to show that many non-residential rate schedules contain a "demand charge" that reflects the "kilo-watt . . . capacity the power company must maintain to meet the [maximum] demand or requirement of the customer, though not used." *State ex rel. Utils. Comm'n v. Carolinas Committee for Industrial Power Rates, etc.*, 257 N.C. 560, 562, 126 S.E.2d 325, 327 (1962). Aside from making non-residential rate schedules more complex than residential rate schedules, the Commission noted that the use of a demand charge may serve to align non-residential rates more closely with cost-causation considerations than residential rates. In addition, the Commission found that the same divergence between appropriate cost-causation principles and the actual design of the utility's residential rates reflected in Duke Energy Carolinas' existing residential Basic Facilities Charge was not present in the utility's non-residential rates given that those rates generally included a demand, as well as a customer-related, component. As a result, for all of these reasons, we hold that the Commission did not commit any error of law by approving an increase in Duke Energy Carolinas' residential Basic Facilities Charge.[24]

## III. Conclusion

Thus, for all of these reasons, we conclude that the Commission did not err by: (1) allowing the inclusion of a large majority of the utilities' coal ash costs in the cost of service used for the purpose of establishing the utilities' North Carolina retail rates; (2) interpreting N.C.G.S. § 62-133(d) to authorize the Commission, in the exercise of its discretion, to allow a return on the unamortized balance of the deferred operating expenses; and (3) increasing Duke Energy Carolinas' residential Basic Facilities Charge from $11.80 to $14.00. On the other hand, we hold that the Commission erred by rejecting the Public Staff's equitable

24. Although we affirm the Commission's conclusions with respect to this issue in this case, we note that the Commission's rate design decisions do not have *res judicata* effect and may be revisited in future general rate proceedings. *Duke Power Co. I*, 285 N.C. at 395, 206 S.E.2d at 281; *State ex rel. Utils. Comm'n v. Edmisten*, 294 N.C. 598, 603, 242 S.E.2d 862, 866 (1978); *Thornburg I*, 325 N.C. at 469, 385 N.C. at 454.

sharing proposal without properly considering and making findings and conclusions concerning "all other material facts" as required by N.C.G.S. § 62-133(d). As a result, we affirm the Commission's decisions, in part, and reverse and remand the Commissions' decisions for further proceedings not inconsistent with this decision, in part.

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

Justice NEWBY concurring in part and dissenting in part.

I agree with most of the majority's analysis. I disagree, however, with the majority's conclusion that the Commission erred by rejecting the Public Staff's equitable sharing proposal in both the Duke Energy Progress (DEP) rate case and the Duke Energy Carolinas (DEC) rate case without, in the majority's view, properly considering and making findings and conclusions concerning "all other material facts" pursuant to N.C.G.S. § 62-133(d), specifically including the alleged environmental violations. To the contrary, the Utilities Commission considered all the evidence and chose not to assess further penalties, other than the $100,000,000 that it had already imposed, against the utilities in the respective orders. As such, the Utilities Commission did not abuse its discretion when choosing to reject the Public Staff's proposal. Moreover, the majority's approach seems to untether the Utilities Commission from its statutorily delineated discretion to make these determinations, which raises separation of powers concerns. Essentially, the majority seems to promulgate an unbridled approach contrary to the statutorily defined discretion and authority afforded to the Utilities Commission in its own, unique capacity. Therefore, I concur with the majority's opinion in part and dissent in part.

The Utilities Commission did not abuse its discretion in rejecting the Public Staff's equitable sharing proposal in both of its orders, the DEP Order as well as in the DEC Order. Notably, the Utilities Commission's discretionary determination is reviewed by this Court for an abuse of discretion. *See State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n*, 123 N.C. App. 623, 627, 473 S.E.2d 661, 664 (1996) ("Exercise of discretionary powers of the Commission will not be reversed by reviewing courts except upon a showing of 'capricious, unreasonable, or arbitrary action or disregard of law.' " (quoting *State ex rel. North Carolina Utils. Comm'n v. Carolina Coach Co.*, 261 N.C. 384, 391, 134 S.E.2d 689, 695 (1964))). Moreover, "the weighing of the evidence and the exercise of judgment thereon within the scope of [the Utilities Commission] authority are matters for the Commission."

*Carolina Coach Co.*, 261 N.C. at 391, 134 S.E.2d at 695 (citing *State ex rel. Utils. Comm'n v. Fredrickson Motor Express*, 232 N.C. 180, 59 S.E.2d 582 (1950)). Simply put, a reviewing court's authority is limited. *State ex rel. Utils. Comm'n v. Gen. Tel. Co. of Se.*, 281 N.C. 318, 336–37, 189 S.E.2d 705, 717 (1972).

"Neither such finding of fact nor the Commission's determination of what rates are reasonable may be reversed or modified by a reviewing court merely because the court would have reached a different finding or determination upon the evidence." *Id.* at 337, 189 S.E.2d at 717 (citing *State ex rel. Utils. Comm'n v. Morgan, Att'y Gen.*, 277 N.C. 255, 177 S.E.2d 405 (1970); *State ex rel. North Carolina Utils. Comm'n v. Southern Railway Co.*, 267 N.C. 317, 148 S.E.2d 210 (1966); *State ex rel. Utils. Comm'n v. S. Ry. Co.*, 254 N.C. 73, 118 S.E.2d 21 (1961); *State ex rel. Utils. Comm'n v. Gulf-Atl. Towing Corp.*, 251 N.C. 105, 110 S.E.2d 886 (1959)). While the Commission certainly must consider all statutory enumerated elements, "[t]he Legislature has . . . designated the Commission to do the weighing of these elements, and the reviewing court may not set aside the Commission's determination of 'fair value' merely because the court would have given the respective elements different weights and would, therefore, have arrived at a different 'fair value.' " *Id.* at 339, 189 S.E.2d at 719 (quoting *Morgan, Att'y Gen.*, 277 N.C. at 267, 177 S.E.2d at 413; then citing *State ex rel. Utils. Comm'n v. State and Utils. Comm'n v. Tel. Co.*, 239 N.C. 333, 344, 349, 80 S.E.2d 133, 140–141, 144 (1954); and then citing *State ex rel. North Carolina Utils. Comm'n v. Westco Tel. Co.*, 266 N.C. 450, 457, 146 S.E.2d 487, 491–92 (1966)).

Under the proper abuse of discretion standard of review, it cannot be said that the Utilities Commission's decision was so arbitrary that it could not be the result of a reasoned decision. The Utilities Commission's thorough orders demonstrate that it knew and was well aware of the alleged environmental violations. While the Utilities Commission need not and could not decide the merits of the alleged violations, it certainly took the underlying facts into account. The evidence admitted and the resulting orders show that the Utilities Commission properly considered all of the allegations. The Commission even noted it was "unable to find DEP faultless in the dilemma." The Commission stated that these circumstances of mismanagement resulted in its decision to impose $70,000,000 and $30,000,000 management penalties in the two orders.

Specifically, in the DEP rate case, the Commission decided to allow amortization of the deferred costs "over five years with a full return on the unamortized balance," but it did so after making a downward

adjustment for a management penalty. Moreover, in the DEC rate case, the Utilities Commission explained that, other than adjusting for a management penalty, it would not be appropriate for the Commission to exercise its discretion to make a further downward adjustment. In doing so, the Commission explained its decision:

> No witness argues that the Commission lacks the discretion to follow the precedent it established in [early rate cases,] where it addressed the issue of amortizing deferred ARO CCR remediation costs over five years and a return on the unamortized balance. No witness argues that the law forbids the Commission to authorize a return on the unamortized balance. The Commission chooses to exercise its discretion and authority under N.C.[G.S.] § 63-133(d) and follow its precedent here—amortize the ARO costs over five years and authorize a return on the unamortized balance . . . . The Commission will not accept the Public Staff equitable sharing argument primarily because the Commission determines in its discretion that amortization of the deferred ARO costs over 25 years is inequitable . . . .

The Commission clearly explained that, despite recognizing the alleged fault of the Utilities in their management of these situations, when considering rate setting, rates that do not allow a utility to recoup reasonable costs jeopardizes the financial strength of the utility, which results in higher rates for ratepayers over time and diminished quality of services that the utility must provide. Thus, the Commission's decisions certainly were not without reason and explanation; it therefore cannot be said that the Commission abused its discretion in allowing a downward adjustment in imposing management penalties, just not to the extent and in the way that the Public Staff requested. To the extent that the applicable statute gave the Utilities Commission a degree of discretion, it understood that it possessed the discretion and exercised the discretion appropriately, explaining its choice to do so.

Neither the Public Staff nor the majority can point to a factor that was not considered in either order. Instead, the Public Staff recommended that the Utilities Commission disallow the Utilities from recovering 50% of the coal ash closure costs in the DEP rate case, and 51% of costs in the DEC rate case. The Public Staff could offer no explanation for selecting the 50% and 51% disallowances. Contrary to the Public Staff's inability to explain its recommended percentages for disallowances, the

Commission did explain why the Public Staff's recommendation of a 51% disallowance in the Duke Energy Carolinas rate case was arbitrary:

> [T]he concept is standard-less, and, therefore, from the Commission's view arbitrary for purposes of disallowing identifiable costs—there is no rationale that supports a substantially large 51% disallowance. The Public Staff chose a desirable equitable sharing ratio, then backed into the mechanism to achieve that level of disallowance, leaving the allocation subject to an arbitrary and capricious attack, particularly as it provides no explanation as to why the "equitable" split for DEP in the 2018 DEP Case was in its view 50-50, while the "equitable" split in this case is 51-49. As the Commission held in the 2018 DEP Case, the "Public Staff provides insufficient justification for the 50/50 [split] as opposed to 60/40 or 80/20 . . . ." 2018 DEP Rate Order, p. 189.

Therefore, it does not appear that the Utilities Commission thought it lacked the authority to weigh all factors presented, nor do the Commission's orders show a willful decision to ignore the Public Staff's argument with regard to the environmental concerns. To the contrary, after carefully considering the Public Staff's recommendations as a whole, the Utilities Commission rejected the Public Staff's recommendation since the Commission already imposed a downward adjustment in the form of management penalties. Therefore, contrary to the majority's conclusion, these cases need not be remanded to the Utilities Commission because it did not abuse its discretion.

Further, the majority's approach in remanding the case to consider additional factors broadens the statutorily delineated discretion that the Utilities Commission has, thereby raising constitutional concerns about separation of powers. By statute, the Utilities Commission does not have unbridled discretion. When the General Assembly delegated some of its legislative authority to the Utilities Commission, the legislature properly set forth "adequate guiding standards to govern the exercise of the delegated powers." *Adams v. N.C. Dep't of Nat. and Econ. Res.*, 295 N.C. 683, 697, 249 S.E.2d 402, 410 (1978). "In fixing rates to be charged by a public utility, the Commission is exercising a function of the legislative branch of government." *Gen. Tel. Co. of Southeast*, 281 N.C. at 336, 189 S.E.2d at 717. The General Assembly, however, limited the Utilities Commission's discretion by setting forth specifically enumerated factors to consider when fixing rates, stated in section 62-133 of the General Statutes. The Commission must comply with the statutory requirements. *Id.* at 336, 189 S.E.2d at 717.

In addition to the specifically enumerated factors set forth in section 62-133, the statute also provides that "[t]he Commission shall consider all other material facts of record that will enable it to determine what are reasonable and just rates." N.C.G.S. § 62-133(d) (2019). The Utilities Commission should set forth the factors considered "so that the reviewing court may see what these elements are and determine the authority of the Commission to consider them as 'relevant to the present fair value.' The statute does not contemplate that the Commission may 'roam at large in an unfenced field' in the selection of such 'other facts.' " *Gen. Tel. Co. of Southeast*, 281 N.C. at 340, 189 S.E.2d at 719 (quoting *State ex rel. Utils. Comm'n v. Pub. Serv. Co.*, 257 N.C. 233, 237, 125 S.E.2d 457, 460 (1962)). While the Commission must consider the factors as enumerated in the statute, and failure to do so warrants reversal, so long as it does so, determining the weight given to those factors when reaching its conclusion is certainly within the Commission's authority and is not the role of a reviewing court. *Id.* at 358–59, 189 S.E.2d at 731.

Here the Commission held over a month of hearings and considered testimony and thousands of pages of exhibits. While the General Assembly has instructed that the Commission shall consider all material facts, this instruction must be read in the context of the entire statute, part of which directs the Commission to follow a specific formula when it sets rates for public utilities. *See* N.C.G.S. § 62-133(b), (c) (2019). These statutory guiding principles enable the Utilities Commission to constitutionally fulfill its role. The Public Staff's position, which essentially asks the Commission to deny a fair rate of return in its unbridled discretion, simply cannot be adopted without the Utilities Commission roaming outside the clear statutory requirements. Thus, allowing the Utilities Commission this type of unfettered discretion implicates separation-of-powers principles, which require that the legislature give specific, detailed guidelines to the Utilities Commission in exercising its legislative function of setting rates. Notably, the Commission reasoned that adopting unsupported percentages as set forth by the Public Staff would equate to the Commission acting arbitrarily and capriciously, which the Commission cannot do.[1] Therefore, the Commission's decision to

1. Moreover, the Utilities Commission certainly knew and understood the decision it made in *Dominion*, where it agreed to the Public Staff's stipulation about Dominion's ability to recover costs and receive a rate of return. *In re Application of Va. Elec. & Power Co., d/b/a Dominion N.C. Power, for Adjustment of Rates and Charges Applicable to Elec. Util. Serv. in N.C., Order Approving Rate Increase and Cost Deferrals and Revising PJM Regulatory Conditions*, Docket No. E-22, Sub 532 (December 22, 2016) (available through https://starw1.ncuc.net/NCUC/page/Orders/portal.aspx by searching docket number and date). If the Utilities Commission decides this case differently, the Commission could be charged with making an arbitrary and capricious decision, departing from a prior decision with very similar facts.

reject the Public Staff's recommendation was within its statutorily defined discretion.[2]

Thus, I disagree with the majority's conclusion that the Commission erred by rejecting the Public Staff's equitable sharing proposal without, in its view, properly considering and making findings and conclusions concerning "all other material facts." Both orders should be affirmed. Therefore, I respectfully concur in part and dissent in part.

Justice EARLS concurring in part and dissenting in part.

Starting for a moment with the basics of what this case involves, the law of North Carolina tasks us with the duty to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action." N.C.G.S. § 62-94(b) (2019). In so doing, this Court may:

> affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.

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2. The Commission reached its decision by thoroughly explaining its reliance on *Thornburg I* and *Thornburg II*, both of which dealt at least in part with plants that were never used at all. *See State ex rel. Utils. Comm'n v. Thornburg*, 325 N.C. 463, 385 S.E.2d 451 (1989) (*Thornburg I*); *State ex rel. Utils. Comm'n v. Thornburg*, 325 N.C. 484, 385 S.E.2d 463 (1989) (*Thornburg II*). This Court on appeal concluded that the Utilities Commission did not have the authority to effectuate any sort of "equitable sharing" position in its decision; either the plants and the relevant equipment were used and useful, and therefore should be included in rate base, or they were not. Therefore, the Utilities Commission here acted within the appropriate scope when determining that, after allowing a management penalty, that certain costs should be allowed based on the statutory criteria that control the Utilities Commission's ability to act.

*Id.* Further, we must take into account the policy of the State described by the General Assembly in statute, as well as the purposes of the laws it writes. *See*, *e.g.*, *State ex rel. Utils. Com. v. Morgan*, 277 N.C. 255, 266, 177 S.E.2d 405, 412 (1970) (taking account of the "clear purpose of chapter 62 of the General Statutes" as well as that chapter's declaration of policy to reject an interpretation of N.C.G.S. § 62-133(b) proposed by a utility). To that end, I observe that it is "the policy of the State of North Carolina," *inter alia*, to "provide fair regulation of public utilities in the interest of the public" and to "encourage and promote harmony between public utilities, their users and the environment." N.C.G.S. § 62-2(a) (2019). "To these ends, therefore, authority shall be vested in the North Carolina Utilities Commission to regulate public utilities generally, their rates, [and their] services and operations . . . in the manner and in accordance with the policies set forth in this Chapter." *Id.* § 62-2(b). The Commission is required to "fix such rates as shall be fair both to the public utilities and to the consumer." *Id.* § 62-133(a).

In this case the intervenors allege that the utilities have caused significant harm to the environment through their operations. The majority has already described some of the history of that harm, including the 2014 incident at Dan River resulting in between 30,000 and 39,000 tons of coal ash being discharged into the river, as well as the nine criminal violations to which the utilities pleaded guilty in federal court. Against the backdrop of new legislation requiring the utilities to address discharges at their coal ash basins, close all of their unlined coal ash basins, and change their coal ash management practices, *see* N.C.G.S. § 130A-309.211–.214, the utilities petitioned the Commission for permission to defer their compliance expenses. The utilities noted that, if they were required instead to "write off billions of dollars of costs for accounting purposes," their investors would receive a return on their investment of approximately 7.5% rather than the approximately 10.3% they would otherwise receive. This is the context of the decision before us—whether to affirm orders from the Commission which place the weight of coal ash cleanup costs on North Carolina energy customers so that investors in Duke Energy Progress and Duke Energy Carolinas receive a higher return on their investment.

I concur in the majority's conclusion that the orders entered by the North Carolina Utilities Commission are sufficient to satisfy the requirements of N.C.G.S. § 62-79(a) (2019) because the orders are "sufficient in detail to enable the court on appeal to determine the controverted questions presented." *See* N.C.G.S. § 62-79(a). Further, I concur in the majority's conclusion that the decision to increase the Basic Facilities

Charge levied by Duke Energy Carolinas for some classes of customers is supported by sufficient evidence in the record.

I also agree, in part, with the majority's discussion of the Commission's conclusions with respect to cost recovery. The Commission ultimately found that the coal ash expenditures made by Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC, were reasonable and prudent within the meaning of the statute so as to permit cost recovery in rates. The intervenors argued that all of these costs should have been disallowed because the utilities unreasonably decided to store coal ash in unlined basins, and further mismanaged those basins, resulting in environmental damage and increased cost to consumers. While the intervenors make a strong policy argument, the majority was correct on the law to reject such a broad claim. I write separately on this point, however, because I disagree with the majority's ultimate conclusion. In my view, the Commission erred by determining that the intervenors failed to produce evidence sufficient to trigger the utilities' burdens of persuasion that the costs were reasonable.

Further, I disagree with the majority's analysis concerning the extent of the Commission's discretionary authority pursuant to N.C.G.S. § 62-133(d) (2019) to allow the utilities to earn a return on the unamortized portion of their deferred coal ash costs.[1] While I agree with the majority's ultimate determination that the Commission did not appropriately utilize its discretion, which is expressed in the majority's remand for a more fulsome consideration of the Public Staff's equitable sharing proposal, I would hold that the Commission's authority is limited by the express terms of that statute and does not extend so far as the majority allows. As a result, I respectfully dissent from that portion of the majority's opinion.

**Cost recovery**

When the Commission is setting rates for a public utility, part of what it must do is determine the utility's "reasonable operating expenses." N.C.G.S. § 62-133(b)(3). When the Commission calculates the total amount of revenue that the utility will be allowed to recover from consumers through rates, the reasonable operating expenses are included in that figure. *Id.* § 62-133(b)(5). However, a utility may only

1. No part of the majority's opinion suggests that the coal ash expenditures were properly included in rate base as property used and useful, and therefore entitled to a return. *See* N.C.G.S. § 62-133(b)(1), (4). While the majority does not discuss this aspect of the case in detail, I elaborate on the issue below.

recover those operating expenses which are reasonable and prudent. *See*, *e.g.*, *State ex rel. Utils. Comm'n v. Eddleman*, 320 N.C. 344, 368, 358 S.E.2d 339, 355 (1987). While we presume that a utility's costs are reasonable, *State ex rel. Utils. Comm'n v. Conservation Council of N.C.*, 312 N.C. 59, 64, 320 S.E.2d 679, 683 (1984), the presumption is overcome if a challenger produces affirmative evidence that the costs "are exorbitant, unnecessary, wasteful, extravagant, or incurred in abuse of discretion or in bad faith or that such expenses exceed either the cost of the same or similar goods or services on the open market or the cost similar utilities pay to their affiliated companies for the same or similar goods or services," *State ex rel. Utils. Comm'n v. Intervenor Residents of Bent Creek/Mt. Carmel Subdivisions*, 305 N.C. 62, 76–77, 286 S.E.2d 770, 779 (1982) (*Bent Creek*). If this happens, the utility must satisfy its burden of persuasion to show that the costs are reasonable. *Id.* at 75–76, 286 S.E.2d at 778–79.

The majority holds that the Commission did not err when it determined that the Attorney General and other intervenors did not produce evidence to overcome the presumption of reasonableness for the utilities' costs. This may be true on a broad basis, in the sense that the intervenors did not produce evidence which would indicate that all of the utilities' costs were imprudent. As it relates to the utilities' decisions to utilize unlined coal ash basins in the first place, the intervenors largely produced evidence suggesting that the utilities' practices were shortsighted, motivated by near-term profit, or insufficiently sensitive to environmental concerns. Certainly, history has demonstrated that the utilities were insufficiently concerned with the environmental impacts of their actions, as evidenced by the extensive record of groundwater seepage, coal ash spills, and other negative environmental effects of the utilities' practices. Further, the evidence demonstrated that, at least in some cases, the utilities ignored the risk of environmental harm. For example, the record in the Duke Energy Progress rate case includes a report, prepared in 2004, regarding a long-term strategy for coal ash at the utility's L.V. Sutton Steam Electric Plant. The report identified problems at the plant, including (1) that an unlined coal ash basin was nearing capacity and would be full within two years, (2) that a nearby test monitoring well was showing high levels of arsenic, and (3) that environmental regulatory pressure was increasing on coal ash storage practices. The report outlined a number of long-term solutions, none of which had been implemented as of 2014. However, the statutory definition of reasonable operating expenses does not relate to the general reasonableness of the overall course of action but only to the reasonableness of the costs incurred. *See Bent Creek*, 305 N.C. at 76-77, 286 S.E.2d at 779.

I conclude that the Commission did err in its reasonableness determination because there was specific evidence produced that the particular costs incurred were exorbitant. "For rate-making purposes, the reasonable operating expenses of the utility must be determined by the Commission." *State ex rel. Utils. Comm'n v. N.C. Textile Mfrs. Ass'n.*, 309 N.C. 238, 239, 306 S.E.2d 113, 114 (1983) (per curiam) (citing N.C.G.S. § 62-133(b)). Where affirmative evidence is offered to challenge the reasonableness of incurred expenses, "[t]he Commission has the *obligation* to test the reasonableness of such expenses." *Bent Creek*, 305 N.C. at 76, 286 S.E.2d at 779. While the majority blesses wholesale the Commission's determinations that the intervenors failed to come forward with sufficient evidence, a closer examination of the record reveals that appropriate evidence was presented.

For example, consider the 2004 report in the record of the Duke Energy Progress rate case pertaining to coal ash management strategies at the L.V. Sutton Steam Electric Plant. The report noted that the plant was permitted for two coal ash basins, one of which was full and the other of which would be full within two years. The report also recognized that the basins "will eventually have to [be] emptied and placed in a lined containment to eliminate the leaching of the ash products into the ground water system." As noted previously, the report presented a number of long-term solutions for managing the facility's coal ash. These included the following options:

- doing nothing;
- increasing the capacity of the newer basin and building a new one in seven years;
- building a new basin more immediately;
- stacking dry ash at the facility and building a vertical dike to increase capacity at the plant;
- using the coal ash to build a golf course;
- using the coal ash to build a wildlife preserve and public park;
- using the coal ash to build an industrial park;
- stacking the dry ash and processing it for sale in cement manufacturing;
- shipping the ash to a landfill or storage facility; and

- using new technology to expand the capacity of the existing coal ash basins.

Significantly, the report also included a section labeled "Economic Analysis." That section stated the following for the "do nothing" approach:

> The economic components of this alternative are all negative and are a direct result of not having any available space in the existing ash pond. The cost figures are derived from the loss of generation from the plant until 2012, at which time the ash would be shipped for the DOT project and allow the plant to continue operation at that time.
>
> This alternative would not alleviate the potential emergent projects associated with the unlined 1983 ash pond, or the pre-ash pond disposal site, and the monitoring well issues. The economic evaluation for this alternative will reflect a negative impact based on the cost of these projects and the probability of their occurrence.

Out of the ten alternatives listed in the report, the "do nothing" approach was ranked very near the bottom of the list in an "Economical Ranking."

This is precisely the type of evidence that we identified in *Bent Creek* as "affirmative evidence [that] is offered by a party to the proceeding that challenges the reasonableness of expenses." *See Bent Creek*, 305 N.C. 62, 76–77, 286 S.E.2d 770, 779 (1982). Faced with evidence that the utilities identified and ignored problems which would lead to greater expenses in the future, the Commission was required to "test the reasonableness of such expenses" when they were presented by the utilities for cost recovery. *Id.* at 76, 286 S.E.2d at 779.

The Commission did not take the approach required of it to determine whether the expenses that the utilities sought to recover were reasonably incurred. A more appropriate approach is demonstrated in the dissents of Commissioner Clodfelter in both the Duke Energy Progress and Duke Energy Carolinas rate cases, where he examined the evidence pertaining to each facility to determine whether the utilities had incurred reasonable costs. As Commissioner Brown-Bland noted in her dissent to the Duke Energy Progress order, the approach taken by the Commission, "without further analysis, does not reasonably assure that the rates fixed for the Company's service are 'fair to both the public utility[y] and to the consumer,' and that the rate set by the Commission and to be received by the Company is just and reasonable." The Commission and the majority of this Court, by failing to undertake a detailed consideration of the

costs proposed by the utilities, wrongly ignore the 2004 report and other evidence suggesting that the costs proposed for recovery by the utilities were not reasonably incurred.

The majority states that it agrees with the Commission's determination that the intervenors failed to quantify the specific effect of these improprieties. However, neither the Commission nor the majority cite authority from this Court or the General Statutes for such a requirement. Having been presented with evidence that the utilities' expenses were unreasonable, the Commission should have required the utilities to prove that they were entitled to cost recovery. *Bent Creek*, 305 N.C. at 76, 286 S.E.2d at 779. For that reason, I dissent from the majority's conclusions that the intervenors did not satisfy the burden of production.

**Investment return**

*Property used and useful*

While the Commission allowed a return on the unamortized balance of the utilities' coal ash expenditures, such a return was not permitted as a result of the expenditures' inclusion in the utilities' rate base. *See*, *e.g.*, N.C.G.S. § 62-133(b)(1) (defining rate base to include the "original cost or the fair value under G.S. 62-133.1A of the public utility's property used and useful"); *State ex rel. Utils. Comm'n v. Thornburg*, 325 N.C. 463, 475, 385 S.E.2d 451, 458 (1989) (*Thornburg I*) (explaining that a utility may receive a return on property used and useful, but may not receive a return on reasonable operating expenses). Upon review of the Commission's orders in this case, I am convinced that further clarification is needed on what, in an ordinary ratemaking case, is properly included in rate base and reasonable operating expenses, respectively.

When calculating the rates that a utility may charge the public, the Commission must first determine the total revenues that the utility is entitled to obtain through rates charged to customers. N.C.G.S. § 62-133(b). In other words, the Commission has to figure out how much total money the utility gets from people who are paying for (in this case) electricity. To do this, the Commission uses a formula that has been prescribed by the General Assembly through statute. We have previously explained the formula:

> This statute requires the Commission to determine the utility's rate base (RB), its reasonable operating expenses (OE), and a fair rate of return on the company's capital investment (RR). These three components

> are then combined according to a formula which can be expressed as follows:
>
> (RB X RR) + OE = REVENUE REQUIREMENTS

*Thornburg I*, 325 N.C. at 467 n.2, 385 S.E.2d at 453 n.2. "[R]ate base," we explained, "is the reasonable cost of the utility's property which is used and useful in providing service to the public, minus accumulated depreciation, and plus the reasonable cost of the investment in construction work in progress." *Id.* So, when the Commission is determining how much money a utility can charge to consumers, the first thing that it must do is figure out how much "used and useful" property (otherwise known as rate base) the utility has, and to multiply the value of that property by a fair rate of return. This is what it means to say that a utility receives a rate of return on its property used and useful. However, the utility does not receive a rate of return on its reasonable operating expenses, which the statute distinguishes from property used and useful. *See* N.C.G.S. § 62-133(b); *accord Thornburg I*, 325 N.C. at 475, 385 S.E.2d at 458 ("While this statute makes clear that the rates to be charged by the public utility allow a return on the cost of the utility's property which is used and useful within the meaning of N.C.G.S. § 62-133(b)(1), the statute permits recovery but no return on the reasonable operating expenses ascertained pursuant to subdivision (3).").

Our prior decisions have provided further clarity on what is and is not included in rate base, and therefore on what the Commission may allow a return. In one case, we considered whether the Commission erred in allowing a utility to include amounts invested in plant facilities servicing abandoned power generation units. *State ex rel. Utils. Comm'n v. Thornburg*, 325 N.C. 484, 486, 385 S.E.2d 463, 464 (1989) (*Thornburg II*). There, the utility had built a facility with four nuclear generation power units while it turned out that only one was necessary to meet the needs of its customers. *Id.* at 487, 385 S.E.2d at 464. Determining that the Commission had erred by including the costs of the abandoned power generation units in rate base and allowing a return, we noted:

> The statute sets out a two-part test for the Commission to use in deciding what goes into the *rate base* for all costs except costs of construction work in progress. The Commission must: (1) determine the *reasonable* original cost of the property and (2) determine if the property is "used and useful, or to be used and useful within a reasonable time after the test period." If the costs in question

> do not meet both parts of the test, the costs may not be included in the *rate base* for ratemaking purposes.

*Id.* at 491, 385 S.E.2d at 466–67 (citations omitted). Because the amount that the utility sought to include in rate base "was spent to build *excess* common facilities," we concluded that they could not be included in rate base. *Id.* at 495, 385 S.E.2d at 469. This was because "[i]f the facilities are *excess*, as a matter of law, they cannot be considered 'used and useful' as that term is used in N.C.G.S. § 62-133(b)(1)." *Id.*

Similarly, we considered in another case whether a wastewater treatment plant that "was not in service at the end of the test year and, in fact, would never again be in service" was includable in rate base. *State ex rel. Utils. Comm'n v. Carolina Water Serv.*, 335 N.C. 493, 507, 439 S.E.2d 127, 135 (1994) (*Carolina Water*). We stated, reviewing our prior decisions:

> If facilities are not used and useful, they cannot be included in rate base. Including costs in rate base allows the company to earn a return on its investment at the expense of the ratepayers. We do not allow such a return for property that will not be used or useful within the near future. Costs for abandoned property may be recovered as operating expenses through amortization, but a return on the investment may not be recovered by including the unamortized portion of the property in rate base.

*Id.* at 508, 439 S.E.2d at 135 (citations omitted). We concluded that the wastewater treatment plant was no longer used and useful and held that "no portion of its costs may be included in rate base." *Id.*

Where a pipeline built to serve a former customer was later used as a storage facility, to the benefit of current customers, we have determined that the property was used and useful and properly included in rate base. *State ex rel. Utils. Comm'n v. N.C. Textile Mfrs. Ass'n*, 313 N.C. 215, 229–30, 328 S.E.2d 264, 273 (1985). Moreover, where a generating unit "is needed to enable [a utility] to meet the load on its system, and does not represent excess generating capacity," *Eddleman*, 320 N.C. at 355, 358 S.E.2d at 347, the unit is appropriately included in rate base as property used and useful, *Id.* at 362, 358 S.E.2d at 351–52.

In each case where we consider whether property is used and useful, the delineating factor is whether that property is currently useful for the provision of current service to customers. In *Thornburg II*, we concluded that excess common facilities should be excluded from rate

base because they were not being used to provide service to customers. 325 N.C. at 495, 385 S.E.2d at 469. Similarly, in *Carolina Water*, a wastewater treatment plant was not properly included in rate base because it was no longer being used to provide service to customers and would not be used in the future. 335 N.C. at 507–08, 439 S.E.2d at 135. By contrast, in *Textile Manufacturers Association*, we determined that a pipeline was properly included in rate base because it was being used as a storage facility, benefiting customers, notwithstanding the fact that it was not being used to its full capacity. 313 N.C. at 229-30, 328 S.E.2d at 273. Finally, in *Eddleman*, we determined that a generating unit that was being used as reserve capacity to handle the peak energy use of current customers was properly included in rate base as property used and useful. 320 N.C. at 355–60, 358 S.E. 2d at 347–50. Moreover, in each case, we considered whether *property* could be included in rate base. *See* N.C.G.S. § 62-133(b)(1) (including "the reasonable original cost or the fair value . . . of the public utility's property used and useful" in the calculation of rate base).

The Commission seems to have confused this analysis. For example, the Commission writes in its Duke Energy Carolinas order:

> Costs are not recoverable simply because they are incurred by the utility. The utility must show that the costs it seeks to recover are (1) "known and measurable"; (2) "reasonable and prudent"; and (3) where included in rate base "used and useful" in the provision of service to customers. . . . But once it has shown that these metrics are met, the utility should have the opportunity to recover the costs so incurred. This is what North Carolina's ratemaking statute requires. . ., and to do otherwise would amount to an unconstitutional taking.

Later, the Commission writes that "if the expenditures [of a utility] do support and provide service to customers, the costs are 'used and useful.' "

However, the Commission's references to "costs" and "expenditures" are broader than the General Assembly has prescribed, and broader than any case from this Court has previously allowed. Only "the cost of the public utility's property" receives a rate of return under the statutory ratemaking formula. N.C.G.S. § 62-133(b)(5). Similarly, our decisions on rate base have stated the figure includes "the reasonable cost of the utility's property which is used and useful in providing service to the public." *Thornburg I*, 325 N.C. at 467 n.2, 385 S.E.2d at 453 n.2; *accord Carolina*

*Water*, 335 N.C. at 508, 439 S.E.2d at 135 ("There is no statutory authority for including in rate base costs from a completed plant that is no longer used and useful within the meaning of this term as determined by our case law."). As a result, to the extent that the Commission determined that the utilities coal ash expenditures were includable in rate base as property used and useful, it erred as a matter of law.

*Discretionary authority pursuant to N.C.G.S. § 62-133(d)*

While the foregoing applies to the ordinary ratemaking case, the majority notes that the rate cases below involved extraordinary and unusual circumstances, triggering the Commission's obligation to "consider all other material facts of record that will enable it to determine what are reasonable and just rates." *See* N.C.G.S. § 62-133(d). The majority sets out a new, four-part test to evaluate the Commission's use of discretion pursuant to that provision. The majority holds that the Commission may utilize its authority under N.C.G.S. § 62-133(d) to "consider other material facts of record" in its determination of "reasonable and just rates" when (1) the rate case involves unusual, extraordinary, or complex circumstances not adequately addressed by the remainder of the statute, (2) the Commission reasonably concludes that a departure from the ordinary ratemaking process is justified, (3) the Commission determines that it must consider "other facts" to produce reasonable and just rates, and (4) the Commission makes sufficient factual findings and legal conclusions supported by substantial record evidence on a review of the whole record which explain (a) why the Commission is diverging from the usual ratemaking process and (b) why its adopted approach is reasonable and just to the utility and consumers.

This is an admirable procedural rule which the Commission must now follow before utilizing its discretionary authority under the statute. The rule helpfully states the categories of information that the Commission must include in its order. However, the majority's new rule provides no guidance on the substantive limits of the Commission's discretionary authority.[2] It also provides the Commission with little

2. The majority's analysis on this point highlights the extent to which the test could be improved as a guiding tool. The majority, analyzing the Commission's orders, notes only that the Commission appropriately identified the utilities' rate cases as unusual and that it contained detailed findings of fact and conclusions of law. According to the majority's test, such a finding triggers the use of the Commission's discretionary authority under N.C.G.S. § 62-133(d). It does not, however, explain why the Commission's particular use of its discretionary authority, here the decision to allow a rate of return on extraordinary operating costs, was appropriate. I also note that the majority's conclusion that "the Commission did not err in approving the basic ratemaking approach that was utilized in these proceedings" directly conflicts with the majority's later holding, that the Commission erred in rejecting

guidance as to when the Commission may appropriately use its discretionary authority to adjust the traditional ratemaking process, providing only the undefined standard of "unusual, extraordinary, or complex circumstances." As I read our prior decisions, the Commission's authority pursuant to N.C.G.S. § 62-133(d) is informed and limited by the remainder of that statute.

In *State ex rel. Utilities Commission v. Duke Power Company*, we held that the Commission acted within its statutory power when, pursuant to N.C.G.S. § 62-133(d), it reduced a utility's rate base to offset accumulated depreciation expense, avoiding "a windfall to [the utility] and a penalty to its customers." 305 N.C. 1, 19, 287 S.E.2d 786, 797 (1982). This adjustment, we explained, was necessary to preserve "the overall scheme of G.S. § 62-133." *Id.* at 15, 287 S.E.2d at 794.

In *Thornburg I*, we blessed the Commission's decision, pursuant to N.C.G.S. § 62-133(d), to liberally construe the statutory provision allowing cost recovery of reasonable operating expenses to include abandonment losses. 325 N.C. at 476, 385 S.E.2d at 458. We noted that the Commission is permitted by that section of the statute "to consider 'all other material facts of record' beyond those specifically set forth in the statute," and stated that this authority meant that "the Commission would not be bound by a strict interpretation of" the other parts of the statute when it utilized this discretion. *Id.* at 478, 385 S.E.2d at 459.

In *State ex rel. Utilities Commission v. Carolina Power & Light Company*, we affirmed the Commission's exercise of discretionary authority pursuant to N.C.G.S. § 62-133(d) because the exercise of that authority gave effect to the intent of the legislature and was consistent with the explicit language of N.C.G.S. § 62-133(c). 320 N.C. 1, 13, 358 S.E.2d 35, 42 (1987).

In each of these cases, we affirmed the Commission's use of its discretionary authority under N.C.G.S. § 62-133(d) because doing so gave effect to the rest of the ratemaking statute. In each case, the Commission's exercise of discretion, while departing slightly from the straightforward calculation prescribed by the remainder of Section 62-133, nevertheless complemented the structure of that statute and was necessary to avoid the "defeat of the overall scheme of G.S. § 62-133." *Duke Power Co.*,

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the Public Staff's equitable sharing proposal. The proposal included disallowing a return on the unamortized portion of the coal ash expenditures. Both of the Commission's decisions (to allow a return and to reject the proposal) implicate the Commission's authority under N.C.G.S. § 62-133(d).

305 N.C. at 15, 287 S.E.2d at 794. This is consistent with our admonition that "N.C.G.S. § 62-133(d) has been construed as a device permitting the Commission to take action *consistent with the overall command of the general rate statutes, but not specifically mentioned in those portions of the statute under consideration in a given case*." *State ex rel. Utils. Comm'n v. Nantahala Power & Light Co.*, 313 N.C. 614, 690–91, 332 S.E.2d 397, 442 (1985) (emphasis added). As a result, it is incorrect for the majority to state that the Commission's authority pursuant to N.C.G.S. § 62-133(d) is not limited by the rest of that statute. To the contrary, the Commission's use of N.C.G.S. § 62-133(d) must be consistent with the overall scheme of the ratemaking structure set out by the General Assembly.

Having discussed the overreaching nature of the general grant of authority the majority has given the Commission, I must emphasize that the specific outcome reached by the Commission below is in direct contradiction of both the statute and our prior decisions. Pursuant to the overall scheme of N.C.G.S. § 62-133, "the rates to be charged by the public utility allow a return on the cost of the utility's property which is used and useful within the meaning of N.C.G.S. § 62-133(b)(1)," and "the statute permits recovery but no return on the reasonable operating expenses ascertained pursuant to subdivision (3)." *Thornburg I*, 325 N.C. at 475, 385 S.E.2d at 458. "Including costs in rate base allows the company to earn a return on its investment at the expense of the ratepayers." *Carolina Water*, 335 N.C. at 508, 439 S.E.2d at 135. By concluding that the Commission may depart from these fundamental principles, the majority expands the discretionary authority permitted under N.C.G.S. § 62-133(d) beyond any semblance of the legislative intent evidenced by the text. Where the ratemaking statute specifically limits application of a rate of return to property used and useful, the Commission's discretion to consider other relevant facts cannot be interpreted so broadly as to achieve the opposite result. *State ex rel. Utils. Comm'n v. Gen. Tel. Co.*, 281 N.C. 318, 336, 189 S.E.2d 705, 717 (1972) ("The Commission, however, does not have the full power of the Legislature but only that portion conferred upon it in G.S. Chapter 62. In fixing the rates to be charged by a public utility for its service, the Commission must, therefore, comply with the requirements of that chapter, more specifically, G.S. 62-133.").

Our decision in *Carolina Water* is particularly instructive. There, the Commission treated an out-of-service wastewater treatment plant "as an extraordinary property retirement," determining "that the unrecoverable costs should be amortized over ten years with the unamortized

portion being included in rate base." 335 N.C. at 507, 439 S.E.2d at 135. Similarly, here, the Commission permitted amortization over a period of time for a portion of the coal ash expenditures and a return on the unamortized portion. Our conclusion in *Carolina Water* that the unamortized portion of costs that did not represent used and useful property were not entitled to a return should control the decision here.

As the Commission wrote in its DEC order, "[i]f the North Carolina General Assembly had intended to give the Commission the authority to deny otherwise recoverable environmental compliance costs due to some punitive theory of causation, it could have said so—and it did not." Just the same, if the General Assembly had intended to give the Commission the authority to allow a rate of return on expenses rather than property, "it could have said so—and it did not." "The legislature does not operate in a vacuum," in the Commission's words. "Rather, it operates within the context of N.C. Gen. Stat. § 62-133 . . . [h]ad it intended to disavow the routine cost recovery standard, it can be expected that the legislature would have had to do so explicitly."

As a final note, the majority remands this case to the Commission for reconsideration of the Public Staff's equitable sharing proposal. Because the proposal is consistent with the overall structure of N.C.G.S. § 62-133, it would likely fall within the limits of the Commission's discretionary authority pursuant to subparagraph (d) of that section, as described in our precedents. Further, the Public Staff's proposal more closely conforms to the General Assembly's mandate that "the Commission shall fix such rates as shall be fair both to the public utilities and to the consumer" than do the results reached in the Commission's orders that are being remanded now.

Returning to the basics of why this case matters, by constitutional mandate, it is the "the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry." N.C. Const. art. XIV, § 5. Although the Constitution provides particular prescriptions intended to achieve that goal, this provision illustrates the state's commitment to environmental protection and enshrines that commitment in our most fundamental source of state law. While the Commission is explicitly charged with "encouraging and promoting harmony between public utilities, their users and the environment," N.C.G.S. § 62-2(a)(5), that statutory mandate must also be read consistent with the state constitutional protections designed to ensure the State protects its lands and waters.

# APPENDIXES

GENERAL RULES OF PRACTICE

---

STATE BAR RULES AND REGULATIONS

---

ANNUAL MEMBERSHIP FEES

---

DISCIPLINE AND DISABILITY OF ATTORNEYS

---

PROCEDURES FOR ADMINISTRATIVE COMMITTEE

---

CERTIFICATION STANDARDS FOR IMMIGRATION LAW SPECIALTY

---

PROFESSIONAL CORPORATIONS AND LLCS PRACTICING LAW

---

REGISTRATION OF INTERSTATE AND INTERNATIONAL LAW FIRMS

---

PREPAID LEGAL SERVICES PLANS

---

BOARD OF LAW EXAMINERS

---

CHIEF JUSTICE'S COMMISSION ON FAIRNESS AND EQUITY

---

RESPONSE TO ORDER ESTABLISHING COMMISSION ON FAIRNESS AND EQUITY

---

BUSINESS COURT RULES

---

RULES OF APPELLATE PROCEDURE

---

RULES FOR MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

---

RULES OF MEDIATION FOR MATTERS BEFORE THE CLERK OF SUPERIOR COURT

---

RULES FOR SETTLEMENT PROCEDURES IN DISTRICT COURT FAMILY FINANCIAL CASES

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## ORDER AMENDING THE GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to section 7A-34 of the General Statutes of North Carolina, the Court hereby amends Rule 5 of the General Rules of Practice for the Superior and District Courts.

* * *

**Rule 5. ~~Form~~Filing of Pleadings and Other Documents**

(a) **Electronic Filing**. Electronic filing is available only in (i) cases that are either designated "complex business" or assigned to a Business Court judge under Rule 2.1 of these rules and (ii) cases subject to the North Carolina eFiling Pilot Project. The procedure for filing documents electronically in those cases is governed by the North Carolina Business Court Rules and by the Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project, respectively. In all other cases, only paper filing is available.

~~(a)~~(b)**Paper Filing.** ~~If feasible, each paper presented to the court for filing shall~~Documents filed with the court in paper should be ~~flat and~~ unfolded~~, without manuscript cover,~~ and firmly bound with no manuscript cover.

~~All papers presented to the court for filing shall~~ They must be letter size (8 ½" x 11"), ~~with the exception of~~except for wills and exhibits. The ~~Clerk of Superior Court~~clerk of superior court ~~shall~~may require a party to refile ~~any paper which~~a document that does not conform to ~~this size~~these requirements. ~~This subsection of this rule shall become effective on July 1, 1982. Prior to that date either letter or legal size papers will be accepted.~~

~~(b) All papers filed in~~In civil actions, special proceedings, and estates, documents filed with the court in paper ~~shall~~must include a cover sheet that summarizes~~as the first page of the filing a cover sheet summarizing~~ the critical elements of the ~~filing~~document in a format that the Administrative Office of the Courts prescribes~~prescribed by the Administrative Office of the Courts~~. The ~~Clerk of Superior Court shall~~ clerk of superior court may not reject the filing of ~~any paper~~a document that does not include ~~the required~~a cover sheet. Instead, the clerk ~~shall~~ must file the ~~paper~~document, notify the ~~filing~~ party of the omission, and grant the ~~filing~~ party ~~a reasonable time not to exceed five (5) days within which~~no more than five days to file the ~~required~~ cover sheet. ~~Until such time as the party files the required cover sheet, the court shall take no further action other than dismissal in the case.~~Other than dismissing the

case, the court should not act on the document before the cover sheet is filed.

**Comment**

The North Carolina Judicial Branch will implement a statewide electronic-filing and case management system beginning in 2021. The system will be made available across the state in phases over a five-year period.

Subsection (a) of Rule 5 of the General Rules of Practice lists those contexts in which electronic filing already exists and serves as a placeholder until the new electronic-filing and case-management system is available. As the new system is implemented, litigants should expect the General Rules of Practice, the North Carolina Business Court Rules, and the Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project to undergo change.

* * *

This amendment to the General Rules of Practice for the Superior and District Courts becomes effective on 1 October 2020.

This amendment 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 23rd day of September, 2020.

Mark A. Davis
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of September, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

## AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules and Regulations and to 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 meetings on April 17, 2020, and July 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, as particularly set forth in the following sections of the North Carolina Administrative Code, be amended as shown in the listed attachments (additions are underlined, deletions are interlined):

- **Attachment 1: 27 N.C.A.C. 1A, Section .0200, Membership – Annual Membership Fees**
- **Attachment 2: 27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys**
- **Attachment 3: 27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee**
- **Attachment 4: 27 N.C.A.C. 1D, Section .2600, Certification Standards for the Immigration Law Specialty Committee**
- **Attachment 5: 27 N.C.A.C. 1E, Section .0100, Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law**
- **Attachment 6: 27 N.C.A.C. 1E, Section .0200, Registration of Interstate and International Law Firms**
- **Attachment 7: 27 N.C.A.C. 1E, Section .0300, Rules Concerning Prepaid Legal Services Plans**

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 regularly called meetings on April 17, 2020, and July 24, 2020.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of September, 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 25th day of September, 2020.

s/Cheri Beasley
Cheri 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 25th day of September, 2020.

s/Davis, J.
For the Court

**ATTACHMENT 1**

**AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR**

**Submitted to the North Carolina Supreme Court on September 11, 2020**

**27 NCAC 01A .0200 PROCEDURES FOR THE ADMINISTRATIVE COMMITTEE**

**.0203 ANNUAL MEMBERSHIP FEES; WHEN DUE**

(a) Amount and Due Date
The annual membership fee shall be in the amount determined by the Council as provided by law and shall be due and payable to the secretary of the North Carolina State Bar on January 1 of each year. The annual membership fee shall be ~~and the same shall become~~ delinquent if not paid by the last day of June ~~before July 1~~ of each year. For calendar year 2020 only, the annual membership fee shall be delinquent if not paid by August 31, 2020.

(b) Late Fee
Any attorney who fails to pay the entire annual membership fee in the amount determined by the Council as provided by law and the annual Client Security Fund assessment approved by the North Carolina Supreme Court by the last day of June ~~before July 1~~ of each year shall also pay a late fee of $30. For calendar year 2020 only, any attorney who fails to pay the entire annual membership fee in the amount determined by the Council as provided by law and the annual Client Security Fund assessment approved by the North Carolina Supreme Court by August, 31, 2020 shall also pay a late fee of $30.

(c) Waiver of All or Part of Dues
No part of the annual membership fee or Client Security Fund assessment shall be prorated or apportioned to fractional parts of the year, and no part of the membership fee or Client Security Fund assessment shall be waived or rebated for any reason with the following exceptions:

(1) A person licensed to practice law in North Carolina for the first time by examination shall not be liable for dues or the Client Security Fund assessment during the year in which the person is admitted;

(2) A person licensed to practice law in North Carolina serving in the armed forces, whether in a legal or nonlegal capacity, will

be exempt from payment of dues and Client Security Fund assessment for any year in which the member is on active duty in the military service;

(3) A person licensed to practice law in North Carolina who files a petition for inactive status on or before December 31 of a given year shall not be liable for the membership fee or the Client Security Fund assessment for the following year if the petition is granted. A petition shall be deemed timely if it is postmarked on or before December 31.

## ATTACHMENT 2

## AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

**Submitted to the North Carolina Supreme Court on September 11, 2020**

### 27 NCAC 01B .0113 PROCEEDINGS BEFORE THE GRIEVANCE COMMITTEE

(a) Probable Cause - The Grievance Committee or any of its panels acting as the Grievance Committee with respect to grievances referred to it by the chairperson of the Grievance Committee will determine whether there is probable cause to believe that a respondent is guilty of misconduct justifying disciplinary action. In its discretion, the Grievance Committee or a panel thereof may find probable cause regardless of whether the respondent has been served with a written letter of notice. The respondent may waive the necessity of a finding of probable cause with the consent of the counsel and the chairperson of the Grievance Committee. A decision of a panel of the committee may not be appealed to the Grievance Committee as a whole or to another panel (except as provided in 27 N.C.A.C. 1A, .0701(a)(3)).

(b) Oaths and Affirmations - The chairperson of the Grievance Committee will have the power to administer oaths and affirmations.

(c) Record of Grievance Committee's Determination - The chairperson will keep a record of the Grievance Committee's determination concerning each grievance and file the record with the secretary.

(d) Subpoenas - The chairperson will have the power to subpoena witnesses, to compel their attendance, and compel the production of books, papers, and other documents deemed necessary or material to any preliminary hearing. The chairperson may designate the secretary to issue such subpoenas.

(e) Closed Meetings - The counsel and deputy counsel, the witness under examination, interpreters when needed, and, if deemed necessary, a stenographer or operator of a recording device may be present while the committee is in session and deliberating, but no persons other than members may be present while the committee is voting.

(f) Disclosure of Matters Before the Grievance Committee - The results of any deliberation by the Grievance Committee will be disclosed to the counsel and the secretary for use in the performance of their duties.

Otherwise, a member of the committee, the staff of the North Carolina State Bar, any interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the committee only when so directed by the committee or a court of record.

(g) Quorum Requirement - At any preliminary hearing held by the Grievance Committee, a quorum of one-half of the members will be required to conduct any business. Affirmative vote of a majority of members present will be necessary to find that probable cause exists. The chairperson will not be counted for quorum purposes and will be eligible to vote regarding the disposition of any grievance only in case of a tie among the regular voting members.

(h) Results of Grievance Committee Deliberations - If probable cause is found and the committee determines that a hearing is necessary, the chairperson will direct the counsel to prepare and file a complaint against the respondent. If the committee finds probable cause but determines that no hearing is necessary, it will direct the counsel to prepare for the chairperson's signature an admonition, reprimand, or censure. If no probable cause is found, the grievance will be dismissed or dismissed with a letter of warning or a letter of caution.

(i) Letters of Caution - If no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is unprofessional or not in accord with accepted professional practice, the committee may issue a letter of caution to the respondent recommending that the respondent be more professional in his or her practice in one or more ways which are to be specifically identified.

(j) Letters of Warning

(1) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is an unintentional, minor, or technical violation of the Rules of Professional Conduct, the committee may issue a letter of warning to the respondent. The letter of warning will advise the respondent that he or she may be subject to discipline if such conduct is continued or repeated. The letter will specify in one or more ways the conduct or practice for which the respondent is being warned. The letter of warning will not constitute discipline of the respondent.

(2) A copy of the letter of warning will be maintained in the office of the counsel for three years. If relevant, a copy of the letter of

warning may be offered into evidence in any proceeding filed against the respondent before the commission within three years after the letter of warning is issued to the respondent. In every case filed against the respondent before the commission within three years after the letter of warning is issued to the respondent, the letter of warning may be introduced into evidence as an aggravating factor concerning the issue of what disciplinary sanction should be imposed. A copy of the letter of warning may be disclosed to the Grievance Committee if another grievance is filed against the respondent within three years after the letter of warning is issued to the respondent.

(3) (A) If valid service upon the respondent has previously been accomplished by certified mail, personal service, publication, or acceptance of service by the respondent or the respondent's counsel, a copy of the letter of warning may be served upon the respondent by mailing a copy of the letter of warning to the respondent's last known address on file with the State Bar. Service shall be deemed complete upon deposit of the letter of warning in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(B) If valid service upon the respondent has not previously been accomplished by certified mail, personal service, publication, or acceptance of service by the respondent or the respondent's counsel, a copy of the letter of warning shall be served upon the respondent by certified mail or personal service. If diligent efforts to serve the respondent by certified mail and by personal service are unsuccessful, the letter of warning shall be deemed served by mailing a copy of the letter of warning to the respondent's last known address on file with the State Bar. Service shall be deemed complete upon deposit of the letter of warning in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service. ~~A copy of the letter of warning will be served upon the respondent in person or by certified mail. A respondent who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the letter of warning to the respondent's last known address on file with the NC State Bar. Service shall be deemed complete upon deposit of the letter of warning in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.~~ Within 15 days after

service, the respondent may refuse the letter of warning and request a hearing before the commission to determine whether the respondent violated ~~a violation of~~ the Rules of Professional Conduct ~~has occurred~~. Such refusal and request will be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. The refusal will state that the letter of warning is refused. If the respondent does not serve a refusal and request ~~are not served~~ within 15 days after service upon the respondent of the letter of warning, the letter of warning will be deemed accepted by the respondent. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown.

(4) In cases in which the respondent refuses the letter of warning, the counsel will prepare and file a complaint against the respondent at the commission.

(k) Admonitions, Reprimands, and Censures

(1) If probable cause is found but it is determined by the Grievance Committee that a complaint and hearing are not warranted, the committee shall issue an admonition in cases in which the respondent has committed a minor violation of the Rules of Professional Conduct, a reprimand in cases in which the respondent's conduct has violated one or more provisions of the Rules of Professional Conduct and caused harm or potential harm to a client, the administration of justice, the profession, or members of the public, or a censure in cases in which the respondent has violated one or more provisions of the Rules of Professional Conduct and the harm or potential harm caused by the respondent is significant and protection of the public requires more serious discipline. To determine whether more serious discipline is necessary to protect the public or whether the violation is minor and less serious discipline is sufficient to protect the public, the committee shall consider the factors delineated in subparagraphs (2) and (3) below.

(2) Factors that shall be considered in determining whether protection of the public requires a censure include, but are not limited to, the following:

(A) prior discipline for the same or similar conduct;

(B) prior notification by the North Carolina State Bar of the wrongfulness of the conduct;

(C) refusal to acknowledge wrongful nature of conduct;

(D) lack of indication of reformation;

(E) likelihood of repetition of misconduct;

(F) uncooperative attitude toward disciplinary process;

(G) pattern of similar conduct;

(H) violation of the Rules of Professional Conduct in more than one unrelated matter;

(I) lack of efforts to rectify consequences of conduct;

(J) imposition of lesser discipline would fail to acknowledge the seriousness of the misconduct and would send the wrong message to members of the Bar and the public regarding the conduct expected of members of the Bar;

(K) notification contemporaneous with the conduct at issue of the wrongful nature of the conduct and failure to take remedial action.

(3) Factors that shall be considered in determining whether the violation of the Rules is minor and warrants issuance of an admonition include, but are not limited to, the following:

(A) lack of prior discipline for same or similar conduct;

(B) recognition of wrongful nature of conduct;

(C) indication of reformation;

(D) indication that repetition of misconduct not likely;

(E) isolated incident;

(F) violation of the Rules of Professional Conduct in only one matter;

(G) lack of harm or potential harm to client, administration of justice, profession, or members of the public;

(H) efforts to rectify consequences of conduct;

(I) inexperience in the practice of law;

(J) imposition of admonition appropriately acknowledges the minor nature of the violation(s) of the Revised Rules of Professional Conduct;

(K) notification contemporaneous with the conduct at issue of the wrongful nature of the conduct resulting in efforts to take remedial action;

(L) personal or emotional problems contributing to the conduct at issue;

(M) successful participation in and completion of contract

with Lawyer's Assistance Program where mental health or substance abuse issues contributed to the conduct at issue.

(l) Procedures for Admonitions, ~~and~~ Reprimands, and Censures

(1) A record of any admonition, reprimand, or censure issued by the Grievance Committee will be maintained in the office of the secretary.

(2) (A) If valid service upon the respondent has previously been accomplished by certified mail, personal service, publication, or acceptance of service by the respondent or the respondent's counsel, a copy of the admonition, reprimand, or censure may be served upon the respondent by mailing a copy of the admonition, reprimand, or censure to the respondent's last known address on file with the State Bar. Service shall be deemed complete upon deposit of the admonition, reprimand, or censure in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(B) If valid service upon the respondent has not previously been accomplished by certified mail, personal service, publication, or acceptance of service by the respondent or the respondent's counsel, ~~A~~ a copy of the admonition, reprimand, or censure shall ~~will~~ be served upon the respondent ~~in person or~~ by certified mail or personal service. If diligent efforts to serve the respondent by certified mail and by personal service are unsuccessful, the respondent shall be served ~~A respondent who cannot, with due diligence, be served by certified mail or personal service shall be deemed served~~ by ~~the~~ mailing ~~of~~ a copy of the admonition, reprimand, or censure to the respondent's last known address on file with the ~~NC~~ State Bar. Service shall be deemed complete upon deposit of the admonition, reprimand, or censure in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(3) Within 15 days after service the respondent may refuse the admonition, reprimand, or censure and request a hearing before the commission. Such refusal and request will be in writing, addressed to the Grievance Committee, and served upon the secretary by certified mail, return receipt requested. The refusal will state that the admonition, reprimand, or censure is refused.

(4) If a refusal and request are not served upon the secretary within 15 days after service upon the respondent of the admonition, reprimand, or censure, the admonition, reprimand, or censure will be deemed accepted by the respondent. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown. A censure that is deemed accepted by the respondent must be filed as provided by Rule .0127(a)(3) of this subchapter.

(5) In cases in which the respondent refuses an admonition, reprimand, or censure, the counsel will prepare and file a complaint against the respondent at the commission.

(m) Disciplinary Hearing Commission Complaints - Formal complaints will be issued in the name of the North Carolina State Bar as plaintiff and signed by the chairperson of the Grievance Committee. Amendments to complaints may be signed by the counsel alone, with the approval of the chairperson of the Grievance Committee.

**ATTACHMENT 3**

**AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR**

**Submitted to the North Carolina Supreme Court on September 11, 2020**

**27 NCAC 01D .0902 REINSTATEMENT FROM INACTIVE STATUS**

(a) Eligibility to Apply for Reinstatement

Any member who has been transferred to inactive status may petition the council for an order reinstating the member as an active member of the North Carolina State Bar.

(b) Definition of "Year"

As used in this rule, a year is a 365 day period of time unless a calendar year is specified.

(c) Requirements for Reinstatement

(1) Completion of Petition.
The member must provide the information requested on a petition form prescribed by the council and must sign the petition under oath.

(2) CLE Requirements Before Inactive.
Unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph (c)(5) of this rule, the member must satisfy the minimum continuing legal education requirements, as set forth in Rule .1518 of this subchapter, for the calendar year in which the member was transferred to inactive status, (the "subject year") if such transfer occurred on or after July 1 of the subject year, including any deficit from a prior calendar year that was carried forward and recorded in the member's CLE record for the subject year.

(3) Character and Fitness to Practice.
The member must have the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and must show that the member's resumption of the practice of law within this state will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest.

(4) Additional CLE Requirements.
If more than 1 year has elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must complete 12 hours of approved CLE for each year that the member was inactive up to a maximum of 7 years. The CLE hours must be completed within 2 years prior to filing the petition. For each 12-hour increment, ~~6 hours may be taken online and~~ 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism. If during the period of inactivity the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision without regard to whether they were taken during the 2 years prior to filing the petition.

(5) Bar Exam Requirement If Inactive 7 or More Years.
[Effective for all members who are transferred to inactive status on or after March 10, 2011.] If 7 years or more have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must obtain a passing grade on a regularly scheduled North Carolina bar examination. A member subject to this requirement does not have to satisfy the CLE requirements in paragraphs (c)(2) and (c)(4).

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of inactive status shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(4) for each year that the member was inactive up to a maximum of 7 years.

(B) Military Service. Each calendar year in which an inactive member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate the requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(4) for each year that the member was inactive up to a maximum of 7 years.

(6) Payment of Fees, Assessments and Costs.
The member must pay all of the following:

(A) a ~~$125.00~~ reinstatement fee in an amount determined by the Council;

(B) the membership fee and the Client Security Fund assessment for the year in which the application is filed;

(C) the annual membership fee, if any, of the member's district bar for the year in which the application is filed and any past due annual membership fees for any district bar with which the member was affiliated prior to transferring to inactive status;

(D) all attendee fees owed the Board of Continuing Legal Education for CLE courses taken to satisfy the requirements of paragraphs (c)(2), (4), and (5);

(E) any costs previously assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission; and/or the secretary or council of the North Carolina State Bar; and

(F) all costs incurred by the North Carolina State Bar in investigating and processing the application for reinstatement.

(d) Service of Reinstatement Petition
The petitioner shall serve the petition on the secretary. The secretary shall transmit a copy of the petition to the members of the Administrative Committee and to the counsel.

(e) Investigation by Counsel
The counsel may conduct any necessary investigation regarding the petition and shall advise the members of the Administrative Committee of any findings from such investigation.

(f) Recommendation of Administrative Committee
After any investigation of the petition by the counsel is complete, the Administrative Committee will consider the petition at its next meeting and shall make a recommendation to the council regarding whether the petition should be granted. The chair of the Administrative Committee may appoint a panel composed of at least three members of the committee to consider any petition for reinstatement and, on behalf of the Administrative Committee, to make a recommendation to the council regarding whether the petition should be granted.

(1) Conditions Precedent to Reinstatement. Upon a determination that the petitioner has failed to demonstrate competence

to return to the practice of law, the committee may require the petitioner to complete a specified number of hours of continuing legal education, which shall be in addition to the requirements set forth in Rule .0902(b)(2) and (4) above, as a condition precedent to the committee's recommendation that the petition be granted,

(2) Conditions Subsequent to Reinstatement. Upon a determination that the petitioner is fit to return to the practice of law pursuant to the reasonable management of his or her substance abuse, addiction, or debilitating mental condition, the committee may recommend to the council that the reinstatement petition be granted with reasonable conditions to which the petitioner consents. Such conditions may include, but are not limited to, an evaluation by a mental health professional approved by the Lawyer Assistance Program (LAP), compliance with the treatment recommendations of the mental health professional, periodic submission of progress reports by the mental health professional to LAP, and waiver of confidentiality relative to diagnosis and treatment by the mental health professional.

(3) Failure of Conditions Subsequent to Reinstatement. In the event the petitioner fails to satisfy the conditions of the reinstatement order, the committee shall issue a notice directing the petitioner to show cause, in writing, why the petitioner should not be suspended from the practice of law. Notice shall be served and the right to request a hearing shall be as provided in Rule .0902(f) below. The hearing shall be conducted as provided in Section .1000 of this subchapter provided, however, the burden of proof shall be upon the petitioner to show by clear, cogent, and convincing evidence that he or she has satisfied the conditions of the reinstatement order.

(g) Hearing Upon Denial of Petition for Reinstatement

(1) Notice of Council Action and Request for Hearing
If the council denies a petition for reinstatement, the petitioner shall be notified in writing within 14 days after such action. The notice shall be served upon the petitioner pursuant to Rule 4 of the N.C. Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the N.C. Rules of Civil Procedure to serve process.

(2) The petitioner shall have 30 days from the date of service of the notice to file a written request for hearing upon the secretary. The request shall be served upon the secretary pursuant to Rule 4 of the N.C. Rules of Civil Procedure.

(3) Hearing Procedure
The procedure for the hearing shall be as provided in Section .1000 of this subchapter.

(h) Reinstatement by Secretary of the State Bar
Notwithstanding paragraph (e) of this rule, an inactive member may petition for reinstatement pursuant to paragraphs (a) and (b) of this rule and may be reinstated by the secretary of the State Bar upon a finding that the inactive member has complied with or fulfilled the conditions for reinstatement set forth in this rule; there are no issues relating to the inactive member's character or fitness; and the inactive member has paid all fees owed to the State Bar including the reinstatement fee. Reinstatement by the secretary is discretionary. If the secretary declines to reinstate a member, the member's petition shall be submitted to the Administrative Committee at its next meeting and the procedure for review of the reinstatement petition shall be as set forth in paragraph (e) of this rule.

(i) Denial of Petition
When a petition for reinstatement is denied by the council in a given calendar year, the member may not petition again until the following calendar year. The reinstatement fee, costs, and any fees paid pursuant to paragraph (c)(7) shall be retained. However, the State Bar membership fee, Client Security Fund assessment, and district bar membership fee assessed for the year in which the application is filed shall be refunded.

**27 NCAC 01D .0904 REINSTATEMENT FROM SUSPENSION**

(a) Compliance Within 30 Days of Service of Suspension Order.

A member who receives an order of suspension for failure to comply with an obligation of membership may preclude the order from becoming effective and shall not be required to file a formal reinstatement petition or pay the reinstatement fee if the member shows within 30 days after service of the suspension order that the member has done the following:

(1) fulfilled the obligations of membership set forth in the order;

(2) paid the administrative fees associated with the issuance of the suspension order, including the costs of service;

(3) paid any other delinquency shown on the financial records of the State Bar including outstanding judicial district bar dues;

(4) signed and filed CLE annual report forms as required by Rule .1522 of this subchapter;

(5) completed CLE hours as required by Rules .1518 and .1522 of this subchapter; and

(6) filed any IOLTA certification required by Rule .1319 of this subchapter.

(b) Reinstatement More than 30 Days after Service of Suspension Order.
At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for failure to comply with an obligation of membership may petition the council for an order of reinstatement.

(c) Definition of "Year."
As used in this rule, a year is a 365 day period of time unless a calendar year is specified.

(d) Requirements for Reinstatement

(1) Completion of Petition
The member must provide the information requested on a petition form prescribed by the council and must sign the petition under oath.

(2) CLE Requirements Before Suspended
Unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph (d)(4) of this rule, the member must satisfy the minimum continuing legal education (CLE) requirements, as set forth in Rule .1518 of this subchapter, for the calendar year in which the member was suspended (the "subject year") if such transfer occurred on or after July 1 of the subject year, including any deficit from a prior year that was carried forward and recorded in the member's CLE record for the subject year. The member shall also sign and file any delinquent CLE annual report form.

(3) Additional CLE Requirements
If more than 1 year has elapsed between the effective date of the suspension order and the date upon which the reinstatement petition is filed, the member must complete 12 hours of approved CLE for each year that the member was suspended up to a maximum of 7 years. The CLE must be completed within 2 years prior to filing the petition. For each 12-hour increment, ~~6 hours may be taken online and~~ 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism. If during the period of suspension the member complied with mandatory CLE requirements of

another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision without regard to whether they were taken during the 2 years prior to filing the petition.

(4) Bar Exam Requirement If Suspended 7 or More Years
[Effective for all members who are administratively suspended on or after March 10, 2011.] If 7 years or more have elapsed between the effective date of the suspension order and the date that the petition is filed, the member must obtain a passing grade on a regularly scheduled North Carolina bar examination. A member subject to this requirement does not have to satisfy the CLE requirements in paragraphs (d)(2) and (d)(3).

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of suspension shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended up to a maximum of 7 years.

(B) Military Service. Each calendar year in which a suspended member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate the requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended up to a maximum of 7 years.

(5) Character and Fitness to Practice
The member must have the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and must show that the member's resumption of the practice of law will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest.

(6) Payment of Fees, Assessments and Costs
The member must pay all of the following:

(A) a ~~$125.00~~ reinstatement fee in an amount to be determined by the Council or $250.00 reinstatement fee if suspended for failure to comply with CLE requirements;

(B) all membership fees, Client Security Fund assessments, and late fees owed at the time of suspension and owed for the year in which the reinstatement petition is filed;

(C) all district bar annual membership fees owed at the time of suspension and owed for the year in which the reinstatement petition is filed;

(D) all attendee fees, fines and penalties owed the Board of Continuing Legal Education at the time of suspension and attendee fees for CLE courses taken to satisfy the requirements of paragraphs (d)(2) and (3) above;

(E) any costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar; and

(F) all costs incurred by the North Carolina State Bar in suspending the member, including the costs of service, and in investigating and processing the application for reinstatement.

(7) Pro Hac Vice Registration Statements
The member must file any overdue pro hac vice registration statement for which the member was responsible.

(8) IOTLA Certification
The member must complete any IOLTA certification required by Rule .1319 of this subchapter.

(9) Wind Down of Law Practice During Suspension
The member must demonstrate that the member fulfilled the obligations of a disbarred or suspended member set forth in Rule .0128 of Subchapter 1B during the 30 day period after the effective date of the order of suspension, or that such obligations do not apply to the member due to the nature of the member's legal employment.

(e) Procedure for Review of Reinstatement Petition.
The procedure for review of the reinstatement petition shall be as set forth in Rule .0902(c)-(f) above.

(f) Reinstatement by Secretary of the State Bar.
At any time during the year after the effective date of a suspension order,

a suspended member may petition for reinstatement pursuant to paragraphs (b) and (c) of this rule and may be reinstated by the secretary of the State Bar upon a finding that the suspended member has complied with or fulfilled the obligations of membership set forth in the order; there are no issues relating to the suspended member's character or fitness; and the suspended member has paid the costs of the suspension and reinstatement procedure including the costs of service and the reinstatement fee. Reinstatement by the secretary is discretionary. If the secretary declines to reinstate a member, the member's petition shall be submitted to the Administrative Committee at its next meeting and the procedure for review of the reinstatement petition shall be as set forth in Rule .0902(c)-(f).

(g) Reinstatement from Disciplinary Suspension.
Notwithstanding the procedure for reinstatement set forth in the preceding paragraphs of this Rule, if an order of reinstatement from disciplinary suspension is granted to a member pursuant to Rule .0129 of Subchapter 1B of these rules, any outstanding order granting inactive status or suspending the same member for failure to fulfill the obligations of membership under this section shall be dissolved and the member shall be reinstated to active status.

(h) Denial of Petition.
When a petition for reinstatement is denied by the council in a given calendar year, the member may not petition again until the following calendar year. The reinstatement fee, costs, and any fees paid pursuant to paragraph (d)(6) shall be retained. However, the State Bar membership fee, Client Security Fund assessment, and district bar membership fee assessed for the year in which the application is filed shall be refunded.

**ATTACHMENT 4**

**AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR**

**Submitted to the North Carolina Supreme Court on September 11, 2020**

## 27 NCAC 01D .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 - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of immigration law.

(1) An applicant shall affirm that during the five years immediately preceding the application, the applicant devoted an average of at least 700 hours a year to the practice of immigration law, but not less than 400 hours in any one year. Service as a law professor concentrating in the teaching of immigration law for two semesters may be substituted for one year of experience to meet the five-year requirement.

(2) An applicant shall show substantial involvement in immigration law for the required period by providing such information as may be required by the board regarding the applicant's participation in at least ~~five~~ four of the seven categories of activities listed below during the five years immediately preceding the date of application. For the purposes of this section, "representation" means the entry as the attorney of record and/or having primary responsibility of preparation of the case for presentation before the appropriate adjudicatory agency or tribunal.

(A) Family Immigration. Representation of clients before ~~the~~ U.S. Immigration and Naturalization Service and the United

States Citizenship and Immigration Services (USCIS) or the State Department in ~~the filing of petitions and~~ family-based applications, including the Violence Against Women Act (VAWA).

(B) Employment- Related Immigration. Representation of employers ~~and/~~or aliens before ~~at least one of the following: the N.C. Employment Security Commission,~~ the U.S. Department of Labor (DOL), ~~U.S. Immigration and Naturalization Service~~ USCIS, Immigration and Customs Enforcement (ICE) (including I-9 reviews in anticipation of ICE audits), or the ~~U.S.~~ Department of State in employment-related immigration matters and filings ~~or U.S. Information Agency~~.

(C) Naturalization and Citizenship. Representation of clients before ~~the U.S. Immigration and Naturalization Service and judicial courts~~USCIS in naturalization and citizenship matters.

(D) Administrative Hearings and Appeals. Representation of clients before immigration judges in ~~deportation, exclusion~~ removal, bond redetermination, and other administrative matters; and the representation of clients in appeals taken before the Board of Immigration Appeals and the Attorney General, the Administrative Appeals ~~Unit~~ Office, the Board of Alien Labor Certification Appeals and DOL, ~~Regional~~ Commissioners, ~~Commissioner, Attorney General, Department of State Board of Appellate Review, and~~ or the Office of Special Counsel for Immigration Related Unfair Employment Practices (OCAHO).

(E) ~~Administrative Proceedings and Review in Judicial Courts~~ Federal Litigation. Representation of clients ~~in judicial matters such as applications for~~before Article III courts in habeas corpus petitions, mandamus or Administrative Procedures Act complaints ~~and declaratory judgments;~~, criminal prosecution of violations of~~matters involving~~ immigration law;, district court naturalization and denaturalization proceedings, or petitions for review or certiorari~~in judicial courts; and ancillary proceedings in judicial courts~~.

(F) Asylum and Refugee Status. Representation of clients ~~in these matters~~ before USCIS or immigration judges in applications for asylum, withholding of removal, protection under the Convention Against Torture, or adjustment of status for refugees or asylees.

(G) ~~Employer Verification, Sanctions, Document Fraud, Bond and Custody, Rescission, Registry, and Fine Proceedings.~~

~~Representation of clients in these matters.~~ Applications for Temporary or Humanitarian Protection. Representation of clients before USCIS, ICE, immigration judges, or the Department of State in applications for Temporary Protected Status, Deferred Action for Childhood Arrivals (DACA), Nicaraguan Adjustment and Central American Relief Act (NACARA), parole in place, humanitarian parole, deferred action, orders of supervision, U and T visas, or other similar protections and benefits.

(c) Continuing Legal Education - An applicant must earn no less than 48 hours of accredited continuing legal education (CLE) credits in topics relating to immigration law during the four years preceding application. At least 20 of the 48 CLE credit hours must be earned during the first and second year preceding application and at least 20 of the CLE hours must be earned during the third and fourth years preceding application. Of the 48 hours, at least 42 must be in immigration law; the balance may be in the related areas of federal administrative procedure, trial advocacy, evidence, taxation, family law, employment law, and criminal law and procedure.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. At least four of the completed peer reference forms received by the board must be from lawyers or judges who have substantial practice or judicial experience in immigration law. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(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 annually. The examination shall be administered and graded uniformly by the specialty committee.

**ATTACHMENT 5**

**AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR**

**Submitted to the North Carolina Supreme Court on September 11, 2020**

**27 NCAC 01E .0104 MANAGEMENT AND FINANCIAL MATTERS**

(a) "Management" At least one director and one officer of a professional corporation and at least one manager of a professional limited liability company shall be active members in good standing with the North Carolina State Bar.

(b) "Authority Over Professional Matters:" No person affiliated with a professional corporation or a professional limited liability company, other than a licensee, shall exercise any authority whatsoever over the rendering of professional services in North Carolina or in matters of North Carolina law.

(c) "No Income to Disqualified Person" The income of a professional corporation or of a professional limited liability company attributable to the practice of law during the time that a shareholder of the professional corporation or a member of a professional limited liability company is legally disqualified to render professional services in North Carolina or, if the shareholder or member is not licensed in North Carolina, in any other jurisdiction in which the shareholder or member is licensed or after a shareholder or a member becomes a judge, other adjudicatory officer, or the holder of any other office, as specified in Rule .0102(a)(4) or .0102(b)(4) of this subchapter, shall not in any manner accrue to the benefit of such shareholder, or his or her shares, or to such member.

(d) "Stock of a Professional Corporation" A professional corporation may acquire and hold its own stock.

(e) "Acquisition of Shares of Deceased or Disqualified Shareholder" Subject to the provisions of G.S. 55B-7, a professional corporation may make such agreement with its shareholders or its shareholders may make such agreement between themselves as they may deem just for the acquisition of the shares of a deceased or retiring shareholder or a shareholder who becomes disqualified to own shares under the Professional Corporation Act or under these regulations.

(f) "Stock Certificate Legend" There shall be prominently displayed on the face of all certificates of stock in a professional corporation a legend that any transfer of the shares represented by such certificate is subject to the provisions of the Professional Corporation Act and these regulations.

(g) "Transfer of Stock of Professional Corporation" When stock of a professional corporation is transferred to a licensee, the professional corporation shall request that the secretary issue a stock transfer certificate (Form PC?5; see Rule .0106(e) of this subchapter) as required by G.S. 55B-6. The secretary is authorized to issue the certificate which shall be permanently attached to the stub of the transferee's stock certificate in the stock register of the professional corporation. The fee for such certificate shall be ~~two dollars ($2.00)~~ in an amount determined by the council and shall be charged for each transferee listed on the stock transfer certificate.

(h) "Stock Register of Professional Corporation" The stock register of a professional corporation shall be kept at the principal office of the corporation and shall be subject to inspection by the secretary or his or her delegate during business hours at the principal office of the corporation.

**27 NCAC 01E .0105 GENERAL AND ADMINISTRATIVE PROVISIONS**

(a) "Administration of Regulations" These regulations shall be administered by the secretary, subject to the review and supervision of the council. The council may from time to time appoint such standing or special committees as it may deem proper to deal with any matter affecting the administration of these regulations. It shall be the duty of the secretary to bring to the attention of the council or its appropriate committee any violation of the law or of these regulations.

(b) "Appeal to Council" If the secretary shall decline to execute any certificate required by Rule .0103(a)(2), Rule .0103(b)(2), or Rule .0104(g) of this subchapter, or to renew the same when properly requested, or shall refuse to take any other action requested in writing by a professional corporation or a professional limited liability company, the aggrieved party may request in writing that the council review such action. Upon receipt of such a request, the council shall provide a formal hearing for the aggrieved party through a committee of its members.

(c) "Articles of Amendment, Merger, and Dissolution" A copy of the following documents, duly certified by the secretary of state, shall be filed

with the secretary within 10 days after filing with the secretary of state:

(1) all amendments to the articles of incorporation of a professional corporation or to the articles of organization of a professional limited liability company;

(2) all articles of merger to which a professional corporation or a professional limited liability company is a party;

(3) all articles of dissolution dissolving a professional corporation or a professional limited liability company;

(4) any other documents filed with the secretary of state changing the corporate structure of a professional corporation or the organizational structure of a professional limited liability company.

(d) "Filing Fee" Except as otherwise provided in these regulations, all reports or papers required by law or by these regulations to be filed with the secretary shall be accompanied by a filing fee ~~of two dollars ($2.00)~~ in an amount determined by the council.

(e) "Accounting for Filing Fees" All fees provided for in these regulations shall be the property of the North Carolina State Bar and shall be deposited by the secretary to its account, and such account shall be separately stated on all financial reports made by the secretary to the council and on all financial reports made by the council.

(f) "Records of State Bar" The secretary shall keep a file for each professional corporation and each professional limited liability company which shall contain the executed articles of incorporation or organization, all amendments thereto, and all other documents relating to the affairs of the corporation or professional limited liability company.

(g) "Additional Information" A professional corporation or a professional limited liability corporation shall furnish to the secretary such information and documents relating to the administration of these regulations as the secretary or the council may reasonably request.

**ATTACHMENT 6**

**AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR**

**Submitted to the North Carolina Supreme Court on September 11, 2020**

**27 NCAC 01E .0203 REGISTRATION FEE**

There shall be submitted with each registration statement and supporting documentation a registration fee of ~~five hundred dollars ($500.00)~~ as an administrative cost which shall be in an amount determined by the Council.

**ATTACHMENT 7**

**AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR**

**Submitted to the North Carolina Supreme Court on September 11, 2020**

**27 NCAC 01E ~~.0301 STATE BAR MAY NOT APPROVE OR DISAPPROVE PLANS~~**

~~The North Carolina State Bar shall not approve or disapprove any prepaid legal services plan or render any legal opinion regarding any plan. The registration of any plan under these rules shall not be construed to indicate approval or disapproval of the plan.~~

**~~.0303~~ .0301 DEFINITION~~S OF PREPAID PLAN~~**

**The following words and phrases when used in this subchapter shall have the meanings given to them in this rule:**

**1) Counsel – the counsel of the North Carolina State Bar appointed by the Council of the North Carolina State Bar.**

**2) Plan Owner – the person or entity not authorized to engage in the practice of law that operates or is seeking to operate a plan in accordance with these Rules.**

**3)** ~~A prepaid legal services plan or a group legal services plan ("a plan") is~~ **Prepaid Legal Services Plan or Plan –** any arrangement by which a person~~, firm or corporation~~ **or entity**, not ~~otherwise~~ authorized to engage in the practice of law, in exchange for any valuable consideration, offers to ~~provide or~~ arrange~~s~~ the provision of specified legal services that are paid for in advance of any immediate need for the specified legal services ("covered services"). In addition to covered services, a plan may ~~provide~~ **arrange the provision of** specified legal services at fees that are less than what a non-member of the plan would normally pay. The North Carolina legal services ~~offered~~ arranged by a plan must be provided by a North Carolina licensed ~~lawyer~~ **attorney** who is not an employee, director, or owner of the plan. A ~~prepaid legal services~~ plan does not include the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee. ~~[This definition is also found in Rule 7.3(d) of the Revised Rules of Professional Conduct.]~~

**~~.0311~~ .0302 State Bar Jurisdiction**

The North Carolina State Bar retains jurisdiction ~~of~~ **over** North Carolina licensed attorneys who participate in ~~prepaid legal services~~ plans ~~and North Carolina licensed attorneys are,~~ **whose conduct is** subject to the rules and regulations of the ~~North Carolina~~ State Bar.

**.0303 Role of Authorized Practice Committee**

**The Authorized Practice Committee ("committee"), as a duly authorized standing committee of the North Carolina State Bar Council, shall oversee the registration of plans in accordance with these rules. The committee shall also establish reasonable deadlines, rules and procedures regarding the initial and annual registrations, amendments to registrations, and the revocation of registrations of plans.**

**~~.0309~~ .0304 Index of Registered Plans**

The North Carolina State Bar shall maintain an index of the ~~prepaid legal services~~ plans registered pursuant to these rules. All documents filed ~~in compliance with this~~ **pursuant to these** rule**s** ~~are considered public documents and~~ shall be available for public inspection during ~~normal~~ **regular** business hours.

**~~.0302~~ .0305 Registration Requirement**

A ~~prepaid legal services~~ plan ~~("plan") must~~ **shall** be registered with the North Carolina State Bar before ~~its implementation or operation~~ **operating** in North Carolina. **Registration shall be evidenced by a certificate of registration issued by the State Bar.** ~~No licensed North Carolina attorney shall participate in a prepaid legal services plan in this state unless the plan has registered with the North Carolina State Bar and has complied with the rules set forth below. No prepaid legal services plan may operate in North Carolina unless at least one licensed North Carolina attorney has agreed to provide the legal services offered under the plan at all times during the operation of the plan.~~ No ~~prepaid legal services~~ plan may operate in any manner that ~~constitutes~~ **violates the North Carolina statutes regarding** the unauthorized practice of law. ~~No plan may operate until its registration has been accepted by the North Carolina State Bar in accordance with these rules.~~ **No plan may operate in North Carolina unless at least one licensed North Carolina attorney has agreed to provide the legal services arranged by the plan at all times during the operation of the plan. No licensed North Carolina attorney shall participate in a plan in this state unless the plan has registered with the State Bar and has complied with the rules set forth below.**

**~~.0308~~ .0306 Registration Fees**

The initial and annual registration fees for each ~~prepaid legal services~~ plan shall be ~~$100~~ **determined by the Council and shall be nonrefundable**. ~~The fee is nonrefundable.~~

**~~.0304~~ .0307 Registration Procedures**

~~To register with the North Carolina State Bar, a prepaid legal services plan must comply with all of the following procedures for initial registration:~~

(a) ~~A prepaid legal services plan seeking to operate in North Carolina must file an~~ **To register a plan, the plan owner shall complete the** initial registration statement form **contained in Rule .0310 and file it** with the secretary of the North Carolina State Bar~~, using a form promulgated by the State Bar, requesting registration~~.

(b) ~~The owner or sponsor of the prepaid legal services plan must fully disclose in its initial registration statement form filed with the secretary at least the following information: the name of the plan, the name of the owner or sponsor of the plan, a principal address for the plan in North Carolina, a designated plan representative to whom communications with the State Bar will be directed, all persons or entities with ownership interest in the plan and the extent of their interests, all terms and conditions of the plan, all services provided under the plan and a schedule of benefits and fees or charges for the plan, a copy of all plan documents, a copy of all plan marketing and advertising materials, a copy of all plan contracts with its customers, a copy of all plan contracts with plan attorneys, and a list of all North Carolina attorneys who have agreed to participate in the plan. Additionally, the owner or sponsor will provide a detailed statement explaining how the plan meets the definition of a prepaid legal services plan in North Carolina. The owner or sponsor of the prepaid legal services plan will certify or acknowledge the veracity of the information contained in the registration statement, an understanding of the rules applicable to prepaid legal services plans, and an understanding of the law on unauthorized practice.~~

(c) ~~The Authorized Practice Committee ("committee"), as a duly authorized standing committee of the North Carolina State Bar Council, shall oversee the registration of prepaid legal services plans in accordance with these rules. The committee shall also establish any deadlines by when registrations~~

~~may be submitted for review and any additional, necessary rules and procedures regarding the initial and annual registrations, and the revocation of registrations, of prepaid legal services plans.~~

**~~.0305~~ .0308 Initial Registration Determination**

Counsel ~~will~~ **shall** review the plan's initial registration statement ~~to determine whether the registration statement is complete and the plan, as described in the registration statement, meets the definition of a prepaid legal services plan and otherwise satisfies the requirements for registration provided by Rule .0304.~~ If~~, in the opinion of counsel,~~ the plan ~~clearly meets the definition and the registration statement otherwise~~ satisfies the requirements for registration, the secretary ~~will~~ **shall** issue a certificate of registration to the plan~~'s sponsor~~ **owner**. If~~, in the opinion of counsel,~~ the plan does not ~~meet the definition or otherwise fails to~~ satisfy the requirements for registration, counsel ~~will~~ **shall** inform the plan~~'s sponsor~~ **owner** that the ~~registration is not accepted~~ **plan will not be registered** and **shall** explain ~~any~~ **the** deficiencies. Upon notice that the plan~~'s registration has not been accepted~~ **will not be registered**, the plan ~~sponsor~~ **owner** may resubmit ~~an~~ **one** amended ~~plan~~ **initial** registration ~~form~~ **statement** or request a hearing before the committee pursuant to Rule ~~.0313~~ **.0317** below. Counsel ~~will~~ **shall** provide a report to the committee each quarter identifying the plans **that** submitted **initial registration statements** and ~~the registration decisions made by counsel~~ **whether each plan was registered**.

**.0309 Registration Does Not Constitute Approval**

**The registration of any plan under these rules shall not be construed to indicate approval, disapproval, or an endorsement of the plan by the North Carolina State Bar. Any plan that advertises or otherwise represents that it is registered with the State Bar shall include a clear and conspicuous statement within the advertisement or communication that registration with the State Bar does not constitute approval or an endorsement of the plan by the State Bar.**

**.0310 ~~Advertising of State Bar Approval Prohibited~~ Initial Registration Statement Form**

~~Any plan that advertises or otherwise represents that it is registered with the North Carolina State Bar shall include a clear and conspicuous statement within the advertisement or communication that registration with the North Carolina State Bar does not constitute approval of the plan by the State Bar.~~

**INITIAL REGISTRATION STATEMENT FORM FOR PREPAID LEGAL SERVICES PLAN**

**Any person or entity seeking to operate a prepaid legal services plan shall register the plan with the North Carolina State Bar on the initial registration statement form provided by the State Bar. Each plan must be registered prior to its operation in North Carolina.**

**The plan owner shall complete this form and file it with the secretary of the State Bar. The plan owner must provide complete responses to each of the following items. The plan will not be registered if any item is left incomplete.**

**1. Name of Plan:**

**a. Owner of Plan**

**i. Name:**

**ii. Title:**

**2. Principal North Carolina Address for Plan:**

**a. Address:**

**b. City:**

**c. State:**

**d. Zip Code:**

**3. Contact Information for Plan Representative**

**a. Name:**

**b. Address:**

**c. City:**

**d. State:**

**e. Zip Code:**

**f. Telephone Number:**

**g. Email Address:**

**4. Is the plan offered by a person or entity not authorized to engage in the practice of law? [Yes] [No]**

5. **Does the plan, in exchange for any valuable consideration, offer to arrange the provision of specified legal services that are paid for in advance of any immediate need for the specified legal service ("covered services")? [Yes] [No]**

6. **Are the legal services the plan offers to arrange provided by North Carolina licensed attorneys who are not employees, directors, or owners of the plan? [Yes] [No]**

   a. **Attach a list of the names, addresses, bar numbers, and telephone numbers of all North Carolina licensed attorneys who have agreed to participate in the plan. This list should be alphabetized by attorney last name.**

7. **Do the covered services the plan offers to arrange extend beyond the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee? [Yes] [No]**

8. **Has the plan owner signing below read and gained an understanding of the administrative rules applicable to prepaid legal services plans as adopted by the State Bar Council? [Yes] [No]**

9. **Does the plan owner signing below agree to comply with the administrative rules applicable to prepaid legal services plans as adopted by the State Bar Council and accept responsibility for the plan's compliance with those administrative rules? [Yes] [No]**

10. **Has the plan owner signing below read and gained an understanding of the law governing the unauthorized practice of law as set out in N.C. Gen. Stat. § 84-2.1, 4, and 5? [Yes] [No]**

11. **Is a check for the initial registration fee made payable to the State Bar enclosed with this statement? [Yes] [No]**

12. **After reading the foregoing form and the list of all North Carolina licensed attorneys who have agreed to participate in the plan in its entirety, does the plan owner signing below certify that all statements made in this form and the list of all North Carolina licensed attorneys who have agreed to participate in the plan are true and correct to the best of his or her knowledge? [Yes] [No]**

_____ _____

**Date** **Signature of Plan Owner**

_____

**Typed Name of Plan Owner**

**~~.0307~~ .0311 Annual Registration Renewal**

After its initial registration, a ~~prepaid legal services~~ plan may continue to operate so long as it ~~is operated as registered and it renews its registration annually on or before January 31 by filing a~~ **timely files the proscribed registration renewal form and its operation is consistent with its registration statement. The plan owner shall file the** registration renewal form **contained in Rule .0312** with the secretary **of the North Carolina State Bar** and pay~~ing~~ the annual registration fee **on or before December 1 of each year**. **If a plan fails to file the registration renewal form and pay the annual registration fee by December 1, counsel may request the committee at its next quarterly meeting to instruct the secretary of the State Bar to serve upon the plan owner a notice to show cause why the plan's registration should not be revoked as provided in Rule .0316.**

**.0312 Registration Renewal Form**

**REGISTRATION RENEWAL FORM FOR PREPAID LEGAL SERVICES PLAN**

**Each prepaid legal services plan registered to operate in North Carolina shall renew its registration each year. If a plan fails to file the registration renewal form and pay the annual registration fee by December 1, counsel may request the Authorized Practice Committee at its next quarterly meeting to instruct the secretary of the State Bar to serve upon the plan's owner a notice to show cause why the plan's registration should not be revoked.**

1. **Current Registration Information**
   a. **Plan Name:**
   b. **Plan Number:**
2. **Is the plan still offered by a person or entity not authorized to engage in the practice of law? [Yes] [No]**
3. **Does the plan, in exchange for any valuable consideration, still offer to arrange the provision of specified**

**legal services that are paid for in advance of any immediate need for the specified legal service ("covered services")? [Yes] [No]**

4. **Are the legal services the plan offers to arrange still provided by North Carolina licensed attorneys who are not employees, directors, or owners of the plan? [Yes] [No]**

5. **Do the covered services the plan offers to arrange still extend beyond the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee? [Yes] [No]**

6. **Attach a list of the names, addresses, bar numbers, and telephone numbers of all North Carolina licensed attorneys who provide or offer to provide the legal services arranged by the plan. This list should be alphabetized by attorney last name.**

7. **If there have been any amendments to the plan since its initial registration statement or since it renewed its registration last year that are not indicated herein, please attach copies of the registration amendment forms filed with the State Bar and the letter from the State Bar reporting that such forms were registered to this report and indicate in the box provided whether any amendments are attached. [ ]**

8. **Is a check for the non-refundable annual registration fee payable to the State Bar enclosed with this report? [Yes] [No]**

9. **Are there any changes the owner signing below wishes to make to the plan? [Yes] [No]**

    a. **If "No," please skip to item 15. If "Yes," only complete the items below that the plan owner wishes to change. Please note that any desired changes must be indicated here and that the plan owner must complete and file a separate registration amendment form.**

10. **New Name of Plan:**

11. **New Owner of Plan**

    a. **Name:**

    b. **Title:**

**12. New Principal North Carolina Address for Plan**

**a. Address:**

**b. City:**

**c. State:**

**d. Zip Code:**

**13. New Contact Information for Plan Representative**

**a. Name:**

**b. Address:**

**c. City:**

**d. State:**

**e. Zip Code:**

**f. Telephone Number:**

**g. Email Address:**

**14. Does the plan owner signing below understand that the amendments to this plan may not be implemented until the registration amendment form is registered with the State Bar in accordance with 27 N.C.A.C. 1E, §§ .0313 through .0315 of the North Carolina State Bar Regulations for Organizations Practicing Law? [Yes] [No]**

**15. Does the plan owner signing below certify that the information contained herein is true and correct to the best of his or her knowledge? [Yes] [No]**

_____ _____

**Date** **Signature of Plan Owner**

_____

**Typed Name of Plan Owner**

**~~.0306~~ .0313 ~~Requirement to File~~ Registration Amendments**

**(a) A plan owner shall file an amendment to its registration statement ("registration amendment") to document any change in the information provided in its initial registration statement or in its last registration renewal form.** ~~Amendments to prepaid legal services plans and to other documents required to be filed upon registration of such plans shall be filed in the office of the North Carolina State Bar~~ **A plan owner shall file the registration amendment form**

**contained in Rule .0315 with the secretary of the North Carolina State Bar** ~~no later than 30 days after the adoption of such amendments~~ **prior to any change that requires the plan owner to file an amendment**. ~~Plan amendments must be submitted in the same manner as the initial registration and may~~ **An amendment to a plan shall** not be implemented until the ~~amended plan~~ **registration amendment** is registered in accordance with Rule ~~.0305~~ **.0314.**

**(b) A plan owner shall not be required to file a registration amendment form each time there is a change in licensed North Carolina attorneys who have agreed to provide the legal services arranged by the plan. A plan owner shall provide a current list of licensed North Carolina attorneys who agree to provide the legal services arranged by the plan with each registration renewal form as set forth in Rule .0312.**

**.0314 Determination of Registration Amendments**

**Counsel shall review a plan's registration amendment. If counsel determines that the plan will continue to satisfy the requirements for registration, counsel shall inform the plan owner that the plan's registration amendment will be registered. If counsel determines that the plan will not continue to satisfy the requirements for registration, counsel shall inform the plan owner that the registration amendment will not be registered and shall explain the deficiencies. Counsel shall provide a report to the committee each quarter identifying the plans that submitted registration amendments and whether each registration amendment was registered.**

**.0315 Registration Amendment Form**

**REGISTRATION AMENDMENT FORM FOR PREPAID LEGAL SERVICES PLAN**

**A prepaid legal services plan shall file a registration amendment form with the secretary of the North Carolina State Bar no later than 30 days after a change in the information provided by the plan in its initial registration statement or in its last registration renewal form. Changes to the operation of the plan or to the governing documents of the plan that are inconsistent with the information contained in the plan's initial registration statement or in the plan's last registration renewal form may not be implemented until they are registered with the State Bar.**

**The plan owner shall provide complete responses to items 2 – 5 if he or she would like to amend the plan's current registration information. There is no need to complete items 2 – 5 if they have not changed. The plan owner shall provide complete responses to item 1 and items 6 – 11.**

1. **Current Registration Information**
   a. **Plan Name:**
   b. **Plan Number:**
2. **New Name of Plan:**
3. **New Owner of Plan**
   a. **Name:**
   b. **Title:**
4. **New Principal North Carolina Address for Plan**
   a. **Address:**
   b. **City:**
   c. **State:**
   d. **Zip Code:**
5. **New Contact Information for Plan Representative**
   a. **Name:**
   b. **Address:**
   c. **City:**
   d. **State:**
   e. **Zip Code:**
   f. **Telephone Number:**
   g. **Email Address:**
6. **Is the plan still offered by a person or entity not authorized to engage in the practice of law? [Yes] [No]**
7. **Does the plan, in exchange for any valuable consideration, still offer to arrange the provision of specified legal services that are paid for in advance of any immediate need for the specified legal service ("covered services")? [Yes] [No]**
8. **Are the legal services the plan offers to arrange still provided by North Carolina licensed attorneys who are not employees, directors, or owners of the plan? [Yes] [No]**

**9. Do the covered services the plan offers to arrange still extend beyond the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee? [Yes] [No]**

**10. After reading the foregoing form in its entirety, does the plan owner signing below certify that all statements made in this form are true and correct to the best of his or her knowledge? [Yes] [No]**

**11. Does the plan owner signing below understand that the amendments to this plan may not be implemented until the registration amendment form is registered with the North Carolina State Bar in accordance with 27 N.C.A.C. 1E, §§ .0313 through .0315 of the North Carolina State Bar Regulations for Organizations Practicing Law? [Yes] [No]**

_____ _____

**Date** **Signature of Plan Owner**

_____

**Typed Name of Plan Owner**

**~~.0312~~ .0316 Revocation of Registration**

Whenever it appears that a plan**: (1)** no longer meets the definition of a prepaid legal services plan; **(2)** is marketed or operates in a manner that is not consistent with the representations made in the initial ~~or amended registration statement and accompanying documents upon which the State Bar relied in registering the plan~~ **registration statement, the registration amendment form, or with the most recent registration renewal form filed with the North Carolina State Bar**; **(3)** is marketed or operates in a manner that ~~would~~ constitute**s** the unauthorized practice of law; **(4)** is marketed or operates in a manner that violates state or federal laws or regulations, including the rules and regulations of the ~~North Carolina~~ State Bar; or **(5)** has failed to pay the annual registration fee, the committee may instruct the secretary **of the State Bar** to serve upon the plan's~~ sponsor~~ **owner** a notice to show cause why the plan's registration should not be revoked. The notice shall specify the plan's apparent deficiency and allow the plan's~~ sponsor~~ **owner** to file **with the secretary** a written response within 30 days of service ~~by sending the same to the secretary~~. If the ~~sponsor~~ **plan owner** fails to file a timely written response, the secretary shall issue an order revoking the plan's registration and shall serve the order upon the plan's~~ sponsor~~ **owner**. If a timely written response is filed, the secretary

shall schedule a hearing, in accordance with Rule ~~.0313~~ **.0317** below, before the ~~Authorized Practice Committee at its next regularly scheduled meeting~~ **committee** and shall so notify the plan ~~sponsor~~ **owner**. **The secretary may waive such hearing based upon a stipulation by the plan owner and counsel that the plan's apparent deficiency has been cured.** All notices to show cause and orders required to be served herein ~~may~~ **shall** be served: **(1)** by certified mail ~~to~~ **at** the ~~last~~ address **last** provided ~~for~~ **to the State Bar by** the plan ~~sponsor on its most current registration statement or~~ **owner; (2)** in accordance with **any other provisions of** Rule 4 of the North Carolina Rules of Civil Procedure**;** ~~and~~ **or (3)** ~~may be served~~ by a State Bar investigator or **by** any ~~other~~ person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process. The State Bar ~~will~~ **shall** not ~~renew the annual registration~~ **register the registration renewal form** of any plan ~~that has received~~ **for which the secretary has issued** a notice to show cause under this section, but the plan may continue to operate under the prior registration **statement** until resolution of the show cause notice by the council.

**~~.0313~~ .0317 Hearing before the Authorized Practice Committee**

~~At any hearing concerning the registration of a prepaid legal services plan, the committee chair~~ **The Chair of the Authorized Practice Committee** ~~will~~ **shall** preside ~~to ensure that the hearing is conducted in accordance with these rules~~ **at any hearing concerning the registration of a prepaid legal services plan**. The ~~committee~~ chair shall cause a record of the proceedings to be made. Strict compliance with the **North Carolina** Rules of Evidence is not required, but **the North Carolina Rules of Evidence** may be used to guide the committee in the conduct of an orderly hearing. ~~The plan sponsor may appear and be heard, be represented by counsel, offer witnesses and documents in support of its position and cross-examine any adverse witnesses.~~ The counsel ~~may appear on behalf of the State Bar and be heard,~~ **shall represent the State Bar** and may offer witnesses and ~~documents~~ **documentary evidence, may cross-examine adverse witnesses, and may argue the State Bar's position. The plan owner may appear and may be represented by counsel, may offer witnesses and documentary evidence, may cross-examine adverse witnesses, and may argue the plan owner's position.** The burden of proof shall be upon the ~~sponsor~~ **plan owner** to establish **that** the plan meets the definition of a prepaid legal services plan, that all registration fees have been paid, and that the plan has operated **and does operate** in a manner consistent with all ~~material~~ **applicable law, with these rules, and with all** representations made in its then current registration statement~~, the law,~~

~~and these rules~~. If the ~~sponsor~~ **plan owner** ~~carries~~ **meets** its burden of proof, the ~~plan's registration shall be accepted or continued~~ **initial registration statement, the registration amendment form, or the registration renewal form in question shall be registered**. If the ~~sponsor~~ **plan owner** fails to ~~carry~~ **meet** its burden of proof, the committee shall recommend to the council that the plan's **initial** registration **statement, registration amendment form, or registration renewal form** be denied or revoked.

**~~.0314~~ .0318 Action by the Council**

Upon the recommendation of the **Authorized Practice** ~~c~~**C**ommittee, the council may enter an order denying or revoking the registration of ~~the~~ **a** plan. The order shall be effective when entered by the council. A copy of the order shall be served upon the plan~~'s sponsor~~ **owner** as prescribed in Rule ~~.0312~~ **.0316** above.

## AMENDMENTS TO THE RULES AND REGULATIONS OF THE BOARD OF LAW EXAMINERS APPROVED BY THE NORTH CAROLINA STATE BAR COUNCIL

The following amendments to the rules and regulations of the Board of Law Examiners were approved by the North Carolina State Bar Council at its quarterly meeting on July 24, 2020.

BE IT RESOLVED by the Council of the North Carolina State Bar and the Board of Law Examiners that the Rules and Regulations of the Board of Law Examiners, as particularly set forth in the following sections of the Rules Governing Admission to the Practice of Law, be amended as shown in the listed attachments (additions are underlined, deletions are interlined):

- **Attachment A: Section .0500 – Requirements for Applicants**
- **Attachment B: Section .0600 – Moral Character and General Fitness**
- **Attachment C: Section .1200 – Board Hearings**

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 Board of Law Examiners were approved by the Council of the North Carolina State Bar at a regularly called meeting on July 24, 2020.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of September, 2020.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the Board of Law Examiners approved 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 25th day of September, 2020.

s/Cheri Beasley
Cheri Beasley, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the Board of Law Examiners 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 25th day of September, 2020.

s/Davis, J.
For the Court

**ATTACHMENT A**

**AMENDMENTS TO THE RULES OF THE BOARD OF LAW EXAMINERS APPROVED BY THE NORTH CAROLINA STATE BAR**

**Submitted to the North Carolina Supreme Court on September 11, 2020**

**SECTION .0500 REQUIREMENTS FOR APPLICANTS**

**.0502 REQUIREMENTS FOR COMITY APPLICANTS**

The Board in its discretion shall determine whether an attorney duly licensed to practice law in any state, or territory of the United States, or the District of Columbia, may be licensed to practice law in the State of North Carolina without written examination, other than the Multistate Professional Responsibility Examination; provided that such attorney's jurisdiction of licensure qualifies as a jurisdiction in comity with North Carolina, in that the conditions required by such state, or territory of the United States or the District of Columbia, for North Carolina attorneys to be licensed to practice law in that jurisdiction without written examination are not considered by the Board to be unduly or materially greater than the conditions required by the State of North Carolina for licensure to practice law without written examination in this State. A list of "approved jurisdictions", as determined by the Board pursuant to this rule, shall be available upon request.

Any attorney at law duly admitted to practice in another state, or territory of the United States, or the District of Columbia, upon written application may, in the discretion of the Board, be licensed to practice law in the State of North Carolina without written examination provided each such applicant shall:

(1) File with the Executive Director, upon such forms as may be supplied by the Board, a typed application ~~in duplicate which will be considered by the Board after at least six (6) months from the date of filing~~. Such application shall require:

(a) That an applicant supply full and complete information in regard to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, whether currently mentally or emotionally impaired, references, and the nature of the applicant's practice of law.

(b) That the applicant furnishes the following documentation:

(i) Certificates of Moral Character from four (4) individuals who know the applicant;

(ii) A recent photograph;

(iii) Two (2) sets of clear fingerprints;

(iv) A certification of the Court of Last Resort from the jurisdiction from which the applicant is applying that:

-the applicant is currently licensed in the jurisdiction;

-the date of the applicant's licensure in the jurisdiction;

-the applicant was of good moral character when licensed by the jurisdiction; and

-the jurisdiction allows North Carolina attorneys to be admitted without examination;

(v) Transcripts from the applicant's undergraduate and graduate schools;

(vi) A copy of all applications for admission to the practice of law that the applicant has filed with any state, territory, or the District of Columbia;

(vii) A certificate of admission to the bar of any state, territory, or the District of Columbia;

(viii) A certificate from the proper court or body of every jurisdiction in which the applicant is licensed that he is in good standing, or that the applicant otherwise satisfy the Board that the applicant falls within the exception provided in Rule .0501(7)(b), and not under pending charges of misconduct;

(2) Pay to the Board with each application, a fee of $2,000.00, no part of which may be refunded to (a) an applicant whose application is denied; or (b) an applicant who withdraws, unless the applicant has filed with the Board a written request to withdraw, in which event, the Board in its discretion may refund no more than one-half of the fee to the withdrawing applicant. However, when an application for admission by comity is received from an applicant who, in the opinion of the Executive Director after consideration with the Board Chair, is not eligible for consideration under the Rules, the applicant

shall be so advised by written notice. Upon receipt of such notice, the applicant may elect in writing to withdraw the application, and, provided the written election is received by the Board within twenty (20) days from the date of the Board's written notice to the applicant, receive a refund of all fees paid.

(3) Prove to the satisfaction of the Board that the applicant is duly licensed to practice law in one or more jurisdictions which are on the list of "approved jurisdictions," or should be on such list, as a comity jurisdiction within the language of the first paragraph of this Rule .0502; that the applicant has been, for at least four out of the six years immediately preceding the filing of this application with the Executive Director, actively and substantially engaged in the practice of law pursuant to the license to practice law from one or more jurisdictions relied upon by the applicant; and that the applicant has read the Rules of Professional Conduct promulgated by the North Carolina State Bar. Practice of law for the purposes of this rule when conducted pursuant to a license granted by another jurisdiction shall include the following activities, if performed in a jurisdiction in which the applicant is admitted to practice law, or if performed in a jurisdiction that permits such activity by a licensed attorney not admitted to practice in that jurisdiction:

(a) The practice of law as defined by G.S. 84-2.1; or

(b) Activities which would constitute the practice of law if done for the general public; or

(c) Legal service as house counsel for a person or other entity engaged in business; or

(d) Judicial service, service as a judicial law clerk, or other legal service in a court of record or other legal service with any local or state government or with the federal government; or

(e) Legal service with the United States, a state or federal territory, or any local governmental bodies or agencies, including military service; or

(f) A full time faculty member in a law school approved by the Council of the North Carolina State Bar.

For purposes of this rule, the active practice of law shall not include (a) work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which any person receiving the unauthorized service was located, or (b) the practice of law in any additional jurisdiction, pursuant to a license to

practice law in that additional jurisdiction, and that additional jurisdiction is not an "approved jurisdiction" as determined by the Board pursuant to this rule.

(4) Be in good standing in each State, territory of the United States, or the District of Columbia in which the applicant is or has been licensed to practice law and not under any charges of misconduct while the application is pending before the Board.

(a) For purposes of this rule, an applicant is "in good standing" in a jurisdiction if:

(i) the applicant is an active member of the bar of the jurisdiction and the jurisdiction issues a certificate attesting to the applicant's good standing therein; or

(ii) the applicant was formerly a member of the bar of the jurisdiction and the jurisdiction certifies the applicant was in good standing at the time that the applicant ceased to be a member; and

(b) if the jurisdiction in which the applicant is inactive or was formerly a member will not certify the applicant'-s good standing solely because of the non-payment of dues, the Board, in its discretion, may waive such certification from that jurisdiction; however, the applicant must not only be in good standing, but also must be an active member of each jurisdiction upon which the applicant relies for admission by comity.

(5) Be of good moral character and have satisfied the requirements of Section .0600 of this Chapter;

(6) Meet the educational requirements of Section .0700 of this Chapter as hereinafter set out if first licensed to practice law after August, 1971;

(7) Not have taken and failed the written North Carolina Bar Examination within five (5) years prior to the date of filing the applicant's comity application;

(8) Have passed the Multistate Professional Responsibility Examination.

## ATTACHMENT B

## AMENDMENTS TO THE RULES OF THE BOARD OF LAW EXAMINERS APPROVED BY THE NORTH CAROLINA STATE BAR

**Submitted to the North Carolina Supreme Court on September 11, 2020**

### SECTION .0600, MORAL CHARACTER AND GENERAL FITNESS

**.0604 BAR CANDIDATE COMMITTEE**

Every General Applant~~applicant~~ and UBE Transfer Applicant not licensed in another jurisdiction shall appear before a bar candidate committee, appointed by the Board Chair, in the judicial district in which the applicant resides, or in such other judicial districts as the Board in its sole discretion may designate to the applicant, to be examined about any matter pertaining to the applicant's moral character and general fitness to practice law. An applicant who has appeared before a hearing Panel may, in the Board's discretion, be excused from making a subsequent appearance before a bar candidate committee. The Board Chair may delegate to the Executive Director the authority to exercise such discretion. The applicant shall give such information as may be required on such forms provided by the Board. A bar candidate committee may require the applicant to make more than one appearance before the committee and to furnish to the committee such information and documents as it may reasonably require pertaining to the moral character and general fitness of the applicant to be licensed to practice law in North Carolina. Each applicant will be advised when to appear before the bar candidate committee. There can be no changes once the initial assignment is made.

**ATTACHMENT C**

**AMENDMENTS TO THE RULES OF THE BOARD OF LAW EXAMINERS APPROVED BY THE NORTH CAROLINA STATE BAR**

**Submitted to the North Carolina Supreme Court on September 11, 2020**

## SECTION .1200, BOARD HEARINGS

### .1201 NATURE OF HEARINGS

(1) Any ~~All general~~ applicant~~s~~ may be required to appear before the Board or a hearing Panel at a hearing to answer inquiry about any matter under these rules. In the event a hearing for an applicant for admission by examination is not held before the written examination, the applicant shall be permitted to take the written examination.

~~(2) Each comity, military spouse comity, or transfer applicant shall appear before the Board or Panel to satisfy the Board that he or she has met all the requirements of Rule .0502, Rule .0503 or Rule .0504.~~

## ADMINISTRATIVE ORDER ESTABLISHING THE CHIEF JUSTICE'S COMMISSION ON FAIRNESS AND EQUITY

In recognition of the need to continuously examine and improve the North Carolina judicial system in order to ensure that everyone, regardless of their race, gender or gender identification, sexual orientation, ethnicity, national origin, religious beliefs, or economic status, receives equal treatment under the law within our court system, the Supreme Court of North Carolina hereby creates **THE CHIEF JUSTICE'S COMMISSION ON FAIRNESS AND EQUITY**.

We recognize the inequalities within our judicial system that stem from a history of deeply rooted discriminatory policies and practices and the ongoing role of implicit and explicit racial, gender, and other biases. While progress has been made, we are cognizant of the persistence of discrimination in our judicial system, and its effects on those who come before our courts.

In recent years, we have documented declining public trust in the fairness and impartiality of our state courts. In 2017, the Final Report of the North Carolina Commission on the Administration of Law and Justice concluded that fifty-three percent of North Carolinians believe that courts are not always fair, and only forty-two percent of the public believes that the courts are "sensitive to the needs of the average citizen."[1] Restoring the trust and confidence of the people we serve will take concerted, proactive effort. Court officials must treat every person with respect and dignity, give proper notice and opportunity to be heard, and provide equal protection under the law, free from discrimination and disparate treatment, and be appropriately accountable for the role that we each play in our system of justice.

### SECTION 1: STRUCTURE AND COMPOSITION OF THE COMMISSION

The structure and composition of the Commission shall be as follows:

#### Section 1.1: Commission Membership

The Commission shall consist of no more than thirty (30) members who reflect the racial, ethnic, gender, socioeconomic, and geographic

1. N.C. Comm'n on the Admin. of Law and Justice, Final Report at 3–4 (2017), *available at* https://www.nccourts.gov/assets/documents/publications/nccalj_final_report.pdf?xahbJ_Q8O_XYD2w.IGCrOOoBeMSeDv2i.

diversity of North Carolina. The Chief Justice or his or her designee shall serve as Chair.

**Section 1.2: Selection of Members**

The Chief Justice shall appoint the members of the Commission, which shall be drawn from the following stakeholder communities:

a. judges representing the District Court, Superior Court, and Appellate Court divisions;

b. district attorneys;

c. public defenders;

d. clerks of the superior court;

e. magistrates;

f. court managers;

g. family court or custody mediators;

h. tribal court representatives;

i. members of law enforcement, one of whom shall be an elected sheriff and one of whom shall be a chief of police or other law enforcement executive;

j. probation officers;

k. juvenile court counselors;

l. social workers;

m. law school deans;

n. scholars or professors;

o. individuals or organizations who advocate on behalf of historically marginalized groups, justice-involved persons, and victims of domestic violence or human trafficking;

p. attorneys in private practice, selected in consultation with the North Carolina State Bar and North Carolina Bar Association, one of whom shall be a family attorney, DSS attorney, or parent attorney, and one of whom shall be employed by a legal aid program; and

q. non-attorney residents of North Carolina.

The Chief Justice may appoint additional *ex officio* members.

**Section 1.3: Terms of Commissioners**

With the exception of the chairperson, the members of the Commission shall serve for a term of three years; provided, however, that in the discretion of the Chief Justice, initial appointments may be for a term of between two and four years so as to accomplish staggered terms for the membership of the Commission. No member shall serve more than two consecutive terms.

**Section 1.4: Committees**

The Commission may form standing or ad hoc committees, which may include additional members at the discretion of the Chair.

**SECTION 2: RESPONSIBILITIES OF THE COMMISSION**

By virtue of this Order, the Court issues the following charge to the Commission:

The Commission shall make recommendations and formulate plans to reduce and ultimately eliminate disparate treatment, impacts, and outcomes in the North Carolina judicial system based on identifiable demographics.

**Section 2.1: Calendar Year 2021**

The Court issues the following specific charge to the Commission for calendar year 2021:

a. recommend such rules, policies, or procedures as are necessary to eliminate adverse consequences based solely on inability to pay a legal financial obligation;

b. evaluate jury selection practices and procedures and recommend such changes to rules, policies, and procedures as are necessary to ensure that no person is prevented from serving on a jury as a result of explicit or implicit bias;

c. develop and submit such plans as are necessary to fully implement the remaining recommendations contained in the Commission on the Administration of Law and Justice Committee on Criminal Investigation and Adjudication reports on Pretrial Justice and Criminal Case Management;

d. make recommendations regarding the display of symbols and images in courthouses and judicial system buildings that have the effect of diminishing public trust and confidence in the impartiality and fairness of the judicial system; and

e. in coordination with the School of Government and other education providers, develop effective, ongoing educational programming for elected and appointed officials, court system personnel, and the private bar to build cultural competency and understanding of systemic racism, implicit bias, disparate outcomes, the impacts of trauma and trauma informed practices, and procedural fairness.

**Section 2.2: Calendar Year 2022**

The Court issues the following specific charge to the Commission for calendar year 2022:

a. develop and submit a plan to collect and disseminate data on court performance, including but not limited to criminal charging, intermediate and final case outcomes, case processing times, and racial and gender disparities;

b. develop and submit a plan for eliminating racial and gender disparities in the administration of abuse, neglect, and dependency cases;

c. develop and submit such plans as are necessary to fully implement the remaining recommendations contained in the Commission on the Administration of Law and Justice Committee on Criminal Investigation and Adjudication report on Improving Indigent Defense Services;

d. develop a plan for obtaining and analyzing feedback from the public, jurors, litigants, witnesses, lawyers, victims, law enforcement, and system employees regarding the performance of the judicial system and system actors.

**Section 2.3 Additional Recommendations**

The Commission may make such other recommendations as are determined to be necessary or prudent to accomplish its charge.

**Section 3: Coordination With Other Commissions**

The Commission shall, as appropriate, solicit information and recommendations from, and coordinate with, the following:

- the North Carolina Equal Access to Justice Commission;

- the North Carolina Sentencing and Policy Advisory Commission;

- the Chief Justice's Family Court Advisory Commission;
- the Commission on Indigent Defense Services;
- the North Carolina Judicial Standards Commission;
- the North Carolina Human Trafficking Commission;
- the Governor's Crime Commission;
- the Governor's Task Force for Racial Equity in Criminal Justice;
- the Legislative Task Force on Justice, Law Enforcement and Community Relations; and
- Such other commissions, associations, conferences, or agencies as the Commission deems appropriate.

Ordered by the Court in Conference, this the 13th day of October, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of October, 2020.

s/Amy L. Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

**RESPONSE OF SENIOR ASSOCIATE JUSTICE PAUL NEWBY TO THE COURT'S ADMINISTRATIVE ORDER ESTABLISHING THE CHIEF JUSTICE'S COMMISSION ON FAIRNESS AND EQUITY**

Equal justice under the law is a bedrock principle of our judicial system. As recognized in our State Constitution, "justice shall be administered without favor, denial, or delay."[1] If our courts fail to provide equal justice, they fail to accomplish one of their fundamental tasks. It is also important that North Carolinians believe in the judiciary's commitment and ability to administer justice impartially and in accordance with the law. The formal legal authority of our courts will not mean very much if we ever reach a point where a large majority of citizens have lost faith in the judicial system.

Consistent with my devotion to these principles, I would like to support the majority's administrative order establishing the Chief Justice's Commission on Fairness and Equity. Unfortunately, however, the order is seriously flawed in ways that I cannot in good conscience overlook. First, the timing of this order appears political. Second, and perhaps most troublesome, the order makes factual findings without evidence, based solely on the subjective personal opinions of a majority of this Court, regarding matters which have and will come before the Court. Lastly, the order's directives to the new commission improperly require it to invade the General Assembly's lawmaking powers through the adoption of rules and policies on matters within the legislature's authority.

The timing of the order seems political: The Supreme Court's current majority has been in place for over a year and a half and will remain in place for two months after the election. However, the majority has chosen to create the commission only three weeks before the election, just as early voting begins. It begs the question of why now. The 2017 report that the order cites, *Final Report of the North Carolina Commission on the Administration of Law and Justice*, states that 76% of individuals polled believe judges' decisions are influenced by politics. Unfortunately, given its timing, today's order will only serve to increase the belief that judges make decisions with political considerations in mind.

Judges should not prejudge issues that are currently pending before the Court: The primary role of the judicial branch is to fairly and impartially decide the cases which come before it. Judges are not to make broad policy pronouncements which will call into question their impartiality. The order creating the commission makes findings based solely on the personal opinions of the majority of the Court. The order states

that our judicial system perpetuates inequalities "that stem from a history of deeply rooted discriminatory policies and practices" and refers to "the ongoing role of implicit and explicit racial, gender, and other biases." Further the order states, "we are cognizant of the persistence of discrimination in our judicial system and its effects on those who come before our courts." These unsupported findings expose the majority's personal opinions and seem to prejudge matters at issue in criminal cases currently pending and likely to come before the Court. Those pending matters raise the issue of the improper role of racial bias in a particular case or within the justice system.[2] By their statements it seems the majority views the North Carolina judicial system and its current participants as biased. By making these policy pronouncements, the majority wrongly tilts the scales of justice in favor of parties claiming discrimination in violation of this Court's duty to approach each case impartially and make decisions based on the applicable law and the evidence presented.

Lawmaking belongs to the legislative branch, not the judicial branch. When judges invade the lawmaking arena, no one is left to hear disputes: Under our constitutional system, the General Assembly, not the judiciary, establishes policies through laws, including the State's criminal justice policies. The order creating the commission seems to insert the judicial branch into the policymaking arena. Once the Court makes policy decisions by rulemaking and other administrative authority, it can no longer provide a fair and neutral review of that policy. If, for instance, this Court ultimately adopts administrative orders that significantly reduce fines in criminal cases,[3] school funding would suffer because the clear proceeds of those fines go to the public schools.[4] Local boards of education and public school systems would have no mechanism for disputing the lawfulness of those orders. When the Court takes a policymaking role, there is no one left to impartially decide a matter when a dispute arises.[5]

The goal of the judiciary is that every person will be afforded equal justice under the law, which is an ideal I wholeheartedly embrace. The order creating the Commission on Fairness and Equity, however, is flawed because of its political timing, its unsupported broad policy statements which prejudge issues raised in pending and future cases, and its improper placement of the judiciary in a legislative policymaking role. I support the establishment of a commission properly tasked to perform a good faith examination of our judicial system, but the commission as established by this order exceeds the appropriate parameters of the judicial branch of government.

1. N.C. Const. art. I, § 18.

2. *See*, *e.g.*, *State v. Crump*, No. 151PA18 (N.C. argued Oct. 12, 2020) (deals in part with questioning on racial bias during jury selection); *see also State v. Augustine*, No. 130A03-2, 2020 WL 5742626 (N.C. Sept. 25, 2020) (Racial Justice Act case); *State v. Golphin*, 847 S.E.2d 400 (N.C. Sept. 25, 2020) (Racial Justice Act case); *State v. Walters*, 847 S.E.2d 399 (N.C. Sept. 25, 2020) (Racial Justice Act case); *State v. Robinson*, 375 N.C. 173, 846 S.E.2d 711 (Aug. 14, 2020) (Racial Justice Act case); *State v. Bennett*, 374 N.C. 579, 843 S.E.2d 222 (June 5, 2020) (*Batson*-related case, which is a legal principle on racial discrimination in jury selection practices); *State v. Ramseur*, 374 N.C. 658, 843 S.E.2d 106 (June 5, 2020) (Racial Justice Act case); *State v. Burke*, 374 N.C. 617, 843 S.E.2d 246 (June 5, 2020) (Racial Justice Act case); *State v. Hobbs*, 374 N.C. 345, 841 S.E.2d 492 (May 1, 2020) (*Batson*-related case).

3. Section 2.1.a of the order directs the commission to recommend rules and policies regarding legal financial obligations.

4. N.C. Const. art. IX, § 7.

5. Other examples where the order embroils the commission in policy matters include section 2.1.b, "jury selection practices and procedures," and section 2.2.a, "criminal charging."

## 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 3 of the North Carolina Business Court Rules.

* * *

**Rule 3. Filing and Service**

**3.1. Mandatory electronic filing**. Except as otherwise specified in these rules, all filings in the Court must be made electronically through the Court's electronic-filing system beginning immediately upon designation of the action as a mandatory complex business case by the Chief Justice of the Supreme Court of North Carolina or assignment to a Business Court judge pursuant to Rule 2.1 of the General Rules of Practice. Counsel who appear in the Court are expected to have the capability to use the electronic-filing system. Instructions for filing documents through the Court's electronic-filing system are available on the Court's website. Counsel should exercise diligence to ensure that the description of the document entered during the filing process accurately and specifically describes the document being filed.

**3.2. Who may file**. A filing through the electronic-filing system may be made by counsel, a person filing on counsel's behalf, or a pro se party. Parties who desire not to use the electronic-filing system may file a motion for relief from using the system, but the Court will grant that relief for counsel only upon a showing of exceptional circumstances. A request by a pro se party to forgo use of the electronic filing system will be determined on a good-cause standard.

**3.3. User account**. Counsel who appear in the Court in a particular matter ("counsel of record") and pro se parties who are not excused from using the electronic filing system must promptly create a user account through the Court's website. Any person who has established a user account must maintain adequate security over the password to the account.

**3.4. Electronic signatures**.

(a) **Form**. A document to be filed that is signed by counsel must be signed using an electronic signature. A pro se party must also use an electronic signature on any document that the party is permitted to file by e-mail pursuant to BCR 3.2. An electronic signature consists of a person's typed name preceded by the symbol "/s/." An electronic

signature serves as a signature for purposes of the Rules of Civil Procedure.

(b) **Multiple signatures.** A filing submitted by multiple parties must bear the electronic signature of at least one counsel for each party that submits the filing. By filing a document with multiple electronic signatures, the lawyer whose electronic identity is used to file the document certifies that each signatory has authorized the use of his or her signature.

(c) **Form of signature block**. Every signature block must contain the signatory's name, bar number (if applicable), physical address, phone number, and e-mail address.

**3.5. Format of filed documents**. All filings must be made in a file format approved by the Court. The Court maintains a list of approved formats on its website. Pleadings, motions, and briefs filed electronically must not be filed in an optically scanned format, unless special circumstances dictate otherwise. Proposed orders must be filed in a format permitted by the filing instructions on the Court's website. The electronic file name for each document filed with the Court must clearly identify its contents.

**3.6. Time of filing**. If a document is due on a date certain, then the document must be filed by 5:00 p.m. Eastern Time on that date, unless the Court orders otherwise.

**3.7. Notice of ~~filing~~Filing**. When a document is filed, the Court's electronic-filing system generates a Notice of Filing. The Notice of Filing appears in the user account for all counsel of record and pro se parties who have created a user account. Filing is not complete until issuance of the Notice of Filing. A document filed electronically is deemed filed on the date stated in the Notice of Filing.

**3.8. Notice and entry of orders, judgments, and other matters**. The Court will transmit all orders, decrees, judgments, and other matters through the Court's electronic-filing system, which, in turn, will generate a Notice of Filing to all counsel of record. The issuance by the electronic-filing system of a Notice of Filing for any order, decree, or judgment constitutes entry and service of the order, decree, or judgment for purposes of Rule 58 of the Rules of Civil Procedure. The Court will file a copy of each order, decree, or judgment with the Clerk of Superior Court in the county of venue. If a pro se party is permitted to forgo use of the electronic-filing system under BCR 3.2, the Court will deliver a copy of every order, decree, judgment, or other matter to that pro se party by alternative means.

**3.9. Service**.

(a) ~~**Effect of Notice of Filing**~~**Service through the Court's electronic-filing system defined**. After an action has been designated as a mandatory complex business case or otherwise assigned to the Court, the issuance of a Notice of Filing ~~constitutes adequate service under the Rules of Civil Procedure of the filed document~~is service under Rule 5(b) of the Rules of Civil Procedure. Service by other means is ~~not required unless~~ required if the party served is a pro se party who has not established a user account. ~~Service of materials on pro se parties is governed by BCR 3.9(c). Documents filed with the Court must bear a certificate of service stating that the documents have been filed electronically and will be served in accordance with this rule~~.

(b) **Certificate of Service**. A Notice of Filing is an "automated certificate of service" under Rule 5(b1) of the Rules of Civil Procedure.

~~(b)~~(c) **E-mail addresses**. Each counsel of record and pro se ~~parties~~party who ~~have~~has established a user account must provide the Court with a current e-mail address and maintain a functioning e-mail system. The Court will issue a Notice of Filing to the e-mail address that a person with a user account has provided to the Court.

~~(c)~~(d) **Service of non-filed documents**. When a document must be served but not filed, the document must be served by e-mail unless (i) the parties have agreed to a different method of service or (ii) the Case Management Order calls for another manner of service. ~~Service by e-mail under this rule constitutes adequate service under Rule 5 of the Rules of Civil Procedure~~.

~~(d) **Effect on Rule 6(e) of the Rules of Civil Procedure**. Electronic service made under these rules through the electronic filing system or by e-mail under BCR 3.9(c) is treated the same as service by mail for purposes of Rule 6(e) of the Rules of Civil Procedure.~~

(e) **Service on a pro se ~~parties~~party**. All documents filed with the Court must be served upon a pro se party by any method allowed by the Rules of Civil Procedure, unless the Court or these rules direct otherwise.

**3.10. Procedure when the electronic-filing system appears to fail**. If a person attempts to file a document, but (i) the person is unable for technical reasons to transmit the filing to the Court, (ii) the document appears to have been transmitted to the Court but the person who filed the document does not receive a Notice of Filing, or (iii) some other technical reason prevents a person from filing the document, then the person attempting to file the document must make a second attempt at filing.

If the second attempt fails, the person may (i) continue further attempts to file or (ii) notify the Court of the technical failure by phone call to the judicial assistant for the presiding Business Court judge and e-mail the document for which filing attempts were made to filing help@ncbusinesscourt.net. The e-mail must state the date and time of the attempted filings and a brief explanation of the relevant technical failure(s). The e-mail does not constitute e-filing, but serves as proof of an attempt to e-file in order to protect a party in the event of an imminent deadline and satisfies the deadline, notwithstanding BCR 3.7, unless otherwise ordered. The e mail should also be copied to counsel of record. The Court may ask the person to make another filing attempt.

The Court will work with the parties on an alternative method of filing, such as a cloud-based file-sharing system, if the parties anticipate or experience difficulties with filing voluminous materials (e.g., exhibits to motions and final administrative records) using the Court's electronic-filing system. In such event, counsel should contact the presiding Business Court judge's judicial assistant for assistance.

For purposes of calculating briefing or response deadlines, a document filed electronically is deemed filed at the time and on the date stated in the Notice of Filing.

**3.11. Filings with the Clerk of Superior Court**. Unless otherwise directed by the Administrative Office of the Courts, the Clerk of Superior Court in the county of venue maintains the official file for any action designated to the Court, and the Court is not required to maintain copies of written materials provided to it. Accordingly, material listed in Rule 5(d) of the Rules of Civil Procedure must be filed with the Clerk of Superior Court in the county of venue, either before service or within five days after service.

**3.12. Appearances**. Counsel whose names appear on a signature block in a court filing need not file a separate notice of appearance for the action. After making an initial filing with the Court, counsel should verify that their names and contact information are properly listed on the docket for the action on the Court's electronic filing system. Counsel

whose names do not appear on that docket, but whose names should appear, should contact the judicial assistant for the presiding Business Court judge and request to be added. Out-of-state attorneys may be added to that docket only after admission pro hac vice to appear in the action.

* * *

These amendments to the North Carolina Business Court Rules are effective immediately.

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 13th day of October, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of October, 2020.

s/Amy L. Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

## ORDER AMENDING THE RULES OF APPELLATE PROCEDURE

Pursuant to Article IV, Section 13(2), of the Constitution of North Carolina, the Court hereby amends the North Carolina Rules of Appellate Procedure. This order affects Rules 7, 9, 10, 11, 12, 18, 27, and 28, and Appendixes A and B.

* * *

**Rule 7. Preparation of the Transcript; Court Reporter's Duties**

(a) **Ordering the Transcript.**

(1) **Civil Cases**. Within fourteen days after filing the notice of appeal the appellant shall contract for the transcription of the proceedings or of such parts of the proceedings not already on file, as the appellant deems necessary, in accordance with these rules, and shall provide the following information in writing: a designation of the parts of the proceedings to be transcribed; the name and address of the court reporter or other neutral person designated to produce the transcript; and, where portions of the proceedings have been designated to be transcribed, a statement of the issues the appellant intends to raise on appeal. The appellant shall file the written documentation of this transcript contract with the clerk of the trial tribunal, and serve a copy of it upon all other parties of record and upon the person designated to produce the transcript. If an appellee deems a transcript of other parts of the proceedings to be necessary, the appellee, within fourteen days after the service of the written documentation of the appellant, shall contract for the transcription of any additional parts of the proceedings or such parts of the proceedings not already on file, in accordance with these rules. The appellee shall file with the clerk of the trial tribunal, and serve on all other parties of record, written documentation of the additional parts of the proceedings to be transcribed and the name and address of the court reporter or other neutral person designated to produce the transcript. In civil cases and special proceedings where there is an order establishing the indigency of a party entitled to appointed appellate counsel, the ordering of the transcript shall be as in criminal cases where there is an order establishing the indigency of the defendant as set forth in Rule 7(a)(2).

~~(2) **Criminal Cases**. In criminal cases where there is no order establishing the indigency of the defendant for the appeal, the defendant shall contract for the transcription of the proceedings as in civil cases.~~

~~When there is an order establishing the indigency of the defendant, unless the trial judge's appeal entries specify or the parties stipulate that parts of the proceedings need not be transcribed, the clerk of the trial tribunal shall order a transcript of the proceedings by serving the following documents upon either the court reporter(s) or neutral person designated to produce the transcript: a copy of the appeal entries signed by the judge; a copy of the trial court's order establishing indigency for the appeal; and a statement setting out the name, address, telephone number, and e-mail address of appellant's counsel. The clerk shall make an entry of record reflecting the date these documents were served upon the court reporter(s) or transcriptionist.~~

~~(b) **Production and Delivery of Transcript**.~~

~~(1) **Production**. In civil cases: from the date the requesting party serves the written documentation of the transcript contract on the person designated to produce the transcript, that person shall have sixty days to produce and electronically deliver the transcript.~~

~~In criminal cases where there is no order establishing the indigency of the defendant for the appeal: from the date the requesting party serves the written documentation of the transcript contract on the person designated to produce the transcript, that person shall have sixty days to produce and electronically deliver the transcript in non-capital cases and one hundred-twenty days to produce and electronically deliver the transcript in capitally-tried cases.~~

~~In criminal cases where there is an order establishing the indigency of the defendant for the appeal: from the date listed on the appeal entries as the "Date order delivered to transcriptionist," that person shall have sixty-five days to produce and electronically deliver the transcript in non-capital cases and one-hundred-twenty-five days to produce and electronically deliver the transcript in capitally-tried cases.~~

~~The transcript format shall comply with standards set by the Administrative Office of the Courts.~~

~~Except in capitally-tried criminal cases which result in the imposition of a sentence of death, the trial tribunal, in its discretion and for good cause shown by the appellant, may, pursuant to Rule 27(c)(1), extend the time to produce the transcript for an additional thirty days. Any subsequent motions for additional time required to produce the transcript may only be made pursuant to Rule 27(c)(2) to the appellate court to which appeal has been taken. All motions for extension of time to produce the transcript in capitally-tried cases resulting in the imposition of a sentence of death shall be made directly to the Supreme Court by the appellant.~~

~~(2) **Delivery**. The court reporter, or person designated to produce the transcript, shall electronically deliver the completed transcript to the parties, including the district attorney and Attorney General of North Carolina in criminal cases, as ordered, within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The court reporter or transcriptionist shall certify to the clerk of the trial tribunal that the transcript has been so delivered. The appellant shall promptly notify the court reporter when the record on appeal has been filed. Once the court reporter, or person designated to produce the transcript, has been notified by the appellant that the record on appeal has been filed with the appellate court to which the appeal has been taken, the court reporter must electronically file the transcript with that court using the docket number assigned by that court.~~

~~(3) **Neutral Transcriptionist**. The neutral person designated to produce the transcript shall not be a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or be financially interested in the action unless the parties agree otherwise by stipulation.~~

**Rule 7. Transcripts**

(a) **Scope**. This rule applies to the ordering, preparation, delivery, and filing of each transcript that is to be designated as part of the record on appeal.

(b) **Ordering by a Party**. A party may order a transcript of any proceeding that the party considers necessary for the appeal.

(1) **Transcript Contract**. A party who orders a transcript for the appeal after notice of appeal is filed or given must use an Appellate Division Transcript Contract form to order the transcript. That form is available on the Supreme Court's rules webpage.

(2) **Service of Transcript Contract**. An appellant must serve its transcript contract on each party and on the transcriptionist no later than fourteen days after filing or giving notice of appeal. An appellee must serve its transcript contract on each party and on the transcriptionist no later than twenty-eight days after any appellant files or gives notice of appeal.

(3) **Transcript Documentation**. A party who has ordered a transcript for the appeal, whether ordered before or after notice of appeal, must complete an Appellate Division Transcript Documentation form. That form is available on the Supreme Court's rules webpage.

(4) **Service of Transcript Documentation**. A party must serve the transcript documentation on all other parties within the time allowed under subsection (b)(2) of this rule for that party to serve a transcript contract.

(c) **Ordering by the Clerk of Superior Court**. If a party is indigent and entitled to appointed appellate counsel, then that party is entitled to have the clerk of superior court order a transcript on that party's behalf.

(1) **Appellate Entries.** The clerk of superior court must use an appropriate appellate entries form to order a transcript. Those forms are available on the Judicial Branch's forms webpage.

(2) **Service of Appellate Entries**. The clerk must serve the appellate entries on each party and on each transcriptionist no later than fourteen days after a judge signs the form. Service on a party who has appointed appellate counsel must be made upon that party's appointed appellate counsel.

(d) **Formatting**. The transcriptionist must format the transcript according to standards set by the Administrative Office of the Courts.

(e) **Delivery**.

(1) **Deadlines**. The transcriptionist must deliver the transcript to the parties no later than ninety days after having been served with the transcript contract or the appellate entries, except:

a. In a capitally tried case, the deadline is one hundred eighty days.

b. In an undisciplined or delinquent juvenile case under Subchapter II of Chapter 7B of the General Statutes, the deadline is sixty days.

c. In a special proceeding about the admission or discharge of clients under Article 5 of Chapter 122C of the General Statutes, the deadline is sixty days.

(2) **Certification**. The transcriptionist must certify to the parties and to the clerk of superior court that the transcript has been delivered.

(f) **Filing.** As soon as practicable after the appeal is docketed, the appellant must file each transcript that the parties have designated as part of the record on appeal. Unless granted an exception for good cause, the appellant must file each transcript electronically.

(g) **Neutral Transcriptionist**. The transcriptionist must not have a personal or financial interest in the proceeding, unless the parties otherwise agree by stipulation.

* * *

**Rule 9. The Record on Appeal**

(a) **Function; Notice in Cases Involving Juveniles; Composition of Record**. In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the ~~verbatim~~ transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9. Parties may cite any of these items in their briefs and arguments before the appellate courts.

(1) **Composition of the Record in Civil Actions and Special Proceedings.** The record on appeal in civil actions and special proceedings shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered

out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons with return, or of other papers showing jurisdiction of the trial court over persons or property, or a statement showing same;

d. copies of the pleadings, and of any pretrial order on which the case or any part thereof was tried;

e. so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the ~~verbatim~~ transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given; and identification of the omitted instruction by setting out the requested instruction or its substance in the record on appeal immediately following the instruction given;

g. copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

h. a copy of the judgment, order, or other determination from which appeal is taken;

i. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the ~~verbatim~~ transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

j. copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all issues presented on appeal unless they appear in the ~~verbatim~~ transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

k. proposed issues on appeal set out in the manner provided in Rule 10;

l. a statement, where appropriate, that the record of proceedings was made with an electronic recording device;

m. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is filed with the record on appeal; and

n. any order (issued prior to the filing of the record on appeal) ruling upon a motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(2) **Composition of the Record in Appeals from Superior Court Review of Administrative Boards and Agencies**. The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons, notice of hearing, or other papers showing jurisdiction of the board or agency over persons or property sought to be bound in the proceeding, or a statement showing same;

d. copies of all petitions and other pleadings filed in the superior court;

e. copies of all items properly before the superior court as are necessary for an understanding of all issues presented on appeal;

f. so much of the litigation in the superior court, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented, or

a statement specifying that the ~~verbatim~~ transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

g. a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken;

h. a copy of the notice of appeal from the superior court, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the ~~verbatim~~ transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3);

i. proposed issues on appeal relating to the actions of the superior court, set out in the manner provided in Rule 10; and

j. any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(3) **Composition of the Record in Criminal Actions**. The record on appeal in criminal actions shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

d. copies of docket entries or a statement showing all arraignments and pleas;

e. so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the entire ~~verbatim~~ transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given; and identification of the omitted instruction by setting out the requested instruction or its substance in the record on appeal immediately following the instruction given;

g. copies of the verdict and of the judgment, order, or other determination from which appeal is taken; and in ~~capitally tried~~capitally tried cases, a copy of the jury verdict sheet for sentencing, showing the aggravating and mitigating circumstances submitted and found or not found;

h. a copy of the notice of appeal or an appropriate entry or statement showing appeal taken orally; of all orders establishing time limits relative to the perfecting of the appeal; of any order finding defendant indigent for the purposes of the appeal and assigning counsel; and of any agreement, notice of approval, or order settling the record on appeal and settling the ~~verbatim~~ transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

i. copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all issues presented on appeal, unless they appear in the ~~verbatim~~ transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

j. proposed issues on appeal set out in the manner provided in Rule 10;

k. a statement, where appropriate, that the record of proceedings was made with an electronic recording device;

l. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is filed with the record on appeal; and

m. any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(b) **Form of Record; Amendments**. The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) **Order of Arrangement**. The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) **Inclusion of Unnecessary Matter; Penalty.** It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the issues presented on appeal. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) **Filing Dates and Signatures on Papers**. Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified it. Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature.

(4) **Pagination; Counsel Identified**. The pages of the printed record on appeal shall be numbered consecutively, be referred to as "record pages," and be cited as "(R p ___)." Pages of the Rule 11(c) or Rule 18(d)(3) supplement to the record on appeal shall be numbered consecutively with the pages of the record on appeal, the first page of the record supplement to bear the next consecutive number following the number of the last page of the printed record on appeal. These pages shall be referred to as "record supplement pages" and be cited as "(R S p ___)." Pages of the ~~verbatim~~ transcript

of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and be cited as "(T p ___)." At the end of the record on appeal shall appear the names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel of record for all parties to the appeal.

(5) **Additions and Amendments to Record on Appeal**.

a. **Additional Materials in the Record on Appeal**. If the record on appeal as settled is insufficient to respond to the issues presented in an appellant's brief or the issues presented in an appellee's brief pursuant to Rule 10(c), the responding party may supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9. The responding party shall serve a copy of those items on opposing counsel and shall file the items in a volume captioned "Rule 9(b)(5) Supplement to the Printed Record on Appeal." The supplement shall be filed no later than the responsive brief or within the time allowed for filing such a brief if none is filed.

b. **Motions Pertaining to Additions to the Record**. On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party, the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the filing of the record on appeal in the appellate court, such motions may be filed by any party in the trial court.

(c) **Presentation of Testimonial Evidence and Other Proceedings.** Testimonial evidence, voir dire, statements and events at evidentiary and non evidentiary hearings, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or by designating the ~~verbatim~~ transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (3). When an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal.

(1) **When Testimonial Evidence, Voir Dire, Statements and Events at Evidentiary and Non-Evidentiary Hearings, and Other Trial Proceedings Narrated—How Set Out in Record**. When an issue is presented on appeal with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence, voir dire, statements and events at evidentiary and non-evidentiary hearings, and other trial proceedings required by Rule 9(a) to be included in the record on appeal shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Parties shall use that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. Parties may object to particular narration on the basis that it does not accurately reflect the true sense of testimony received, statements made, or events that occurred; or to particular questions and answers on the basis that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, the judge or referee shall settle the form in the course of settling the record on appeal.

(2) **Designation that ~~Verbatim~~ Transcript of Proceedings in Trial Tribunal Will Be Used**. Appellant may designate in the record on appeal that the testimonial evidence will be presented in the ~~verbatim~~ transcript of the evidence of the trial tribunal in lieu of narrating the evidence and other trial proceedings as permitted by Rule 9(c)(1). When a ~~verbatim~~ transcript of those proceedings has been made, appellant may also designate that the ~~verbatim~~ transcript will be used to present voir dire, statements and events at evidentiary and non-evidentiary hearings, or other trial proceedings when those proceedings are the basis for one or more issues presented on appeal. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the ~~verbatim~~ transcript that has been made, provided that when the ~~verbatim~~ transcript

is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all issues presented on appeal. When appellant has narrated the evidence and other trial proceedings under Rule 9(c)(1), the appellee may designate the ~~verbatim~~ transcript as a proposed alternative record on appeal.

(3) **~~Verbatim~~ Transcript of Proceedings—Settlement, Filing, ~~Copies~~Notice, Briefs**. Whenever a ~~verbatim~~ transcript is designated to be used pursuant to Rule 9(c)(2):

a. it shall be settled, together with the record on appeal, according to the procedures established by Rule 11;

b. appellant shall cause the ~~settled record on appeal and~~ transcript to be filed pursuant to Rule 7 with the clerk of the appellate court in which the appeal has been docketed;

c. in criminal appeals, upon settlement of the record on appeal, the district attorney shall notify the Attorney General of North Carolina that the record on appeal and transcript have been settled; and

d. the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) **Presentation of Discovery Materials**. Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances in which discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be treated as testimonial evidence and shall be presented by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like, pertinent to issues presented on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits in accordance with Rule 9(d)(2).

(5) **Electronic Recordings**. When a narrative or transcript has been produced from an electronic recording, the parties shall not file a copy of the electronic recording with the appellate division except at the direction or with the approval of the appellate court.

(d) **Exhibits**. Any exhibit filed, served, submitted for consideration, admitted, or made the subject of an offer of proof may be made a part of the record on appeal if a party believes that its inclusion is necessary to understand an issue on appeal.

(1) **Documentary Exhibits Included in the Printed Record on Appeal**. A party may include a documentary exhibit in the printed record on appeal if it is of a size and nature to make inclusion possible without impairing the legibility or original significance of the exhibit.

(2) **Exhibits Not Included in the Printed Record on Appeal**. A documentary exhibit that is not included in the printed record on appeal can be made a part of the record on appeal by filing a copy of the exhibit with the clerk of the appellate court. The copy shall be paginated. If multiple exhibits are filed, an index must be included in the filing. A copy that impairs the legibility or original significance of the exhibit may not be filed. An exhibit that is a tangible object or is an exhibit that cannot be copied without impairing its legibility or original significance can be made a part of the record on appeal by having it delivered by the clerk of superior court to the clerk of the appellate court. When a party files a written request with the clerk of superior court that the exhibit be delivered to the appellate court, the clerk must promptly have the exhibit delivered to the appellate court in a manner that ensures its security and availability for use in further trial proceedings. The party requesting delivery of the exhibit to the appellate court shall not be required to move in the appellate court for delivery of the exhibit.

(3) [Reserved]

(4) **Removal of Exhibits from Appellate Court**. All models, diagrams, and exhibits of material placed in the custody of the clerk of the appellate court must be taken away by the parties within ninety days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the clerk. When this

is not done, the clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the clerk shall destroy them, or make such other disposition of them as to the clerk may seem best.

* * *

**Rule 10. Preservation of Issues at Trial; Proposed Issues on Appeal**

(a) **Preserving Issues During Trial Proceedings**.

(1) **General.** 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. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, including, but not limited to, whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal.

(2) **Jury Instructions**. A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

(3) **Sufficiency of the Evidence**. In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial. 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 or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action, or for judgment as in case of nonsuit, at the conclusion of all the evidence, irrespective of whether defendant made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action, or for judgment as in case of nonsuit, at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action, or for judgment as in case of nonsuit, is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

(4) **Plain Error**. In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

(b) **Appellant's Proposed Issues on Appeal**. Proposed issues that the appellant intends to present on appeal shall be stated without argument at the conclusion of the record on appeal in a numbered list. Proposed issues on appeal are to facilitate the preparation of the record on appeal and shall not limit the scope of the issues presented on appeal in an appellant's brief.

(c) **Appellee's Proposed Issues on Appeal as to an Alternative Basis in Law**. Without taking an appeal, an appellee may list proposed issues on appeal in the record on appeal based on any action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. An appellee's list of proposed issues on appeal shall not preclude an appellee from presenting arguments on other issues in its

brief. Portions of the record or transcript of proceedings necessary to an understanding of such proposed issues on appeal as to an alternative basis in law may be included in the record on appeal by agreement of the parties under Rule 11(a), may be included by the appellee in a proposed alternative record on appeal under Rule 11(b), or may be designated for inclusion in the ~~verbatim t~~ranscript of proceedings, if one is filed under Rule 9(c)(2).

* * *

**Rule 11. Settling the Record on Appeal**

(a) **By Agreement**. Within ~~thirty-five~~forty-five days after ~~the court reporter or transcriptionist certifies delivery of the transcript, if such was ordered~~all of the transcripts that have been ordered according to Rule 7 are delivered (seventy days in ~~capitally tried~~capitally tried cases)~~,~~ or ~~thirty-five~~forty-five days after ~~appellant files~~the last notice of appeal is filed or given, whichever is later, the parties may by agreement entered in the record on appeal settle a proposed record on appeal that has been prepared by any party in accordance with Rule 9 as the record on appeal.

(b) **By Appellee's Approval of Appellant's Proposed Record on Appeal**. If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within thirty days (thirty-five days in ~~capitally tried~~capitally tried cases) after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) **By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment**. Within thirty days (thirty-five days in ~~capitally tried~~capitally tried cases) after service upon appellee of appellant's proposed record on appeal, that appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served,

submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in its request for judicial settlement. The formatting of the ~~proposed~~ record on appeal and the order in which items appear in it are the responsibility of the appellant.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal. If a party requests that an item be included in the record on appeal but not all other parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the printed record on appeal in a volume captioned "Rule 11(c) Supplement to the Printed Record on Appeal," along with any ~~verbatim~~ transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to these rules; provided that any item not filed, served, submitted for consideration, or admitted, or for which no offer of proof was tendered, shall not be included. Subject to the additional requirements of Rule 28(d), items in the Rule 11(c) supplement may be cited and used by the parties as would items in the printed record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal. Judicial settlement is not appropriate for disputes that concern only the formatting of a record on appeal or the order in which items appear in a record on appeal.

The Rule 11(c) supplement to the printed record on appeal shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 11(c) supplement shall be paginated as required by Rule 9(b)(4) and the contents should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal. If a party does not agree to the inclusion or specification

of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to these rules were not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that a statement or narration permitted by these rules is not factually accurate, then that party, within ten days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request that the judge from whose judgment, order, or other determination appeal was taken settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the judge in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 9(c)(1), and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non duplicative, or otherwise suited for inclusion in the record on appeal.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than fifteen days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than twenty days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial-settlement process with the order settling the record on appeal.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is timely sought, the record is deemed settled as of the expiration of the ten-day period within which any party could have requested judicial settlement of the record on appeal under this Rule 11(c).

Provided that, nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) **Multiple Appellants; Single Record on Appeal**. When there are multiple appellants (two or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal. The proposed issues on appeal of the several appellants shall be set out separately in the single record on appeal and attributed to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) **Extensions of Time**. The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

* * *

**Rule 12. Filing the Record; Docketing the Appeal; Copies of the Record**

(a) **Time for Filing Record on Appeal**. Within fifteen days after the record on appeal has been settled by any of the procedures provided in Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

(b) **Docketing the Appeal**. At the time of filing the record on appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to N.C.G.S. § 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal *in forma pauperis* as provided in N.C.G.S. §§ 1 288 or 7A-450 et seq., the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed in the appellate court.

(c) **Copies of Record on Appeal**. The appellant shall file one copy of the printed record on appeal, one copy of each exhibit designated pursuant to Rule 9(d), one copy of any supplement to the record on appeal submitted pursuant to Rule 11(c) or Rule 18(d)(3), and one copy of any ~~paper~~ deposition or administrative hearing transcript~~, and shall cause any court proceeding transcript to be filed electronically pursuant to Rule 7~~. The appellant is encouraged to file each of these documents electronically, if permitted to do so by the electronic-filing site. Unless granted an exception for good cause, the appellant shall file one

copy of each transcript that the parties have designated as part of the record on appeal electronically pursuant to Rule 7. The clerk will reproduce and distribute copies of the printed record on appeal as directed by the court, billing the parties pursuant to these rules.

* * *

**Rule 18. Taking Appeal; Record on Appeal—Composition and Settlement**

(a) **General**. Appeals of right from administrative agencies, boards, commissions, or the Office of Administrative Hearings (referred to in these rules as "administrative tribunals") directly to the appellate division under N.C.G.S. § 7A-29 shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as provided in this Article.

(b) **Time and Method for Taking Appeals**.

(1) The times and methods for taking appeals from an administrative tribunal shall be as provided in this Rule 18 unless the General Statutes provide otherwise, in which case the General Statutes shall control.

(2) Any party to the proceeding may appeal from a final decision of an administrative tribunal to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within thirty days after receipt of a copy of the final decision of the administrative tribunal. The final decision of the administrative tribunal is to be sent to the parties by Registered or Certified Mail. The notice of appeal shall specify the party or parties taking the appeal; shall designate the final administrative tribunal decision from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(3) If a transcript of fact-finding proceedings is not made as part of the process leading up to the final administrative tribunal decision, ~~the appealing party may contract with a court reporter for production of such parts of the proceedings not already on file as it deems necessary, pursuant to the procedures prescribed in Rule 7~~then the parties may order transcripts using the procedures applicable to court proceedings in Rule 7.

(c) **Composition of Record on Appeal**. The record on appeal in appeals from any administrative tribunal shall contain:

(1) an index of the contents of the record on appeal, which shall appear as the first page thereof;

(2) a statement identifying the administrative tribunal from whose judgment, order, or opinion appeal is taken; the session at which the judgment, order, or opinion was rendered, or if rendered out of session, the time and place of rendition; and the party appealing;

(3) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the administrative tribunal over persons or property sought to be bound in the proceeding, or a statement showing same;

(4) copies of all other notices, pleadings, petitions, or other papers required by law or rule to be filed with the administrative tribunal to present and define the matter for determination, including a Form 44 for all workers' compensation cases which originate from the Industrial Commission;

(5) a copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the administrative tribunal from which appeal was taken;

(6) so much of the litigation before the administrative tribunal or before any division, commissioner, deputy commissioner, or hearing officer of the administrative tribunal, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the ~~verbatim~~ transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2) and (3);

(7) when the administrative tribunal has reviewed a record of proceedings before a division or an individual commissioner, deputy commissioner, or hearing officer of the administrative tribunal, copies of all items included in the record filed with the administrative tribunal which are necessary for an understanding of all issues presented on appeal;

(8) copies of all other papers filed and statements of all other proceedings had before the administrative tribunal or any of its individual commissioners, deputies, or

divisions which are necessary to an understanding of all issues presented on appeal, unless they appear in the ~~verbatim~~ transcript of proceedings being filed pursuant to Rule 9(c)(2) and (3);

(9) a copy of the notice of appeal from the administrative tribunal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the ~~verbatim~~ transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

(10) proposed issues on appeal relating to the actions of the administrative tribunal, set out as provided in Rule 10;

(11) a statement, when appropriate, that the record of proceedings was made with an electronic recording device;

(12) a statement, when appropriate, that a supplement compiled pursuant to Rule 18(d)(3) is filed with the record on appeal; and

(13) any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84 4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(d) **Settling the Record on Appeal**. The record on appeal may be settled by any of the following methods:

(1) **By Agreement**. Within ~~thirty-five~~forty-five days after ~~filing of the notice of appeal, or after production of the transcript if one is ordered pursuant to Rule 18(b)(3)~~all of the transcripts that have been ordered according to Rule 7 and Rule 18(b)(3) are delivered or forty-five days after the last notice of appeal is filed, whichever is later, the parties may by agreement entered in the record on appeal settle a proposed record on appeal that has been prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) **By Appellee's Approval of Appellant's Proposed Record on Appeal**. If the record on appeal is not settled

by agreement under Rule 18(d)(1), the appellant shall, ~~within thirty-five days after filing of the notice of appeal, or after production of the transcript if one is ordered pursuant to Rule 18(b)(3)~~within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within thirty days after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal or objections, amendments, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in its request for judicial settlement. The formatting of the ~~proposed~~ record on appeal and the order in which items appear in it is the responsibility of the appellant. Judicial settlement is not appropriate for disputes concerning only the formatting or the order in which items appear in the settled record on appeal. If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) **By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment**. If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 18(c) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal, in the absence of contentions that the item was not filed, served, or offered into evidence. If a party requests that an item be included in the record on appeal but not all parties to the appeal agree to its inclusion, then that item shall not be included in the printed record

on appeal, but shall be filed by the appellant with the record on appeal in a volume captioned "Rule 18(d)(3) Supplement to the Printed Record on Appeal," along with any ~~verbatim~~ transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to these rules; provided that any item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered shall not be included. Subject to the additional requirements of Rule 28(d), items in the Rule 18(d)(3) supplement may be cited and used by the parties as would items in the printed record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal.

The Rule 18(d)(3) supplement to the printed record on appeal shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 18(d)(3) supplement shall be paginated consecutively with the pages of the record on appeal, the first page of the supplement to bear the next consecutive number following the number of the last page of the record on appeal. These pages shall be referred to as "record supplement pages," and shall be cited as "(R S p ___)." The contents of the supplement should be arranged, so far as practicable, in the order in which they occurred or were filed in the administrative tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to these rules were not filed, served, submitted for consideration, admitted, or offered into

evidence, or that a statement or narration permitted by these rules is not factually accurate, then that party, within ten days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request that the administrative tribunal convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the administrative tribunal, shall be served upon all other parties. Each party shall promptly provide to the administrative tribunal a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the administrative tribunal in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 18(c)(6), and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

Upon receipt of a request for settlement of the record on appeal, the administrative tribunal shall send written notice to counsel for all parties setting a place and time for a conference to settle the record on appeal. The conference shall be held not later than fifteen days after service of the request upon the administrative tribunal. The administrative tribunal or a delegate appointed in writing by the administrative tribunal shall settle the record on appeal by order entered not more than twenty days after service of the request for settlement upon the administrative tribunal. If requested, the settling official shall return the record items submitted for reference during the settlement process with the order settling the record on appeal.

When the administrative tribunal is a party to the appeal, the administrative tribunal shall forthwith request the Chief Judge of the Court of Appeals or the

Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these rules and the appointing order.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is sought, the record is deemed settled as of the expiration of the ten-day period within which any party could have requested judicial settlement of the record on appeal under this Rule 18(d)(3).

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by administrative tribunal decision.

(e) **Further Procedures and Additional Materials in the Record on Appeal**. Further procedures for perfecting and prosecuting the appeal shall be as provided by these rules for appeals from the courts of the trial divisions.

(f) **Extensions of Time**. The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

* * *

**Rule 27. Computation and Extension of Time**

(a) **Computation of Time**. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

(b) **Additional Time After Service**. Except as to filing of notice of appeal pursuant to Rule 3(c), whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper and the notice or paper is served by mail, or by e-mail if allowed by these rules, three days shall be added to the prescribed period.

(c) **Extensions of Time; By Which Court Granted**. Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules, or by order of court, for doing

any act required or allowed under these rules, or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a petition for rehearing or the responses thereto prescribed by these rules or by law.

(1) **Motions for Extension of Time in the Trial Division**. The trial tribunal for good cause shown by the appellant may extend once, for no more than thirty days, the time permitted by: (1) Rule 7~~(b)(1)~~ for ~~the person designated to prepare the transcript to produce such transcript~~ a transcriptionist to deliver a transcript; and (2) Rule 11 or Rule 18 for service of the proposed record on appeal.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state.

Motions made under this Rule 27 to a court of the trial division may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chair of the commission; or if to a commissioner, then by that commissioner.

(2) **Motions for Extension of Time in the Appellate Division**. All motions for extensions of time other than those specifically enumerated in Rule 27(c)(1) may be made only to the appellate court to which appeal has been taken.

(d) **Motions for Extension of Time; How Determined**. Motions for extension of time made in any court may be determined *ex parte*, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time; provided that motions made after the expiration of the time allowed in these rules for the action sought to be extended must be in writing and with notice to all other parties and may be allowed only after all other parties have had an opportunity to be heard.

* * *

**Rule 28. Briefs—Function and Content**

(a) **Function**. The function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of

review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned. Similarly, issues properly presented for review in the Court of Appeals, but not then stated in the notice of appeal or the petition accepted by the Supreme Court for review and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court, are deemed abandoned.

(b) **Content of Appellant's Brief**. An appellant's brief shall contain, under appropriate headings and in the form prescribed by Rule 26(g) and the appendixes to these rules, in the following order:

(1) A cover page, followed by a subject index and table of authorities as required by Rule 26(g).

(2) A statement of the issues presented for review. The proposed issues on appeal listed in the record on appeal shall not limit the scope of the issues that an appellant may argue in its brief.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) A statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

(5) A full and complete statement of the facts. This should be a non argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all issues presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

(6) An argument, to contain the contentions of the appellant with respect to each issue presented. Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.

The argument shall contain a concise statement of the applicable standard(s) of review for each issue, which shall appear either at the beginning of the discussion of each issue or under a separate heading placed before the beginning of the discussion of all the issues.

The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the issue may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal, the transcript of proceedings, or exhibits.

(7) A short conclusion stating the precise relief sought.

(8) Identification of counsel by signature, typed name, post office address, telephone number, State Bar number, and e-mail address.

(9) The proof of service required by Rule 26(d).

(10) Any appendix required or allowed by this Rule 28.

(c) **Content of Appellee's Brief; Presentation of Additional Issues**. An appellee's brief shall contain a subject index and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel, and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix required or allowed by this Rule 28. It does not need to contain a statement of the issues presented, procedural history of the case, grounds for appellate review, the facts, or the standard(s) of review, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present issues in addition to those stated by the appellant.

Without taking an appeal, an appellee may 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, order, or other determination from which appeal has been taken. Without having taken appeal or listing proposed issues as permitted by Rule 10(c), an appellee may also argue on appeal whether a new trial should be granted to the appellee rather than a judgment notwithstanding the verdict awarded to the appellant when the latter relief is sought on appeal by the appellant. If the appellee presents issues in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new issues supported by references to pages in the record on appeal, the transcript

of proceedings, or the appendixes, as appropriate, as well as a statement of the applicable standard(s) of review for those additional issues.

An appellee may supplement the record with any materials pertinent to the issues presented on appeal, as provided in Rule 9(b)(5).

(d) **Appendixes to Briefs**. Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file ~~verbatim~~ portions of the transcript as appendixes to their briefs, if required by this Rule 28(d).

(1) **When Appendixes to Appellant's Brief Are Required**. Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

a. those portions of the transcript of proceedings which must be reproduced ~~verbatim~~ in order to understand any issue presented in the brief;

b. those portions of the transcript showing the pertinent questions and answers when an issue presented in the brief involves the admission or exclusion of evidence;

c. relevant portions of statutes, rules, or regulations, the study of which is required to determine issues presented in the brief;

d. relevant items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal, the study of which are required to determine issues presented in the brief.

(2) **When Appendixes to Appellant's Brief Are Not Required**. Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an issue presented:

a. whenever the portion of the transcript necessary to understand an issue presented in the brief is reproduced ~~verbatim~~ in the body of the brief;

b. to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

c. to show the general nature of the evidence necessary to understand an issue presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).

(3) **When Appendixes to Appellee's Brief Are Required**. An appellee must reproduce appendixes to its brief in the following circumstances:

a. Whenever the appellee believes that appellant's appendixes do not include portions of the transcript or items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal that are required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript or supplement it believes to be necessary to understand the issue.

b. Whenever the appellee presents a new or additional issue in its brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript or relevant items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal as if it were the appellant with respect to each such new or additional issue.

(4) **Format of Appendixes**. The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of clear photocopies of transcript pages that have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered, and an index to the appendix shall be placed at its beginning.

(e) **References in Briefs to the Record**. References in the briefs to parts of the printed record on appeal and to parts of the ~~verbatim~~ transcript or parts of documentary exhibits shall be to the pages where those portions appear.

(f) **Joinder of Multiple Parties in Briefs**. Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief even though they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) **Additional Authorities**. Additional authorities discovered by a party after filing its brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs or in such a memorandum may not be cited and discussed in oral argument.

(h) **Reply Briefs**. Within fourteen days after an appellee's brief has been served on an appellant, the appellant may file and serve a reply brief, subject to the length limitations set forth in Rule 28(j). Any reply brief which an appellant elects to file shall be limited to a concise rebuttal of arguments set out in the appellee's brief and shall not reiterate arguments set forth in the appellant's principal brief. Upon motion of the appellant, the Court may extend the length limitations on such a reply brief to permit the appellant to address new or additional issues presented for the first time in the appellee's brief. Otherwise, motions to extend reply brief length limitations or to extend the time to file a reply brief are disfavored.

(i) **Amicus Curiae Briefs**. An amicus curiae may file a brief with the permission of the appellate court in which the appeal is docketed.

(1) **Motion**. To obtain the court's permission to file a brief, amicus curiae shall file a motion with the court that states concisely the nature of amicus curiae's interest, the reasons why the brief is desirable, the issues of law to be addressed in the brief, and the position of amicus curiae on those issues.

(2) **Brief**. The motion must be accompanied by amicus curiae's brief. The amicus curiae brief shall contain, in a footnote on the first page, a statement that identifies any person or entity—other than amicus curiae, its members, or its counsel—who, directly or indirectly, either wrote the brief or contributed money for its preparation.

(3) **Time for Filing**. If the amicus curiae brief is in support of a party to the appeal, then amicus curiae shall file its motion and brief within the time allowed for filing that party's principal brief. If amicus curiae's brief does not support either party, then amicus curiae shall file its motion and proposed brief within the time allowed for filing appellee's principal brief.

(4) **Service on Parties**. When amicus curiae files its motion and brief, it must serve a copy of its motion and brief on all parties to the appeal.

(5) **Action by Court**. Unless the court orders otherwise, it will decide amicus curiae's motion without responses or argument. An amicus motion filed by an individual on his or her own behalf will be disfavored.

(6) **Reply Briefs**. A party to the appeal may file and serve a reply brief that responds to an amicus curiae brief no

later than thirty days after having been served with the amicus curiae brief. A party's reply brief to an amicus curiae brief shall be limited to a concise rebuttal of arguments set out in the amicus curiae brief and shall not reiterate or rebut arguments set forth in the party's principal brief. The court will not accept a reply brief from an amicus curiae.

(7) **Oral Argument**. The court will allow a motion of an amicus curiae requesting permission to participate in oral argument only for extraordinary reasons.

(j) **Word-Count Limitations Applicable to Briefs Filed in the Court of Appeals**. Each brief filed in the Court of Appeals, whether filed by an appellant, appellee, or amicus curiae, shall be set in font as set forth in Rule 26(g)(1) and described in Appendix B to these rules. A principal brief may contain no more than 8,750 words. A reply brief may contain no more than 3,750 words. An amicus curiae brief may contain no more than 3,750 words.

(1) **Portions of Brief Included in Word Count**. Footnotes and citations in the body of the brief must be included in the word count. Covers, captions, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, counsel's signature block, and appendixes do not count against these word count limits.

(2) **Certificate of Compliance**. Parties shall submit with the brief, immediately before the certificate of service, a certification, signed by counsel of record, or in the case of parties filing briefs pro se, by the party, that the brief contains no more than the number of words allowed by this rule. For purposes of this certification, counsel and parties may rely on word counts reported by word-processing software, as long as footnotes and citations are included in those word counts.

* * *

## Appendix A. Timetables for Appeals

**Timetable of Appeals from Trial Division and Administrative Tribunals Under Articles II and IV of the Rules of Appellate Procedure**

| *Action* | *Time (Days)* | *From date of* | *Rule Ref.* |
|---|---|---|---|
| Taking Appeal (Civil) | 30 | Entry of Judgment (Unless Tolled) | 3(c) |
| Cross-Appeal | 10 | Service and Filing of a Timely Notice of Appeal | 3(c) |
| Taking Appeal (Administrative Tribunal) | 30 | Receipt of Final Administrative Tribunal Decision (Unless Statutes Provide Otherwise) | 18(b)(2) |
| Taking Appeal (Criminal) | 14 | Entry of Judgment (Unless Tolled) | 4(a) |
| ~~Ordering Transcript (Civil, Administrative Tribunal)~~Serving Transcript Contract (Appellant) | 14 | Filing or Giving Notice of Appeal | ~~7(a)(1)~~ 7(b)(2) 18(b)(3) |
| Serving Transcript Contract (Appellee) | 28 | Appellant Filing or Giving Notice of Appeal | 7(b)(2) 18(b)(3) |
| ~~Ordering Transcript (Criminal Indigent)~~ Serving Appellate Entries (Clerk of Superior Court) | 14 | ~~Order Filed by Clerk of Superior Court~~Judge Signing Appellate Entries | ~~7(a)(2)~~ 7(c)(2) |
| ~~Preparing and Delivering Transcript~~ | | ~~Service of Order for Transcript~~Service of Transcript Contract or Appellate Entries | ~~7(b)(1)~~ 7(e)(1) |
| ~~(Civil, Non-Capital Criminal)~~ | ~~60~~ | | |
| ~~(Capital Criminal)~~ | ~~120~~ | | |
| Delivering Transcript (General Rule) | 90 | | |
| (Capitally Tried Cases) | 180 | | |
| (Undisciplined or Delinquent Juvenile Cases) | 60 | | |

| | | | |
|---|---|---|---|
| (Special Proceedings about the Admission or Discharge of Clients) | 60 | | |
| Serving Proposed Record on Appeal<br>~~(Civil, Non-Capital Criminal)~~<br>~~(Administrative Tribunal)~~<br>(General Rule) | <br>~~35~~<br>~~35~~<br>45 | ~~Notice of Appeal (No Transcript) or Court Reporter's Certificate of Delivery of Transcript~~All Transcripts Being Delivered or Notice of Appeal, Whichever is Later | 11(b)<br>18(d) |
| Serving Proposed Record on Appeal<br>~~(Capital)~~(Capitally Tried Cases) | 70 | ~~Court Reporter's Certificate of Delivery~~All Transcripts Being Delivered | 11(b) |
| Serving Objections or Proposed Alternative Record on Appeal<br>~~(Civil, Non-Capital Criminal)~~<br>~~(Capital Criminal)~~<br>~~(Administrative Tribunal~~)<br>(General Rule)<br>(Capitally Tried Cases) | <br>~~30~~<br>~~35~~<br>~~30~~<br>30<br>35 | Service of Proposed Record<br><br>~~Service of Proposed Record~~ | 11(c)<br><br>18(d)(2) |
| Requesting Judicial Settlement of Record | 10 | Expiration of the Last Day Within Which an Appellee Who Has Been Served Could Serve Objections, etc. | 11(c)<br>18(d)(3) |
| Judicial Settlement of Record | 20 | Service on Judge of Request for Settlement | 11(c)<br>18(d)(3) |
| Filing Record on Appeal in Appellate Court | 15 | Settlement of Record on Appeal | 12(a) |
| Filing Appellant's Brief (or Mailing Brief Under Rule 26(a)) | 30 | Filing the Record on Appeal in Appellate Court (60 Days in Death Cases) | 13(a) |

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|---|---|---|---|
| Filing Appellee's Brief (or Mailing Brief Under Rule 26(a)) | 30 | Service of Appellant's Brief (60 Days in Death Cases) | 13(a) |
| Filing Appellant's Reply Brief (or Mailing Brief Under Rule 26(a)) | 14 | Service of Appellee's Brief | 28(h) |
| Oral Argument (Usual Minimum Time) | 30 | Filing Appellant's Brief | 29 |
| Certification or Mandate | 20 | Issuance of Opinion | 32 |
| Petition for Rehearing (Civil Action Only) | 15 | Mandate | 31(a) |

**Timetable of Appeals from Trial Division Under Article II, Rule 3.1, of the Rules of Appellate Procedure**

| *Action* | *Time (Days)* | *From date of* | *Rule Ref.* |
|---|---|---|---|
| Taking Appeal | 30 | Entry of Judgment | 3.1(b); N.C.G.S. § 7B-1001 |
| Notifying Court Reporting Manager | 1 (Business) | Filing Notice of Appeal | 3.1(c) |
| Assigning Transcriptionist | 5 (Business) | Completion of Expedited Juvenile Appeals Form | 3.1(c) |
| Delivering a Transcript of the Proceedings | 40 | Assignment by Court Reporting Manager | 3.1(c) |
| Serving Proposed Record on Appeal | 15 | Delivery of Transcript | 3.1(d) |
| Serving Notice of Approval, Specific Objections or Amendments, or Proposed Alternative Record on Appeal | 10 | Service of Proposed Record on Appeal | 3.1(d) |

| | | | |
|---|---|---|---|
| Requesting Judicial Settlement of Record | 10 | Expiration of the Last Day Within Which an Appellee Who Has Been Served Could Serve Objections, etc. | 3.1(d); 11(c) |
| Judicial Settlement of Record | 20 | Service on Judge of Request for Settlement | 3.1(d); 11(c) |
| Filing Record on Appeal in Appellate Court | 5 (Business) | Settlement of Record on Appeal | 3.1(d) |
| Filing Appellant's Brief | 30 | Filing of Record on Appeal | 13(a)(1) |
| Filing Appellee's Brief | 30 | Service of Appellant's Brief | 13(a)(1) |
| Filing Appellant's Reply Brief (or Mailing Brief Under Rule 26(a)) | 14 | Service of Appellee's Brief | 13(a)(1); 28(h) |

**Timetable of Appeals to the Supreme Court from the Court of Appeals Under Article III of the Rules of Appellate Procedure**

| *Action* | *Time (Days)* | *From date of* | *Rule Ref.* |
|---|---|---|---|
| Petition for Discretionary Review Prior to Determination | 15 | Docketing Appeal in Court of Appeals | 15(b) |
| Notice of Appeal and/or Petition for Discretionary Review | 15 | Mandate of Court of Appeals (or From Order of Court of Appeals Denying Petition for Rehearing) | 14(a) 15(b) |
| Cross-Notice of Appeal | 10 | Filing of First Notice of Appeal | 14(a) |
| Response to Petition for Discretionary Review | 10 | Service of Petition | 15(d) |
| Filing Appellant's Brief (or Mailing Brief Under Rule 26(a)) | 30 | Filing Notice of Appeal Certification of Review | 14(d) 15(g)(2) |

| | | | |
|---|---|---|---|
| Filing Appellee's Brief (or Mailing Brief Under Rule 26(a)) | 30 | Service of Appellant's Brief | 14(d) 15(g) |
| Filing Appellant's Reply Brief (or Mailing Brief Under Rule 26(a)) | 14 | Service of Appellee's Brief | 28(h) |
| Oral Argument | 30 | Filing Appellee's Brief (Usual Minimum Time) | 29 |
| Certification or Mandate | 20 | Issuance of Opinion | 32 |
| Petition for Rehearing (Civil Action Only) | 15 | Mandate | 31(a) |

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All of the critical time intervals outlined here except those for taking an appeal, petitioning for discretionary review, responding to a petition for discretionary review, or petitioning for rehearing may be extended by order of the court in which the appeal is docketed at the time. Note that Rule ~~7(b)(1)~~27 authorizes the trial tribunal to grant only one extension of time for ~~production of the transcript and that the trial tribunal lacks such authority in criminal cases in which a sentence of death has been imposed~~the delivery of a transcript. Note also that Rule 27 authorizes the trial tribunal to grant only one extension of time for service of the proposed record. All other motions for extension of the times provided in these rules must be filed with the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." (Rule 21(c)).

* * *

**Appendix B. Format and Style**

All documents for filing in either appellate court are prepared on 8½ x 11", plain, white unglazed paper of 16- to 20-pound weight. Typing is done on one side only, although the document will be reproduced in two-sided format. No vertical rules, law firm marginal return addresses, or punched holes will be accepted. The papers need not be stapled; a binder clip or rubber bands are adequate to secure them in order.

Papers shall be prepared using font no smaller than 12-point and no larger than 14-point using a proportionally spaced font with serifs. Examples of proportionally spaced fonts with serifs include, but are not

limited to, Constantia, Century, Century Schoolbook, and Century Old Style typeface. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be approximately 6½ inches wide and 9 inches long. Tabs are located at the following distances from the left margin: ½", 1", 1½", 2", 4¼" (center), and 5".

**CAPTIONS OF DOCUMENTS**

All documents to be filed in either appellate court shall be headed by a caption. The caption contains: the number to be assigned the case by the clerk; the Judicial District from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties to the action, except as provided by Rule 42; the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall be placed beginning at the top margin of a cover page and again on the first textual page of the document.

No. _____ (Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)

(or)

(NORTH CAROLINA COURT OF APPEALS)

**********

| | | |
|---|---|---|
| STATE OF NORTH CAROLINA | ) | |
| or | ) | |
| (Name of Plaintiff) | ) | From (Name) County |
| | ) | |
| v | ) | No. _____ |
| | ) | |
| (Name of Defendant) | ) | |

**********

(TITLE OF DOCUMENT)

**********

The caption should reflect the title of the action (all parties named except as provided by Rule 42) as it appeared in the trial division. The appellant or petitioner is not automatically given topside billing; the relative positions of the plaintiff and defendant should be retained.

The caption of a record on appeal and of a notice of appeal from the trial division should include directly below the name of the county, the indictment or docket numbers of the case in the trial division. Those numbers, however, should not be included in other documents, except a petition for writ of certiorari or other petitions and motions in which no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the Court of Appeals docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, e.g., PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31, or DEFENDANT APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is entitled NEW BRIEF.

**INDEXES**

A brief or petition that is ten pages or more in length and all appendixes to briefs (Rule 28) must contain an index to the contents.

The index should be indented approximately ¾" from each margin, providing a 5" line. The form of the index for a record on appeal should be as follows (indexes for briefs are addressed in Appendix E):

(Record)

INDEX

**USE OF THE TRANSCRIPT OF EVIDENCE WITH RECORD ON APPEAL**

Those portions of the printed record on appeal that correspond to the items asterisked (*) in the sample index above would be omitted if the transcript option were selected under Rule 9(c). In their place, counsel should insert a statement in substantially the following form:

> "Per Rule 9(c) of the Rules of Appellate Procedure, the transcript of proceedings in this case, taken by (name), ~~court reporter~~ transcriptionist, from (date) to (date) and consisting of (# of volumes) volumes and (# of pages) pages, numbered (1) through (last page #), is electronically filed pursuant to Rule 7."

Entire transcripts should not be inserted into the printed record on appeal, but rather should be electronically filed by the ~~court reporter~~appellant pursuant to Rule 7. Transcript pages inserted into the record on appeal will be treated as a narration and will be printed at the standard page charge. Counsel should note that transcripts will not be reproduced with the record on appeal, but will be treated and used as an exhibit.

**TABLE OF CASES AND AUTHORITIES**

Immediately following the index and before the inside caption, all briefs, petitions, and motions that are ten pages or greater in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and

other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to the most recent edition of *The Bluebook: A Uniform System of Citation*. Citations to regional reporters shall include parallel citations to official state reporters.

**FORMAT OF BODY OF DOCUMENT**

Paragraphs within the body of the record on appeal should be single-spaced, with double spaces between paragraphs. The body of petitions, notices of appeal, responses, motions, and briefs should be double-spaced, with captions, headings, issues, and long quotes single-spaced.

Adherence to the margins is important because the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented ¾" from each margin and should be single-spaced. The citation should immediately follow the quote.

References to the record on appeal should be made using a parenthetical in the text: (R pp 38-40). References to the transcript, if used, should be made in a similar manner: (T p 558, line 21).

**TOPICAL HEADINGS**

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin. Sub issues should be presented in similar format, but block indented ½" from the left margin.

**NUMBERING PAGES**

The cover page containing the caption of the document (and the index in records on appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lowercase Roman numerals, e.g., i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by Arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g., -4-.

An appendix to the brief should be separately numbered in the manner of a brief.

**SIGNATURE AND ADDRESS**

Unless filed pro se, all original papers filed in a case will bear the original signature of at least one counsel participating in the case, as in the example below. The name, address, telephone number, State Bar number, and e-mail address of the person signing, together with the capacity in which that person signs the paper, will be included. When counsel or the firm is retained, the firm name should be included above the signature; however, if counsel is appointed in an indigent criminal appeal, only the name of the appointed counsel should appear, without identification of any firm affiliation. Counsel participating in argument must have signed the brief in the case prior to that argument.

(Retained) [LAW FIRM NAME]

By: _____
[Name]

By: _____
[Name]

Attorneys for Plaintiff-Appellants
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
State Bar No. _____
[e-mail address]

(Appointed) _____
[Name]
Attorney for Defendant-Appellant
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
State Bar No. _____
[e-mail address]

* * *

These amendments to the North Carolina Rules of Appellate Procedure become effective on 1 January 2021 and apply to cases that are appealed on or after that date.

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 17th day of November, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of November, 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 Rule 4 of the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions.

* * *

**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) **Attendance Required Through the Use of Remote Technology**. Any party or person required to attend a mediated settlement conference shall 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 is declared. Notwithstanding this remote attendance requirement, the conference may be conducted in person if:

a. 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. 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.

(4) **Excusing the Attendance Requirement**. Any party or person may be excused from the requirement to attend a mediated settlement conference with the consent of all parties and persons required to attend the conference and the mediator.

(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.

* * *

This amendment to the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions becomes effective on 23 November 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 17th day of November, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of November, 2020.

s/Amy L. Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

## 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 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 is declared. Notwithstanding this remote attendance requirement, the mediation may be conducted in person if:

a. 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. the clerk, upon motion of a person required to attend the mediation and notice to the mediator and to all other persons required to attend the mediation, 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.

(7) Any person may be excused from the requirement to attend a mediation with the consent of all persons required to attend the mediation and 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.

* * *

This amendment to the Rules of Mediation for Matters Before the Clerk of Superior Court becomes effective on 23 November 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 17th day of November, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of November, 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 Rule 4 of the Rules for Settlement Procedures in District Court Family Financial Cases.

* * *

**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. The parties.

b. At least one counsel of record for each party whose counsel has appeared in the case.

(2) **Attendance Required Through the Use of Remote Technology**. Any party or person required to attend a mediated settlement conference shall 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 when an impasse is declared. Notwithstanding this remote attendance requirement, the conference may be conducted in person if:

a. 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. the court, upon motion of a party and notice to the mediator and to all parties and persons required to attend the conference, so orders.

(3) **Excusing the Attendance Requirement**. Any party or person may be excused from the requirement to attend a mediated settlement conference with the consent of all parties and persons required to attend the conference and the mediator.

(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.

* * *

These amendments to the Rules for Settlement Procedures in District Court Family Financial Cases become effective on 23 November 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 17th day of November, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of November, 2020.

s/Amy L. Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

# HEADNOTE INDEX

## TOPICS COVERED IN THIS INDEX

**CONSTITUTIONAL LAW—Continued**

**TERMINATION OF PARENTAL RIGHTS—Continued**

**Best interest of the child—statutory factors—likelihood of adoption—behavioral issues—**The trial court did not abuse its discretion by concluding that termination of a mother and father's parental rights served their twelve-year-old child's best interests where a family was interested in adopting all six of their children (including the twelve-year-old) and the trial court did not find that the child's behavioral issues made adoption unlikely. **In re S.M., 673.**

**Best interest of the child—sufficiency of findings—likelihood of adoption—bond between parent and child—**In a termination of parental rights case, the Supreme Court rejected the mother's challenges to the trial court's dispositional findings regarding her eleven-year-old child who had behavioral issues. The challenged findings on achievement of permanence and likelihood of adoption were supported by competent evidence, and the trial court was not required to make findings about the child's attitude toward adoption or whether the mother's relationship with the child was detrimental to his well-being. **In re C.B., 556.**

**Best interests of child—consideration of factors—no abuse of discretion—**The trial court did not abuse its discretion by determining that termination of a mother's parental rights to her four children was in the children's best interests. When making its best interests determination, the court properly considered each dispositional factor under N.C.G.S. § 7B-1110(a), entered findings of fact supported by the evidence, and assessed the children's best interests in a way that was consistent with those findings and with the recommendations made by the children's guardian ad litem. **In re E.F., 88.**

**Best interests of child—findings—basis—**The trial court's conclusion that termination of respondents' parental rights to their three children was in the children's best interests was supported by unchallenged findings of fact addressing the statutory factors in N.C.G.S. § 7B-1110(a). Although respondent-father had a strong bond with the oldest child, and the three children would not be able to live together as a family unit after termination, the trial court did not abuse its discretion by weighing certain factors more than others in determining that termination was in the best interests of the children. **In re A.H.F.S., 503.**

**Best interests of child—potential guardian—findings of fact—not required—**In determining that termination of a mother's parental rights to her four children was in the children's best interests, the trial court did not err by failing to consider the maternal great-grandmother as a potential guardian because the mother presented insufficient evidence of the great-grandmother's willingness or ability to provide the children a permanent home. Thus, when making its best interests determination, the court was not obligated to enter findings under N.C.G.S. § 7B-1110(a)(6) about the great-grandmother's eligibility as a placement option for the children. **In re E.F., 88.**

**Best interests of child—statutory factors—likelihood of adoption—aid in accomplishing permanent plan—**The trial court did not abuse its discretion by determining that termination of a mother's parental rights to her four children was in the children's best interests. Although the father of the three youngest children retained his parental rights at the time of the termination hearing, the trial court properly found that the children had a high likelihood of being adopted and that terminating the mother's parental rights would aid in accomplishing the children's permanent plan of adoption (N.C.G.S. § 7B-1110(a)(2)-(3)) where competent evidence showed that the father wanted his children's foster caretaker to adopt the children and that the foster caretaker had already taken steps toward doing so. **In re E.F., 88.**

**TERMINATION OF PARENTAL RIGHTS—Continued**

**Best interests of child—statutory factors—relevance of additional considerations—**The trial court's conclusion that terminating a mother's parental rights to her daughter was in the daughter's best interest was supported by unchallenged findings of fact which addressed the factors in N.C.G.S. § 7B-1110(a), including the child's relationship with her mother, grandmother, and brother. The trial court did not err by excluding findings of fact on other issues where there were no conflicts in the evidence for the court to resolve. **In re S.J.B., 362.**

**Best interests of the child—abuse of discretion analysis—**The Supreme Court declined to deviate from well-established precedent that a trial court's best interest determination in a termination of parental rights case should be reviewed for abuse of discretion, rather than de novo, as argued by respondent-mother. In this case, the trial court did not abuse its discretion by concluding termination of respondent's parental rights was in the child's best interest based on detailed dispositional findings addressing the statutory factors contained in N.C.G.S. § 7B-1110(a), and that the child's best interests lay in being adopted by his maternal aunt and uncle with whom he had resided for several years. **In re A.M.O., 717.**

**Best interests of the child—adoption or guardianship—sixteen-year-old minor—misapprehension of law—remand—**Where the trial court's best interests determination—which found that termination of parental rights would aid in the accomplishment of the permanent plan of adoption or guardianship—appeared to rest upon a misapprehension of the legal differences between adoption and guardianship (termination was not necessary to accomplish guardianship), the matter was remanded for reconsideration of guardianship as a dispositional alternative. The trial court was instructed to give proper weight to the now-seventeen-year-old minor's age, his lack of consent to adoption, his bond with his parents, and the availability of a family to be appointed as guardians. **In re A.K.O., 698.**

**Best interests of the child—current circumstances—speculation—**On remand from an earlier appeal, respondent-father failed to show the trial court abused its discretion by concluding that termination of his parental rights was in the best interests of his three children on the existing record without taking additional evidence. The trial court properly relied on evidence from the original termination hearing, and respondent's argument that the trial court failed to take into account changes in the children's circumstances was based on speculation and not supported by a forecast of evidence. **In re R.L.O., 655.**

**Best interests of the child—misapprehension of law—co-parenting inconsistent with termination—**The trial court's disposition order concluding that termination of respondent-father's parental rights in his son was in the son's best interests was vacated and remanded for reconsideration where the court's order—directing the department of social services to continue to allow respondent-father to co-parent his son and to honor the son's request not to be adopted by his foster parents—indicated a misapprehension of the law regarding the effect termination would have on the parental-child relationship. **In re Z.O.G.-I., 858.**

**Best interests of the child—statutory factors—likelihood of adoption—child's wishes—**The trial court did not abuse its discretion by concluding that termination of respondent-father's parental rights was in the best interests of his fifteen-year-old son where the court's findings addressed each of the dispositional factors in N.C.G.S. § 7B-1110(a) and were supported by competent evidence. The findings demonstrated the court's consideration of the son's views on being adopted,

**TERMINATION OF PARENTAL RIGHTS—Continued**

and supported the court's determination that the son's best interests would not be served by requiring him to consent to adoption. **In re B.E., 730.**

**Best interests of the child—statutory factors—sufficiency of findings—adoption—**The trial court did not abuse its discretion by concluding that termination of a mother's and father's parental rights was in their nine-year-old daughter's best interests where the trial court appropriately considered the statutory factors, making unchallenged findings that the daughter was bonded with her prospective adoptive family and that termination would aid in the permanent plan of adoption. Explicit written findings were not required on matters for which there was no conflict in the evidence. **In re A.K.O., 698.**

**Best interests of the child—sufficiency of dispositional findings—mother's poverty and mental health—dispositional alternatives—**The trial court did not abuse its discretion by concluding that termination of a mother's parental rights would be in her child's best interests where the trial court made sufficient dispositional findings and performed the proper statutory analysis. The trial court was not required to make dispositional findings concerning the mother's poverty and mental health issues, and it also was not required to consider whether an alternative plan of guardianship that included visitation would have been in the child's best interests. **In re N.K., 805.**

**Best interests of the child—weighing of dispositional factors—**In a private termination action, the trial court did not abuse its discretion in determining that termination of a father's parental rights would be in his children's best interests where the unchallenged dispositional findings included the children's young ages, the children's positive living arrangements with their mother and grandparents, the son's significant progress in overcoming the trauma of seeing his father shoot his mother in the leg, the lack of any bond between the children and the father, and the mother's demonstrated ability to meet the children's needs. The trial court's weighing of the dispositional factors was neither arbitrary nor manifestly unsupported by reason. **In re K.L.M., 118.**

**Competency inquiry—parental guardian ad litem—**In a termination of parental rights proceeding, the trial court did not abuse its discretion by failing to conduct a second inquiry into whether respondent-mother was entitled to a guardian ad litem despite respondent being adjudicated incompetent and appointed a guardian of the person in a separate adult protective services proceeding. Although these events occurred after the trial court's first determination that respondent was not entitled to a Rule 17 guardian, the trial court was not required to hold another competency hearing before proceeding with termination where there was sufficient evidence that respondent was competent to take part in the proceedings without the aid of a guardian ad litem. **In re Q.B., 826.**

**Competency inquiry—parental guardian ad litem—obligation of petitioning agency to request—**In a termination of parental rights proceeding, the petitioning department of social services was not obligated to request the appointment of a guardian ad litem for respondent-mother if there was reason to believe she was incompetent where Civil Procedure Rule 17(c) imposed no such requirement. **In re Q.B., 826.**

**Competency of parent—appointment of guardian ad litem—trial court's discretion—**In a termination of parental rights case, the trial court did not abuse its

**TERMINATION OF PARENTAL RIGHTS—Continued**

(N.C.G.S. § 7B-1111(a)(6)) but failed to make any findings regarding whether the mother had an appropriate alternative child care arrangement, the trial court's findings were insufficient to support its conclusion of law on this ground for termination and the order was reversed. **In re K.H., 610.**

**Grounds for termination—dependency—incarceration—**The trial court did not err by terminating a mother's parental rights in her children on the grounds of dependency (N.C.G.S. § 7B-1111(a)(6)) where the mother would be incarcerated for at least twenty-two months beyond the termination hearing and there was no appropriate alternative child care arrangement. The trial court's error in finding that her expected release date was approximately eight additional months later (thirty months) was harmless. **In re A.L.S., 708.**

**Grounds for termination—failure to make reasonable progress—**Respondents' parental rights to their three children were properly terminated based on grounds of failure to make reasonable progress to correct the conditions which led to the removal of the children where respondents did not adequately address the mother's substance abuse and mental health, conditions and safety of the home, and the children's medical, dental, and developmental needs. Although respondent-father made some progress on his case plan, he did not make reasonable progress toward the primary issues which led to the removal of the children. The trial court's determination that respondent-mother's failure was willful was supported by the evidence and findings of fact. **In re A.H.F.S., 503.**

**Grounds for termination—failure to make reasonable progress—**The trial court properly terminated respondent-father's parental rights in his child based on grounds of failure to make reasonable progress to correct the conditions which led to the removal of the child where respondent was put on notice of the requirements of his case plan but failed to consistently submit to drug screens or to demonstrate maintained sobriety, failed to obtain income either through employment or disability benefits, failed to participate in individual therapy, and delayed starting his visitation schedule with the child until over a year after he was released from incarceration. **In re Z.O.G.-I., 858.**

**Grounds for termination—failure to make reasonable progress—incarceration—**The trial court erred by concluding that grounds of failure to make reasonable progress existed to terminate a mother's parental rights where the department of social services failed to carry its burden of proof. The finding that the mother, who was incarcerated, was able to comply with her case plan during her incarceration was not supported by sufficient evidence; her release date was too remote in time (fifteen months) to expect her to have secured housing and employment; and her completion of a "mothering" class was a sufficient attempt to complete a required "parenting" class. **In re K.D.C., 784.**

**Grounds for termination—failure to make reasonable progress—incarceration—ability to comply with case plan—**The trial court properly terminated a father's parental rights to his daughter on grounds of willful failure to make reasonable progress to correct the conditions that led to the child's removal (N.C.G.S. § 7B-1111(a)(2)) where the trial court found that, although the father's incarceration for a drug offense limited his ability to comply with his case plan, the father failed to complete parts of his case plan that he could have accomplished while incarcerated or to supply documentation confirming that he completed any case plan item apart from one parenting class. Additionally, the court found that the father never inquired

**TERMINATION OF PARENTAL RIGHTS—Continued**

about his daughter in the fifteen months before his incarceration, even though he knew she was in the department of social services' custody. **In re A.J.P., 516.**

**Grounds for termination—failure to make reasonable progress—juvenile mother and child in same foster home—**Where a sixteen-year-old mother and her nine-month-old baby were taken into social services custody and placed in the same foster home, the time that the mother and baby lived together in the same foster home could not count toward the requisite twelve months of separation for termination under N.C.G.S. § 7B-1111(a)(2) because they were not living apart from each other. **In re K.H., 610.**

**Grounds for termination—failure to make reasonable progress—removal conditions—direct or indirect—**In a termination of parental rights case, the Supreme Court rejected a mother's argument that the removal conditions she had to correct to avoid termination based on N.C.G.S. § 7B-1111(a)(2) were limited to those set forth in the underlying petition, which the mother contended were the need for stable and appropriate housing. The trial court had the authority to require her to address any condition that directly or indirectly contributed to the children's removal, which included parenting, mental health concerns, and housing instability. **In re E.C., 581.**

**Grounds for termination—failure to make reasonable progress—sufficiency of findings—**The trial court properly terminated a father's parental rights to his daughter on grounds of willful failure to make reasonable progress to correct the conditions that led to the child's removal (N.C.G.S. § 7B-1111(a)(2)) where the evidence supported the court's findings of fact, including that the father was the mother's drug supplier, the father knew about the mother's pregnancy months before the child's birth, and the father provided drugs to the mother throughout her pregnancy. These findings established a nexus between the conditions leading to the daughter's removal (she tested positive for controlled substances at birth and her mother's drug abuse problems persisted) and the substance abuse and mental health components of the father's case plan that he failed to comply with. **In re A.J.P., 516.**

**Grounds for termination—failure to make reasonable progress—sufficiency of findings—extremely limited progress—**Grounds existed to terminate a mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2) for willful failure to make reasonable progress where the mother made only extremely limited progress in correcting the conditions that led to her children's removal and no evidence suggested that the mother had any barriers preventing her from complying with her case plan. Among other things, she failed to cooperate with social services workers; to obtain stable housing, employment, and income; to participate in domestic violence counseling; and to complete a court-ordered substance abuse assessment. **In re S.M., 673.**

**Grounds for termination—failure to make reasonable progress—sufficiency of findings—failure to comply with case plan—**In a termination of parental rights case, the trial court's findings supported its conclusion that a mother willfully left her children in foster care where she failed to comply with the components of her case plan addressing her parenting and mental health issues, and she addressed the housing component only one month before the termination hearing—after the children had been in Youth and Family Services custody for more than three years. **In re E.C., 581.**

**TERMINATION OF PARENTAL RIGHTS—Continued**

**Grounds for termination—failure to make reasonable progress—sufficiency of findings—no removal—**There was insufficient evidence to terminate a father's parental rights on the grounds of failure to make reasonable progress where no petition was ever filed to adjudicate the child abused, dependent, or neglected and no trial court with appropriate jurisdiction ever entered an order removing the child from the father's custody. The Supreme Court rejected the argument that the father's voluntary out-of-home family services agreement identified the "conditions" that "led to the removal" of the child and that his failure to comply with the agreement constituted grounds for termination under N.C.G.S. § 7B-1111(a)(2). **In re E.B., 310.**

**Grounds for termination—failure to make reasonable progress—willfully leaving juveniles in placement outside home—voluntary kinship placement—**The trial court erred in finding grounds to terminate a mother's parental rights for willfully leaving her daughter in a placement outside the home for more than twelve months without making reasonable progress toward correcting the conditions that led to her removal (N.C.G.S. § 7B-1111(a)(2)). These grounds did not apply because the mother agreed to place her child with the child's aunt and uncle through a voluntary kinship placement, and the aunt and uncle later obtained full custody though a civil custody order under Chapter 50 of the General Statutes. **In re K.C.T., 592.**

**Grounds for termination—failure to pay a reasonable portion of the cost of care—**The trial court properly terminated a father's parental rights to his daughter based on willful failure to pay child support (N.C.G.S. § 7B-1111(a)(3)) where the evidence showed that the father was employed during the six months prior to the filing of the termination petition, that he earned some income during that time, and that he had the financial means to support his child. The trial court was not obligated to enter findings about the father's living expenses in order to support its adjudication. **In re J.A.E.W., 112.**

**Grounds for termination—failure to pay reasonable portion of cost of care—six months immediately preceding petition—sufficiency of findings—**Where the trial court terminated a sixteen-year-old mother's parental rights in her infant for willful failure to pay a reasonable portion of the cost of care (N.C.G.S. § 7B-1111(a)(3)) but failed to address the six-month time period immediately preceding the filing of the petition, the trial court's findings were insufficient to support its conclusion of law on this ground for termination and the order was reversed. **In re K.H., 610.**

**Grounds for termination—neglect—failure to address underlying problems—sufficiency of evidence—**A mother's parental rights in her child were subject to termination on the grounds of neglect (N.C.G.S. § 7B-1111(a)(1)) where the child had been adjudicated neglected and the neglect was likely to recur based on the mother's failure to adequately address her substance abuse, mental health, and domestic violence problems and to obtain appropriate housing. Contrary to the mother's argument on appeal, the trial court made an independent determination by taking judicial notice of the underlying adjudicatory and dispositional orders, admitting reports from the department of social services and the child's guardian ad litem, and hearing testimony from the child's social worker. **In re N.K., 805.**

**Grounds for termination—neglect—likelihood of future neglect—**In an action between two parents, the trial court properly terminated respondent-mother's parental rights to her child on the grounds of neglect based on an unchallenged finding that the child was previously neglected due to living in an environment injurious

**TERMINATION OF PARENTAL RIGHTS—Continued**

to his welfare when living with respondent, and on findings showing a likelihood of repetition of neglect if the child were returned to her care. Respondent's previously stated desire to relinquish her parental rights for a sum of money, her past substance abuse and lack of treatment, her previous failure to contact her son for a period of more than a year, and a lack of evidence that the condition of her home had changed sufficiently demonstrated respondent's inability or unwillingness to provide adequate care and supported a reasonable conclusion that neglect would likely continue in the future. **In re D.L.A.D., 565.**

**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 continued substance abuse, limited progress on his case plan, multiple criminal charges during the pendency of the case, and incarceration after entering an Alford plea to one of those charges—during which he made no attempt to contact his son—indicated a likelihood of future neglect if the son were returned to the father's care. **In re A.S.T., 547.**

**Grounds for termination—neglect—likelihood of future neglect—**The trial court properly terminated respondent-father's parental rights to his three children on the grounds of neglect after making supplemental findings of fact from the existing record (on remand from an earlier appeal) without taking new evidence. The findings were binding where respondent did not challenge their evidentiary basis, and they established a pattern of neglect consisting of an unsafe and unsanitary home and improper care of the children, which in turn supported a reasonable conclusion that neglect would likely continue if the children were returned to the father's care. **In re R.L.O., 655.**

**Grounds for termination—neglect—likelihood of future neglect—incarceration—**The trial court's findings did not support its conclusion that grounds of neglect existed to terminate a mother's parental rights where the trial court erred in determining that there would be a likelihood of future neglect. The finding that the mother, who was incarcerated, had the ability to comply with her case plan during her incarceration was not supported by sufficient evidence; her release date was too remote in time (fifteen months) to expect her to have secured housing and employment; she completed a "mothering" class (in lieu of a required "parenting" class), an anger management class, and a grief recovery class; and she maintained regular contact with her children. **In re K.D.C., 784.**

**Grounds for termination—neglect—likelihood of future neglect—neglect by abandonment—**The trial court erred in finding grounds to terminate a mother's parental rights to her daughter based on neglect (N.C.G.S. § 7B-1111(a)(1)) where there was no evidence to support a finding of a high likelihood of future neglect if the child were returned to the mother's care, apart from highly speculative testimony regarding the mother's ability to care for the child in light of her own mental disabilities. Furthermore, the mother did not neglect her daughter by abandonment where she consistently sent gifts and repeatedly contacted her daughter and her daughter's caregivers over a long period of time leading up to the termination hearing. **In re K.C.T., 592.**

**Grounds for termination—neglect—likelihood of future neglect—sufficiency of findings—substance abuse and domestic violence—**There was a reasonable probability that a father with an extensive history of substance abuse and domestic violence would repeat the neglect of his children if they were returned to his care

**TERMINATION OF PARENTAL RIGHTS—Continued**

where the trial court found that he was inconsistent with drug screening requirements, failed to establish the status or durability of his sobriety, failed to comply with his recommended long-term individual counseling for domestic violence, and demonstrated no meaningful recognition of the effect of domestic violence on his children. **In re D.M., 761.**

**Grounds for termination—neglect—likelihood of future neglect—sufficiency of findings—substance abuse and domestic violence—**There was a reasonable probability that a mother with an extensive history of substance abuse and domestic violence would repeat the neglect of her children if they were returned to her care where the trial court found that she was inconsistent with drug screening requirements, failed to establish the status or durability of her sobriety, failed to complete her recommended domestic violence counseling, and demonstrated no meaningful recognition of the effect of domestic violence on her children. **In re D.M., 761.**

**Grounds for termination—neglect—non-compliance with case plan—**The trial court's determination that grounds existed to terminate respondent-father's parental rights in his children based on neglect was upheld where it was supported by unchallenged findings of fact and record evidence that respondent failed to comply with numerous requirements of his service plan related to substance abuse, domestic violence, housing, parenting, visitation, and child support. **In re K.P.-S.T., 797.**

**Grounds for termination—neglect—private termination—**In a private termination of parental rights action where the child had not been in respondent-mother's physical custody for several years, the trial court properly terminated respondent's rights based on neglect where its unchallenged findings established that the child was previously neglected, supporting a conclusion that the child was likely to be neglected again if returned to respondent's care. **In re R.L.D., 838.**

**Grounds for termination—neglect—substance abuse and inappropriate discipline—denial of effect on children—**The trial court properly terminated respondent-mother's parental rights in her children based on neglect where the trial court found, based on sufficient evidence, that respondent-mother was in denial about how alcohol abuse by the children's father and physical abuse he inflicted on them affected the children and that her failure to address past trauma through recommended therapy precluded her from providing her children with proper care and supervision. These and other findings supported the court's conclusion that there was a high likelihood of the repetition of neglect should the children be returned to her care. **In re B.E., 730.**

**Grounds for termination—neglect—sufficiency of findings—**The trial court's findings supported its conclusion that grounds existed to terminate a father's parental rights based on neglect (N.C.G.S. § 7B-1111(a)(1)) where the father's failure to comply with his case plan during the time he was not incarcerated demonstrated a likelihood of future neglect. Specifically, he continued using illegal drugs, failed to comply with mental health treatment, failed to maintain stable employment or income, failed to take parenting classes, and failed to maintain stable housing suitable for the child. His minimal eleventh-hour efforts during his subsequent incarceration did not outweigh his previous failure to make progress on his case plan. **In re O.W.D.A., 645.**

**Grounds for termination—neglect—sufficiency of findings—void permanency planning hearings and orders—**There was insufficient evidence to terminate a

**TERMINATION OF PARENTAL RIGHTS—Continued**

father's parental rights on the grounds of neglect where nearly all of the trial court's findings of fact related directly to permanency planning and review hearings that were legally void because no juvenile petition was ever filed (pursuant to N.C.G.S. § 7B-402(a) and 403(a)). There was no evidence that the father had neglected the child (who had never been in his custody) or that he would neglect her if she were in his care; rather, the evidence showed that the father was successfully caring for three other minor children. Findings related to the father's history of marijuana use and the loss of his job and housing were also insufficient to support the conclusion that the father was likely to neglect the child in the future. **In re E.B., 310.**

**Grounds for termination—willful abandonment—conduct outside the statutory period—**The trial court properly terminated a father's parental rights to his daughter on grounds of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where the trial court found the father knew of his daughter about four months before her birth but failed to contact or provide support to her between her birth and his incarceration for possession of cocaine. Although the father was incarcerated during the relevant six-month period, the trial court properly considered the father's conduct outside that period in evaluating his credibility and intentions within the relevant period. **In re A.J.P., 516.**

**Grounds for termination—willful abandonment—determinative time period—no contact or support—**The trial court's decision terminating a father's parental rights in his child on the grounds of willful abandonment was affirmed where, during the determinative six-month period, the father had no contact with his child, who had moved to California with the mother, despite having working cell phone numbers for the mother and her husband; had expressed no interest in a relationship with the child; and had sent nothing to or for the child except for one partial child support payment. The trial court was also permitted to consider the father's actions outside of the six-month period to evaluate his intentions—for example, the father's failure to express any interest in seeing the child after learning she was back in North Carolina (after the termination petition was filed). **In re C.A.H., 750.**

**Grounds for termination—willful abandonment—lack of contact and show of affection—**The trial court's findings in a proceeding to terminate a mother's parental rights were supported by evidence and in turn supported the court's conclusion that the mother willfully abandoned her child. Although the mother was incarcerated during the determinative six-month period, she was not barred by court order from contacting her son and took no steps to communicate with him through several possible relatives, nor did she show any affection or concern toward him. **In re L.M.M., 346.**

**Grounds for termination—willful abandonment—no contact or financial support—**In an action between two parents, the trial court properly terminated a father's parental rights to his daughter based on willful abandonment where, during the nearly three years prior to the filing of the termination petition, the father had no contact with his daughter and provided no financial or other tangible support for her. Although the trial court failed to use the statutory language of "willful abandonment," its findings—based on clear, cogent, and convincing evidence—supported the conclusion that respondent's conduct constituted willful abandonment. **In re N.M.H., 637.**

**Grounds for termination—willful abandonment—sufficiency of findings—void permanency planning hearings and orders—**There was insufficient evidence

**TERMINATION OF PARENTAL RIGHTS—Continued**

to terminate a father's parental rights on the grounds of willful abandonment where nearly all of the trial court's findings of fact related directly to permanency planning and review hearings that were legally void because no juvenile petition was ever filed (pursuant to N.C.G.S. § 7B-402(a) and 403(a)). The father's failure to attend these hearings and comply with the resulting void orders could not support termination of his parental rights; furthermore, the father made ongoing efforts before and throughout the determinative time period to obtain custody of his child—even though the trial court and the county department of social services lacked the authority to keep the child out of his custody. **In re E.B., 310.**

**Grounds—willful abandonment—findings of fact—conclusions of law—**The trial court properly terminated a father's parental rights to his two children on the ground of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where for two and a half years, including the six months before the termination petition was filed, the father made only one attempt to see his children and did not provide them any emotional, material, or financial support. Clear, cogent, and convincing evidence supported enough of the findings of fact to support termination, and the trial court properly considered the father's conduct outside the determinative six-month window when evaluating his credibility and intentions. Importantly, the father's single attempt to visit his children did not undermine the court's ultimate finding and conclusion that he willfully abandoned his children. **In re J.D.C.H., 335.**

**Grounds—willful failure to make reasonable progress—**The trial court properly terminated a mother's parental rights to her daughter based upon a willful failure to make reasonable progress toward correcting the conditions that led to the child's removal from the family home (N.C.G.S. § 7B-1111(a)(2)). The trial court found that the mother failed to maintain stable housing and employment, frequently missed scheduled visits with her daughter, and failed to attend most of her individual and group therapy sessions despite continuing to be involved in incidents of domestic violence with the daughter's father since the child's removal from the home. **In re L.E.W., 124.**

**Jurisdiction—UCCJEA—home state—record evidence—**The trial court had jurisdiction to terminate respondents' parental rights to their two children, despite respondents' argument that the trial court failed to make specific findings establishing North Carolina as the children's home state (per the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)) in a previous order adjudicating the children neglected, where record evidence established that both children lived in various locations in North Carolina since they were born and at all times until the department of social services obtained custody. **In re A.S.M.R., 539.**

**Motion for continuance—more time for counsel to review court records—**In a termination of parental rights case, the trial court did not abuse its discretion by denying the father's motion to continue the termination hearing to allow his counsel time to review a permanency planning order that counsel allegedly never received a copy of. The father failed to show extraordinary circumstances justifying the continuance—which would have extended beyond the statutorily allowed period—where his counsel's court file contained multiple references to the permanency planning order, including summaries of the trial court's findings and of the evidence at the permanency planning hearing. **In re A.J.P., 516.**

**No-merit brief—abandonment and neglect—drug use and failure to comply with case plan—**The termination of a father's parental rights on the grounds of

**TERMINATION OF PARENTAL RIGHTS—Continued**

**TERMINATION OF PARENTAL RIGHTS—Continued**

grounds (he had a history of substance abuse, which the children were exposed to at home, and he made minimal progress in addressing the problem) was affirmed where the father's counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence. **In re S.D.H., 846.**

**On remand from earlier appeal—no new evidence taken—abuse of discretion analysis—**On remand from an earlier appeal, the trial court did not abuse its discretion by terminating respondent-father's parental rights to his three children on review of the existing record without taking further evidence. Not only did respondent stipulate that the trial court could enter an order on remand without an evidentiary hearing, but also the Court of Appeals' instructions for the trial court on remand left the decision to take new evidence in the trial court's discretion. **In re R.L.O., 655.**

**Permanency planning order—reunification with parent—eliminated—sufficiency of findings—**Before terminating a mother's parental rights to her daughter, the trial court did not err by entering a permanency planning order eliminating reunification with the mother from the child's permanent plan. Not only did the trial court's findings of fact address each of the factors stated in N.C.G.S. § 906.2(d) for evaluating the likely success of future reunification efforts, but the court also expressly found that the mother and the child's father—who shared a continuing pattern of domestic violence and often neglected to feed their child—acted in a manner inconsistent with the child's health and safety. **In re L.E.W., 124.**

**Permanency planning order—standard of proof—misstated—harmless error—**Before terminating a mother's parental rights to her daughter, the trial court did not commit prejudicial error by misstating the applicable standard of proof in a permanency planning order that eliminated reunification with the mother from the child's permanent plan. Under the misstated standard, the trial court's decision to eliminate reunification from the permanent plan rested upon findings of fact that required the petitioner (the Department of Social Services) to present stronger proof than the law actually required; therefore, the trial court's error worked in the mother's favor. **In re L.E.W., 124.**

**Permanency planning order—visitation—reduced—proper—**Before terminating a mother's parental rights to her daughter, the trial court did not abuse its discretion by entering a permanency planning order reducing the amount of visitation the mother was entitled to have with the child. In addition to properly eliminating reunification with the mother from the child's permanent plan, the court found that the mother neglected to take full advantage of her existing visitation rights, frequently missing or arriving late to visits with her daughter. **In re L.E.W., 124.**

**Standing to file petition—effect on trial court's jurisdiction—**In a termination of parental rights case, where the trial court entered a permanency planning order awarding custody and guardianship of the children to their great-aunt and uncle while specifically retaining jurisdiction and providing for further hearings upon motion by any party, the trial court had jurisdiction to enter an order granting nonsecure custody of the children to the department of social services (DSS) after DSS filed a motion seeking review of the children's custody arrangement. Thus, as a party granted custody by a "court of competent jurisdiction," DSS had standing to file a petition to terminate respondent-parents' rights to the children and, therefore, did not deprive the trial court of its jurisdiction over the termination proceeding. **In re K.S.D-F., 626.**

**UTILITIES—Continued**

**General rate case—coal ash spill—return on coal ash remediation costs—consideration of "other material facts"—**In two general rate cases (consolidated on appeal), where the Utilities Commission allowed two electric companies to defer certain coal ash remediation costs and to include those costs in the cost of service used to establish their retail rates, the Commission properly allowed the companies to earn a return on the unamortized balance of those costs. Although this decision represented a departure from ordinary ratemaking procedures, it was nevertheless lawful where the Commission properly exercised its authority under N.C.G.S. § 62-133(d) to "consider all other material facts of record" apart from those specifically mentioned throughout section 62-133 (the ratemaking statute) when determining what rates would be "just and reasonable." **State ex rel. Utils. Comm'n v. Stein, 870.**

**General rate case—coal ash spill—return on coal ash remediation costs—sufficiency of findings—**In two general rate cases (consolidated on appeal), where the Utilities Commission allowed two electric companies to include certain coal ash remediation costs in the cost of service used to establish their retail rates, the Commission entered sufficient findings of fact pursuant to N.C.G.S. § 62-79(a) to enable the Court of Appeals to discern the bases for also allowing the companies to earn a return on the unamortized balance of those costs. Although intervenors in both cases argued that the Commission made contradictory findings about how it classified the coal ash-related costs under the ratemaking statute (N.C.G.S. § 62-133), the Commission clearly decided that it had authority to allow the return on those costs regardless of the classification issue. **State ex rel. Utils. Comm'n v. Stein, 870.**

**General rate case—increase in basic facilities charge—for one class of ratepayers—**In a general rate case, the Utilities Commission did not err by authorizing an electric company to increase the basic facilities charge for the residential rate class while leaving the facilities charges against other classes of ratepayers unchanged. Evidence in the record supported the increase, as well as the exact dollar figure the Commission chose and the methodology used to generate that figure, and the Commission properly balanced competing policy goals when approving the increase. Further, the Commission adequately considered any adverse effects of the increased facilities charge on low-income customers and showed that the increase was not "unduly discriminatory" under N.C.G.S. § 62-140. **State ex rel. Utils. Comm'n v. Stein, 870.**