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SUPREME COURT OF NORTH CAROLINA

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OF
NORTH CAROLINA

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[1]Term ended 31 December 2020. [2]Sworn in 1 January 2021. [3]Term ended 31 December 2020. [4]Sworn in 1 January 2021. [5]Sworn in 1 January 2021.

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[6]Resigned 7 January 2021. [7]Appointed 8 January 2021.

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	Chad Hogston	Wilmington
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Munsahe Magarira
Katherine McCraw
Kindelle McCullen
Jarrett McGowan
Neal McHenry
Alan McInnes
Erin McKee
Carolyn McLain
Christopher McLennan
Michael Shawn Maier
Mary Maloney
Lee Miller
Kelly Ann Moore
Thomas H. Moore
Kimberly Murrell
Tracy Nayer
Ellen A. Newby
Bryan Nichols
Zachary Padget
Sondra C. Panico
Perry Pelaez
Cheryl A. Perry
Kyle Peterson
Matthew Petracca
Stacey Phipps
Robert Pickett
Ebony J. Pittman
Sandra Postell
Rajeev K. Premakumar
Jessica Price
Kenzie Rakes
Kimberly Randolph
Mercedes Restucha-Klem
Yvonne B. Ricci
Kristine Ricketts
Brenda Rivera
Orlando Rodriguez
Jason Rosser
Nicholas Sanders
Alexander Saunders
Stuart Saunders
Wes Saunders
John Schaeffer
Shelby Smith
William Smith
Matthew Sommer

Benjamin Spangler
Asher Spiller
Charlotte Stewart
Mary Ann Stone
Dylan Sugar
Matthew Sommer
Jessica Sutton
Sarah Tackett
John Tillery
Phyllis A. Turner
Kristin Uicker
Victor Unnone
Janelle Varley
Nicholaos G. Vlahos
Melissa Walker
William Walton
Alexander Ward
James A. Webster
Elizabeth J. Weese
Travis Wiggs
Daniel Wilkes
Alex Williams
Ronald Williams
Kristen Wills
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
1	Andy Womble	Elizabeth City
2	Seth Edwards	Washington
3	Faris Dixon	Greenville
4	Scott Thomas	New Bern
5	Ernie Lee	Jacksonville
6	Ben David	Wilmington
7	Valerie Asbell	Winton
8	Robert Evans	Rocky Mount
9	Matt Delbridge	Goldsboro
10	Lorrin Freeman	Raleigh
11	Mike Waters	Oxford
12	Suzanne Matthews	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
26	Spencer Merriweather	Charlotte
27	Brandy Cook	Salisbury
28	Lynn Clodfelter	Albemarle
29	Mike Hardin	Carthage
30	Trey Robison	Monroe
31	Jim O'neill	Winston-Salem
32	Sarah Kirkman	Statesville
33	Garry Frank	Lexington
34	Tom Horner	Wilkesboro
35	Seth Banks	Boone
36	Scott Reilly	Newton
37	Andy Gregson	Asheboro
38	Travis Page	Gastonia
39	Mike Miller	Shelby
40	Todd Williams	Asheville
41	Ted Bell	Rutherfordton
42	Andrew Murray	Hendersonville
43	Ashley Hornsby Welch	Franklin

PUBLIC DEFENDERS

District	District Attorney	Address
1	Thomas P. Routten	Elizabeth City
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
16A	Jonathan L. McInnis	Laurinburg
16B	Ronald H. Foxworth	Lumberton
18	John F. Nieman	Greensboro
21	Paul James	Winston-Salem
26	Kevin P. Tully	Charlotte
27A	Stuart C. Higdon	Gastonia
28	Samuel A. Snead	Asheville
29A	Laura A. Powell	Rutherfordton
29B	Beth W. Stang	Hendersonville

CASES REPORTED

ORDERS

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

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

CROSS-REFERENCE TABLE[1]

Case	N.C. Reports citation	Universal parallel citation
In re C.L.H.	376 N.C. 614	2021-NCSC-1
In re J.E.B.	376 N.C. 629	2021-NCSC-2
In re J.T.C.	376 N.C. 642	2021-NCSC-3
In re S.F.D.	376 N.C. 643	2021-NCSC-4
In re S.R.F.	376 N.C. 647	2021-NCSC-5
Comm. to Elect Dan Forest v. EMPAC	376 N.C. 558	2021-NCSC-6
Chisum v. Campagna	376 N.C. 680	2021-NCSC-7
Gay v. Saber Healthcare Grp., L.L.C.	376 N.C. 726	2021-NCSC-8
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In re N.P.	376 N.C. 729	2021-NCSC-11
In re Q.P.W.	376 N.C. 738	2021-NCSC-12
In re Z.J.W.	376 N.C. 760	2021-NCSC-13
JVC Enters., LLC v. City of Concord	376 N.C. 782	2021-NCSC-14
Lauziere v. Stanley Martin Cmtys., LLC	376 N.C. 789	2021-NCSC-15
Raleigh Hous. Auth. v. Winston	376 N.C. 790	2021-NCSC-16
Red Valve, Inc. v. Titan Valve, Inc.	376 N.C. 798	2021-NCSC-17
State v. Corbett	376 N.C. 799	2021-NCSC-18
State v. Ditenhafer	376 N.C. 846	2021-NCSC-19
State v. Fuller	376 N.C. 862	2021-NCSC-20

[1]Effective 1 January 2021, the Supreme Court of North Carolina adopted a universal parallel citation form. *Administrative Order Concerning the Formatting of Opinions and the Adoption of a Universal Citation Form*, 373 N.C. 605 (2019).

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

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

No. 249PA19

Filed 18 December 2020

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

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

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

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

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

No brief for respondent-appellee Ashe County Planning Board.

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

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

ERVIN, Justice.

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

I. Factual Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Substantive Legal Analysis

A. Standard of Review

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

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

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

B. Interlocutory Appeals

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Other Issues

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

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

III. Conclusion

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

REVERSED, IN PART, AND REMANDED.

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

v.

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

No. 315PA18-2

Filed 18 December 2020

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

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

Justice EARLS dissenting.

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

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

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

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

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

ERVIN, Justice.

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

I. Factual Background

A. Substantive Facts

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

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

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

B. Procedural History

1. Trial Court Proceedings

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

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

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

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

2. Appellate Proceedings

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

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

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

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

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

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

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

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

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

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

II. Substantive Legal Issues

A. Positions of the Parties

1. Governor's Arguments

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

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

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

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

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

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

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

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

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

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

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

2. Legislative Defendants' Arguments

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

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

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

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

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

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

B. Analysis of the Parties' Positions

1. Standard of Review

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

2. Federal Block Grant Programs

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Specific Legal Claims

a. State Constitutional Spending Rules

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Separation of Powers

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

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

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

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

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

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

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

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

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

c. "Custodial Funds"

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

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

III. Conclusion

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

AFFIRMED.

Justice EARLS dissenting.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CRESCENT UNIVERSITY CITY VENTURE, LLC

v.

TRUSSWAY MANUFACTURING, INC. AND TRUSSWAY MANUFACTURING, LLC

No. 407A19

Filed 18 December 2020

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

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

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

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

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

MORGAN, Justice.

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

Factual and Procedural Background

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

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

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

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

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

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

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

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

Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

AFFIRMED.

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

v.

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

No. 156A17-2

Filed 18 December 2020

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

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

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

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

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

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

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

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

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

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

ERVIN, Justice.

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

I. Factual Background

A. Substantive Facts

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

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

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

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

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

B. Procedural History

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

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

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

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

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

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

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

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

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

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

II. Substantive Legal Analysis

A. Standard of Review

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

B. Chapter 75 Claims

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Article I, Section 34 Claim

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Conclusion

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

AFFIRMED, IN PART; REVERSED, IN PART.

IN THE MATTER OF A.L.L.

No. 319A19

Filed 18 December 2020

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

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

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

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

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

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

Justice NEWBY concurring in part and dissenting in part.

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

Christopher M. Watford for petitioner-appellees.

Jeffrey L. Miller, for respondent-appellant mother.

EARLS, Justice.

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

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

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

Standard of Review

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

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

Background

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

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

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

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

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

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

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

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

Analysis

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

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

a. Jurisdiction

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

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

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

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

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

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

b. Dependency

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

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

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

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

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

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

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

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

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

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

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

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

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

c. Willful Abandonment

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

REVERSED.

Justice NEWBY concurring in part and dissenting in part.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IN RE B.L.H.

[376 N.C. 118 (2020)]

IN THE MATTER OF B.L.H.

No. 276A19

Filed 18 December 2020

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

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

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

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

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

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

HUDSON, Justice.

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

Factual and Procedural History

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

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

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

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

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

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

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

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

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

Analysis

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

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

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

I.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.

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

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

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

III.

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

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

Conclusion

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

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

AFFIRMED.

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

No. 65A20

Filed 18 December 2020

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

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

Justice EARLS dissenting.

Justices NEWBY and DAVIS join in this dissent.

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

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

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

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

ORDER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

s/Davis, J.
For the Court

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

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

Justice EARLS dissenting from Order.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IN THE MATTER OF J.D.

No. 343A19

Filed 18 December 2020

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

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

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

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

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

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

Justice NEWBY concurring in part and dissenting in part.

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

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

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

BEASLEY, Chief Justice.

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

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

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

Factual and Procedural Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Analysis

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

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

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

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

i. Second-Degree Exploitation of a Minor

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

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

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

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

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

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

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

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

ii. First-Degree Forcible Sexual Offense

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

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

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

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

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

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

iii. Attempted Larceny

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

AFFIRMED IN PART; REVERSED IN PART.

Justice NEWBY concurring in part and dissenting in part.

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

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

No. 430A19

Filed 18 December 2020

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

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

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

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

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

Justice EARLS dissenting.

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

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

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

Anné C. Wright for respondent-appellant mother.

ERVIN, Justice.

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

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

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

I. Factual Background

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

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

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

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

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

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

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

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

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

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

II. Substantive Legal Analysis

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

A. Grounds for Termination

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Employment/Income

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

Finding of Fact No. 18 states that

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

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

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

b. Housing

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

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

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

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

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

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

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

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

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

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

c. Substance Abuse

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

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

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

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

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

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

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

d. Parenting Skills

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

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

e. Mental Health

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

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

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

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

f. Family Relationships/Domestic Violence

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

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

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

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

g. Visitation/Child Support/Other[5]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Likelihood of Repetition of Neglect

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

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

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

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

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

B. Dispositional Determination

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

(1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

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

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

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

(6) Any relevant consideration.

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

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

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

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

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

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

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

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

III. Conclusion

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

AFFIRMED.

Justice EARLS, dissenting.

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

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

Employment/Income

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

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

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

Housing

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

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

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

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

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

Substance Abuse

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

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

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

Mental Health

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

Visitation/Child Support/Other

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

Conclusion

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

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

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

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

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

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

No. 356A19

Filed 18 December 2020

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

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

Justice MORGAN dissenting.

Justice NEWBY joins in this dissenting opinion.

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

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

Michelle FormyDuval Lynch for appellee Guardian ad Litem.

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

ERVIN, Justice.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

According to well-established federal and North Carolina law, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures," *In re Murphy*, 105 N.C. App. 651, 653, 414 S.E.2d 396, 397–98, *aff'd per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992) (quoting *Santosky v. Kramer*, 455 U.S. 745, 753–54, 102 S. Ct. 1388, 71 L.Ed.2d 599, 606 (1982)), with the existence of such procedures being an inherent part of the State's efforts to protect the best interests of the affected children by preventing unnecessary interference with the parent-child relationship. N.C.G.S. § 7B-100(4) (stating that one of the purposes of the relevant statutory provisions is to "prevent[ ] the unnecessary or inappropriate separation of juveniles from their parents"). In order to adequately protect a parent's due process rights in a termination of parental rights proceeding, the General Assembly has created a statutory right to counsel for parents involved in termination proceedings. More specifically, N.C.G.S. § 7B-1101.1(a) provides that "[t]he parent [in a termination of parental rights proceeding] has the right to counsel, and to appointed counsel in cases of indigency,

unless the parent waives the right." Although parents eligible for the appointment of counsel in termination of parental rights proceedings may waive their right to counsel, they are entitled to do so only "after the court examines the parent and makes findings of fact sufficient to show that the waiver is knowing and voluntary." N.C.G.S. § 7B-1101.1(a1).

Consistently with the provisions of N.C.G.S. §7B-1101.1(a1), Rule 16 of the General Rules of Practice prohibits an attorney from withdrawing from his or her representation of a client in the absence of "(1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court." N.C. Gen. R. Pract. Super. and Dist. Ct. 16. As the Court of Appeals has correctly held, a trial court's decision concerning whether to allow the withdrawal of a parent's counsel in a termination of parental rights proceeding is discretionary in nature, with any such decision being subject to reversal on appeal only in the event that the trial court's ruling constitutes an abuse of discretion. *Benton v. Mintz*, 97 N.C. App. 583, 587, 389 S.E.2d 410, 412 (1990) (citing *Brown v. Rowe Chevrolet-Buick, Inc.*, 86 N.C. App. 222, 357 S.E.2d 181 (1987)). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re J.H.*, 373 N.C. 264, 268, 837 S.E.2d 847, 850 (2020) (quoting *In re N.G.*, 186 N.C. App. 1, 10–11, 650 S.E.2d 45, 51 (2007)). However, this "general rule presupposes that an attorney's withdrawal has been properly investigated and authorized by the court," so that, "[w]here an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion." *Williams & Michael, P.A. v. Kennamer*, 71 N.C. App. 215, 217, 321 S.E.2d 514, 516 (1984).

Although a waiver of counsel, generally speaking, requires a knowing and intentional relinquishment of that right, *State v. Thomas*, 331 N.C. 671, 673–74, 417 S.E.2d 473, 475–76 (1992), "the trial court is not required to abide by the . . . directive to engage in a colloquy regarding a knowing waiver" where the litigant has forfeited his right to counsel by engaging in "actions [which] totally undermine the purposes of the right itself by making representation impossible and seeking to prevent a trial from happening at all." *State v. Simpkins*, 373 N.C. 530, 536–38, 838 S.E.2d 439, 446–47 (N.C. 2020). However, "[a] finding that a defendant has forfeited the right to counsel" has been restricted to situations involving "egregious dilatory or abusive conduct on the part of the [litigant]." *Id.* at 541, 838 S.E.2d at 449. A trial court's determination concerning whether a parent has waived his or her right to counsel is a conclusion of law that must be made in light of the statutorily prescribed criteria, so we review the question of whether the trial court erroneously

determined that a parent waived or forfeited his or her statutory right to counsel in a termination of parental rights proceeding using a *de novo* standard of review. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019) (citing *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009)).

After examining the unique circumstances that occurred in this case, we conclude that the trial court erred by allowing Mr. Dawson's motion to withdraw from his representation of respondent-mother and permitting respondent-mother to represent herself at the termination hearing without ensuring that she had knowingly and voluntarily waived her right to the assistance of counsel. Admittedly, the Court of Appeals has correctly held on a number of occasions that attorneys were properly allowed to withdraw from their representation of a parent in a termination proceeding in instances in which the parent failed to appear at scheduled proceedings or to maintain contact with his or her counsel, *see, e.g.*, *In re M.G.*, 239 N.C. App. at 77, 767 S.E.2d at 436; *In re D.E.G.*, 228 N.C. App. at 381, 747 S.E.2d at 280; *In re K.N.*, 181 N.C. App. 736, 741, 640 S.E.2d 813, 817 (2007), in light of the fact that "a lawyer cannot properly represent a client with whom [he or she] has [had] no contact." *Dunkley v. Shoemate*, 350 N.C. 573, 578, 515 S.E.2d 442, 445 (1999). However, these decisions also recognize that, "before allowing an attorney to withdraw or relieving an attorney from any obligation to actively participate in a termination of parental rights proceeding when the parent is absent from a hearing, the trial court must inquire into the efforts made by counsel to contact the parent in order to ensure that the parent's rights are adequately protected." *In re D.E.G.*, 228 N.C. App. at 386–87, 747 S.E.2d at 284 (2013) (citing *In re S.N.W.*, 204 N.C. App. 556, 698 S.E.2d 76 (2010)).

For example, in *In re M.G.*, while DSS sent "notice of the date, time, and location of the [termination] hearing to [r]espondent" at her last known address, the parent contended that she never received the notice that had been mailed to her. 239 N.C. App. at 80, 767 S.E.2d at 439. After the respondent failed to appear at the termination hearing, the trial court allowed the parent's attorney to withdraw given that "the [r]espondent was served but has failed to appear." *Id.* at 81–82, 767 S.E.2d at 440. Following the allowance of the withdrawal motion, the parent's attorney neither participated in nor presented any evidence on the parent's behalf at the termination hearing. *Id.* After determining that the record was "devoid of any evidence whatsoever that [r]espondent received any notice from her trial counsel that counsel would seek to withdraw from her representation at the start of the [termination] hearing," *id.*

at 84, 767 S.E.2d at 441, the Court of Appeals vacated the trial court's termination order on the grounds that it "ha[d] consistently vacated or remanded [termination] orders when questions of 'fundamental fairness' have arisen due to failures to follow basic procedural safeguards." *Id.* at 83, S.E.2d at 441.

A careful examination of the record that has been presented for our review in this case indicates that neither the certificate of service attached to Mr. Dawson's withdrawal motion nor any related correspondence shows that respondent-mother was served with a copy of the withdrawal motion prior to the date upon which Mr. Dawson was allowed to withdraw. On the contrary, the certificate of service attached to Mr. Dawson's withdrawal motion appears to reflect that the only party upon whom that motion was served was DSS. Although Mr. Dawson told the trial court that respondent-mother had "requested" that he withdraw from his representation of her and that he had "attempted to secure [respondent-mother's] presence in court" at the time that his withdrawal motion was heard, the trial court does not appear to have made any inquiry into whether respondent-mother had been served with the withdrawal motion; whether Mr. Dawson had informed respondent-mother that he intended to move to withdraw on that date; why respondent-mother had requested Mr. Dawson to withdraw, including whether his withdrawal motion resulted from respondent-mother's inability to pay for his services; and what efforts Mr. Dawson had made to ensure that respondent-mother understood the implications of the action that he proposed to take or to protect her statutory right to the assistance of counsel. As a result, given the very limited inquiry that the trial court undertook before allowing Mr. Dawson's withdrawal motion, we conclude that the trial court erred by allowing that motion.

In addition, we hold that, even if the trial court did not err by allowing Mr. Dawson's withdrawal motion, it erred by allowing respondent-mother to represent herself at the termination hearing without making adequate inquiry into the issue of whether she wished to appear *pro se*. As the record clearly reflects, the waiver of counsel form that respondent-mother completed at the time that Mr. Perry was allowed to withdraw from his representation of respondent-mother in the termination proceeding was intended to facilitate her employment of privately-retained counsel and did not constitute a waiver of her right to any and all counsel. On the contrary, a careful examination of the waiver of counsel form that respondent-mother completed reflects that respondent-mother checked the box relating to a waiver of her right to court-appointed counsel and did not check the box stating that "I do

not want the assistance of any lawyer. I understand that I have the right to represent myself, and that is what I intend to do." For that reason, the record amply demonstrates that respondent-mother had generally wished to be represented by counsel, had been represented by counsel in the termination proceeding until the allowance of Mr. Dawson's withdrawal motion, and had never expressed the intention of representing herself. In light of that set of circumstances, we believe that the trial court had an obligation to make inquiry of respondent-mother concerning the issue of whether she wished to represent herself at the time that she made her tardy appearance at the termination hearing as required by N.C.G.S. § 7B-1101.1(a1).

Admittedly, respondent-mother did not ask the trial court to conduct an inquiry into the issue of whether she wished to represent herself or desired to request the appointment of counsel following her tardy arrival at the termination hearing. On the other hand, nothing in the record suggests that respondent-mother knew that she had the right to do so or that the trial court informed her that such an option was available. The fact that respondent-mother had been represented by counsel at the underlying juvenile proceeding and had been provisionally appointed counsel to represent respondent-mother in the termination proceeding provides ample basis for believing that respondent-mother was indigent at the beginning of the termination proceeding.[6] In addition, the fact that respondent-mother was able to retain counsel as the result of a one-time increase in her income and the fact that the financial status of litigants can change over time suggests that it would have been appropriate for the trial court to have made further inquiry into the issue of whether respondent-mother was indigent and wished to be represented by court-appointed counsel following the allowance of Mr. Dawson's withdrawal motion. At an absolute minimum, given that respondent-mother had never waived the right to all counsel, the trial court violated N.C.G.S. § 7B-1101.1(a1) by allowing respondent-mother to represent herself at the termination hearing without having "examin[ed] [respondent-mother] and mak[ing] findings of fact sufficient to show that" respondent-mother "knowing[ly] and voluntary[ily]" wished to appear *pro se*.

Although respondent-mother's level of engagement with the proceedings before the trial court in connection with this termination proceeding was certainly less than exemplary, nothing in

6. We note that the record on appeal presented for our consideration in this case does not contain any affidavit of indigency that had been executed by respondent-mother during the course of the trial court proceedings.

respondent-mother's conduct had the repeatedly disruptive effect necessary to constitute the "egregious" conduct that is required to support a determination that respondent-mother had forfeited her statutory right to counsel. *Simpkins*, 373 N.C. at 535, 838 S.E.2d at 446. Simply put, this is not a case in which a respondent-parent has acted to delay or disrupt the proceedings in such a manner as to work a forfeiture of the right to counsel. As a result, in addition to rejecting the argument that respondent-mother waived her right to counsel in a valid manner, we reject the guardian *ad litem*'s contention that she forfeited her right to counsel by engaging in serious misconduct.[7]

Finally, we decline to adopt the guardian *ad litem*'s suggestion that we require a showing of prejudice as a prerequisite for obtaining an award of appellate relief in cases involving the erroneous deprivation of the right to counsel. In the criminal context, no showing of prejudice is required in instances like this one, *see, e.g.*, *State v. Colbert*, 311 N.C. 283, 286, 316 S.E.2d 79, 81 (1984), and we decline to adopt a different rule for use in termination of parental rights proceedings. *See, e.g.*, *In re D.E.G.*, 228 N.C. App. at 388 n.6, 747 S.E.2d at 285 (declining an invitation by DSS and the guardian *ad litem* to "uphold the termination order on non-prejudice grounds" in light of "the absence of any information tending to show the extent, if any, to which [the respondent's] trial counsel attempted to contact [the respondent] prior to the hearing in question"); *In re N.T.S.*, 2011 WL 3891795, at *4 (N.C. App. Ct. 2011) (unpublished) (stating that, "given the fundamental nature of the right to counsel in juvenile abuse, neglect, and dependency cases, our cases have not required parents to demonstrate prejudice in order to obtain appellate relief based upon a violation of their right to counsel"). Aside from the fact that the effect of such a deprivation upon a parent involved

7. Similarly, we are not inclined to hold that respondent-mother waived her right to the assistance of counsel based upon her less-than-stellar record for attending court. Assuming, without in any way deciding, that such an implicit waiver is possible despite our admonition that a waiver of the right to the assistance of counsel involves a knowing and intentional relinquishment of that right, *Thomas*, 331 N.C. at 673–74, 417 S.E.2d at 475–76, we are unable to interpret respondent-mother's conduct as being sufficient to support a finding of implied waiver given her prior invocation of the right to counsel; the fact that she had consistently had the assistance of counsel throughout the underlying abuse, neglect, and dependency proceeding; the lack of any explanation for her request that Mr. Dawson withdraw from his representation of her in the termination proceeding; and the fact that respondent-mother had not previously failed to appear in the termination proceeding. In our view, at least, a much stronger showing than that which exists in this case is necessary to establish the existence of an implied waiver of the right to counsel in a termination of parental rights proceedings, to the extent that such an implied waiver can occur at all.

in a termination proceeding can be quite significant, it is simply impossible for a reviewing court to know what difference the availability of counsel might have made in any particular termination proceeding. For example, we cannot know whether counsel for respondent-mother in this case would have been able to provide documentation that respondent-mother did, in fact, make progress toward addressing the mental health, substance abuse, and domestic violence problems that led to the trial court's decision that grounds for terminating respondent-mother's parental rights in the children existed here. As a result, we conclude that respondent-mother is entitled to a new termination hearing in which her statutory right to counsel has been adequately protected.

Thus, for the reasons set forth above, we conclude that the trial court erred by allowing Mr. Dawson to withdraw from his representation of respondent-mother without making an adequate inquiry into the circumstances surrounding the making of that motion and by failing to inquire, at the time that respondent-mother appeared at the termination hearing, whether she was represented by counsel, whether she wished to apply for court-appointed counsel, or whether she wished to represent herself. As a result, the trial court's termination orders are reversed and this case is remanded to the District Court, Lenoir County, for further proceedings not inconsistent with this opinion, including the holding of a new termination hearing.

REVERSED AND REMANDED.

Justice MORGAN dissenting.

I respectfully dissent from the majority view in this case. While I appreciate the laudable foundation upon which my distinguished colleagues of the majority construct their determinations in this case, this foundation perilously undermines and potentially supplants more deeply fundamental aims of justice relating to the best interests of children and the integrity of the judicial process. With this concern, I disagree with the conclusion of the majority that "the trial court erred by allowing [respondent-mother's privately retained counsel] Mr. Dawson's motion to withdraw from his representation of respondent-mother and permitting respondent-mother to represent herself at the termination hearing without ensuring that she had knowingly and voluntarily waived her right to the assistance of counsel." I likewise take issue with the majority's expansion of this determination that "the trial court erred by allowing Mr. Dawson to withdraw from his representation of respondent-mother without making an adequate inquiry into the circumstances

surrounding the making of that motion and by failing to inquire, at the time that respondent-mother appeared at the termination hearing, whether she was represented by counsel, whether she wished to apply for court-appointed counsel, or whether she wished to represent herself." While I agree with the majority that respondent-mother's behavior regarding the status of her legal representation was not so egregious as to amount to her forfeiture of the right to counsel, nonetheless I am convinced that respondent-mother's conduct was sufficiently serious to constitute waiver of counsel. Therefore, I would affirm the trial court's actions in this matter and would find that there was no error committed by the trial court.

The majority is excruciatingly generous in observing that "respondent-mother's level of engagement with the proceedings before the trial court in connection with this termination proceeding was certainly less than exemplary"; indeed, the termination of parental rights hearing served as the capstone of trial court proceedings in which respondent-mother was cavalier in her interactions with her attorneys and with the judicial system. Utilizing the majority's own opinion here to chronicle examples of respondent-mother's approach to these important proceedings: 1) respondent-mother failed to appear for a permanency planning review hearing held on 16 April 2019 at which her court-appointed counsel appeared and for which respondent-mother had notice; 2) respondent-mother had not been in contact with her court-appointed counsel since the previous trial court hearing which had been conducted on 20 November 2018; 3) respondent-mother failed to appear for her contempt hearing on 30 April 2019 concerning her failure to appear for the 16 April 2019 permanency planning review hearing because she reported to a different courtroom in which her former counsel located her and aided the attainment of another court date for respondent-mother's contempt hearing; 4) respondent-mother failed to appear for her rescheduled contempt hearing on 14 May 2019, with her counsel reporting to the trial court on this occasion that the attorney "attempted to secure [respondent-mother's] presence in court today for this" but was "unable to do so"; 5) respondent-mother appeared for the 11 June 2019 termination of parental rights hearing some sixteen minutes after the matter had been called to be conducted; 6) as a participant in the 11 June 2019 termination hearing, respondent-mother abruptly left the courtroom without explanation during the proceedings.

Amidst all of this, the majority secures its view in the operation of N.C.G.S. § 7B-1101.1(a) (2019), which states, in pertinent part, that in a termination of parental rights case, "[t]he parent has the right to counsel,

and to appointed counsel in cases of indigency, unless the parent waives the right." Based on this statute, the majority cobbles together a series of acts which the trial court should have performed at certain stages of respondent-mother's maneuvers with her counsel and resulting consequences: 1) at an 8 January 2019 hearing, the trial court honored respondent-mother's desire to waive her right to the assistance of court-appointed counsel and to hire her own counsel; however, in the majority's view, "the waiver of counsel form that respondent-mother completed at the time that [respondent-mother's court-appointed counsel] Mr. Perry was allowed to withdraw from his representation of respondent-mother in the termination proceeding was intended to facilitate her employment of privately-retained counsel and did not constitute a waiver of her right to any and all counsel"; 2) at the 14 May 2019 show cause hearing at which respondent-mother failed to appear, the trial court allowed the motion of her retained counsel, Mr. Dawson, to withdraw, based on the counsel's representations that the attorney had not been able to obtain respondent-mother's presence in court for the hearing; however, in the majority's view, despite the retained counsel's status as an officer of the court and his representation to the trial court that respondent-mother had requested the retained counsel to withdraw from his representation of her, nonetheless the majority expresses concern that "neither the certificate of service attached to Mr. Dawson's withdrawal motion nor any related correspondence shows that respondent-mother was served with a copy of the withdrawal motion prior to the date upon which Mr. Dawson was allowed to withdraw" and also that,

> at the time that his withdrawal motion was heard, the trial court does not appear to have made any inquiry into whether respondent-mother had been served with the withdrawal motion; whether Mr. Dawson had informed respondent-mother that he intended to move to withdraw on that date; why respondent-mother had requested Mr. Dawson to withdraw, including whether his withdrawal motion resulted from respondent-mother's inability to pay for his services; and what efforts Mr. Dawson had made to ensure that respondent-mother understood the implications of the action that he proposed to take or to protect her statutory right to the assistance of counsel. As a result, given the very limited inquiry that the trial court undertook before allowing Mr. Dawson's withdrawal motion, we conclude that the trial court erred by allowing that motion[;]

3) at the 11 June 2019 termination of parental rights hearing at which respondent-mother made a tardy appearance after the hearing had already begun, respondent-mother had already been granted her request by the trial court to sign a waiver of counsel form to indicate that she would be responsible for hiring her own attorney for representation in these proceedings, and had already expressed her desire for her retained counsel to cease representation of her, as related to the trial court by the attorney and upon such information, the trial court granted counsel's motion to withdraw; however, while the majority frankly acknowledges that, at the 11 June 2019 termination hearing

> respondent-mother did not ask the trial court to conduct an inquiry into the issue of whether she wished to represent herself or desired to request the appointment of counsel following her tardy arrival at the termination hearing. On the other hand, nothing in the record suggests that respondent-mother knew that she had the right to do so or that the trial court informed her that such an option was available. . . . At an absolute minimum, given that respondent-mother had never waived the right to all counsel, the trial court violated N.C.G.S. § 7B-1101.1(a1) by allowing respondent-mother to represent herself at the termination hearing without having "examin[ed] [respondent-mother] and mak[ing] findings of fact sufficient to show that" respondent-mother "knowing[ly] and voluntar[ily]" wished to proceed *pro se*.

At most, these numerous requirements which the majority has imposed upon trial courts in circumstances in which N.C.G.S. § 7B-1101.1(a1) (2019) is invoked as an issue constitute best practices for a trial court to implement; however, in my estimation, the failure to follow them as detailed by the majority does not constitute error as the majority has decreed here. A trial court should not be compelled to look at the circumstances in a vacuum at the termination of parental rights hearing with regard to the sanctity of a respondent parent's right to counsel; a trial court should be allowed to look at the circumstances *surrounding* the termination of parental rights hearing with regard to a parent's right to counsel. In the present case, respondent-mother had routinely frustrated her attorneys' efforts and flouted the trial court's administration of justice in the choices that she elected to make regarding her adherence to the judicial process.

The best interests of the juvenile are of paramount consideration by the court. N.C.G.S. § 7B-100(5) (2019). This state's approach to

controversies involving child neglect is that the best interest of the child is the polar star. *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251–52 (1984). The power of the trial judge to maintain absolute control of his courtroom is essential to the maintenance of proper decorum and the effective administration of justice. *State v. Ford*, 323 N.C. 466, 469, 373 S.E.2d 420, 422 (1988). From my vantage point, the trial court properly balanced all of the potentially competing interests before it in properly applying N.C.G.S. § 7B-1101.1(a1) on its face regarding respondent-mother's right to counsel in a termination of parental rights proceeding, promoting the best interests of the two children at issue in the present case by conducting the termination hearing in an effort to bring the juveniles to permanence rather than to yield to further upheaval of court proceedings by respondent-mother, and preserving proper decorum and the effective administration of justice by including respondent-mother as a participant in the termination hearing to represent her own interests after her desire to relieve her previous two attorneys from responsibility for her representation was allowed by the trial court. On the other hand, the new duty for a trial court which the majority creates upon its expansion of N.C.G.S. § 7B-1101.1(a1) requires, in a case like this one, that after a respondent-parent in a termination of parental rights case has signed a knowing and voluntary waiver to court-appointed counsel and subsequently gotten retained counsel to withdraw, that the trial court must halt the termination proceedings during the presentation of evidence in order to accommodate the late arrival of the respondent-parent in order to make a new inquiry of the respondent-parent's desire for counsel, thereby potentially suspending the hearing and delaying the establishment of a permanent home for the juveniles. Based upon my recognition of this needless collision of critical fundamental principles which could and should be mutually promoted, I respectfully dissent.

Justice NEWBY joins in this dissenting opinion.

IN RE MURPHY

[376 N.C. 219 (2020)]

IN RE INQUIRY CONCERNING A JUDGE,
NO. 17-318 J. HUNTER MURPHY, RESPONDENT

No. 396A19

Filed 18 December 2020

Judges—discipline—unprofessional work environment—censure

The Supreme Court censured an appellate judge for conduct in violation of Canons 1, 2B, 3A(3), and 3B(2) of the Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute and willful misconduct in office (N.C.G.S. § 7A-376) where the judge contributed to and enabled an unprofessional work environment in his office and minimized the inappropriate conduct of an employee—a longtime friend—who engaged in a pattern of lying, intimidating co-workers, making sexually inappropriate comments, and using profane language in the office.

This matter is before the Court pursuant to N.C.G.S. §§ 7A-376 and -377 upon a recommendation by the Judicial Standards Commission entered 13 September 2019 that respondent J. Hunter Murphy, a Judge of the General Court of Justice, Appellate Court Division, Court of Appeals, State of North Carolina, be censured for conduct in violation of Canons 1, 2B, 3A(3), and 3B(2) of the North Carolina Code of Judicial Conduct and for willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376. Heard in the Supreme Court on 31 August 2020.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester, Mark W. Merritt, Matthew W. Sawchak, and Lexi M. Fleming, Counsel for the Judicial Standards Commission.

Robert F. Orr, PLLC, by Robert F. Orr, and The Hunt Law Firm, PLLC, by Anita B. Hunt, for respondent.

ORDER OF CENSURE

The issue before the Court is whether Court of Appeals Judge Hunter Murphy, respondent, should be censured for violations of Canons 1, 2B, 3A(3), and 3B(2) of the North Carolina Code of Judicial Conduct amounting to conduct prejudicial to the administration of justice that brings the

judicial office into disrepute in violation of N.C.G.S. § 7A-376(b). For the reasons that follow, this Court orders that respondent be censured.

On 21 March 2018, Counsel for the Commission filed a Statement of Charges against respondent alleging he had engaged in conduct inappropriate to his office by failing to establish, maintain, and enforce appropriate standards of conduct to ensure the integrity and independence of the judiciary; allowing his family and social relationships to influence his judicial conduct or judgment, and permitting others to convey the impression that they are in a special position to influence respondent; failing to require his staff to exhibit patient, dignified and courteous conduct to lawyers and others with whom respondent deals in his official capacity; and failing to ensure his staff observed the standards of fidelity and diligence that apply to him. In the Statement of Charges, Counsel for the Commission asserted that respondent's actions were inappropriate to his judicial office and prejudicial to the administration of justice constituting grounds for disciplinary proceedings under Chapter 7A, Article 30 of the North Carolina General Statutes.

Respondent filed his answer on 18 May 2018. Vice-Chair Judge R. Stuart Albright, acting as chair of the hearing panel, struck the answer *ex mero motu*, and respondent filed his amended answer on 14 June 2018. On 6 and 7 June 2019, the Commission heard this matter and entered its recommendation on 13 September 2019, which contains the following findings of fact:

A. Background

1. Respondent is a judge of the Court of Appeals elected to an eight-year term that commenced in January 2017.

2. As a judge of the Court of Appeals, Respondent is entitled to hire three members of his chambers staff—two "research assistants" or "law clerks" as they are commonly called, and one executive assistant or "EA." All members of a judge's chambers staff are employees at will, and can be fired by the employing judge for any reason at any time, as long as the reason is not discriminatory.

3. Law clerks are responsible for researching issues raised in appeals, preparing memoranda for their assigned judge on cases to be argued, and drafting and editing opinions. In drafting and editing opinions, law clerks are also tasked with the important job of checking every citation in draft opinions for accuracy (referred to as cite-checking).

Law clerks also perform a number of other tasks assigned by their judge.

4. For his first two law clerks, Respondent hired one female law clerk, Lauren Suber, and one male law clerk, Clark Cooper. Ms. Suber had just completed a clerkship for a justice of the Supreme Court [of North Carolina] and agreed to clerk for eight months until August 2017. Mr. Cooper had just completed a clerkship for another judge of the Court of Appeals, and prior to that, had clerked for yet another judge of the Court of Appeals and agreed to clerk for two years.

5. Respondent hired his close, personal friend from high school, Mr. Ben Tuite, to serve as both his permanent EA and a third law clerk. Respondent gave Mr. Tuite both express and implied authority to supervise and manage the term law clerks and the operations of his chambers.

6. In March 2017, Mr. Cooper suddenly resigned after less than two months as Respondent's law clerk. To replace Mr. Cooper, Respondent hired Mary Scruggs, who was highly qualified, with good academic credentials, had passed the bar and practiced with a firm before being hired by Respondent.

7. After Ms. Suber completed her clerkship in August 2017, she was replaced by Ms. Chelsey Maywalt. Ms. Maywalt's term began on August 28, 2017 and was scheduled to conclude in August 2018. Ms. Maywalt had excellent recommendations, experience and academic credentials and had just completed a clerkship for another judge of the Court of Appeals.

8. Law clerks at the Court of Appeals are expected to comply with the Law Clerk Code of Conduct. On March 21, 2017, Respondent attended training on the Code of Judicial Conduct, which included review of Respondent's duties to ensure that his law clerks adhere to the same standards of professionalism and diligence as apply to the judge. Later that day, after the training, Respondent was given a copy of the North Carolina Court of Appeals Code of Conduct for Staff Attorneys and Law Clerks to review and provide to his law clerks. Among other things, Canon 3B of the Law Clerk Code of Conduct requires a law clerk

"to be faithful to the highest standards of his or her profession and maintain professional competence in it. He or she should be patient, dignified, courteous, and fair to all persons with whom he or she deals in the performance of his or her duties. He or she should diligently discharge the responsibilities of his or her position in an efficient, fair-minded, and professional manner."

9. Mr. Tuite, Ms. Scruggs and Ms. Maywalt later attended a Court of Appeals training program on their obligations under the Law Clerk Code of Conduct.

B. The Working Environment in Respondent's Chambers

10. When Mr. Cooper announced his resignation in March 2017, Respondent reacted with a great deal of animosity that he made known to his law clerks. Respondent and Mr. Tuite willfully made belittling comments or jokes about him to the other law clerks.

11. On one occasion, in or around June 2017, Respondent participated in a group text message with Mr. Tuite, Ms. Suber and Ms. Scruggs. In the group text, Respondent and Mr. Tuite exchanged profane and inappropriate comments and jokes about Mr. Cooper, including encouraging Ms. Suber to sabotage Mr. Cooper's career plans and comparing Mr. Cooper to a member of the terrorist group ISIS.

12. Respondent's active participation in and condoning of the belittling of Mr. Cooper contributed to and enabled a toxic work environment in Respondent's chambers.

13. Mr. Tuite also regularly used profanity during the workday, belittled others and used fear and intimidation while interacting with and supervising the law clerks. Mr. Tuite frequently used the word "fuck" and referred to female law clerks on more than one occasion as "bitch" or "bitching."

14. Respondent observed and was aware of Mr. Tuite's regular use of profanity in his chambers and belittling comments about other court employees and failed to take action to address it when he observed or became aware of it. By failing to address this conduct when it occurred, Respondent condoned Mr. Tuite's workplace misconduct and therefore again contributed to and enabled a toxic work environment.

15. Mr. Tuite was dishonest and did not diligently discharge his duties as the EA or as a law clerk.

16. Respondent was aware of Mr. Tuite's dishonesty and lack of diligence. Ms. Suber in her exit interview on August 10, 2017 specifically informed Respondent that Mr. Tuite was a manipulative liar who handed off his work to others or simply did not do it (including necessary editing and cite-checking), that such conduct was impacting Respondent's reputation and would also cause him to "burn through law clerks," and that Ms. Suber had concerns that Mr. Tuite would be rude to Ms. Maywalt and take advantage of her strong work ethic. Ms. Maywalt had a meeting with Respondent on November 13, 2017 and advised Respondent that Mr. Tuite was dishonest in his communications with other employees at the Court of Appeals. Ms. Suber and Ms. Scruggs advised Respondent on December 2, 2017 that Mr. Tuite was dishonest in his communications with other employees at the Court of Appeals and that he failed to diligently discharge his duties.

17. After learning of Mr. Tuite's dishonesty and lack of diligence on multiple occasions, Respondent failed to address these issues directly with Mr. Tuite. . .

18. Mr. Tuite made comments of a sexual or inappropriate nature in the workplace.

19. In early 2017, Mr. Tuite came into the offices of Ms. Suber and Ms. Scruggs on separate occasions early in their c1erkships, and without any context closed the doors to their offices and told them that he likes to have relationships with female co-workers but that they should not misconstrue his efforts to spend time with them, and stated that he had been sexually harassed in his prior employment by a female co-worker who had pulled him into a vehicle and assaulted him after she "misconstrued" their relationship. Mr. Tuite also told Respondent about this incident, but described it in "vulgar terms."

20. Later, during a cold workday while outside with Ms. Suber, Mr. Tuite stated that he would like to see her in a "wife beater" tank top and shorts on a cold day. Mr. Tuite, on or about the following day, asked Ms. Suber to come

into Respondent's office (when Respondent was away from the office), kept the lights off and sat down beside her and told her that he "was married but not blind" or similar words in an apparent attempt to apologize for the inappropriate sexual remark from the previous day. Ms. Suber was offended and upset by the inappropriate and suggestive sexual remarks and non-apology when they occurred, felt unsafe as a result and feared it would occur again. Ms. Suber continued to be upset and uncomfortable about this incident when she warned Ms. Maywalt about it in October 2017 and when she informed Respondent about it on December 2, 2017, and continues to feel uncomfortable about it to this day. Upon learning of this incident, Respondent dismissed Ms. Suber's concerns.

21. On another occasion, during the summer of 2017, while reviewing a female law clerk's application, Mr. Tuite intentionally and in the presence of Respondent, Ms. Suber and Ms. Scruggs, repeated derogatory and belittling online comments about the female applicant comparing her breasts to "fun bags." Ms. Scruggs was offended and immediately expressed concern in Respondent's presence about Mr. Tuite's inappropriate treatment of this female law clerk applicant, but Respondent did nothing.

22. By failing to act when he observed or was informed of Mr. Tuite's pattern of making lewd or sexually inappropriate remarks in the workplace, Respondent again condoned Mr. Tuite's workplace misconduct and thus again contributed to and enabled a toxic work environment.

23. On August 11, 2017, Ms. Suber also informed Respondent about an incident in which Mr. Tuite intentionally ruined her engagement in July 2017 and stated that she was very upset about Mr. Tuite's interference in her personal life.

24. As a result of the toxic work environment, Ms. Suber was miserable and felt unsafe working in Respondent's chambers. Ms. Suber also chose to decline Respondent's offer to extend her clerkship past August 2017 in part because of the toxic work environment.

25. Mr. Tuite also engaged in profane, violent and angry outbursts in the office while Respondent was present.

26. On one occasion in September, 2017, Mr. Tuite, after being told of a problem with his work product, yelled "fuck" loud enough for everyone in Respondent's chambers, including Respondent who was in his office with the door open, to hear, and slammed his fist on a table hard enough to activate a panic alarm that was attached to that table. Respondent did nothing to address Mr. Tuite's profane and violent outburst at the time and by failing to act, condoned Mr. Tuite's workplace misconduct and therefore again contributed to and enabled a toxic work environment.

27. On another occasion, on or about Friday, October 27, 2017, during a chambers meeting to discuss hiring law clerks, Mr. Tuite, in Respondent's presence, got angry at Ms. Maywalt, slammed his fist on his chair (which was, as usual, located behind or next to Respondent) and said, "Goddamn it, Chelsey: [then told her] to shut [her] mouth, and that [her] opinion did not fucking matter." By his words and deeds, Mr. Tuite belittled and threatened Ms. Maywalt in Respondent's presence. Respondent took no immediate action against Mr. Tuite except to call for a break and never addressed the incident with Ms. Maywalt or Ms. Scruggs. Later that evening, on October 27, 2017, Respondent emailed Mr. Tuite and asked him to apologize for saying that he did not care about Ms. Maywalt's opinion. Respondent did not address Mr. Tuite's use of profanity or the anger and intimidation associated with his comments. On the following Monday, October 30, 2017, Mr. Tuite offered a non-apology to Ms. Maywalt for his actions and then threatened her with a reminder that he influences the hiring and firing in the office.

28. On or about November 13, 2017, Ms. Maywalt informed Respondent that Mr. Tuite continued to treat her in an unprofessional manner, was lying to employees in the Court of Appeals, and further, that Mr. Tuite's apology for the October 27, 2017 incident was a non-apology that resulted in worse treatment by Mr. Tuite.

29. Upon learning of Mr. Tuite's ongoing misconduct towards Ms. Maywalt and failure to follow Respondent's instructions in his email to Mr. Tuite on October 27, Respondent took no immediate action. By allowing this

type of workplace behavior to take place on October 27 and 30, 2017 without any apparent or immediate consequences, Respondent again condoned Mr. Tuite's workplace misconduct, thus contributing to and enabling a toxic work environment.

C. Interactions with AOC HR and the Commission

30. By November 2017, the toxic work environment in Respondent's chambers and concerns about potential sexual harassment got to a point where a judge of the Court of Appeals reported his concerns to the Chief Judge.

31. The Chair of the Judicial Standards Commission met with Respondent on November 29, 2017 to discuss Mr. Tuite's treatment of the female law clerks and concerns of potential sexual harassment, including an allegation that Mr. Tuite had said to Ms. Suber, who has red hair, that he wanted to "fuck a red head." The Chair advised Respondent of his obligations under the Code of Judicial Conduct with respect to the supervision of his chambers staff and suggested that Respondent contact the Administrative Office of the Courts Human Resources Department ("AOC HR") for additional guidance regarding the sexual harassment concerns.

32. As suggested by the Chair of the Judicial Standards Commission, Respondent contacted AOC HR on November 29, 2017 regarding the possible sexual harassment issue. The following day, November 30, 2017, Respondent met with Ms. Leila Jabbar, the AOC employee relations specialist, HR policy consultant and EEO officer, and Russ Eubanks, the AOC manager.

33. During this first face to face meeting with Ms. Jabbar on November 30, 2017, Ms. Jabbar asked Respondent a number of questions to evaluate any potential unlawful sexual harassment issues in his chambers. Respondent lacked candor when speaking to AOC HR and did not disclose the extent of complaints that Ms. Suber raised about Mr. Tuite on August 10 and 11, 2017, or any of the incidents he had observed prior to that date involving Mr. Tuite's regular use of profanity, angry and violent outbursts, mistreatment of Ms. Maywalt, dishonesty or lewd remarks in the workplace. Instead, Respondent affirmatively

represented to Ms. Jabbar that beyond the rumored "red head" comment, he was not aware of any other issues with Mr. Tuite's performance.

34. Respondent lacked candor and downplayed, minimized, and mischaracterized Mr. Tuite's actions in his face-to-face meeting with Ms. Jabbar on November 30, 2017. Respondent did so because his conduct and judgment were influenced by his close personal friendship with and loyalty towards Mr. Tuite.

35. Respondent's lack of candor and representations to AOC HR on November 30, 2017 impacted the advice given to Respondent. Because Respondent did not disclose the information noted in ¶ 33 above, AOC HR only advised Respondent to ensure his staff that all concerns of sexual harassment would be taken seriously and to have them review the judicial branch's workplace conduct policy and recent advice and legal news articles focused on sexual harassment in the legal profession and the judiciary. AOC HR also advised Respondent that he could reach out to both Ms. Suber and Mr. Tuite to find out if the comment was made.

36. On Saturday, December 2, 2017, Respondent decided to talk directly to Mr. Tuite, Ms. Maywalt, Ms. Scruggs and Ms. Suber. Prior to meeting with any of them, and prior to ascertaining if Mr. Tuite had made any sexually inappropriate comments to Ms. Suber, Respondent assured his friend Mr. Tuite that his job was secure.

37. During the conversations on December 2, 2017, the following occurred:

a. Mr. Tuite denied making any sexually inappropriate comment to Ms. Suber.

b. Respondent told Ms. Suber that he needed to ask her whether Mr. Tuite had made an improper sexual remark to her. Before she answered, Respondent also advised her that he had no intention of firing Mr. Tuite. Ms. Suber then told Respondent about the sexually inappropriate remark as described in ¶ 20, that such comment made her uncomfortable, and that Mr. Tuite's non-apology included the additional inappropriate remark that also made her uncomfortable.

Respondent then asked her about the "red head" comment, and she advised that Mr. Tuite had not made that comment. Respondent then advised Ms. Suber that he had spoken to AOC HR about the "red head" comment and was told that even if true, it was not sexual harassment. Ms. Suber was also upset about and informed Respondent that Mr. Tuite continued to lie and not do his work and falsely impugned her work product to other employees in the Court of Appeals regarding an opinion that had to be withdrawn because of Mr. Tuite's dishonesty and lack of diligence.

c. Ms. Maywalt told Respondent as she had previously done on November 13, 2017 that Mr. Tuite was a liar, that he mistreated her, and that his forced apology after his violent and intimidating outburst on October 27, 2017 was a non-apology that resulted in threatening her that he (Mr. Tuite) had influence over hiring and firing. Ms. Maywalt also told Respondent directly that Mr. Tuite was mistreating and bullying her and that she felt like the next Clark Cooper based on Mr. Tuite's mistreatment of her and [was] uncomfortable in Respondent's chambers. Ms. Maywalt also told Respondent that Mr. Tuite's angry outbursts were violent and personally threatening to her, including the incident when Mr. Tuite had punched a desk and yelled "fuck," and that she did not want to be left alone with Mr. Tuite in Respondent's absence the following week. Ms. Maywalt reiterated these concerns to Respondent by email and advised Respondent that she intended to take a personal week away from the office the following week because she was afraid of being alone with Mr. Tuite during Respondent's absence.

d. Ms. Scruggs told Respondent that his friendship with Mr. Tuite was making it difficult to address problems, and that Mr. Tuite was a liar, that his work product was inferior, that Mr. Tuite's actions and behavior were adversely affecting how other chambers in the Court of Appeals interacted with Respondent's chambers, that Mr. Tuite mistreated Ms. Maywalt, that Mr. Tuite's bullying of Ms. MaywaIt had a negative impact on her as well, and that all of the law clerks had an issue with Mr. Tuite. Ms. Scruggs also informed Respondent

about her concerns as to Mr. Tuite's violent and angry outbursts, citing the incident when Mr. Tuite slammed his desk and yelled "fuck" and also told Respondent of another incident in which Mr. Tuite had cursed and thrown a draft opinion across chambers.

38. After speaking with Ms. Maywalt, Ms. Scruggs and Ms. Suber, and learning about Mr. Tuite's sexually inappropriate remarks to Ms. Suber, Respondent sent an email to the Chair and Executive Director of Judicial Standards on December 2, 2017. Instead of informing the Commission about the sexually inappropriate remark disclosed by Ms. Suber and the personally threatening behavior towards Ms. Maywalt and Ms. Scruggs, Respondent represented to the Commission that any rumor of sexual harassment had been "debunked," that "there was not even a whiff of a complaint of a sexual or sexual harassment nature," that he wanted Mr. Tuite to return to work as usual on Monday, December 4, 2017, and that he wanted to find out about how the "nasty rumor" about Mr. Tuite had been spread. Respondent also dismissed the female law clerks' extensive complaints about Mr. Tuite's workplace misconduct and threatening behavior as concerns about "how things are handled" inside and outside of chambers.

39. Respondent lacked candor and downplayed, minimized, and mischaracterized Mr. Tuite's actions in his December 2, 2017 email to the Chair and Executive Director. Respondent did so because his conduct and judgment were influenced by his close personal friendship with and loyalty towards Mr. Tuite.

40. After speaking with Ms. Maywalt, Ms. Scruggs and Ms. Suber, Respondent also sent an email to Ms. Jabbar on December 3, 2017. In his December 3, 2017 email to Ms. Jabbar, Respondent reported that he had spoken to his law clerks and again downplayed and minimized Mr. Tuite's workplace misconduct as issues with Mr. Tuite's "management style" and some "negative events" in the office that Ms. Maywalt had experienced. At the time Respondent made such representations to AOC HR, Respondent knew that the workplace misconduct reported by the female law clerks was not related to "management issues" or "management style" and instead involved Mr. Tuite's ongoing

profanity, sexually inappropriate comments, angry and violent outbursts, bullying of Ms. Maywalt, dishonesty and lack of diligence.

41. Respondent also told Ms. Jabbar in the December 3, 2017 email that the sexual harassment rumor involving Ms. Suber had been "debunked and is not an issue" because Ms. Suber denied the "red head" comment had been made, and that while Mr. Tuite had made a comment about her "clothing" that made her uncomfortable, Mr. Tuite had apologized and the matter was resolved. At the time Respondent made the representations to Ms. Jabbar in the December 3, 2017 email, Respondent knew that Mr. Tuite's remark went beyond a comment about "clothing" and was in fact a sexually inappropriate remark, that Ms. Suber was uncomfortable about Mr. Tuite's sexually inappropriate remark to her, and that she did not accept Mr. Tuite's non-apology because it again made her uncomfortable.

42. Respondent downplayed, minimized and mischaracterized Mr. Tuite's workplace misconduct in his December 3, 2017 email to Ms. Jabbar. Respondent did so because his conduct and judgment were influenced by his close personal friendship with and loyalty towards Mr. Tuite.

43. On Monday, December 4, 2017, after Mr. Tuite went to work as usual per the instructions from Respondent, the Chief Judge of the Court of Appeals contacted Respondent regarding her concerns about the working environment in his chambers and suggested that Respondent close his chambers for the week he was gone. Respondent agreed to close his chambers for two days.

44. On the evening of Monday, December 4, 2017, Ms. Maywalt contacted AOC HR and reported in detail Mr. Tuite's workplace misconduct and Respondent's lack of response. On Tuesday, December 5, 2017, Ms. Scruggs also contacted Ms. Jabbar to report her concerns about Mr. Tuite's workplace misconduct and his close friendship with Respondent.

45. On Tuesday, December 5, 2017, after hearing from Ms. Maywalt and Ms. Scruggs about Mr. Tuite's extensive workplace misconduct and the close personal friendship between Respondent and Mr. Tuite, Ms. Jabbar drastically

changed her advice from the November 30, 2017 meeting and advised Respondent that Mr. Tuite should be placed on immediate investigatory leave pending the conclusion of an AOC HR investigation.

46. With Respondent's cooperation, AOC HR then investigated alleged workplace misconduct in his chambers, including the potential claim of unlawful sexual harassment. AOC HR could not fully evaluate the unlawful sexual harassment issue, however, because Ms. Suber declined to be interviewed based on Respondent's representations to her on December 2, 2017 that AOC HR had already concluded that she had not been sexually harassed even if the "red head" comment had been made.

47. Respondent displayed a reckless disregard for the truth, lacked candor, and willfully engaged in a pattern of downplaying the seriousness and extensive nature of Mr. Tuite's workplace misconduct to those charged with enforcing appropriate standards of professional conduct in the judicial branch.

48. Notwithstanding Respondent's knowledge of Mr. Tuite's extensive workplace misconduct, from the period from December 1, 2017 until January 5, 2018, Respondent regularly assured his close personal friend Mr. Tuite and indicated to others that his employment at the Court of Appeals would continue. On December 1, 2017 and prior to ascertaining if Mr. Tuite had made any sexually inappropriate comments to Ms. Suber, Respondent assured his friend Mr. Tuite that his job was secure. Mr. Tuite again texted Respondent on or about December 4, 2017 and stated to Respondent that he was "glad you have my back." On Tuesday, December 5, 2015, Mr. Tuite texted Respondent, to whom he referred to as "Dude," and expressed concern for his job security. Respondent texted back and again reassured his close friend: "You are not losing your job. This sucks tremendously for everyone, especially given what I expect to be an easy resolution when the smoke clears." On December 11, 2017, Respondent contacted Ms. Jabbar and informed her that he wanted Mr. Tuite to return to the office, to which Ms. Jabbar replied that Mr. Tuite "should not return to the office for any reason" until the investigation is complete. On January 4, 2018, Respondent

> also advised his chambers that he was planning for Mr. Tuite's return to work and intended to move Mr. Tuite's desk from the EA area into Ms. Scruggs' private law clerk office in the hallway.
>
> 49. As a result of Respondent's conduct and his protection of Mr. Tuite, and the resulting toxic work environment, Ms. Scruggs and Ms. Maywalt were miserable, felt unsafe and uncomfortable working in Respondent's chambers and did not trust Respondent to accurately portray their reports of workplace misconduct to others or to protect their well-being. Ms. Maywalt resigned on or about December 6, 2017, approximately eight months early. Ms. Scruggs also began to look for another job in December 2017 and resigned in January 2018 before her clerkship concluded.
>
> 50. After learning on January 2, 2018 that Ms. Scruggs was interviewing for another position and receiving advice from a judicial colleague about ensuring his female law clerks were not uncomfortable, Respondent ultimately asked Mr. Tuite to resign on January 5, 2018, which he did.

(alterations in original) (internal citations omitted).

Based on the foregoing findings of fact, the Commission made the following conclusions of law:

> **B. Violations of the Code of Judicial Conduct**
>
> 3. To preserve the integrity and independence of the judiciary, Canon 1 of the Code of Judicial Conduct imposes an affirmative duty on judges to establish, maintain, and enforce appropriate standards of conduct in the judiciary, and to personally observe such standards of conduct. The Commission's findings of fact establish that Respondent failed in these duties, violating Canon 1 of the Code of Judicial Conduct.
>
> 4. Canon 2B of the Code of Judicial Conduct provides that judges must not allow their social or other relationships to influence the judge's judicial conduct or judgment. The Commission's findings of fact establish that Respondent allowed his close personal friendship with Mr. Tuite to influence both his judicial conduct and judgment, violating Canon 2B of the Code of Judicial Conduct.

5. The Code of Judicial Conduct also imposes affirmative duties on judges to ensure the highest degree of professionalism among attorneys, their fellow judges, and any judicial branch employees or court officials subject to their direction and control. *See*, *e.g.*, Canon 3B(3) ("A judge should take or initiate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware."); Canon 3A(3) ("A judge should be patient, dignified and courteous to [those] with whom the judge deals in the judge's official capacity, and should require similar conduct of lawyers, and of the judge's staff, court officials and others subject to the judge's direction and control"); Canon 3B(2) ("A judge should require the judge's staff and court officials subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge.").

6. With respect to young lawyers in particular, the Commission has also recognized that judges have "a compelling interest in maintaining the integrity and moral character of those seeking admission to practice law in North Carolina."

7. Moreover, in the North Carolina Court of Appeals, judges discharge their duties under Canon 3A(3) and Canon 3B(2) in part by requiring their law clerks to adhere to the standards of conduct set forth in the Law Clerk Code of Conduct. Among the obligations in the Law Clerk Code of Conduct are the duties to (1) "be faithful to the highest standards of his or her profession and maintain professional competence in it"; (2) "be patient, dignified, courteous, and fair to all persons with whom he or she deals in the performance of his or her duties"; and (3) "diligently discharge the responsibilities of his or her position in an efficient, fair-minded, and professional manner."

8. The Commission's findings of fact establish that Respondent failed to require that Mr. Tuite engage in patient, dignified and courteous conduct towards those with whom Mr. Tuite dealt in his official capacity, violating Canon 3A(3) of the Code of Judicial Conduct.

9. The Commission's findings of fact further establish that Respondent failed to require that Mr. Tuite observe the

standards of fidelity and diligence that apply to Respondent, violating Canon 3B(2) of the Code of Judicial Conduct.

C. Conduct Prejudicial to the Administration of Justice

10. The Commission further concludes that Respondent's violations of the Code of Judicial Conduct amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C. Gen. Stat. § 7A-376(b). *See also* Code of Judicial Conduct, Preamble ("[a] violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute.").

11. The Supreme Court first defined conduct prejudicial to the administration of justice in *In re Edens*, 290 N.C. 299 (1976) as "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to the public esteem for the judicial office." The Supreme Court further explained in *Edens* that the focus is "on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers."

12. In evaluating Respondent's conduct, the Supreme Court also considers "fundamental principles of judicial decorum" rooted in the concept that " '[t]he place of justice is an hallowed place; and therefore not only the bench, but the foot-pace and precincts and purpose thereof, ought to be preserved without scandal and corruption." The Supreme Court has also warned that "[a]t a time when the requirements of the Rule of Law subject the judiciary to intense and ever greater scrutiny by our citizens, the demands of respondent's judicial office require[ ] him to comport himself with dignity, reserve, and probity. The integrity of the office requires that its holder project nothing less than the high standards of character and rectitude citizens should expect from their judges.' "

13. Looking to fundamental principles of judicial decorum, the nature and frequency of Respondent's conduct and the results thereof, the Commission concludes that Respondent engaged in conduct prejudicial to the administration of justice. Respondent's conduct in contributing

> to and enabling a toxic work environment in his chambers and his conduct in downplaying, minimizing and mischaracterizing Mr. Tuite's workplace misconduct to AOC HR and the Commission not only undermines the dignity of the Court of Appeals, but negatively impacted the court's work product, court employees and· the reputation and integrity of the judiciary. Moreover, Respondent's reckless disregard for the truth, lack of candor, and willful pattern of misrepresenting or downplaying Mr. Tuite's workplace misconduct to AOC HR and the Commission also undermined the judiciary's ability to enforce appropriate standards of professional conduct in the judicial branch. Finally, Respondent objectively displayed an extraordinary blindness to the seriousness of the judiciary's efforts to ensure that all employees are treated respectfully and fairly in the workplace and caused two intelligent and respected young female law clerks to resign from Respondent's chambers. Based on the totality of the circumstances, such conduct undoubtedly brings the judicial office into disrepute and is conduct prejudicial to the administration of justice.

(alterations in original) (internal citations omitted). Based on the foregoing findings of facts and conclusions of law, the Commission unanimously recommended that respondent be censured.

When reviewing recommendations from the Commission, this Court "acts as a court of original jurisdiction, rather than in its typical capacity as an appellate court." *In re Badgett*, 362 N.C. 202, 207 (2008). The Court reviews the Commission's recommendation to determine whether the Commission's findings of fact are supported by clear and convincing evidence and whether those findings support the conclusions of law. Subsequently, the Court exercises its independent judgment in determining whether the Commission's proposed sanctions are appropriate. *Id.* The Court, however, is not bound by the Commission's findings or conclusions and may make its own findings. *Id.* at 206.

As an initial matter, respondent argues that the Commission's prosecution, rather than investigation, of this case exceeded its statutory authority and violated his due process rights to a fundamentally fair investigatory process. Pursuant to N.C.G.S. § 7A-377(a), the Commission may initiate an investigation on its own motion. If, after the investigation is completed, the Commission concludes that disciplinary proceedings should be instituted, notice and a statement of

charges must be filed. N.C.G.S. § 7A-377(a5) (2019). Even still, no judge or justice shall be recommended for public reprimand, censure, suspension, or removal unless he has been given a hearing affording due process of law. N.C.G.S. § 7A-377(a). Thus, the Commission's statutory authority is limited to investigating, hearing evidence, finding facts, and making recommendations.

To that end, respondent's due process rights are not violated simply because of the Commission's dual investigative and judicial functions. Indeed prior to and after the disciplinary proceedings, the judge or justice's employment is not disrupted. Furthermore, the Commission's investigator and special prosecutor are employees of the Commission, but not voting members, and any "alleged partiality of the Commission is cured by the final scrutiny of this adjudicatory body." *In re Nowell*, 293 N.C. 235, 244 (1977). This Court, too, confirmed that "[i]t is well settled by both federal and state court decisions that a combination of investigative and judicial functions within an agency does not violate due process. An agency which has only the power to recommend penalties is not required to establish an independent investigatory staff." *Id.* Thus, respondent's argument that the Commission violated his due process rights is without merit.

Respondent further contends that the Commission's findings of fact lack a sufficient evidentiary basis. Specifically, respondent argues that the key findings do not implicate respondent, are premised on the assumption that the Code of Judicial Conduct dictates managerial standards to which a judge or justice must comply, are conclusory mischaracterizations, or are irrelevant. Respondent does not, however, contest the validity of the findings as they relate to the working environment in his chambers. As such, the Court will not address respondent's general challenge that findings of fact 10 through 29 do not implicate respondent or amount to violations of the Code of Judicial Conduct.

Respondent, however, specifically argues that findings of fact 13, 15, 16, 25, 26 and 27 are based on conclusory and over-exaggerated statements of witnesses. These specific findings, relating to Mr. Tuite's regular use of profanity, dishonesty, and angry outbursts, are all supported by clear and convincing evidence. Indeed, all three clerks consistently complained of Mr. Tuite's profanity, lying, and deceit. Respondent verified that he witnessed respondent yelling "fuck" loud enough for everyone in his chambers to hear. Respondent also indicated that there was an issue with excessive use of profanity by Mr. Tuite in the chambers. To that end, there was no reason for the Commission panel to believe that the clerks' testimony was anything less than truthful.

Ms. Jabbar testified that she believed the law clerks' testimony and that she did not find Mr. Tuite credible because his recount of events was inconsistent, and he constantly attacked the character of his colleagues. Ms. Jabbar testified that Mr. Tuite also called the day after his interview and informed her that while he had denied an incident in his interview, after speaking with respondent, he "kind of recalled it."

Lastly, respondent contends that there is no evidentiary basis for finding that respondent misled or lied to either AOC HR or the Commission. To the contrary, the record and testimony indicates otherwise. During his initial meeting with Ms. Jabbar, respondent reported only the alleged "red head" comment. When asked if there were any other issues with Mr. Tuite outside of this alleged comment, respondent indicated that there were no further issues. Respondent made this claim after being a witness to Mr. Tuite's loud outbursts and inappropriate behavior and after both Ms. Suber and Ms. Maywalt had indicated, in private meetings with respondent, their concerns about Mr. Tuite during respondent's absences.

Additionally, on 1 December 2017, after speaking with Ms. Jabbar, respondent sent an email to the Commission Chair. The email stated that AOC HR had suggested that because the "red head" comment was "based on hearsay and there was not any formal complaint, there [was] no reason to reach out to [Ms. Suber] to get confirmation or address head on with [Mr. Tuite] as it may upset the overall working relationships without need." Ms. Jabbar, however, testified that she did not relay to respondent that the incident was not serious but that she actually suggested he reach out to Mr. Tuite and Ms. Suber to do his own investigation. Thus, after carefully reviewing the record and transcript, we conclude that the Commission's findings are supported by clear and convincing evidence, and we hereby adopt them as our own.

Respondent also argues that the Commission's conclusions of law are not supported by the evidence. We, however, agree with the Commission's conclusion that respondent's actions violated Canons 1, 2B, 3A(3), and 3B(2) of the North Carolina Code of Judicial Conduct amounting to conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b).

Canon 1 of the North Carolina Code of Judicial Conduct provides that "[a] judge should uphold the integrity and independence of the judiciary. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall

be preserved." The abundance of evidence establishes that respondent did not uphold these principles. Respondent casually used profanity and allowed Mr. Tuite to aggressively use profanity while in the workplace. And while use of profanity alone may not amount to a violation, such conduct, especially when directed toward employees, is unprofessional and poses great risk to the integrity of the judiciary.

The evidence shows that respondent willfully engaged in vindictive behavior. As the Commission indicated in finding of fact 11, respondent actively engaged in a group text with Mr. Tuite, Ms. Suber and Ms. Scruggs, where he exchanged inappropriate comments. During the group message, the following exchange occurred:

> **[Ms. Suber:]** Well Clark's firm just called me about a civil litigation associate interview and my concealed carry permit came in. It's been a big day for this girl.
>
> **[Respondent:]** That is great, I am assuming that those two things would go hand in hand.
>
> **[Mr. Tuite:]** Well, shit. Your dreams could come true and you could work arm to arm with lark while armed. Seriously though, take every interview.
>
> **[Mr. Tuite:]** Okay, I got this. You go to Clark's firm. Work hard for several years/decades. Get to be Clark's boss. Call him in and be like: "You're fucking done son." It's probably worth the effort.
>
> **[Respondent:]** I concur in part. Alternatively, wait until he files to run for some judicial seat. Then primary his ass.

In addition to making these remarks, respondent ostracized Mr. Cooper while he was still employed by respondent by purposely excluding him from a chambers lunch. While it is understandable for respondent to be frustrated by Mr. Cooper's decision to resign after only two months, respondent's behavior is not justified.

As a judge respondent should, at all times and in all places, uphold "the integrity and independence of the judiciary." A judge's behavior not only reflects upon the court but also sets the tone for his chambers. To that end, respondent's vindictive behavior and his failure to reprimand Mr. Tuite for engaging in similar conduct does not "ensure the integrity and independence of the judiciary." Respondent allowed Mr. Tuite to make inappropriate and unprofessional jokes about Mr. Cooper in the presence of Ms. Suber and Ms. Scruggs, without consequence. Such implied approval did, in fact, create a toxic work environment in which the other clerks testified that they feared similar mistreatment.

The evidence also shows that respondent violated his duties under Canon 1 by being dismissive of and turning a blind eye to comments and incidents that took place both within and outside of his presence. A judge cannot "establish, maintain and enforce appropriate standards of conduct" if he chooses to ignore egregious misconduct. Specifically, respondent was present for the following: (1) Mr. Tuite making inappropriate jokes about Mr. Cooper; (2) Mr. Tuite making comments about a female applicant's "fun bags"; (4) Mr. Tuite yelling "Goddamn it Chelsey. Your fucking opinion doesn't matter"; and (5) Mr. Tuite yelling "fuck" and slamming his fist on the desk with such force that he triggered a security alarm. In addition, respondent was not only present for, but participated in, a conversation with Mr. Tuite about Mr. Tuite possibly having illegitimate children from high school relations.

Respondent was also informed about Mr. Tuite's dishonesty, poor work ethic, and bullying tactics at least twice: in Ms. Suber's exit interview in August 2017 and in a meeting with Ms. Maywalt in November 2017. Still, respondent chose not to address these issues with Mr. Tuite. By failing to correct Mr. Tuite's conduct, respondent implicitly condoned it and, as a result, the conduct continued. Respondent's active participation in these events and his witnessing of demeaning events without taking corrective action amount to a violation of Canon 1 of the North Carolina Code of Judicial Conduct.

Canon 2B provides, in pertinent part, that

> [a] judge should not allow the judge's family, social or other relationships to influence the judge's judicial conduct or judgment. The judge should not lend the prestige of the judge's office to advance the private interest of others except as permitted by this Code; nor should the judge convey or permit others to convey the impression that they are in a special position to influence the judge.

Here, it is undisputed that respondent and Mr. Tuite were good friends outside of the workplace. It is also undisputed that respondent was aware of Mr. Tuite's inability to present good work product. Respondent, himself, testified that he constantly had to remind Mr. Tuite of his duties. Respondent also knew that Mr. Tuite was not cite checking—resulting in an opinion being withdrawn. Respondent informed Ms. Suber on the phone that he was aware that she was not to blame for the withdrawn opinion, yet Mr. Tuite faced no repercussion as a result of any of his failure to competently complete work assignments. According to Ms. Jabbar, throughout the investigation respondent also continued to

show a sense of concern for Mr. Tuite, yet respondent never expressed concerns about the wellbeing of the law clerks in his chambers.

Furthermore, after AOC HR became involved and respondent took the time to individually speak with all three of his law clerks, respondent continued to overlook the severity of the allegations against Mr. Tuite. To that end, respondent also attempted to minimize their concerns by relaying to AOC HR and the Commission that any issue of sexual harassment had been "debunked" and the only concerns to be addressed dealt with management style.

Additionally, throughout the investigation, respondent seemed more concerned with discounting the importance of actions that occurred while he was absent instead of understanding the effect of Mr. Tuite's behavior on his coworkers. Respondent was relieved to hear that Mr. Tuite did not make the "red head" comment, despite hearing from Ms. Suber that an equally inappropriate comment was made. Respondent then informed AOC HR that the issue was resolved when it was not.

By failing to take action in preventing future misconduct, respondent caused his staff to lose faith in his ability to be impartial when Mr. Tuite's inappropriate actions were apparent, regardless of the severity of their concerns. As such, respondent violated Canon 2B by allowing his personal relationship with Mr. Tuite to influence his conduct and judgment.

Canon 3A(3) of the North Carolina Code of Judicial Conduct provides that "[a] judge should be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity, and should require similar conduct of lawyers, and of the judge's staff, court officials and others subject to the judge's direction and control." Canon 3B(2) of the North Carolina Code of Judicial Conduct similarly provides that "[a] judge should require the judge's staff and court officials subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge."

Because many of the instances of misconduct in this case were performed by Mr. Tuite, respondent argues that he cannot be held accountable for actions of others in his chambers. However, Canons 3A(3) and 3B(2) provide otherwise. These canons specifically provide that respondent should require "dignified and courteous" behavior of his staff. Here, respondent did not uphold these standards or require similar conduct from the individuals in his chambers. And while respondent asks the Court to look past his participation in several incidents as mere "fun,"

respondent fails to understand the role his actions played in encouraging unacceptable behavior.

Respondent's vindictive behavior toward Mr. Cooper immediately before and after his resignation violates these canons. Respondent was neither courteous nor dignified, nor did he require courteous or dignified behavior from his staff. Similarly, respondent's failure to address Mr. Tuite's inappropriate comments about a female applicant, angry outbursts, and frequent use of profanity against law clerks in the chambers amount to violations of Canons 3A(3) and 3B(2).

The Court recognizes that respondent was not immediately made aware of the entirety of Mr. Tuite's misconduct in chambers. The incidents for which respondent was present, however, were sufficient to warrant corrective action with regard to Mr. Tuite. Instead, respondent continued to turn a blind eye. This shortcoming is not, as respondent contends, simply a matter of managerial style. Rather, it is a failure to recognize the gravity of Mr. Tuite's sexually explicit language and profane and suggestive language directed toward respondent's law clerks and the impact on the law clerks of such unprofessional behavior.

Respondent's final argument is that the Commission's conclusion that his conduct was "prejudicial to the administration of justice" cannot be sustained. Subsection 7A-376(b) of the North Carolina General Statutes is referenced in the Preamble to the Code of Judicial Conduct but is not a specific canon. It provides, in pertinent part:

> Upon recommendation of the Commission, the Supreme Court may issue a public reprimand, censure, suspend, or remove any judge for willful misconduct in office, willful and persistent failure to perform the judge's duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

The Commission concluded that respondent's conduct was prejudicial to the administration of justice, because, among other things, he contributed to and enabled a toxic work environment in his chambers, and because his interactions with AOC Human Resources undermined the dignity of the Court of Appeals. We agree.

The Preamble to the Code of Judicial Conduct provides that "[a] violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute." This Court explained that "wil[l]ful misconduct in office

is improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally, in bad faith. It is more than a mere error of judgment or an act of negligence." *In re Edens*, 290 N.C. 299, 305 (1976). Furthermore, conduct that is prejudicial to the administration of justice that brings the judicial office into disrepute is "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." *Id.* at 305. Thus, the propriety of a judge's conduct under the Judicial Code of Conduct depends on both the actual conduct and the impact such conduct might have on knowledgeable bystanders. *Id.* at 305-06.

Judges play an important role in ensuring an "independent and honorable judiciary." It is, therefore, essential that anyone who holds this title understand the magnitude of their influence. Indeed, a judge's title alone carries a presumption that the individual possesses the ability to ensure order and fairness. Here, respondent fell short of these expectations.

We find that respondent's conduct in contributing to and enabling an unprofessional work environment in his chambers and his conduct in minimizing Mr. Tuite's workplace misconduct not only undermined the dignity of the Court of Appeals but negatively impacted the work product of his clerks and ultimately the court and denigrated the reputation and integrity of the judiciary as a whole. Based on the totality of the circumstances, such conduct undoubtedly brings the judicial office into disrepute and is conduct prejudicial to the administration of justice.

Because respondent has violated several canons of the North Carolina Code of Judicial conduct and N.C.G.S. § 7A-376, we must now decide whether to accept the Commission's recommendation of censure or impose a different penalty. The Commission's recommendation is that the Court censure respondent based on a finding that he "willfully engaged in misconduct prejudicial to the administration of justice that brings the judicial office into disrepute." N.C.G.S. § 7A-374.2(1).

Censure is appropriate where the judge's willful misconduct "does not warrant the suspension of the judge from the judge's judicial duties or the removal of the judge from judicial office." N.C.G.S. § 7A-374.2. The Court finds that the Commission's findings of fact establish that respondent did, in fact, willfully engage in misconduct prejudicial to the administration of justice. However, respondent's conduct did not rise to the level of incurring suspension or removal as contemplated in other decisions of this Court.

IN RE MURPHY

[376 N.C. 219 (2020)]

The Supreme Court of North Carolina orders that respondent J. Hunter Murphy be CENSURED for conduct in violation of Canons 1, 2B, 3A(3), and 3B(2) of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute and willful misconduct in office in violation of N.C.G.S. § 7A-376.

By order of the Court in Conference, this the 15th day of December 2020.

Justice DAVIS did not participate in the consideration or decision of this case.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of December, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

IN RE R.D.

[376 N.C. 244 (2020)]

IN THE MATTER OF R.D.

No. 268A19

Filed 18 December 2020

1. Termination of Parental Rights—guardian ad litem—evidence—admissibility of report

During the disposition phase of a termination of parental rights proceeding, the trial court did not abuse its discretion by allowing the admission of the guardian ad litem's report because trial courts are allowed to consider any evidence that they deem to be relevant, reliable, and necessary without making specific findings as to admissibility during this stage of the proceeding.

2. Termination of Parental Rights—evidence—guardian ad litem report—right to confront and cross-examine guardian ad litem

During the disposition phase of a termination of parental rights proceeding, the trial court did not abuse its discretion by declining to subject the guardian ad litem, who also served as the attorney advocate, to cross-examination regarding the report she submitted because a disposition proceeding is not adversarial in nature, N.C.G.S. § 7B-1110(a) allows trial courts to consider hearsay evidence, and a potential ethical conflict existed pursuant to Rule 3.7 of the Rules of Professional Conduct.

3. Termination of Parental Rights—best interests of the child—statutory factors—findings as to each factor

The trial court did not err when it failed to make explicit findings for each statutory factor listed in N.C.G.S. § 7B-1110(a) during a termination of parental rights proceeding because trial courts are not required to make specific findings as to each statutory factor and the trial court properly considered all factors and made written findings for those factors that were relevant.

4. Termination of Parental Rights—best interests of the child—findings of fact—evidentiary support

The trial court's finding of fact during the best interest determination of a termination of parental rights proceeding that children who are adopted often face harm was not supported by competent evidence and was prejudicial, warranting remand, because of the possibility it improperly influenced the trial court's best interest determination.

Justice EARLS concurring in part and dissenting in part.

Chief Justice BEASLEY and Justice HUDSON join in this opinion concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 6 March 2019 by Judge Elizabeth Trosch in District Court, Mecklenburg County. Heard in the Supreme Court on 2 September 2020.

Thurman, Wilson, Boutwell & Galvin, P.A., by W. David Thurman and Thomas J. Thurman, for petitioner-appellant Bethany Christian Services.

Wendy C. Sotolongo, Parent Defender, by J. Lee Gilliam, Assistant Parent Defender, for respondent-appellee father.

DAVIS, Justice.

In this case, we address several issues relating to the manner in which dispositional hearings in termination of parental rights cases are conducted and the factors that a trial court may properly consider in making a determination as to whether termination is in the best interests of the juvenile. For the reasons set out below, we affirm in part and vacate and remand in part for the entry of a new dispositional order.

Factual and Procedural Background

This case involves a private termination of parental rights proceeding initiated by petitioner Bethany Christian Services (BCS), a private adoption agency, against the father (respondent) of the juvenile. The minor child "Ryan"[1] was born in October 2017 to respondent and "Brittany." Respondent and Brittany met at school in 2016 when they were 15 and 14 years of age, respectively. The two were family friends and lived in the same neighborhood. In January 2017, respondent and Brittany began a sexual relationship that lasted until March 2017.

Brittany discovered that she was pregnant in March 2017. Later that month, respondent blocked Brittany from contacting him on social media—the primary means that the two had used to communicate with each other. The two offered differing accounts in their testimony as to

1. Pseudonyms are used throughout this opinion in order to protect the identity of the minor child.

why this occurred. Brittany testified that respondent blocked her immediately after she informed him of the pregnancy, but respondent testified that he did so because "[s]he was becoming annoying."

Brittany changed schools while she was pregnant, and respondent's family moved away from Brittany's neighborhood. Respondent did not see Brittany over the summer of 2017, and, according to respondent, no discussion took place between them during that time as to whether she might be pregnant.

Brittany gave birth to Ryan in October 2017 in Mecklenburg County. The day after Ryan's birth, Brittany signed a document relinquishing her parental rights over Ryan to BCS and also signed an affidavit naming respondent as the father of Ryan. Brittany selected Jason and Demi Dowdy as the prospective adoptive parents for Ryan, and Ryan was placed with the Dowdys on 1 November 2017. Ryan has lived exclusively with the Dowdys since that time. Following Ryan's placement with the Dowdys, BCS attempted to contact respondent by sending letters to the address listed in Brittany's affidavit. However, Brittany had mistakenly written down the wrong house number when listing respondent's address, and respondent never received the letters.

Respondent testified that he was not aware of Brittany's pregnancy or the birth of Ryan until 2018. He stated that in January of 2018 he heard rumors at school that Brittany had given birth, and respondent's sister testified that she had seen a photo of Brittany with Ryan on social media. Nevertheless, respondent did not take any steps to investigate whether he might be the father of Brittany's child and did not make any attempt to contact Brittany until after he was served with BCS's termination petition several months later.

BCS filed its petition to terminate respondent's parental rights on 21 November 2017, alleging that respondent had neglected Ryan under N.C.G.S. § 7B-1111(a)(1) and had failed to establish paternity under N.C.G.S. § 7B-1111(a)(5). After several unsuccessful efforts to locate respondent both by mail and via the internet, BCS finally served respondent at his new address on 6 March 2018. After receiving the petition, respondent's mother paid for a paternity test. Upon confirming that respondent was, in fact, the father of Ryan, respondent's mother began the process of challenging BCS's custody of Ryan.

At a pretrial hearing on 30 May 2018, the trial court appointed Rhonda Hitchens—a local attorney—to serve as the guardian *ad litem* (GAL) for Ryan in the termination proceeding. The adjudication stage of the termination proceeding was held on 24 August 2018. During

the adjudication stage, the trial court dismissed the ground of neglect but found the existence of a ground for termination under N.C.G.S. § 7B-1111(a)(5) due to respondent's failure to establish paternity.

The dispositional stage of the termination proceeding was subsequently held over the course of two dates—31 October 2018 and 9 January 2019. During the dispositional hearing, the trial court directed Hitchens to take the witness stand in order to testify about the GAL's report she had prepared. The GAL's report contained summaries of interviews with twenty individuals connected with the case, an assessment of Ryan's needs and interests, and Hitchens' ultimate recommendation that respondent's parental rights not be terminated.

Respondent objected to Hitchens being called as a witness on the ground that allowing her to testify about her report would create a conflict of interest by requiring her to act as both a lawyer and witness in violation of Rule 3.7 of the North Carolina Rules of Professional Conduct.[2] In response, BCS argued that it would not be improper for Hitchens to testify and that BCS should have the right to cross-examine Hitchens about the contents of her report.

The trial court ultimately presented Hitchens with two options—either to (1) testify as a witness and withdraw as Ryan's attorney advocate; or (2) remain as his attorney advocate and submit her written report to the trial court without testifying. Hitchens chose the second option, and her report was admitted into evidence without her testimony. BCS objected to the admission of Hitchens' report on the grounds that the report presented an improper expert opinion on the ultimate issue of whether termination would be in Ryan's best interests and that it had been denied its right to cross-examine her. The trial court overruled this objection and also denied BCS's request to present an offer of proof regarding the testimony Hitchens would have given had she testified.

At the conclusion of the hearing, the trial court determined that termination of respondent's parental rights was not in Ryan's best interests. The trial court entered a written order dismissing BCS's petition to terminate parental rights on 6 March 2019. BCS appealed to this Court pursuant to N.C.G.S. § 7B-1001(a1)(1).

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2. Rule 3.7(a) provides that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client." N.C. Rev. R. Prof. Conduct 3.7(a).

Analysis

Our Juvenile Code provides for a two-step process for the termination of parental rights—an adjudication stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019). At the adjudication stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence that one or more grounds for termination exist under N.C.G.S. § 7B-1111(a). N.C.G.S. § 7B-1109(e), (f). If the trial court finds the existence of one or more grounds to terminate the respondent's parental rights, the matter proceeds to the dispositional stage where the trial court must determine whether terminating the parent's rights is in the juvenile's best interests. N.C.G.S. § 7B-1110(a).

"We review a trial court's adjudication under N.C.G.S. § 7B-1111 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). With regard to the trial court's assessment of a juvenile's best interests at the dispositional stage, however, we review that decision "solely for abuse of discretion." *In re A.U.D.*, 373 N.C. 3, 6 (2019). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 6–7 (alteration in original) (quoting *In re T.L.H.*, 368 N.C. 101, 107 (2015)).

BCS raises a number of arguments on appeal, which essentially raise two primary issues. First, BCS contends that the trial court's admission of the GAL's report during the dispositional stage of the termination proceeding without allowing Hitchens to be cross-examined about the report constituted an abuse of discretion. Second, BCS asserts that the trial court's written order contained key findings of fact that lacked evidentiary support in the record. We address each argument in turn.

I. Admission of the GAL's Report Without the Opportunity for Cross-Examination

BCS initially argues that the trial court should not have admitted the GAL's report into evidence during the dispositional stage without affording its counsel the opportunity to cross-examine Hitchens about the contents of the report. In order to fully analyze this issue, it is necessary to review the legal framework governing the role of the GAL in termination of parental rights proceedings. Our Juvenile Code provides for the appointment of a GAL in a termination proceeding as follows:

> (b) If an answer or response denies any material allegation of the petition or motion, the court shall appoint a guardian ad litem for the juvenile to represent the best interests of the juvenile, unless the petition or motion was filed by the guardian ad litem pursuant to G.S. 7B-1103, or a guardian ad litem has already been appointed pursuant to G.S. 7B-601. A licensed attorney shall be appointed to assist those guardians ad litem who are not attorneys licensed to practice in North Carolina. . . .
>
> (c) In proceedings under this Article, the appointment of a guardian ad litem shall not be required except, as provided above, in cases in which an answer or response is filed denying material allegations, or as required under G.S. 7B-1101; but the court may, in its discretion, appoint a guardian ad litem for a juvenile, either before or after determining the existence of grounds for termination of parental rights, in order to assist the court in determining the best interests of the juvenile.

N.C.G.S. § 7B-1108(b)–(c) (2019).

Our Juvenile Code also states the following with respect to the GAL's duties:

> [t]he duties of the guardian ad litem program shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to facilitate, when appropriate, the settlement of disputed issues; to offer evidence and examine witnesses at adjudication; to explore options with the court at the dispositional hearing; to conduct follow-up investigations to insure that the orders of the court are being properly executed; to report to the court when the needs of the juvenile are not being met; and to protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court.

N.C.G.S. § 7B-601(a) (2019).

This Court has recognized that in termination cases where a respondent-parent files an answer denying material allegations in a termination petition, "the trial court (1) must appoint a GAL for the juvenile, and (2) must appoint a licensed attorney . . . if the appointed GAL is not an

attorney." *In re C.J.C.*, 374 N.C. 42, 44 (2020). It is therefore clear that in some cases a GAL may be appointed to serve in a dual role as both the juvenile's GAL *and* attorney advocate. *See In re J.H.K.*, 365 N.C. 171, 175–76 (2011) ("Thus, if the GAL is an attorney, that person can perform the duties of both the GAL and the attorney advocate. . . . [The Juvenile Code] recognizes that in TPR proceedings the [GAL] attorney advocate is to perform the traditional role of a lawyer . . . ."). Moreover, subsection (c) of N.C.G.S. § 7B-1108 provides that even when the trial court is not expressly required to appoint a GAL, the trial court may still do so in its discretion "in order to assist the court in determining the best interests of the juvenile." N.C.G.S. § 7B-1108(c). This language makes clear that one of the statutorily enumerated functions of a GAL is to assist the trial court in making its best interests determination during the dispositional stage.

In light of the specific argument BCS asserts in this appeal, we must also address the evidentiary distinctions between the adjudication and dispositional stages of termination proceedings. The portion of the Juvenile Code governing the adjudication stage of termination proceedings provides, in pertinent part, that

> [t]he burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence. *The rules of evidence in civil cases shall apply.* No husband-wife or physician-patient privilege shall be grounds for excluding any evidence regarding the existence or nonexistence of any circumstance authorizing the termination of parental rights.

N.C.G.S. § 7B-1109(f) (emphasis added).

With regard to the dispositional stage, however, the General Assembly has stated the following:

> After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. *The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile.*

N.C.G.S. § 7B-1110(a) (emphasis added).

These statutes make clear that during the adjudication stage of a termination proceeding, the trial court must apply the provisions of the

North Carolina Rules of Evidence that apply in all civil cases. During the dispositional stage, conversely, the trial court retains significantly more discretion in its receipt of evidence and may admit *any* evidence that it considers to be relevant, reliable, and necessary in its inquiry into the child's best interests—even if such evidence would be inadmissible under the Rules of Evidence.

* * *

[1] Applying these principles to the present case, we must first decide whether the GAL's report was admissible—that is, whether the trial court erred in its implicit determination that the report was "relevant, reliable, and necessary to determine the best interests of the juvenile." N.C.G.S. § 7B-1110(a). We agree with respondent that the trial court did not abuse its discretion in determining that the report provided by Hitchens met each of these criteria. The report contained summaries of interviews with twenty different persons having some connection with the case, an analysis of the needs of Ryan, and Hitchens' ultimate recommendation that the trial court not terminate respondent's parental rights. The report detailed the basis of Hitchens' opinion and thoroughly set out both the pros and cons of terminating respondent's parental rights. This report was therefore directly related to the trial court's task during the dispositional stage. Thus, the trial court possessed the discretion to determine that the report was, in fact, "relevant, reliable, and necessary" to determine the best interests of Ryan.

We also observe that the admission of a GAL's report at the best interests stage of a termination proceeding is a commonplace occurrence and that such reports are frequently introduced in order to aid the trial court in determining the juvenile's best interests. *See, e.g.*, *In re N.G.*, 374 N.C. 891, 905 (2020) (noting that the trial court admitted a "detailed [GAL] report" during the dispositional stage and that "[n]o objection was made and said report was received into evidence and considered by the [trial court] on the issue of best interest"); *In re A.L.L.*, 254 N.C. App. 252, 261 (2017) ("In the dispositional phase, the trial court received the report of the guardian ad litem . . . ."); *In re M.A.I.B.K.*, 184 N.C. App. 218, 221 (2007) (noting that during the best interests determination the trial court "considered a report on the child's best interests submitted by her guardian ad litem").

BCS argues, however, that the trial court was required to make explicit findings setting out *why* it found the GAL's report to be "relevant, reliable, and necessary" pursuant to N.C.G.S. § 7B-1110(a) before admitting it into evidence. This argument is unavailing. This Court has

never interpreted N.C.G.S. § 7B-1110(a) to impose such a requirement, and nothing in the statutory text indicates that the General Assembly intended that such express findings be required. By way of contrast, we note that other portions of the Juvenile Code *do* require explicit factual findings in certain contexts. *See*, *e.g.*, N.C.G.S. § 7B-1101 (2019) ("[T]he court *shall find* that it has jurisdiction to make a child-custody determination . . . .") (emphasis added)). The absence of any analogous language in N.C.G.S. § 7B-1110(a) demonstrates that no explicit findings are necessary when a trial court deems it appropriate to consider evidence that would otherwise be inadmissible under the Rules of Evidence.

[2] Having determined that the trial court did not abuse its discretion in admitting the GAL's report, we must next determine whether the trial court committed reversible error in declining to require that Hitchens be subject to cross-examination after her report was admitted into evidence. During the dispositional stage of the termination proceeding, the trial court initially asked Hitchens to take the witness stand to testify regarding her report. Respondent, however, objected to Hitchens being called as a witness, contending that her dual role as an attorney advocate and as a factual witness would create an impermissible ethical conflict under Rule 3.7 of the North Carolina Rules of Professional Conduct. After hearing arguments on this issue from both parties and consulting the North Carolina Rules of Professional Conduct, the trial court ultimately ruled that Hitchens "being compelled to testify or giving testimony as a witness would constitute a violation of Rule 3.7 and necessitate her withdrawal." The trial court then gave Hitchens the option either to testify and withdraw as Ryan's advocate or—alternatively—to introduce her written report without giving any testimony at all. Hitchens chose the latter option.

BCS argues that it was improperly deprived of its right to cross-examine Hitchens by the trial court's ruling. BCS asserts that a party has the absolute right to "an opportunity to fairly and fully cross-examine a witness who has testified for the adverse party." *Citizens Bank & Tr. Co. v. Reid Motor Co.*, 216 N.C. 432, 434 (1939). Because the GAL's report in this case contained relevant evidence—including interviews with persons who did not appear in court and a recommendation from Hitchens regarding Ryan's best interests—BCS contends that it should have been allowed to question her regarding the basis for her opinion and the methods she used to conduct these interviews. Similarly, BCS challenges the trial court's characterization of the ethical conflict that would exist under Rule 3.7 if Hitchens had been required to testify, contending that there is no legal authority in this state preventing a party

from compelling a material witness to testify. Finally, BCS argues that the trial court committed prejudicial error by denying its offer of proof regarding Hitchens' anticipated testimony.

In response, respondent contends that BCS was not entitled to cross-examine Hitchens as a matter of right because the dispositional stage of a termination proceeding is inherently non-adversarial in nature. Respondent further asserts that the relaxed evidentiary standards applicable to dispositional hearings under N.C.G.S. § 7B-1110(a) do not lend themselves to bright-line rules regarding the manner in which evidence may be admitted by a trial court during this stage of a termination proceeding.

As a preliminary matter, we first address BCS's contention that the trial court's ruling amounted to a deprivation of its constitutional due process right to cross-examine an opposing witness. Because BCS made no constitutional argument before the trial court, this issue is not properly before us. *See State v. Golphin*, 352 N.C. 364, 411 (2000) ("Constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal."). As a result, the only issue for our determination is whether the trial court acted within its discretion by refusing to allow cross-examination of Hitchens. On these facts, we cannot say that an abuse of discretion occurred.

While it is axiomatic that cross-examination of an adverse witness is an essential right in adversarial proceedings, *see*, *e.g.*, *Brewer v. Garner*, 264 N.C. 384, 386 (1965), the dispositional stage of a termination proceeding is not adversarial. *See Stephens v. Stephens*, 213 N.C. App. 495, 503 (2011) (quoting *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 78 (1992)) (" '[T]he best interest' question is thus more inquisitorial in nature than adversarial . . . ."). Instead, the focus during the dispositional stage is entirely on ascertaining the best interests of the child by utilizing whatever evidence the trial court believes is most "relevant, reliable, and necessary." N.C.G.S. § 7B-1110(a). This statute gives the trial court broad discretion regarding the receipt of evidence in its quest to determine the best interests of the child under the particular circumstances of the case. Although this reservoir of discretion is not limitless, we are satisfied that here the trial court's ruling on this issue was within its discretion.[3]

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3. For example, we are not confronted with a scenario in which the trial court allowed the GAL to testify on direct examination for respondent but then refused to allow cross-examination by BCS. Instead, the trial court allowed the GAL's report to speak for itself.

Our conclusion is supported by the language of N.C.G.S. § 7B-1110(a) itself, which—as noted above—expressly allows the trial court to consider hearsay evidence. *See* N.C.G.S. § 7B-1110(a) ("The court may consider any evidence, including hearsay evidence . . . ."). Hearsay, by definition, is an out-of-court statement that is not subject to cross-examination. *See State v. Baymon*, 336 N.C. 748, 759 (1994) (quoting N.C.G.S. § 8C-1, Rule 801(c)). Accordingly, because the statute expressly allows the admission of evidence which inherently cannot be subject to cross-examination, our legislature has made clear that no absolute right to cross-examination exists during the dispositional stage.[4]

We deem instructive this Court's decision in *In re J.H.K.* In that case, the trial court appointed the juveniles a GAL and a separate attorney advocate shortly after DSS obtained custody of them. *J.H.K.*, 365 N.C. at 172. At the subsequent termination proceeding, the attorney advocate was present, but the juveniles' GAL was absent from the courtroom. *Id.* at 173. On appeal, the respondent-parent argued that the trial court erred by conducting the termination proceeding without the children's GAL being physically present. *Id.* We disagreed, holding that a "nonlawyer GAL volunteer is not required to be physically present at the TPR hearing." *Id.* at 178. In explaining our ruling, we emphasized the "separate in-court and out-of-court responsibilities" of the nonlawyer GAL—such as investigation and observation of the needs of the children. *Id.* at 176. We noted that "[a]lthough the GAL's presence at the TPR hearing may be preferable," nothing in the Juvenile Code explicitly requires the GAL's attendance. *Id.*

We further held that it was clear that the GAL had fulfilled her statutory duties by "regularly fil[ing] reports describing the children's needs . . . and her recommendations concerning the best interests of the children in light of her ongoing investigation of their case." *Id.* at 177. Meanwhile, the attorney advocate had, in turn, complied with her respective duties by "appear[ing] at every hearing documented in the record" and by examining witnesses and introducing the GAL's report at the termination proceeding. *Id.* Thus, we concluded that "[t]hrough the work of its team members appointed to th[e] case, the GAL program satisfied its out-of-court investigatory duties as well as its in-court representational duties." *Id.* at 178.

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4. Although BCS contends that cross-examination was particularly warranted because the GAL's report contained Hitchens' expert opinion regarding Ryan's best interests, Hitchens made clear to the trial court that she was not holding herself out as an expert witness or purporting to offer an expert opinion.

Although *In re J.H.K.* did not involve the specific issue raised by BCS in the present case, it is nevertheless consistent with our ruling today. If the GAL is not even required to be present in the courtroom at the termination proceeding, then logically there is no absolute right to cross-examine the GAL in cases where she is present but does not testify for the adverse party. *In re J.H.K.* further demonstrates that a GAL can fulfill her "out-of-court investigatory duties" simply by submitting her written report to the trial court—which is what ultimately happened here. *Id.*

Moreover, the existence of the potential for an ethical conflict pursuant to Rule 3.7 of the Rules of Professional Conduct makes the trial court's refusal to require Hitchens to testify even more reasonable. After becoming aware of the possible ethical conflict, the trial court (1) heard arguments on this issue from both parties; (2) reviewed Rule 3.7, the relevant portions of the Juvenile Code, and case law regarding the duties of the GAL; and (3) made a phone call to the North Carolina State Bar seeking guidance on this ethical issue. The trial court then offered Hitchens the option to either testify as a witness and withdraw as Ryan's advocate or submit her written report without testifying and continue to serve as Ryan's advocate. In so doing, we are satisfied that the trial court acted within its authority in attempting to resolve this issue. Accordingly, BCS's argument is overruled.

II. Best Interests Determination

BCS next makes several arguments regarding the trial court's dispositional findings of fact in its written order. Specifically, BCS contends that the trial court (1) improperly placed a burden of proof upon BCS during the dispositional stage; (2) failed to properly consider the statutory factors relevant to the best interests determination; and (3) made several material findings of fact that were unsupported by the evidence including, most notably, a finding about alleged harms associated with adoption generally.

We first address BCS's argument regarding the burden of proof during disposition. BCS argues that the trial court's order incorrectly (1) conflated the applicable burden of proof with the statement of legislative purpose set out in the Juvenile Code; and (2) suggested that BCS bore the burden of proving that respondent was not a capable parent.

In its written order, the trial court looked to the stated legislative purpose contained in the section of the Juvenile Code governing termination proceedings for guidance in making its dispositional findings. The trial court's order noted that

> [t]he court, in making its [best interests] determination, has considered the general purpose of Article 11, which is to provide judicial procedures for terminating the legal relationship between a child and the child's biological or legal parents when the parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the child.

The trial court also framed several of its dispositional findings in terms of whether or not respondent had "demonstrated an inability or unwillingness to provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the child."

As noted by BCS, this language in the trial court's order is drawn directly from N.C.G.S. § 7B-1100, which sets out the underlying legislative intent with regard to the statutory scheme governing termination of parental rights proceedings. *See* N.C.G.S. § 7B-1100(1) (2019) ("The general purpose of this Article is to provide judicial procedures for terminating the legal relationship between a juvenile and the juvenile's biological or legal parents when the parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the juvenile.").

However, we do not believe that it is improper for a trial court to look to the General Assembly's intent as set out in the Juvenile Code for guidance when making its dispositional findings of fact. In fact, this Court has similarly examined statements of legislative intent contained within the Juvenile Code in reviewing orders involving the termination of a party's parental rights. *See*, *e.g.*, *In re F.S.T.Y.*, 374 N.C. 532, 540 (2020). Moreover, although it is true that the trial court's order does not recite *all* of the legislative policies contained in N.C.G.S. § 7B-1100, we are unaware of any rule that required it to do so.

BCS further contends that the trial court improperly suggested that BCS bore the burden of proof during the dispositional stage. BCS is correct that—unlike during the adjudication stage—no burden of proof should be imposed upon either party at the dispositional stage. *Compare* N.C.G.S. § 7B-1109(f) ("The burden in [adjudication] proceedings shall be upon the petitioner or movant . . . ."), *with* N.C.G.S. § 7B-1110 (containing no burden of proof requirement). *See also In re Anderson*, 151 N.C. App. 94, 96 (2002) ("There is no burden of proof on the parties at disposition."). However, our reading of the trial court's order does not reveal any indication that the trial court actually imposed a burden of proof upon BCS.

[3] BCS also argues that the trial court erred by either minimizing or ignoring altogether the five statutory factors required to be considered in the best interests analysis under N.C.G.S. § 7B-1110(a). Most notably, BCS contends that the trial court failed to sufficiently consider Ryan's high likelihood of adoption, his lack of a bond with respondent, and whether termination would aid in accomplishing Ryan's permanent plan of adoption. BCS also claims that the trial court placed too much weight on the statutory "catchall" provision under N.C.G.S. § 7B-1110(a)(6). Section 7B-1110 states, in pertinent part, as follows:

> In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a).

We have held that the five enumerated factors are not exclusive, as subsection (a)(6) expressly authorizes a trial court to rely on any other "relevant consideration" it deems pertinent to the best interests determination. *See In re A.R.A.*, 373 N.C. 190, 200 (2019) ("In addition to the statutory factors set out in N.C.G.S. § 7B-1110(a)(1)–(5), the district court considered other relevant factors, as it was permitted to do under N.C.G.S. § 7B-1110(a)(6) . . . .").

We previously rejected an argument similar to that made by BCS in *In re A.U.D.* There, the respondent-parent contended that "the trial court did not make sufficient findings regarding the factors set forth in N.C.G.S. § 7B-1110(a)" and that the trial court improperly weighed these factors by relying too heavily on the "catchall" provision under (a)(6). *A.U.D.*, 373 N.C. at 10. We disagreed, explaining that while "[i]t is clear that a trial court must *consider* all of the factors in section 7B-1110(a)," a court need not make explicit "written findings as to each factor." *Id.* Because the transcript indicated that the trial court considered each of

the five statutory factors, we held that there was no violation of N.C.G.S. § 7B-1110(a). *Id.* We further determined that it was permissible for the trial court to "consider[ ] other relevant circumstances . . . under N.C.G.S. § 7B-1110(a)(6)" in making its best interests determination—such as the circumstances surrounding the children's adoption and the respondent's recent "strides in self-improvement." *Id.* at 12. As for the respondent's argument regarding the allegedly erroneous weighing of the statutory factors, we noted that while some "evidence existed that would have supported a contrary decision . . . . this Court lacks the authority to reweigh the evidence that was before the trial court." *Id.*

Here, as in *In re A.U.D.*, we are satisfied that the trial court properly considered each of the statutory factors. Indeed, the trial court's order stated that "[t]he court has considered each of the six criteria set out in subsection 1110, and makes written findings on those factors that are relevant, placing significant weight on the sixth criteria which addresses any relevant consideration." Furthermore, to the extent that BCS is contending that the trial court improperly weighed and balanced the six factors in reaching its conclusion, such balancing is uniquely reserved to the trial court and will not be disturbed by this Court on appeal. *See In re A.U.D.*, 373 N.C. at 12 ("[T]his Court lacks the authority to reweigh the evidence that was before the trial court.").

Finally, we address BCS's various challenges to the trial court's factual findings in its written order. During the dispositional stage, we review the trial court's factual findings to determine if they are supported by competent evidence. *In re K.N.K.*, 374 N.C. 50, 57 (2020) ("The trial court's dispositional findings of fact are reviewed under a 'competent evidence' standard."). In making findings of fact, "it is the trial judge's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn from the testimony." *In re T.N.H.*, 372 N.C. 403, 411 (2019). Moreover, findings of fact are binding "where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. at 110–11.

BCS first challenges Finding of Fact 14, which discusses Brittany's attendance at a birthday party held by respondent's sister. Finding of Fact 14 states as follows:

> 14. [Brittany] attended a birthday party in May, 2017 for Respondent-Father's sister. This was a pool party to which [Brittany] wore a bikini. [Brittany] initially denied attending the party, but acknowledged her participation when

> confronted with photographic evidence of her presence. [Brittany] was not obviously pregnant and she did not disclose her pregnancy to any member of the father's family. Respondent-Father did not attend the birthday party.

BCS asserts that this finding is incorrect because the transcript demonstrates that Brittany never denied attending the party—rather, she simply stated that she did not recall whether she had attended the party.

The transcript reveals that, when Brittany was asked whether she had "any contact or communication" with anyone in respondent's family after becoming pregnant in March 2017, Brittany responded "[n]o." When initially asked about her attendance at the May 2017 pool party, Brittany stated that she "[didn't] recall" whether or not she had attended. After being asked about the pool party again on cross-examination and after being confronted with a photograph of her at the party, Brittany admitted that she was "the person wearing a pink bikini" in the photograph. To the extent that a portion of Finding of Fact 14 contained an inaccurate recitation of the evidence, we do not deem any such inaccuracy prejudicial. Indeed, the transcript reveals that Brittany initially denied having *any* contact with respondent's family after becoming pregnant but later admitted attending the party for respondent's sister while pregnant.

Second, BCS challenges Findings of Fact 42, 52, and 53, which discuss the "barriers" that prevented respondent from visiting Ryan and forming a bond with him after becoming aware of his birth. These findings state, in relevant part, as follows:

> 42. . . . . Additionally, in this case, the Respondent-Father was innocent in his ignorance of the pregnancy. . . .
>
> . . . .
>
> 52. That the only reason this child does not have a strong reciprocal bond with Respondent-Father is because of barriers that were erected after his birth which the Father could not, despite his efforts, overcome.
>
> 53. Immediately after he became aware of the existence of this child, Respondent-Father expressed his desire to visit with and establish a bond with his son. He was prohibited from doing so, both by [BCS] and the Court.

BCS asserts that no "barriers" were erected to deny respondent access to Ryan because it was respondent who (1) blocked Brittany on social media; (2) failed to ever inquire about whether Brittany was

pregnant (despite knowing where she lived); and (3) heard rumors of her pregnancy in January 2018 but still did nothing to assert his parental rights until March 2018. For these same reasons, BCS argues that respondent was not "innocent in his ignorance of the pregnancy" and that he did not express a desire to visit Ryan "immediately" after becoming aware of Ryan's birth. BCS asserts that respondent knew about the pregnancy two months before service of the termination petition yet still took no action.

There was conflicting evidence in the record regarding respondent's knowledge of Brittany's pregnancy. Brittany testified that she informed respondent that she was pregnant in March 2017, but respondent denied this assertion and testified that he did not learn about the pregnancy until 2018—having first heard rumors about her pregnancy in January 2018 and receiving confirmation of her pregnancy when he was served with BCS's termination petition in March 2018. The trial court found respondent's account of these events to be credible and found Brittany's testimony "not believable"—as was its province as the trier of fact.

Moreover, the evidence of record permitted the trial court to conclude that barriers were erected after Ryan's birth that prevented respondent from bonding with Ryan. It is undisputed that Brittany relinquished her parental rights to Ryan one day after his birth and that Ryan was shortly thereafter placed with a prospective adoptive family without respondent's knowledge. Thus, the circumstances surrounding Ryan's adoption alone were enough to allow the trial court to infer that barriers existed that made it difficult—if not impossible—for him to bond with Ryan.

BCS next challenges the portions of Findings of Fact 15, 30, and 38 that discuss Brittany's "active efforts to conceal" her pregnancy from respondent. These findings provide as follows:

> 15. [Brittany's] guardians engaged in active efforts to conceal [her] pregnancy in that they withdrew her from the school she attended with Respondent-Father and sent her to a school outside of their community of residence.
>
> . . . .
>
> 30. . . . . The Respondent-Father's failure to provide an adequate standard of care for this minor child could not be willful because . . . [Brittany] and her guardians intentionally concealed her pregnancy from Respondent-Father [and] engaged in a process of planning for the child's future at the exclusion of the minor father . . . .

. . . .

> 38. A fourteen year old child, with the counsel and assistance of her legal guardians, made a decision to conceal this pregnancy from a fifteen year old father, his family and the world . . . . All of these decisions were carried out by a minor child who intentionally excluded the father of her unborn child from the process.

BCS argues that none of the actions in which Brittany engaged were motivated by an intent to conceal her pregnancy from respondent. BCS asserts that (1) her family moved Brittany to a different school to prevent her from being bullied because of her pregnancy; (2) she informed respondent of her pregnancy; (3) she posted a picture of herself with Ryan on social media; and (4) she told BCS the correct name of the baby's father. BCS asserts that the lack of communication between the two was respondent's fault, as it was respondent who knew where Brittany lived at all times but chose not to contact her.

We reject BCS's argument as we believe that these findings were likewise supported by competent evidence. Given that the trial court disbelieved Brittany's claim that she informed respondent of the pregnancy, the remaining evidence could have led a reasonable trier of fact to conclude that Brittany and her family were intentionally concealing her pregnancy from respondent. First, Brittany changed schools while pregnant. She testified that she changed schools in order to avoid being bullied or harassed, but the trial court was free to reject her testimony and to infer that her true motivation for changing schools was to avoid contact with respondent. Second, Brittany listed the wrong address for respondent on her affidavit. While this could have been a simple mistake, it also would have been permissible for the trial court to infer that this inaccuracy was intentional given the trial court's unchallenged finding that Brittany gave "inconsistent, self-serving and untruthful testimony . . . concerning a number of substantive matters." Third, as noted above, there was evidence that Brittany and her family never attempted to contact respondent after Ryan's birth, and it is uncontested that respondent was not consulted regarding the decision to relinquish Ryan for adoption.

Additionally, BCS challenges the portion of Finding of Fact 23 stating that BCS did not "engage in meaningful efforts to ascertain the proper address of the minor Respondent." BCS asserts that it asked Brittany for respondent's address and that BCS had no reason to believe that the address provided by Brittany would be inaccurate. BCS notes that it was unable to verify respondent's address through county property records

because his family did not own the residence. BCS argues that it never gave up the search for respondent, claiming that it was not until after several months of undelivered letters as well as searches conducted through the internet, social media, criminal records, and Division of Motor Vehicles records that BCS could finally locate a current address for respondent's mother, who lived in a different county. Likewise, BCS also challenges the trial court's refusal to admit into evidence BCS's affidavit of service—a record that BCS contends documented its diligent efforts to search for respondent.

Although it is true that BCS took a number of steps to attempt to locate respondent—such as sending letters to the address for respondent listed in Brittany's affidavit and searching for respondent on social media and on the internet—the trial court noted that there were several other commonsense steps that BCS could have taken to find respondent but that it did not do so. For example, BCS did not seek additional information from Brittany or her family, who were known to be acquainted with respondent's family. Nor did BCS attempt to obtain an address for respondent from the high school that he was known to attend.[5]

[4] Finally, BCS challenges the portion of Finding of Fact 57 discussing the alleged "harm" associated with adoption generally. In the trial court's oral findings at disposition, the trial court not only emphasized the "need to protect all children from the unnecessary severance of relationship[s] with biological parents" but also went on to discuss the "harm or the challenges that children who are adopted often face." This concern was also reflected in Finding of Fact 57 of the written order, which states as follows:

> 57. There is insufficient evidence that changing primary care givers and homes at fourteen months of age would be traumatic and should be considered a primary or compelling factor on best interests to terminate parental rights. A change in caregivers, routine and home must be balanced against *the harm that children who are adopted often face as they try to understand who they are*, *where*

5. We also reject BCS's argument that the trial court committed reversible error by refusing to admit the affidavit of service, which described BCS's various efforts to contact respondent via mail, the internet, and through public records searches. The trial court received extensive testimony from BCS's representative Robyn Johnson regarding BCS's efforts to contact respondent. Given the broad amount of discretion that trial courts possess in making evidentiary rulings during the dispositional stage coupled with the fact that the majority of this information was described in Johnson's testimony, we do not believe that the trial court abused its discretion by declining to admit the affidavit of service.

> *they came from, and why they were not raised by their biological parents.*

(Emphasis added). BCS argues that this finding is unsupported by the evidence and that if the finding is allowed to stand, it will signal that adoptive families are deemed by courts in this state to be inherently inferior to biological families for purposes of conducting a best interests determination.

We agree with BCS that the italicized portion of Finding of Fact 57 and the above-quoted oral findings by the trial court not only lack support in the record but can also be read as reflecting an inappropriate bias against adoption. At oral argument, counsel for respondent conceded that the trial court heard no evidence from the GAL or any other witness regarding any "harm" associated with adoption as a general proposition. Additionally, although it is true that our Juvenile Code states a preference for avoiding the dissolution of the biological parent-child relationship except when absolutely necessary, *see, e.g.*, N.C.G.S. § 7B-1100(2) (recognizing "the need to protect all juveniles from the unnecessary severance of a relationship with biological or legal parents"), this does not mean that adoption is contrary to the public policy of our state or that our law deems adoptive parental relationships to be any less valuable than biological parental relationships.

As articulated elsewhere in our General Statutes, the legislature has stated that "it is in the public interest to establish a clear judicial process for adoptions, [and] to promote the integrity and finality of adoptions." N.C.G.S. § 48-1-100(a) (2019). The General Assembly has further declared "as a matter of legislative policy" that it is desirable to "advance the welfare of minors by . . . facilitating the adoption of minors in need of adoptive placement by persons who can give them love, care, security, and support." N.C.G.S. § 48-1-100(b). This Court recognized eighty years ago that

> [t]he institution of adoption is a very worthy response of the law to social needs . . . . Instances of its beneficent effect may be found in the history of men and women who have been aided to become prominent in all lines of private and public service, and in the consolation it has given to hundreds of childless homes.

Ward v. Howard, 217 N.C. 201, 208 (1940).

In response, respondent argues that even if there was no evidence in the record about harm suffered generally by adopted children, it was nevertheless permissible for the trial court to make such an inference

based on its own personal experience pursuant to the doctrine of judicial notice. We disagree.

We have held that "[a] matter is the proper subject of judicial notice only if it is 'known,' well established and authoritatively settled." *Hughes v. Vestal*, 264 N.C. 500, 506 (1965). Conversely, "[a]ny subject . . . that is open to reasonable debate is not appropriate for judicial notice." *Greer v. Greer*, 175 N.C. App. 464, 472 (2006). Here, it can hardly be said that it is "well established" or "authoritatively settled" that children who are adopted often face "harm" while growing up and attempting to understand their identity. *Hughes*, 264 N.C. at 506.

Accordingly, because no evidence existed in the record to support the trial court's finding on this issue and because the doctrine of judicial notice is inapplicable, we hold that the challenged portion of Finding of Fact 57 was erroneous. Furthermore, we deem this inappropriate finding to be prejudicial because of the possibility that it influenced the trial court's ultimate best interests determination. Although there were factors in this case suggesting that Ryan's interests were likely to be best served by the termination of respondent's parental rights—such as Ryan's close bond with his prospective adoptive parents, the extremely high likelihood of adoption, his lack of any bond with respondent, and the very young age of respondent himself—the trial court ultimately found that these factors were outweighed not only by the importance of maintaining the biological parental bond between respondent and Ryan but also by the trial court's perception of the "harm" that adopted children face simply by virtue of the fact that they are adopted.

We are therefore unable to determine whether the trial court would have reached the same result in its best interests analysis but for the consideration of this improper finding. Thus, we remand this case to the trial court for the entry of a new dispositional order. We express no opinion as to the ultimate result of the best interests determination on remand, as that decision must be made by the trial court. The trial court shall have the discretion on remand to determine whether a new dispositional hearing is necessary.[6]

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6. BCS also argues that the trial court erred in dismissing the ground of neglect during the adjudication stage. Because the trial court found that a separate ground for termination existed—i.e., respondent's failure to establish paternity—we need not address the trial court's determination regarding the ground of neglect. *See In re D.W.P.*, 373 N.C. 327, 340 (2020) ("Because there is sufficient evidence to support one ground for termination of respondent-mother's parental rights, the Court need not address the second ground for termination . . . ."); *In re E.H.P.*, 372 N.C. 388, 395 (2019) ("[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights.").

Conclusion

For the reasons set out above, we affirm in part and vacate and remand in part for the entry of a new dispositional order.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Justice EARLS concurring in part and dissenting in part.

I join the entirety of Part I of the majority opinion, which correctly resolves BCS's challenge to the trial court's admission of the GAL report. I also join Part II, except as to the majority's disposition of this appeal. In contrast to the majority, I believe there is sufficient evidence in the record to support the trial court's conclusion that terminating respondent-father's parental rights was not in the juvenile's best interests, even without the portion of the court's finding that it must consider "the harm that children who are adopted often face as they try to understand who they are, where they came from, and why they were not raised by their biological parents."[1] Accordingly, I dissent from the majority's decision to remand to the trial court for the entry of a new dispositional order and would instead affirm.

The trial court made specific findings of fact relating to all six enumerated factors provided by N.C.G.S. § 7B-1110(a) (2019). First, regarding "[t]he age of the juvenile," N.C.G.S. § 7B-1110(a)(1), the trial court found that because Ryan "is only fourteen months old . . . the establishment of a new primary care giver would not cause such a significant disruption in social and emotional well-being and development[ ] that it should preclude preservation of the relationship between this child and his father." Second, regarding "[t]he likelihood of adoption of the juvenile," N.C.G.S. § 7B-1110(a)(2), and "[w]hether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile," N.C.G.S. § 7B-1110(a)(3), the trial court found that because

1. The majority is correct that there was no expert witness testimony in this case documenting the impact of adoption on the adoptee, but I do not agree that its factual finding reflects "an inappropriate bias against adoption" on behalf of the trial court as asserted by the majority. There is a large body of academic research addressing this question. *See*, *e.g.*, David M. Brodzinsky et al., *Being Adopted: The Lifelong Search for Self* (1993) (describing seminal research on the unique stages of adoptee development); *Psychological Issues in Adoption* (David M. Brodzinsky & Jesús Palacios eds., 2005) (collecting works from psychologists engaged in adoption research, including issues of adoptive adjustments). While the existence of this body of research does not justify the trial court taking judicial notice of an adjudicative fact in this regard, it does demonstrate some basis for the trial court's concern.

"the likelihood of adoption of this Juvenile is extremely high and the Dowdy's are absolutely committed to providing a permanent home through adoption, this is one of many counter-balancing considerations made by the Court." Third, regarding the "bond between the juvenile and the parent," N.C.G.S. § 7B-1110(a)(4), the trial court determined that this factor should be given "limited weight because the Mother's act of placing the child in the custody of Petitioner twenty-eight (28) days after birth combined with no clear statutory right to visitation pending this action, resulted in a limited opportunity for Respondent-Father [to] nurture and parent his son." The trial court further found that "the only reason this child does not have a strong reciprocal bond with Respondent-Father is because of barriers that were erected after his birth which the Father could not, despite his efforts, overcome." Fourth, regarding "[t]he quality of the relationship between the juvenile and the proposed adoptive parent[s]," N.C.G.S. § 7B-1110(a)(5), the trial court found that while "[t]his child has a very strong and reciprocal bond and attachment with the proposed adoptive parents and the extended family members, and their entire circle of friends[,] . . . [t]he quality of the relationship with the prospective adoptive parents should not be the prevailing factor resulting in the deprivation of a relationship with Respondent-Father."

If the findings recounted above reflected the sum total of the trial court's dispositional findings, I might agree with the majority that a remand for further factfinding is appropriate. However, the trial court also expressly stated that, in reaching its ultimate conclusion at the dispositional stage, it was "placing significant weight on the sixth criteria which addresses any relevant consideration," referring to N.C.G.S. § 7B-1110(a)(6). Regarding this factor, the trial court made numerous findings of fact relating to "[t]he circumstances surrounding the [mother's] pregnancy and [Ryan's] birth," which tended to show that despite "fac[ing] extraordinary constraints to establishing his biological, legal[,] and personal relationship with his son," the respondent-father had "on service of the petition and learning of the existence of his son, contacted petitioner to request custody and visitation," and immediately "purchased and collected items to provide care for his son and unequivocally expressed his desire to exercise his parental rights and duties." The trial court found that the evidence presented "do[es] not also demonstrate that Respondent-Father will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of his child." Thus, in light of "the general purpose of Article 11, which is to provide judicial procedures for terminating the legal relationship between a child and the child's biological or legal parents when the parents have demonstrated that they will not provide the degree of

care which promotes the healthy and orderly physical and emotional well-being of the child," the trial court weighed the evidence against the statutorily enumerated factors and concluded that terminating respondent-father's parental rights did not serve Ryan's best interests.

The trial court's express statement that it was relying most heavily on findings related to N.C.G.S. § 7B-1110(a)(6) suggests that its consideration of the potential harms of adoption was not a basis for its ultimate conclusion. Further, absent this finding, the trial court's order bears substantial similarities to the order at issue in a recently decided case involving substantially similar facts, *In re A.U.D.*, 373 N.C. 3, 832 S.E.2d 698 (2019). In that case, we concluded that the trial court did not abuse its discretion in concluding that termination of parental rights was not in the best interests of the juveniles, reasoning that it was appropriate for the trial court to emphasize the importance of preserving ties between the children and their biological father and to consider the circumstances of the mother's relinquishment of the children which had deprived the respondent-father of an opportunity to develop a parental bond:

> Here, the trial court carefully weighed the competing goals of (1) preserving the ties between the children and their biological relatives; and (2) achieving permanence for the children as offered by their prospective adoptive family. In addition to the statutory factors set out in N.C.G.S. § 7B-1110(a)(1)–(5), the trial court also considered other relevant circumstances—as it was permitted to do under N.C.G.S. § 7B-1110(a)(6)—such as the fact that (1) [the juveniles] were relinquished to BCS solely at the behest of their mother; (2) respondent was never afforded the opportunity to parent [the juveniles] or provide for their care prior to their relinquishment; (3) upon learning of [the juveniles'] birth, respondent "proactively" attempted to establish paternity.

Id. at 12, 832 S.E.2d at 703–04. For similar reasons, I believe that the trial court's appropriate findings in this case are adequate to support its conclusion that termination of parental rights is unwarranted.

Our decision in *In re A.U.D.* reflected a recognition that "[o]ne of the stated policies of the Juvenile Code is to prevent 'the unnecessary or inappropriate separation of juveniles from their parents.' " *Id.* at 11, 832 S.E.2d at 703 (quoting N.C.G.S. § 7B-100(4) (2019)). Whatever the state of the evidence here regarding the potential impact on this child from being adopted, the trial court was entitled to conclude that because

there was "substantial evidence that Respondent-Father is willing and capable of providing the degree of care that is necessary to promote the healthy and orderly physical and emotional well-being of his son," terminating respondent-father's parental rights was "unnecessary" to achieving an outcome that served the juvenile's best interests. An unwarranted skepticism of adoption is inconsistent with our Juvenile Code, but a belief that preserving the relationship between a child and a fit parent serves that child's best interests is perfectly appropriate. Although the trial court had no specific evidence of the impact of adoption generally, the trial court was well within its discretionary authority to conclude that it served Ryan's best interests to preserve his relationship with a respondent-father who was ready and able to provide appropriate care.

Further, our decision in *In re A.U.D.* and other cases also reflect an appropriate respect for and deference to the judgment of trial courts tasked with weighing the often contradictory evidence presented during termination proceedings. As we indicated in that case, our sole task on appeal is to review the trial court's order and the underlying record to determine whether the trial court's conclusion that termination of respondent's parental rights was not in the children's best interests was either arbitrary or manifestly unsupported by reason. *See id.* at 12, 832 S.E.2d at 704; *see also In re I.N.C.*, 374 N.C. 542, 550, 843 S.E.2d 214, 220 (2020) ("[T]he responsibility for weighing the relevant statutory criteria delineated in N.C.G.S. § 7B-1110(a) lies with the trial court, which 'is permitted to give greater weight to other factors,' rather than with this Court.") (quoting *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 66 (2019)).

In the present case, it does not appear that the trial court's conclusion that termination of parental rights was not in Ryan's best interests rested upon its unsupported factual finding regarding the impact of adoption, nor was its ultimate conclusion "arbitrary" or "manifestly unsupported by reason" given the trial court's other findings at the dispositional stage of the proceeding. Upon close review of the trial court's order and the record, I cannot agree with the majority that the trial court's finding regarding the harms of adoption was so central to its determination that respondent-father's parental rights should not be terminated as to permit us to disturb the trial court's reasoned judgment.

Therefore, I respectfully dissent from the majority's decision to remand to the trial court for the entry of a new dispositional order.

Chief Justice BEASLEY and Justice HUDSON join in this opinion concurring in part and dissenting in part.

IN RE W.K.

[376 N.C. 269 (2020)]

IN THE MATTER OF W.K. AND N.K.

No. 458A19

Filed 18 December 2020

1. Termination of Parental Rights—competency of parent—guardian ad litem—Rule 17—duties of guardian ad litem

The trial court did not abuse its discretion by terminating respondent-father's parental rights where the performance of respondent's guardian ad litem was legally sufficient. There was no evidence that the guardian ad litem failed to meet or interact with respondent and there was no evidence of actions the guardian ad litem could have taken which would have increased the probability of a favorable ruling for respondent.

2. Termination of Parental Rights—grounds for termination—neglect—findings—evidentiary support

The trial court's unchallenged findings of fact were sufficient to support termination of respondent-father's parental rights on the ground of neglect given respondent's extensive history of substance abuse, failure to follow his case plan, and his lack of contact with his children over several years, and any of the challenged findings that were not supported by evidence had no impact on the trial court's ultimate determination that a ground for termination existed.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 12 September 2019 by Judge Christine Underwood, in District Court, Alexander County. Heard in the Supreme Court on 13 October 2020.

Thomas R. Young for petitioner-appellee Alexander County Department of Social Services.

Elisabeth C. Kelly for appellee Guardian ad Litem.

Kathleen M. Joyce for respondent-appellant father.

MORGAN, Justice.

In this matter, respondent-father appeals from the trial court's orders terminating respondent-father's parental rights to his biological children,

"Wesley" and "Natasha."[1] Respondent-father's primary challenge to the termination orders is that his guardian *ad litem* (GAL), appointed pursuant to Rule 17 of the North Carolina Rules of Civil Procedure and N.C.G.S. § 7B-1101.1, did not participate sufficiently to satisfy the statutory requirements of his role and, thus, that the trial court abused its discretion in advancing the adjudication and disposition proceedings which ultimately resulted in the termination of respondent-father's parental rights. *See* N.C.G.S. § 1A-1, Rule 17 (2019); N.C.G.S. § 7B-1101.1 (2019). We disagree and therefore affirm the trial court's orders.

Factual Background and Procedural History

Wesley and Natasha each tested positive for the presence of controlled substances at birth. In juvenile petitions filed by the Alexander County Department of Social Services (DSS) on 3 March 2016, the children's mother was alleged to have "a sustained addiction to controlled substances which ha[d] impaired her ability to provide appropriate care" for Wesley and Natasha. Respondent-father was not living with the mother and the children, but he was named in the petition as the father of Wesley and Natasha. Wesley and Natasha were adjudicated to be neglected juveniles in April 2016 and placed in the custody of DSS. Following a review hearing on 12 January 2017, the trial court entered an order on 2 February 2017 relieving DSS of reunification efforts and establishing adoption as the sole plan. On 10 October 2017, DSS filed motions to terminate the parental rights of respondent-father and the mother, alleging the grounds of neglect and failure to make reasonable progress to correct the conditions which led to removal of the juveniles. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019). Following a 29 March 2018 hearing, the trial court entered orders on 10 May 2018 terminating respondent-father's and the mother's parental rights after adjudicating the existence of both grounds alleged in the motions for termination. Both parents filed notices of appeal.[2] At that stage, respondent-father's sole appellate issue was that the trial court erroneously deprived him of his right to be represented by counsel at the termination hearing. Upon review, the Court of Appeals agreed and vacated those portions of the orders terminating respondent-father's parental rights to the juveniles and remanded for a new hearing on the motions to terminate

1. The minor children will be referred to throughout this opinion as Wesley and Natasha, which are pseudonyms used to protect their identities and for ease of reading.

2. The children's mother is not a party to this appeal.

respondent-father's parental rights. *In re K.S.K.*, No. COA18-814, 2019 WL 1472981 (N.C. Ct. App. Apr. 2, 2019) (unpublished).[3]

On remand, respondent-father was appointed new counsel, and the trial court made the following findings:

> Respondent has previously admitted to being diagnosed with bi[-]polar disorder, depression, and schizophrenia. He previously received special education classes. He received a psychiatric evaluation on October 17, 2017, in which he admitted having auditory hallucinations in the past. He receives disability for psychiatric issues, and has an alternate payee. His intellectual function is well below normal. He has poor insight and judgment. He is a poor historian. He had hydrocephalus as a child. He did not graduate high school. He has previously had his IQ evaluated and was placed on the scale at 71. He has difficulty with information processing skills. A Rule 17 hearing was held in October 2017. Respondent presents today in court with a blank and confused look on his face. On December 17, 2009 he received a diagnosis of schizophrenia and mental retardation[.]

Accordingly, respondent-father was appointed a GAL pursuant to Rule 17. N.C.G.S. § 1A-1, Rule 17(b)(2) ("In actions or special proceedings when any of the defendants are . . . incompetent persons, . . . the court in which said action or special proceeding is pending . . . may appoint some discreet person to act as guardian ad litem, to defend in behalf of such . . . incompetent persons . . . ."). Thereafter, a termination hearing was held in July and August 2019.

Prior to the termination hearing, respondent-father met with both his counsel and his Rule 17-appointed GAL, Edward Hedrick, both of whom jointly discussed the case with respondent-father. At the 25 July 2019 hearing, respondent-father's counsel reported to the trial court that respondent-father wanted his counsel to withdraw because respondent-father did not believe his counsel was working on his behalf. The Rule 17 GAL was asked for any thoughts, and he expressed that he had none at that moment. The trial court denied counsel's motion to withdraw. Testimony from a DSS social worker was received during which counsel

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3. Wesley and Natasha's half-sibling, "K.," was the first named party in the previous appeal but is not a subject of this appeal.

for respondent-father objected and then moved for and received a continuance to review pertinent records. Respondent-father's Rule 17 GAL was not directly consulted in regard to the motion to continue, but he had joined with respondent-father's counsel in making two objections to the evidence, and he also assisted in identifying a date for the new hearing.

On 15 August 2019 when the termination hearing resumed, respondent-father did not appear. Respondent-father's GAL was silent at this hearing but did confer with respondent-father's counsel. Counsel for respondent-father moved to continue the matter, which was denied. Respondent-father's counsel again moved for a continuance at the close of DSS's evidence. The trial court denied the second motion to continue. No evidence was presented on respondent-father's behalf. The trial court proceeded to the disposition stage and again denied a motion to continue by counsel for respondent-father. Orders terminating respondent-father's parental rights on both grounds were entered on 12 September 2019. Respondent-father's direct appeal is now before our Court.[4]

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4. Respondent-father's notice of appeal states that he is appealing from "the Order Terminating Parental Rights that was filed on August 15, 2019." The termination hearing concluded on 15 August 2019, and the trial court stated that termination was in the best interests of the juveniles and provided written findings to counsel on that date. The trial court subsequently filed two orders terminating respondent-father's parental rights on 12 September 2019. The notice of appeal thus does not properly designate the orders from which respondent-father appeals.

Rule 3(d) of the North Carolina Rules of Appellate Procedure provides that a notice of appeal "shall designate the judgment or order from which appeal is taken . . . ." N.C. R. App. P. 3(d). "Compliance with the requirements for entry of notice of appeal is jurisdictional." *State v. Oates*, 366 N.C. 264, 266, 732 S.E.2d 571, 573 (2012) (citing *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197–98, 657 S.E.2d 361, 365 (2008)). "As such, 'the appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken.' " *Sellers v. Ochs*, 180 N.C. App. 332, 334, 638 S.E.2d 1, 2–3 (2006) (citation omitted). An exception exists where "a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake." *Evans v. Evans*, 169 N.C. App. 358, 363, 610 S.E.2d 264, 269 (2005) (citation omitted).

In this matter, DSS and the children's guardian *ad litem* have fully participated in the appeal, do not challenge this Court's jurisdiction, and do not appear to have been misled by the mistake. Respondent-father's inclusion of the correct lower-court numbers and his characterization of the order at issue as terminating his parental rights make sufficiently clear his intent to appeal the orders entered on 12 September 2019, and we thus address the merits of respondent-father's appeal.

Analysis

In his appeal before this Court, respondent-father's first argument is that his Rule 17 GAL did not appropriately represent him. Respondent-father and DSS agree that this question is a matter of discretion for the trial court. "An '[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015) (alteration in original).

In his second argument, respondent-father challenges several of the trial court's findings of fact as unsupported by the evidence produced during the adjudication stage. Because a finding of only one ground is necessary to support a termination of parental rights, *see In re T.N.H.*, 372 N.C. 403, 413, 831 S.E.2d 54, 62 (2019), we only address respondent-father's argument regarding alleged error in the trial court's ultimate finding as to the existence of the basis for termination of neglect. *See* N.C.G.S. § 7B-1111(a)(1). We review

> trial court orders in cases in which a party seeks to have a parent's parental rights in a child terminated by determining whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings support the trial court's conclusions of law. A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding.

In re B.O.A., 372 N.C. 372, 379, 831 S.E.2d 305, 310 (2019) (citations omitted).

Here we hold that the ground of neglect was so supported. Grounds exist to terminate parental rights when "[t]he parent has . . . neglected the juvenile . . . within the meaning of G.S. 7B-101." N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare . . . ." N.C.G.S. § 7B-101(15) (2019). When termination of parental rights is based on neglect, "if the child has been separated from the parent for a long period of time, there must be a showing of . . . a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016) (citing *In re Ballard*, 311 N.C. 708,

713–15, 319 S.E.2d 227, 231–32 (1984)).[5] "When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212, 835 S.E.2d 425, 430 (2019) (citing *Ballard*, 311 N.C. at 715, 319 S.E.2d at 232).

I. Sufficiency of performance by respondent-father's Rule 17 GAL

[1] Respondent-father's first contention is that the trial court abused its discretion when it proceeded through the adjudication and disposition hearings without the active participation of respondent-father's Rule 17 GAL. We disagree with respondent-father's characterization of his GAL's performance.

Under Rule 17(e),

> [a]ny guardian ad litem appointed for any party pursuant to any of the provisions of this rule shall file and serve such pleadings as may be required within the times specified by these rules, unless extension of time is obtained. After the appointment of a guardian ad litem under any provision of this rule and after the service and filing of such pleadings as may be required by such guardian ad litem, the court may proceed to final judgment, order or decree against any party so represented as effectually and in the same manner as if said party had been under no legal disability, had been ascertained and in being, and had been present in court after legal notice in the action in which such final judgment, order or decree is entered.

N.C.G.S. § 1A-1, Rule 17(e); *see also In re T.L.H.*, 368 N.C. 101, 106, 772 S.E.2d 451, 454 (2015). Appointed counsel and an appointed Rule 17 GAL serve different roles.

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5. The Court in *In re Ballard* held that an adjudication of past neglect is admissible in subsequent proceedings to terminate parental rights, but is not, standing alone, enough to prove that a ground exists to terminate parental rights on the basis of neglect. 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984). The Court in *In re Ballard* did not suggest that a showing of past neglect is necessary in order to terminate parental rights in every case. Indeed, N.C.G.S. § 7B-1111(a)(1) does not require a showing of past neglect if the petitioner can show current neglect as defined in N.C.G.S. § 7B-101(15). To the extent other cases have relied upon *In re D.L.W.* as creating such a requirement, we disavow such an interpretation.

> The parent's counsel shall not be appointed to serve as the guardian ad litem and the guardian ad litem shall not act as the parent's attorney. Communications between the guardian ad litem appointed under this section and the parent and between the guardian ad litem and the parent's counsel shall be privileged and confidential to the same extent that communications between the parent and the parent's counsel are privileged and confidential.

N.C.G.S. § 7B-1101.1(d).

While acknowledging that Rule 17 and N.C.G.S. § 7B-1101.1 do not specify exact duties of a GAL appointed under those provisions, respondent-father contends that the trial court abused its discretion by proceeding to judgment on these circumstances, asserting that Rule 17 permits a trial court to proceed against a party only after a GAL performs his or her necessary duties. N.C.G.S. § 1A-1, Rule 17(e) ("After the appointment of a guardian ad litem under any provision of this rule and after the service and filing of such pleadings as may be required by such guardian ad litem, the court may proceed to final judgment, order or decree against any party [represented thereby] . . . .").

Respondent-father asserts that the performance of his Rule 17 GAL was insufficient in that (1) he could not immediately refer to his GAL by name during the July 2019 hearing and (2) the Rule 17 GAL spoke on the record only five times during the July 2019 hearing and did not speak on the record at the August 2019 hearing. In regard to the first assertion, given respondent-father's mental health status and the pressure which the hearing would present for any respondent, we cannot infer from respondent-father's query in reference to the Rule 17 GAL asking "what's your name?", standing alone, that the Rule 17 GAL had failed to fulfill his statutory duties. Respondent-father cites no evidence that respondent-father's question indicated that the GAL had not met with respondent-father or that the Rule 17 GAL had failed to appropriately interact with and adequately represent respondent-father's interests during the termination-of-parental-rights process. As to the Rule 17 GAL's participation during the August 2019 hearing, respondent-father now contends that the Rule 17 GAL could have been more active by making statements in support of respondent-father's counsel's motion for a continuance and could have "worked with" respondent-father's counsel to present evidence in respondent-father's favor at the August 2019 hearing after the motion for a continuance was denied.

We disagree given that respondent-father has not identified any actions his Rule 17 GAL could have taken that would have improved his chances to obtain a decision in his favor, has not shown the Rule 17 GAL did not guard his due-process rights, and has not shown his Rule 17 GAL did not otherwise adequately assist him in executing his legal rights. It is well-established that "we will not presume error from a silent record." *State v. Bond*, 345 N.C. 1, 26, 478 S.E.2d 163, 176 (1996); *see also Wall v. Timberlake*, 272 N.C. 731, 733, 158 S.E.2d 780, 782 (1968) ("The appellate courts approve when the evidence is sufficient to warrant the findings and when error of law does not appear on the face of the record."). For example, there is no evidence of what, if anything, the Rule 17 GAL could have offered in support of respondent-father's arguments to the trial court regarding the potential replacement of respondent-father's trial counsel. Similarly, respondent-father argues his GAL should have addressed the trial court in support of his counsel's multiple motions to continue, but there is no evidence that the Rule 17 GAL could have offered anything beyond repeating counsel's arguments. Respondent-father contends his Rule 17 GAL could have worked with his counsel to present evidence favorable to him, but respondent-father does not show his GAL had any such evidence. Moreover, the record establishes that the evidence needed by respondent-father's counsel could only come from respondent-father, not from his GAL.

Respondent-father's arguments are founded on unwarranted assumptions that presume error where none is shown on the record. *Bond*, 345 N.C. at 26, 478 S.E.2d at 176; *see also Wall*, 272 N.C. at 733, 158 S.E.2d at 782. We therefore reject respondent-father's first appellate argument because he has failed to show any reversible error by his Rule 17 GAL in the execution of his role in respondent-father's case.

II. Findings of Fact 9, 32, 38, and 39

[2] Respondent-father next asserts that portions of Finding of Fact 9 (respondent-father was appropriately represented by a Rule 17 GAL) and Finding of Fact 32 (respondent-father received a high-school diploma or GED, and respondent-father made poor financial choices in spending disability payments on drugs), and the entirety of Finding of Fact 38 (the ultimate finding of fact of the existence of the ground for termination of neglect) and Finding of Fact 39 (the ultimate finding of fact of the existence of the ground for termination of failure to make reasonable progress) were not supported by clear and convincing evidence. We affirm the trial court's termination orders on the basis of its finding that the statutory ground for termination of neglect existed, having determined that any errors in the challenged underlying findings

of fact are not necessary to the trial court's ultimate finding regarding neglect.[6] Accordingly, we do not consider respondent-father's challenge to Finding of Fact 39.

Findings of fact used to support the termination of a parent's parental rights must be proven by "clear and convincing evidence." N.C.G.S. § 7B-1111(b). This Court has defined this standard as "greater than the preponderance of the evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in criminal cases." *In re Montgomery*, 311 N.C. 101, 109–10, 316 S.E.2d 246, 252 (1984). As explained above, Finding of Fact 9—that the Rule 17 GAL provided appropriate representation—is supported by clear and convincing evidence here given the facts and circumstances as previously discussed.

As to the challenged portion of Finding of Fact 32 that respondent-father received "either a diploma or a GED," we agree with respondent-father that the documentary evidence before the trial court indicated that while respondent-father sometimes self-reported that he had graduated from high school or had received his GED, respondent-father actually finished high school with either a "certificate of completion" or a "certificate of attendance," designations given to students in an Exceptional Child Program. However, respondent-father does not explain how this relatively minor error in the characterization of respondent-father's educational history would have had any impact on the trial court's ultimate findings that grounds existed to terminate respondent-father's parental rights, and we likewise perceive none.

In regard to the portion of Finding of Fact 32[7] which states that respondent-father "makes poor choices with the financial resources that are made available to him [and w]ith his disability payments, aside from taking care of his personal needs, [respondent-father] purchases a large amount of marijuana and some amounts of cocaine," respondent-father acknowledges that evidence presented at the hearing did indicate his use of marijuana and cocaine, but respondent-father contends that no evidence was presented in the trial court revealing how

6. In light of our holding regarding neglect, we do not address respondent-father's argument regarding the trial court's ultimate finding regarding the existence of the ground for termination of failure to make reasonable progress in correcting the conditions that led to the removal of the children. *See* N.C.G.S. § 7B-1111(a)(2) (2019).

7. A separate order was entered for each child, which are virtually identical. For ease of reading, we quote from the order as to Wesley.

respondent-father may have paid for the illegal controlled substances. The trial court appears to have made an inference based upon such evidence that respondent-father, having no other apparent source of income beyond his disability payments and having admitted to having used the aforementioned controlled substances, must have paid for those controlled substances with the funds he received for his disability. To the extent that this portion of Finding of Fact 32 is unsupported or represents an unsupported inference, it is not necessary or relevant to the trial court's ultimate finding of the existence of neglect as a basis for termination of respondent-father's parental rights.

As noted above, Wesley and Natasha were adjudicated to be neglected juveniles in April 2016. In order to correct the conditions that led to the children's neglect adjudication and to prevent future instances of neglect, respondent-father was ordered to: (1) complete a Comprehensive Clinical Assessment and comply with all recommendations; (2) complete a domestic violence evaluation and comply with all recommendations; (3) submit to random drug screens; (4) not use or possess alcohol, illegal controlled substances, or drug paraphernalia; (5) use all medications in the amount and manner prescribed; (6) not associate with known substance abusers; (7) not engage in acts of domestic violence; (8) complete parenting classes and demonstrate skills learned during interactions with the juveniles; (9) submit to inpatient substance abuse treatment; (10) refrain from incurring additional criminal charges; and (11) complete a sexual abuse prevention services assessment and follow all recommendations. However, the unchallenged adjudicatory findings of fact establish that respondent-father (1) entered into a case plan to address issues related to those which led to the removal of the children and the potential for future additional neglect of the children; (2) had a long and serious history of substance abuse involving both marijuana and cocaine; (3) never followed the recommendations of his substance abuse assessments and had not taken serious attempts to achieve sobriety; (4) admitted to continuing to use marijuana, had continued to test positive for that substance, and had repeatedly refused to complete drug screens; (5) failed to complete parenting classes; (6) had no contact with his children in years, including his failure to send cards or gifts despite being able to do so; (7) never procured reliable transportation or availed himself of transportation assistance offered to him; (8) never demonstrated that he had obtained and maintained an appropriate home and refused to allow the social worker to visit the premises; (9) continued to accumulate serious criminal charges including various drug-related offenses and four charges of sex offense with a child by an adult; and (10) had been largely unavailable to his social worker. Based

on respondent-father's failure to follow his case plan and the trial court's orders and his continued abuse of controlled substances, the trial court found that there was a likelihood the children would be neglected if they were returned to his care.

These findings of fact, *inter alia*, provide support for the trial court's ultimate finding of the existence of the ground for termination of neglect. Respondent-father has not challenged the trial court's conclusion that termination of his parental rights was in the children's best interests, and we thus affirm the trial court's orders.

AFFIRMED.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.
v.
MARINA MARTIN, BY AND THROUGH HER NATURAL PARENT AND GUARDIAN JEAN O. MARTIN, JEAN O. MARTIN, INDIVIDUALLY, AND DAVID M. MARTIN

No. 391A19

Filed 18 December 2020

Insurance—policy terms—interpretation—"resident" of "household"—separate dwellings

In a dispute concerning insurance coverage for injuries sustained in a car accident, the trial court properly granted summary judgment in favor of plaintiff insurance carrier where evidence clearly indicated defendants (a mother and daughter) never lived in the same dwelling as the policyholder (the daughter's paternal grandmother) and therefore did not qualify as a "resident" of the grandmother's "household" within the meaning of the insurance policy. Although defendants lived on the grandmother's farm, they lived in a separate house with a different address than the grandmother and had never actually lived together under the same roof.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from a divided decision of the Court of Appeals, 833 S.E.2d 183 (N.C. Ct. App. 2019), affirming an order entered on 28 September 2017 by Judge J. Carlton Cole in Superior Court, Currituck County. Heard in the Supreme Court on 15 June 2020.

Breit Cantor Grana Buckner, PLLC, by Jeffrey A. Breit, for defendant-appellants.

Young, Moore, and Henderson, P.A., by Walter E. Brock, Jr., Andrew P. Flynt, and Matthew C. Burke, for plaintiff-appellee.

Pinto Coates Kyre & Bowers, PLLC, by Jon Ward and Paul D. Coates, and Ann C. Ochsner, for amicus curiae North Carolina Advocates for Justice.

George L. Simpson, IV, for amicus curiae North Carolina Association of Defense Attorneys.

DAVIS, Justice.

In this case, we must determine whether defendants are afforded underinsured motorist and medical payments coverage under an insurance policy issued by the plaintiff insurance company to a family member. Because we conclude the trial court properly determined that defendants are not entitled to coverage under the policy, we affirm the decision of the Court of Appeals.

Factual and Procedural Background

This case arises from a car accident that occurred in Virginia Beach, Virginia, involving defendants Jean Martin (Jean) and Marina Martin (Marina). Marina is the teenage daughter of Jean and David Martin (David). On 6 January 2014, Jean was driving her 1994 Ford automobile with Marina in the passenger seat. Jean was crossing a four-way intersection when a vehicle driven by a third party, Santiago Livara, struck her car. Jean and Marina were both injured in the collision.

Jean and Marina subsequently sued Livara for negligence in the Virginia Beach Circuit Court. The parties eventually reached a settlement in which Livara's liability insurer paid its maximum liability coverage limits in the amount of $25,000 to both Jean and Marina.

Jean and Marina also sought additional coverage under two different automobile insurance policies issued by plaintiff North Carolina Farm Bureau Mutual Insurance Company, Inc. (Farm Bureau) to members of the Martin family. The first policy bore policy number APM-3887419 and was issued by Farm Bureau to David and Jean for the coverage period of 19 October 2013 to 19 February 2014. This policy identified David and Jean as the named insureds and listed three covered vehicles, including the Ford automobile that Jean was driving at the time of the accident. The policy provided medical payments coverage of up to $1,000 per person and uninsured/underinsured motorist coverage of up to $50,000 per person/$100,000 per accident. Because Jean and Marina both qualified as "insureds" under this policy, Farm Bureau paid the applicable policy limits of $1,000 each to Jean and Marina under the medical payments coverage and $25,000 each to Jean and Marina under the underinsured motorist coverage.

In addition, Jean and Marina asserted that they were also entitled to medical payments and underinsured motorist coverage under a second Farm Bureau policy. This second policy (the Policy) is the subject of this appeal and bore policy number APM-3482146. The Policy was issued by Farm Bureau to Mary Martin (Mary), who is the mother of David and the paternal grandmother of Marina. The Policy was issued for the period encompassing 13 October 2013 to 13 April 2014. The Policy designated

Mary as the named insured, identified two covered drivers (Mary and her late husband William), and listed one covered vehicle.[1] The Policy provided medical payments coverage of up to $1,000 per person and uninsured/underinsured motorist coverage of up to $100,000 per person/$300,000 per accident. The Policy contained the following provisions that are relevant to this appeal:

DEFINITIONS

Throughout this policy, "you" and "your" refer to:

1. The "named insured" shown in the Declarations; and

2. The spouse if a resident of the same household.

. . . .

"Family member" means a person related to you by blood, marriage, or adoption who is a resident of your household. This includes a ward or foster child.

. . . .

PART B — MEDICAL PAYMENTS COVERAGE

INSURING AGREEMENT

We will pay reasonable expenses incurred for necessary medical and funeral services because of bodily injury:

1. Caused by accident; and

2. Sustained by an insured.

. . . .

"Insured" as used in this Part means:

1. You or any family member;

a. while occupying; or

---

1. The vehicle driven by Jean at the time of the 6 January 2014 accident was not identified as a covered vehicle under Mary's policy.

b. as a pedestrian when struck by;

a motor vehicle designed for use mainly on public roads or a trailer of any type.

. . . .

PART C2—COMBINED UNINSURED/ UNDERINSURED MOTORISTS COVERAGE

INSURING AGREEMENT

We will pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of:

1. Bodily injury sustained by an insured and caused by an accident; . . .

. . . .

We will also pay compensatory damage which an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury sustained by an insured and caused by an accident.

. . . .

Insured as used in this Part means:

1. You or any family member.

. . . .

Jean and Marina asserted that they were covered under the Policy because they were "family members" of Mary Martin—that is, they were related to Mary and were "residents" of her "household." Farm Bureau disputed coverage and filed a declaratory judgment action on 13 April 2015 in Superior Court, Wake County, against Marina, Jean, and David (defendants) seeking a declaration that they were not entitled to coverage under Mary's policy because they were not "residents" of Mary's "household" at the time of the accident. On 16 March 2016, defendants filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. On 20 April 2016, a consent order was entered transferring the case to Superior Court, Currituck County. Farm Bureau filed a cross-motion for summary judgment on 19 May 2017.

The evidence before the trial court at the summary judgment stage did not contain any material factual disputes. On the date of the accident, Mary was the sole owner of the Martin Farm, a 76-acre property located on Knotts Island, North Carolina, that contained two separate houses located on the property. At all relevant times, Mary lived in the "main house" on the farm, while defendants lived in a separate "guest house" that was also situated on the farm. Both residences were owned by Mary, and Mary never charged defendants rent to live in the guest house.

The houses shared a single driveway but were both stand-alone structures located approximately 100 feet from one another. Each residence was visible from the other, and it took approximately 3-5 minutes to walk between them. The houses had different street addresses. Mary's home was located at 213 Martin Farm Lane, while the address of defendants' residence was 224 Bay Orchard Lane. Defendants and Mary maintained separate post office boxes for the receipt of mail, but packages for both defendants and Mary were delivered to Mary's house. With the exception of occasional overnight stays (such as when a power outage occurred at one of the two houses), defendants and Mary lived separately in their respective homes at all relevant time periods.

Defendants visited with Mary almost every day, ate meals together, and performed chores for each other. Defendants possessed keys to Mary's house and were granted unlimited access to enter her residence. Mary had the same right of access to defendants' house. At all relevant times, David and Jean worked on the Martin Farm, managing the crops and the winery. David and Jean, in turn, received a weekly salary—contingent upon there being sufficient funds available in the farm's bank account after all farm-related bills were paid.

The Martin Farm was operated as a limited liability company (LLC). Mary maintained a business checking account in the name of the LLC, which she used to pay most of the bills for the farm. The salaries of Jean and David were paid by the LLC. The utility bills and property taxes for both houses as well as the cost of repairs for both residences were also paid by the LLC. Additionally, the LLC paid for some of the personal expenses of defendants, including their gas, internet, and cell phone bills. However, defendants paid for their remaining personal expenses such as life insurance, groceries, cable, and clothing.

Beginning in 2013—approximately a year before the accident—Mary began staying for extended periods of time with her son Wayne in Virginia Beach while she received medical treatment for cancer. As

Mary's health worsened, she was increasingly unable to travel back and forth between North Carolina and Virginia and had to remain primarily at Wayne's house in Virginia Beach. At that point, she started having all of her personal mail sent to Wayne's house—although farm-related mail was still sent to her North Carolina home.

A hearing was held on the parties' summary judgment motions on 21 August 2017. On 28 September 2017, the trial court entered summary judgment in favor of Farm Bureau after concluding as a matter of law that defendants were not entitled to coverage under the Policy.

Defendants appealed to the Court of Appeals, which affirmed the trial court's order in a divided decision. In its opinion, the Court of Appeals majority concluded that defendants did not qualify as "residents" of Mary's "household" and, accordingly, were not covered under the Policy. Judge Inman dissented, stating her belief that defendants and Mary were all part of the same household and asserting that the majority's opinion conflicted with the Court of Appeals' prior decision in *N.C. Farm Bureau Mut. Ins. Co v. Paschal*, 231 N.C. App. 558 (2014). On 8 October 2019, defendants filed a notice of appeal with this Court based upon the dissent.

Analysis

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2019). "A ruling on a motion for summary judgment must consider the evidence in the light most favorable to the non-movant, drawing all inferences in the non-movant's favor." *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018). We review de novo an appeal of a summary judgment order. *In re Will of Jones*, 362 N.C. 569, 573, 669 (2008).

This Court has held that a dispute regarding coverage under an insurance policy is appropriate for resolution by summary judgment where the material facts and the relevant language of the policy are not in dispute and the sole point of contention is "whether events as alleged in the pleadings and papers before the court are covered by the policies." *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 690–91 (1986). The party seeking coverage under an insurance policy bears the burden "to allege and prove coverage." *Brevard v. State Farm Mut. Auto. Ins. Co.*, 262 N.C. 458, 461 (1964).

The parties here do not dispute either the material facts of the case or the pertinent language of the Policy. Therefore, we agree that this case was appropriate for resolution by summary judgment.

Our interpretation of an insurance policy is based on the fundamental principle that the plain language of the policy controls. *Lunsford v. Mills*, 367 N.C. 618, 623 (2014). As we have previously explained, when interpreting an insurance policy

> the goal of construction is to arrive at the intent of the parties when the policy was issued. Where a policy defines a term, that definition is to be used. If no definition is given, nontechnical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning is intended. The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect.

Woods v. Nationwide Mut. Ins. Co., 295 N.C. 500, 505–06 (1978).

While it is true that ambiguities in the terms of an insurance policy must be construed against the insurer and in favor of coverage, this rule of construction is only triggered "when a provision in an insurance agreement is ambiguous." *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 10 (2010).

> To be ambiguous, the language of an insurance policy provision must, "in the opinion of the court, [be] fairly and reasonably susceptible to either of the constructions for which the parties contend." If the language is not "fairly and reasonably susceptible" to multiple constructions, then we "must enforce the contract as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay."

Id. (citations omitted).

The existence of an ambiguity "is not established by the mere fact that the plaintiff makes a claim based upon a construction of [the policy] language which the company asserts is not its meaning"—rather, an ambiguity exists only when the language of the policy could reasonably support "either of the constructions for which the parties contend." *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354 (1970).

In accordance with these principles, we now turn to the language of the Policy. In order to receive coverage under the Policy, defendants must qualify as "insureds." The Policy defines an "insured," for purposes of both medical payments and underinsured motorist coverage, as "[y]ou or any family member." A "family member" is defined, in relevant part, as "a person related to you by blood, marriage, or adoption *who is a resident of your household*." (emphasis added). The Policy does not, however, define the key terms "resident" or "household."

As an initial matter, it is undisputed that defendants were related to Mary "by blood, marriage, or adoption" as Marina was Mary's granddaughter and Jean was Mary's daughter-in-law. Thus, the sole remaining inquiry for this Court is whether defendants qualified as "residents" of Mary's "household."

In *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430 (1966), we stated the following in interpreting a similar provision contained in an insurance policy:

> In the construction of contracts . . . words which are used in common, daily, nontechnical speech, should, in the absence of evidence of a contrary intent, be given the meaning which they have for laymen in such daily usage, rather than a restrictive meaning which they may have acquired in legal usage. In the construction of contracts the purpose is to find and give effect to the intention of the contracting parties, if possible. Thus the definition of 'resident' in the standard, nonlegal dictionaries may be a more reliable guide to the construction of an insurance contract than definitions found in law dictionaries.

Id. at 438.

It is therefore appropriate to begin our analysis by examining the definitions of the terms "resident" and "household" as contained in nonlegal dictionaries. The Merriam-Webster Collegiate dictionary defines "resident" as "[o]ne who resides in a place." *Resident*, Merriam-Webster Collegiate Dictionary (11th ed. 2007). "Reside" is defined, in turn, as "[t]o dwell permanently or continuously." *Reside*, Merriam-Webster Collegiate Dictionary (11th ed. 2007).

A "household" is defined as "[t]hose who dwell under the same roof and compose a family" or, alternatively, "a social unit composed of those living together in the same dwelling." *Household*, Merriam-Webster Collegiate Dictionary (11th ed. 2007). These definitions are

largely mirrored by the American Heritage Dictionary, which defines "reside" as "[t]o live in a place permanently or for an extended period" and defines "household" as "[a] person or group of people occupying a single dwelling." *Reside*, *Household*, The American Heritage Dictionary (4th ed. 2000).

Next, it is appropriate to examine those decisions from this Court in which we have had occasion to construe these same policy terms or analogous ones. In doing so, we acknowledge at the outset that this Court has struggled in attempting to formulate a precise definition of the term "resident" in connection with an insurance policy.

In *Barker v. Iowa Mut. Ins. Co.*, 241 N.C. 397 (1955), we considered whether a college student who lived in an apartment near campus was still considered a resident of his father's household for purposes of a fire insurance policy issued to the father. *Id.* at 399. At the time the policy originally went into effect, the family had all lived together in a single dwelling in Sparta, North Carolina. However, the son left home at age 19 to attend college in Raleigh and thereafter lived near the campus in a rented apartment, which was paid for and furnished by his father. *Id.*

After the son's apartment burned down, the father's insurance company denied coverage, claiming that after the son moved out he was no longer covered under the policy. The policy provided coverage for "household and personal property . . . belonging to the insured or any member of the family of and residing with the insured." *Id.* The trial court ruled that coverage existed, and the insurance company appealed to this Court. *Id.* at 398.

We explained that the determinative question was "where the minor son had his residence at the time of the loss." *Id.* We observed that the term "[r]esidence has been variously defined by this Court" with definitions ranging from "a place of abode for more than a temporary period of time" to "a permanent and established home." *Id.* at 400. We focused our analysis on the question of whether a college student supported by his father who moves to an apartment "for the purpose of attending college classes become[s] a resident of the college community, or [whether] he retain[s] his residence with his father[.]" *Id.* at 399. We ruled that "[t]o say the son ceased to be a resident of Sparta and became a resident of Raleigh under the facts of this case would be giving the term 'residing with the insured' its most narrow and restricted meaning." *Id.* Accordingly, we concluded that the son was a resident of his father's household at the time of the fire and was therefore covered under the father's insurance policy. *Id.* at 401.

In *Newcomb v. Great Am. Ins. Co.*, 260 N.C. 402 (1963), we addressed whether the plaintiffs, a husband and wife along with their infant daughter, should be considered "residents of the same household" as the wife's mother, Mrs. Gray, within the meaning of her insurance policy. Mrs. Gray was driving the plaintiffs' automobile with their daughter in the backseat when the vehicle ran off the road, killing their daughter. *Id.* at 402.

The evidence showed that after their marriage in 1957, the husband and wife had initially lived in Mrs. Gray's house for a year. *Id.* at 403. In 1958, they "renovated and furnished a house which belonged to Mrs. Gray and which was about one-quarter of a mile distance from Mrs. Gray's home." They lived there on their own until March 1959, at which time the death of a relative caused them to move back in with Mrs. Gray for several months. When the wife's brother, Bobby, came home from college in July 1959 to spend the summer with Mrs. Gray, the plaintiffs again "moved out of Mrs. Gray's home and into their own cottage" for approximately a month. After Bobby returned to college, the plaintiffs moved back into Mrs. Gray's house where they "slept, ate, lived, and stayed . . . up to the time of the accident, June 12, 1960." At all relevant times, "the plaintiffs' cottage ha[d] been kept clean and furnished and all utilities ha[d] been kept on and ready for habitation." The plaintiffs had planned to ultimately "remove themselves from Mrs. Gray's house and into their cottage" upon Bobby's anticipated graduation from college in 1961. *Id.*

Based on these facts, we held that the plaintiffs were residents of the same household as Mrs. Gray. We explained our ruling as follows:

> While the word 'resident' has different shades of meaning depending upon context, we think it clear, under the stipulated facts, that plaintiffs, their infant daughter and Mrs. Gray were living together on June 12, 1960, as members of one household, and were then residents of the same household within the terms of the policy. Their status is determinable on the basis of conditions existing at the time the casualty occurred.

Id. at 405 (citations omitted).

This Court interpreted a similar insurance policy provision in *Jamestown*. The issue in that case was whether an adult son who had recently moved back into his father's home was a "resident of the same household" as his father. *Jamestown*, 266 N.C. at 431. The son had been involved in a car accident on 8 February 1963 and thereafter claimed that he was covered under his father's automobile insurance policy as "a

relative of the Named Insured who is a resident of the same household." *Id.* at 432.

The record demonstrated that the father had lived at all relevant times in the same house in Rutherford County. *Id.* at 432. At the time of the accident, the son was "29 years of age, married but separated from his wife." *Id.* at 433. During his youth, the son had lived with his father until he turned 18, at which time he left home and moved to Virginia for work. He remained in Virginia for 14 months and then returned to his father's house, where he stayed for "several months until his marriage, when he left again." He then enlisted in the army, and for the next few years either lived with his wife in Spindale, North Carolina, or was stationed abroad. After he separated from his wife, he moved to Greenville, South Carolina, and stayed at a boarding house for approximately one year. Upon leaving Greenville, he went to work at a mill in Shelby, North Carolina, where he stayed at his sister's home for several months. *Id.* He was then transferred to a different position at the mill, which made transportation "more convenient[] if he stayed at his father's home." As a result, "he left his sister's home and returned to the home of his father, intending ultimately to find a boarding house in Shelby and get a room there." *Id.*

At the time of the accident, the son had been staying at his father's home for approximately two weeks. *Id.* at 433. The evidence showed that (1) he "did not intend to stay there permanently but he had no fixed plan as to when he would leave;" (2) he "had found a boarding house in Shelby but had not [yet] moved to it;" (3) he "had no home of his own and no furniture" and his "only belongings were his clothes;" and (4) he considered his father's home "the only permanent place that he had to go back to." During this time spent at his father's house, he ate meals together with his father, paid nothing for room and board, occasionally drove his father's car, and used his father's home address "as his permanent mailing address." He also "had the full use of the house and slept in the room which he had used when he was growing up." *Id.* In analyzing the policy, we recognized that

> [t]he words 'resident,' 'residing,' and 'residence' are in common usage and are found frequently in statutes, contracts and other documents of a legal or business nature. They have, however, no precise, technical and fixed meaning applicable to all cases.

Id. at 435.

We ultimately concluded that the son was a resident of his father's household for purposes of the policy. *Id.* at 439. We found it dispositive that (1) the son "had no home of his own;" (2) he "carr[ied] with him all his possessions" when he returned to his father's house; (3) he intended to "remain there until living quarters more convenient to his employment could be found;" (4) while at his father's house, he "lived in and used his father's house as he had done when a boy" by eating, sleeping, and doing laundry there; and (5) the son paid no rent to his father. Based on these factors, we stated the following:

> We think it is clear that under these circumstances [the son] was 'a resident of the same household' as his father. He is not in the same position as an adult child having a home of his own to which he intends to return and is making a mere visit to his parents. Nor is he in the position of a mere roomer or boarder. He was there because he was a member of the family and had no other home.

Id.

These cases aptly demonstrate that the question of who is considered to be a resident of a household can require a particularized, fact-intensive inquiry into the circumstances of the parties' current and prior living arrangements. Nevertheless, our prior decisions do make clear that one basic prerequisite exists when a party seeks coverage under this type of provision contained within a relative's insurance policy—namely, the party must show that they actually lived in the same dwelling as the insured relative for a meaningful period of time. The son in *Barker* lived with his father before leaving for college at age 19. The husband and wife in *Newcomb* had lived with Mrs. Gray off and on for at least three years. The son in *Jamestown* had lived with his father at periodic intervals for most of his adult life. Such a requirement is also fully in accord with the above-quoted dictionary definitions of the terms "resident" and "household."[2]

The dissent accuses us of "imposing [a] novel rule" by holding that family members must have actually lived together in order to be considered residents of the same household, apparently believing it is simply a coincidence that the families in *Barker*, *Newcomb*, and *Jamestown* had

2. The dissent takes us to task for deeming relevant the dictionary definitions of the terms "resident" and "household." However, as noted earlier in our analysis, this Court in *Jamestown* expressly favored such an approach. *See Jamestown*, 266 N.C. at 438 ("Thus the definition of 'resident' in the standard, nonlegal dictionaries may be a more reliable guide to the construction of an insurance contract than definitions found in law dictionaries.").

all lived under a common roof together for meaningful periods of time. This argument is patently incorrect. In each of these three cases, we would not have even considered the possibility that the persons seeking coverage were residents of the named insured's household had they not previously lived together in the same residence for a sufficient time period.[3] Given that the existence of such a threshold requirement is obvious, it is not surprising that this Court felt no need to state it outright. Instead, our prior decisions focused on the question of whether the party seeking coverage had stayed in the insured family member's residence on more than merely a temporary basis and whether the facts supported a finding that the family members intended to form a common household.

Oddly, the dissent characterizes our decision as "results-driven." To the contrary, it is the dissent who engages in an analysis untethered by either the prior decisions of this Court or the plain meaning of the policy terms at issue in order to reach its preferred result. Indeed, the dissent advocates no actual standard at all—instead utilizing a vague and amorphous analysis that would presumably permit a finding of coverage any time a court feels such a result would be desirable. Such an approach finds no refuge in the prior decisions of this Court.

Under the facts of the present case, it is clear that defendants were not residents of Mary's household within the meaning of the Policy. The record unambiguously demonstrates that defendants have never actually lived in the same residence as Mary. Defendants lived in a house at 224 Bay Orchard Lane while Mary resided in a separate home at 213 Martin Farm Lane—the two residences being separated by a 3-5 minute walk. The houses had separate addresses and post office boxes. Although defendants and Mary would occasionally spend the night at each other's houses, they never actually lived together in one dwelling. Instead, they lived and slept primarily in their own homes and stored their clothing, furniture, and personal belongings in their own respective residences.

Defendants, however, ask us to apply a different test to determine whether they qualified as residents of Mary's household. In so doing, they rely heavily on the analysis employed by the Court of Appeals in *N.C. Farm Bureau Mut. Ins. Co. v. Paschal*, 231 N.C. App. 558 (2014), the case serving as the basis for the dissent in the Court of Appeals in the present case.

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3. Although the dissent appears to view *Barker* as the controlling precedent on this subject, it conveniently ignores the fact that in *Barker*, as noted above, our opinion relied on the fact that the son had lived in the father's home—presumably for his entire life—prior to leaving for college.

In *Paschal* the minor plaintiff was injured in a car accident and sought coverage under her grandfather's automobile insurance policy, which provided coverage to "residents" of the insured's "household." *Id.* at 559. At the time of the accident, the grandfather owned a family farm that consisted of "multiple houses" on "several hundred acres of farmland." *Id.* at 560. For much of her childhood, the plaintiff lived with her father in one house on the farm, while the grandfather lived in his own residence. The houses were approximately one mile apart and were both located on a parcel of contiguous land owned by the grandfather. The grandfather's mail was sent to his own house, which was also where he kept the majority of his clothing. The grandfather spent most nights sleeping either at his own house or his girlfriend's house, but "on rare occasions" he would spend the night at the plaintiff's home. *Id.*

The grandfather testified that he considered the farm to be a "family farm" with his relatives living in various houses scattered across the property. The grandfather paid all of the bills associated with the plaintiff's house, including all taxes, utilities, and maintenance costs. *Id.* Because the plaintiff's father had "ongoing trouble with the law," she would stay in her grandfather's house "on occasion" when her father was away. *Id.* at 561. For example, in 2005 (prior to the accident at issue in *Paschal*) the plaintiff spent an entire year living with her grandfather while her father was in prison, and the grandfather was also appointed her legal guardian during that time. The plaintiff was supported by her grandfather through " 'every bit' of her life, providing food, clothes, housing, utilities, phone, and other expenses" and taking her to any necessary medical appointments. Even when not living in the same house, they saw each other almost every day, and each of them was free to enter the other's house at any time. The grandfather testified that he considered the plaintiff and her father to be "a part of his household." *Id.*

Based on these facts, the Court of Appeals held that the plaintiff qualified as a resident of her grandfather's household under the policy. *Id.* The court explained its reasoning as follows:

> Determinations of whether a particular person is a resident of the household of a named insured are individualized and fact-specific . . . . [W]here members of an insured's household are provided coverage under the policy, "household" has been broadly interpreted, and *members of a family need not actually reside under a common roof to be deemed part of the same household* . . . . [I]n determining whether a person in a particular case is a resident of a

> particular household, the intent of that person is material to the question.

Id. at 565–66.

The Court of Appeals found it dispositive that (1) the grandfather "was the most constant caregiver in [plaintiff's] life;" (2) the grandfather "did not charge any rent" for the plaintiff and her father to live on his property; (3) the grandfather "paid for the vast majority of [her] expenses" such as food, clothing, and utilities; (4) the two houses were both located on the family farm and "connected to each other by contiguous land owned by [the grandfather];" (5) on several occasions during her childhood, the plaintiff had lived with her grandfather while her father was away; and (6) both plaintiff and her grandfather considered themselves to belong to the same household. *Id.* at 568.

We need not determine whether the ultimate outcome in *Paschal* was correctly decided. Instead, we simply express our disapproval of the portions of the analysis in *Paschal* that are inconsistent with our holding in the present case—most notably, the proposition that relatives need not have *ever* actually lived in the same dwelling to be considered residents of the same household. Although there is no requirement that members of a family must have *continuously* resided under a common roof—without interruption—to be deemed residents of the same household, they must have done so for some meaningful length of time. The record must also reflect an intent to form a common household. But no matter how close or integrated the family relationship, family members who have never actually lived together in the same dwelling cannot be considered to be residents of a single household.

Alternatively, defendants and the *amici* suggest that *Paschal* established the existence of a "family farm exception," allowing family members who live near each other on a contiguous family farm to qualify as residents of a single household regardless of whether they have ever actually lived in the same dwelling. However, we are unable to discern any basis under this Court's prior case law for adopting a separate test for defining the policy terms "resident" and "household" that would apply uniquely to persons living on "family farms."[4]

The dissent claims that we depart from a "settled rule" by disregarding the decision of the Court of Appeals in *Paschal*. This argument is

4. Nor does the Policy itself recognize any exception to the terms of its coverage that would apply solely to family farms.

incorrect for several reasons. Most basically, *Paschal* is clearly not a decision from this Court. We are, of course, not bound by any decision of the Court of Appeals. *See Misenheimer v. Burris*, 360 N.C. 620, 625 (2006) ("[D]ecisions of the Court of Appeals are clearly not binding on this Court."). Moreover, this Court has never even cited *Paschal*—much less stated our approval of the analysis contained therein. Finally, as stated above, we express no opinion on the question of whether the Court of Appeals reached the correct result in *Paschal*. Indeed, we note that the minor plaintiff in that case lived with her grandfather for a full year, whereas here it is clear that defendants and Mary never actually lived under the same roof.

The dissent resorts to hyperbole in accusing us of doing a "grave disservice to the people of this State" by failing to recognize a special rule for persons living on family farms, but fails to acknowledge that there is no precedent of this Court that would support the recognition of such an exception. Moreover, creating an exception out of whole cloth for residents of family farms would inevitably lead to arguments from litigants in future cases demanding that their unique living arrangements are similarly deserving of an exception to the general rule.

The dissent also attempts to manufacture an "urban versus rural" dynamic to our decision. Obviously, no such distinction exists. Rather, we are simply applying the longstanding and logical requirement that in order to be deemed residents of the same household, parties must have lived in the same dwelling for some meaningful period of time under circumstances demonstrating an intent to form a common household—regardless of where in this state they happen to live.

Because there is no dispute regarding any of the material facts of this case and the record clearly demonstrates that defendants and Mary never lived together under the same roof, defendants are unable to meet their burden of demonstrating that they were residents of Mary's household. Accordingly, we conclude that the Court of Appeals correctly determined that defendants are not entitled to coverage under the Policy and that the trial court appropriately awarded summary judgment in favor of Farm Bureau.

Conclusion

For the reasons stated above, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice EARLS dissenting.

The sole issue in this case is whether, as a matter of law, the terms "resident" and "household" in Mary Martin's insurance policy were intended and understood by the contracting parties to include her daughter-in-law and her granddaughter, who lived on her farm. I believe that in defining these terms to exclude family members who live in separate dwellings on a single farm and concluding that Jean and Marina Martin were not residents of Mary's household, the majority imposes an unduly restrictive frame of reference that ignores the realities of rural life and fails to account for the full context of the lives the Martin's led on Mary's 76-acre farm on Knotts Island, North Carolina. Accordingly, I dissent from the majority's decision to construe "household" to deny the defendants coverage under the policy. Because I would hold that Mary Martin and the defendants were members of the same household, I would conclude that they are covered under the plain terms of the insurance policy issued to Mary, which covers all family members who were residents of the insured's household.

The crux of the issue for the majority is that Mary Martin lived in the main house on the farm and Jean and Marina lived in the guest house. According to the majority, because they do not now and have not previously lived together under a single roof, they cannot be members of one "household." As the cases cited by the majority illustrate, the question of whether family members are residents together in a single household is a highly fact-intensive inquiry that necessarily varies on a case-by-case basis. *See Newcomb v. Great Am. Ins. Co.*, 260 N.C. 402, 405, 133 S.E.2d 3, 6 (1963) ("[T]he word 'resident' has different shades of meaning depending upon context."). Although we have looked to dictionaries in evaluating the meaning of a term used in an insurance contract, we have never held that the dictionary definition is dispositive. Instead, we have considered numerous factors relevant in ascertaining the meaning of the term as utilized in a particular contract, including the intent of the individuals claiming residence in a single household, the financial and familial relationships between them, and the "touchstone . . . that the phrase 'resident of the same household' has no absolute or precise meaning, and, if doubt exists as to the extent or fact of coverage, the language used in an insurance policy will be understood in its most inclusive sense." *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 439, 146 S.E.2d 410, 417 (1966) (quoting *Am. Universal Ins. Co. v. Thompson*, 62 Wash. 2d 595, 599, 384 P.2d 367, 370 (1963)); *see also Great Am. Ins. Co. v. Allstate Ins. Co.*, 78 N.C. App. 653, 656, 338 S.E.2d 145, 147 (1986) ("Our courts have also found, however, that in

determining whether a person in a particular case is a resident of a particular household, the intent of that person is material to the question.").

For example, we have previously held that a son who lives in an apartment near his college campus is still a member of his parent's household for insurance purposes, finding compelling the fact that the parent financially supported the son and paid for the apartment. *Barker v. Iowa Mut. Ins. Co.*, 241 N.C. 397, 85 S.E.2d 305 (1955). In reaching this conclusion in *Barker*, the Court emphasized that "[i]t must be remembered that the policy of insurance was written by the company's lawyers and that the courts must, therefore, in case of doubt or ambiguity as to its meaning, construe the policy strictly against the insurer and liberally in favor of the insured." *Id.* at 400, 85 S.E.2d at 307.

The facts of the present case should lead us to the same conclusion as we reached in *Barker*. Mary Martin paid the utility bills and property taxes for Jean and Marina's home, as well as bills for the replacement or repair of appliances, plumbing, and other infrastructure, from the farm account or, if there were insufficient funds, from her personal account. The family operated as a single, unified financial and family unit, with Mary Martin at the head. If it "would be giving to the term 'residing with the insured' its most narrow and restricted meaning" to hold that a father living in Sparta and a son living in Raleigh were not residents of the same household, *id.*, then certainly a mother and her daughter-in-law who live 100 yards from each other are residents of the same household, especially given the background presumption we apply in resolving ambiguous terms of an insurance contract. *See, e.g.*, *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 295, 378 S.E.2d 21, 25 (1989) ("Like all contracts, insurance contracts must be construed against the drafter, which had the best opportunity to protect its interests."); *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978) ("If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder.").

The majority attempts to distinguish away our precedents by imposing the novel rule that "no matter how close or integrated the family relationship, family members who have never actually lived together in the same dwelling cannot be considered to be residents of a single household."[1] The majority divines this supposed prerequisite from the fact that in *Barker*, *Newcomb*, and *Jamestown*, people who this Court

1. The majority does not define the term "dwelling."

deemed to be residents of a single household had also previously lived under a single roof. Although the majority does not dispute that none of our precedents ever expressly refer to this supposed prerequisite, the majority contends that this silence is unsurprising given that "the existence of such a threshold requirement is obvious." According to the majority, "we would not have even considered the possibility that the persons seeking coverage were residents of the named insured's household had they not previously lived together in the same residence for a sufficient time period." This reasoning elevates what our precedents establish as, at most, a factor to be considered in analyzing a term in an insurance contract into a dispositive prerequisite. Even if it were correct that this Court has (silently) "relied on the fact that [the party seeking coverage] had lived in the [insured party's] home," it is not at all obvious why that fact renders moot all the other factors we have previously relied upon in assessing the meaning of the term "resident." In my view, the utterly unremarkable fact that in three cases people who this Court deemed to be residents of a single household had previously lived under a single roof does not establish that this Court has recognized "one basic prerequisite" to claiming coverage in an insurance contract. The majority points to no other context in which we have treated a factual circumstance common in a small number of our precedents as equivalent to the establishment of a binding legal rule.

The new prerequisite the majority recognizes is not found within the plain language of terms of the insurance policy at issue in this case, nor is it found in our precedents. Regardless, the majority's opinion does not negate the reality that in rural North Carolina, the type of living arrangement the Martins experienced at the time of the loss at issue in this case is common and commonly understood to be a family household. I am doubtful that the majority would apply the same stringent definition to living arrangements that are more common in urban parts of the state. If Jean and Marina lived in a semi-detached garage apartment on Mary's property, would they still be part of Mary's household? What if they lived separately in both units of a duplex? Or what if Mary occupied an in-law suite complete with a kitchen, bath, and a separate living room, but which was physically contained within the same structure? No matter how the majority would interpret contracts applying to individuals in these hypothetical circumstances, the majority provides no convincing rationale for why that decision should turn entirely on whether or not the parties previously lived together in a single physical structure. We should apply the same fact-intensive, contextual approach to resolve a claim arising from Knotts Island as we would to a claim arising from Raleigh. The majority does a grave disservice to the people of this State

by failing to account for and give legal recognition to the residential patterns that so many families experience in rural areas.

The majority's treatment of *N.C. Farm Bureau Mut. Ins. Co. v. Paschal*, 231 N.C. App. 558, 752 S.E.2d 775 (2014) is particularly illustrative of its unwillingness to conduct the contextual analysis long held to be necessary in interpreting the meaning of a term in an insurance context. In *Paschal*, the Court of Appeals affirmed that in conducting the "individualized and fact-specific" inquiry which is necessary to determine "whether a particular person is a resident of the household of a named insured," it would follow the settled rule that " 'household' has been broadly interpreted, and *members of a family need not actually reside under a common roof to be deemed part of the same household*." *Id.* at 565, 752 S.E.2d at 780 (quoting *Davis v. Md. Cas. Co.*, 76 N.C. App. 102, 105, 331 S.E.2d 744, 746 (1985)). Of course, a decision of the Court of Appeals is not binding on this Court. But the Court of Appeals' decision gives ample reason to doubt that the "threshold requirement" the majority gleans from *Barker*, *Newcomb*, and *Jamestown* is as self-evidently "obvious" as the majority claims. In my view, *Paschal* accords with the two principles animating our jurisprudence in this domain: (1) courts should resolve disputes through a fact-intensive, contextual analysis, and (2) ambiguities should be resolved in favor of the party claiming coverage. We should not ignore these principles on the basis of an observation about an unsurprising factual circumstance shared by three of our precedents and inconclusive dictionary definitions.

Although the majority's results-driven reasoning in this case fails to consider the realities of family life in rural North Carolina, its decision does not negate a court's responsibility to resolve disputes of this nature through "a particularized, fact-intensive inquiry into the circumstances of the parties' current and prior living arrangements." The majority does not explain why conducting this "particularized, fact-intensive inquiry" in a way that accounts for the lived realities of rural families would require "engag[ing] in an analysis untethered by either the prior decisions of this Court or the plain meaning of the policy terms at issue." Instead, such an approach is firmly consistent with our precedents, which have consistently avoided a one-size-fits-all rule in favor of an analysis that incorporates a variety of factors to account for the varying circumstances of households across our state. If that standard seems "vague and amorphous," it is because "[t]he words 'resident,' 'residing' and 'residence' . . . have, however, no precise, technical and fixed meaning applicable to all cases." *Jamestown*, 266 N.C. at 435, 146 S.E.2d at 414. In my view, the majority opinion relies upon an unduly rigid analysis instead of one

that adequately considers relevant context and nuance, and in doing so disregards "the principle [which] has grown up in the courts that these policies must be construed liberally in respect to the persons insured, and strictly with respect to the insurance company." *Roberts v. Am. All. Ins. Co.*, 212 N.C. 1, 192 S.E. 873, 876 (1937). Hopefully, future courts will analyze these contracts in a manner more consistent with the principles we have established in our previous cases, which this decision does not overrule. Because I believe the majority errs in denying coverage to Jean and Marina Martin, I respectfully dissent.

DELIA NEWMAN ET UX.
v.
HEATHER STEPP ET UX.

No. 383A19

Filed 18 December 2020

Emotional Distress—negligent infliction of emotional distress—foreseeability—judgment on the pleadings

The trial court erred by entering judgment on the pleadings for defendants, operators of an unlicensed at-home day care, on a claim for negligent infliction of emotional distress (NIED) brought by plaintiffs, parents of a two-year-old girl who was fatally shot at defendants' home with a loaded shotgun left on the kitchen table accessible to unsupervised children. The evidence, taken in the light most favorable to plaintiffs, sufficiently forecast that plaintiffs' severe emotional distress was a reasonably foreseeable consequence of defendants' negligent conduct, including the fact that plaintiffs were known to defendants.

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, 267 N.C. App. 232, 833 S.E.2d 353 (2019), reversing an order granting judgment on the pleadings in favor of defendants entered on 9 January 2019 by Judge Gregory Horne in Superior Court, Henderson County, and remanding to the trial court for further proceedings. Heard in the Supreme Court on 1 September 2020.

F.B. Jackson & Associates Law Firm, PLLC, by Frank B. Jackson and James L. Palmer, for plaintiff-appellees.

Ball Barden & Cury P.A., by J. Boone Tarlton and Ervin L. Ball Jr., for defendant-appellants.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Linda Stephens, for North Carolina Association of Defense Attorneys, amicus curiae.

MORGAN, Justice.

Our review in this matter requires the Court to apply well-established precedent to a trial court's order granting judgment on the pleadings regarding a claim for negligent infliction of emotional distress. Viewing the specific facts alleged here in the light most favorable to plaintiffs, we conclude that the trial court erred by entering judgment on the pleadings in favor of defendants.

Factual Background and Procedural History

In this tragic case, the facts are undisputed. On the morning of 26 October 2015, plaintiff Delia Newman took her two-year-old daughter Abagail, referred to as "Abby," to the residence of defendants Heather and James Stepp in Hendersonville. Delia Newman had a scheduled training class for her ultrasound certification at A-B Technical Community College on this date. Defendants were providing childcare in an unlicensed day care at defendants' home where the couple regularly cared for Abby and other children. At about 8:00 a.m., Abby and defendants' several minor children entered defendants' kitchen where a 12-gauge shotgun belonging to James Stepp, which he had used for hunting on the previous day, had been left on the kitchen table of defendants' home. The firearm was loaded and was not secured by safety, trigger lock, or other mechanism. One of defendants' children under the age of five years somehow discharged the shotgun and Abby was struck in the chest at close range. Shortly thereafter, Heather Stepp contacted emergency services for help.

Plaintiff Jeromy Newman, Abby's father, was a volunteer firefighter. He heard a report over his citizens band (CB) radio about "a young female child [who] was critically wounded by the discharge of a shotgun at close range at the babysitter's home and that her condition was extremely critical." When Jeromy Newman heard defendants' address

over the CB radio as the location of the incident, he drove towards defendants' home and also contacted his wife by telephone. While en route to defendants' residence, Jeromy Newman saw the ambulance which he learned "contain[ed] his daughter who was still alive at the time" and followed the emergency vehicle to the hospital where he observed Abby being removed from the ambulance and taken inside the building. Delia Newman's training class was occurring near the hospital where Abby was taken so, after receiving the telephone call from her husband, Delia Newman reached the hospital shortly after Abby had arrived. At that point, Delia Newman was informed of Abby's death and was allowed to hold Abby's body for an extended period of time.

On 26 June 2018, plaintiffs filed a complaint which included claims for negligent infliction of emotional distress, intentional infliction of emotional distress, wrongful death, and loss of consortium. Plaintiffs voluntarily dismissed their wrongful death claim without prejudice on 16 August 2018. On 2 October 2018, with consent of defendants, plaintiffs filed an amended complaint. In their amended complaint, plaintiffs alleged, *inter alia*, the following:

> 32. Defendants failed to unload the firearm prior to laying it on the kitchen table, where it was readily available to the minor children that had unfettered access to the entire home.
>
> 33. Defendants failed to "check" the firearm to [ensure] it was unloaded prior to allowing the [plaintiffs'] child inside their home.
>
> 34. Defendants failed to properly educate their young children regarding firearms and the dangers involved with "playing" with said firearm.
>
> 35. Defendants failed to [ensure] that they had the proper training prior to possessing such a firearm.
>
> 36. Defendants failed to properly supervise the minor children that were in their home.
>
> 37. That the actions of the [d]efendants were a direct and proximate cause of the injuries and death of [Abby].
>
> . . . .
>
> 39. It was reasonably foreseeable that the conduct of the [d]efendants, and the wounding and death of [Abby] would

cause the [p]laintiffs severe emotional distress, including but not limited to:

> a. Both [p]laintiffs have incurred severe emotional distress. The mother has incurred such severe emotional distress that she has been under constant psychiatric care and has been placed on numerous strong anti-depressants as well as other medications.
>
> b. The mother has had etched in her memory the sight of her lifeless daughter in her arms at Mission Hospital.
>
> c. The mother has convinced herself that she also is going to die, because God would not allow her to suffer as she has suffered without taking her life also.
>
> d. The mother is still unable to deal with the possessions of her dead daughter but has kept every possession in a safe place.
>
> e. At times[,] the mother has wished death for herself.
>
> f. The mother has not been able to tend to her usual household duties and has stopped her efforts to obtain the degree she had sought . . . .
>
> g. There are days the mother has trouble leaving her home.
>
> h. Both [p]laintiffs have lost normal husband and wife companionship and consortium.
>
> i. As a result of all the aforesaid, the mother has been rendered disabled for periods of time since her daughter's death.

On 15 November 2018, defendants filed their answer, along with a motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. N.C.G.S. § 1A-1, Rule 12(c) (2019). The trial court heard defendants' motion on 3 December 2018. On 9 January 2019, the trial court filed a corrected order granting judgment on the pleadings, dismissing all three of plaintiffs' remaining claims. On 27 December 2018, plaintiffs appealed from the trial court's judgment in

favor of defendants. Plaintiffs filed an amended written notice of appeal from a Corrected Judgment of Dismissal on 10 January 2019.

On appeal, plaintiffs argued that their complaint sufficiently alleged negligent infliction of emotional distress so as to withstand defendants' motion for judgment on the pleadings. *See* N.C.G.S. § 1A-1, Rule 12(c). The parties and the entire panel of the lower appellate court agreed that the dispositive issue in the case was whether plaintiffs' allegations regarding foreseeability were sufficient to support a claim for negligent infliction of emotional distress as a result of Abby's shooting and resulting death. *Newman v. Stepp*, 267 N.C. App. 232, 833 S.E.2d 353 (2019). To sustain a claim for negligent infliction of emotional distress, "a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) *it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress* . . . , and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, *P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990) (emphasis added).

The Court of Appeals panel was divided on the question of foreseeability. The majority held that "plaintiffs properly alleged severe emotional distress to support foreseeability in their claim of negligent infliction of emotional distress" and therefore reversed the trial court's ruling in favor of defendants for judgment on the pleadings and remanded the matter for further proceedings. *Newman*, 267 N.C. App. at 233, 833 S.E.2d at 355. The dissent in the lower appellate court cited and considered the same case law as the majority, but in the view of the dissenting judge, "[p]laintiffs' allegations rely *solely* upon the existence of a parent-child relationship and the aftermath and effects they suffered from the wrongful death of their child," and thus they "cannot sustain a claim for negligent infliction of emotional distress." *Id.* at 243–44, 833 S.E.2d at 361 (Tyson, J., dissenting).[1] On 1 October 2019, defendants filed in this Court a notice of appeal on the basis of the dissent in the Court of Appeals. *See* N.C.G.S. § 7A-30(2) (2019).

Analysis

The question before this Court is whether judgment on the pleadings was appropriate in this case, where the underlying claim was negligent

1. The dissenting judge also took issue with the majority opinion's direction to the trial court on remand concerning the loss of consortium claim, first stating that the claim was not before the Court of Appeals and further opining that a claim for loss of consortium resulting from a death may be brought *only* as an ancillary claim to a wrongful death action, citing *Keys v. Duke Univ.*, 112 N.C. App. 518, 520, 435 S.E.2d 820, 821 (1993). *Newman v. Stepp*, 267 N.C. App. 232, 251, 833 S.E.2d 353, 366 (2019) (Tyson, J., dissenting).

infliction of emotional distress, a claim primarily focused upon the element of foreseeability in light of the facts and circumstances presented in this case. After careful consideration, we conclude that the averments contained in plaintiffs' complaint were sufficient as to the element of foreseeability for this case to proceed beyond the pleading stage of this legal controversy. Therefore, we hold that the trial court erred by allowing judgment on the pleadings for defendants.

We begin with an identification of the proper standard of review to be applied in this matter. In considering a motion for judgment on the pleadings, a "trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). This high standard is imposed because

> [j]udgment on the pleadings is a summary procedure and the judgment is final. Therefore, each motion under Rule 12(c) must be carefully scrutinized lest the nonmoving party be precluded from a full and fair hearing on the merits. The movant is held to a strict standard and must show that no material issue of facts exists and that he is clearly entitled to judgment.

Id. (citations omitted).

As the non-moving party, plaintiffs are entitled to have the trial court to view the facts and permissible inferences from plaintiffs' complaint in the light most favorable to them, with plaintiffs' factual allegations taken as true and defendants' opposing responses taken as false. With this established approach, it is apparent that the first and third elements of a claim for negligent infliction of emotional distress as articulated in *Johnson* exist in the present case. In assessing foreseeability, this Court has stated that "the 'factors to be considered' include, *but are not limited to*: (1) 'the plaintiff's proximity to the negligent act' causing injury to the other person, (2) 'the relationship between the plaintiff and the other person,' and (3) 'whether the plaintiff personally observed the negligent act.' " *Sorrells v. M.Y.B. Hosp. Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 322 (1993) (quoting *Johnson*, 327 N.C. at 305, 395 S.E.2d at 98).

Turning to the substance of the negligent infliction of emotional distress claim, it is clear that "a plaintiff may recover for his or her severe emotional distress arising due to concern for another person, *if* the

plaintiff can prove that he or she has suffered such severe emotional distress as a proximate and *foreseeable* result of the defendant's negligence." *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97. As noted above, plaintiffs' allegations were undisputed that defendants' negligent act of leaving a loaded shotgun unsecured and accessible to a group of young children was the proximate cause of both Abby's death and plaintiffs' resulting mental anguish and suffering; therefore, only the sufficiency of the allegations regarding the element of foreseeability remains for this Court's determination in this appeal. *See id.* ("Although an allegation of ordinary negligence will suffice, a plaintiff must also allege that severe emotional distress was the foreseeable and proximate result of such negligence in order to state a claim; mere temporary fright, disappointment or regret will not suffice. In this context, the term 'severe emotional distress' means any emotional or mental disorder . . . ." (citation omitted)). In *Johnson*, we observed that "[f]actors to be considered on the question of foreseeability . . . include the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act." *Id.* at 305, 395 S.E.2d at 98.

In recalling the three aforementioned *Johnson* factors undergirding a negligent infliction of emotional distress claim as we applied then in *Sorrells*, we further emphasized that

> *such factors are not mechanistic requirements* the absence of which will inevitably defeat a claim for negligent infliction of emotional distress. *The presence or absence of such factors simply is not determinative in all cases*. Therefore, North Carolina law forbids the mechanical application of any arbitrary factors . . . for purposes of determining foreseeability. Rather, the question of reasonable foreseeability under North Carolina law *must be determined under all the facts presented, and should be resolved on a case-by-case basis* by the trial court and, where appropriate, by a jury.

Sorrells, 334 N.C. at 672–73, 435 S.E.2d at 322 (extraneity omitted) (emphasis added). *See also Johnson*, 327 N.C. at 291, 395 S.E.2d at 89 ("[O]ur law includes *no arbitrary requirements to be applied mechanically* to claims for negligent infliction of emotional distress." (emphasis added)).

Relying on their interpretation of this standard and in light of the facts alleged in plaintiffs' complaint, defendants contend that dismissal

on the pleadings was appropriate because plaintiffs did not observe and were not in close proximity to the shooting or the death of Abby. Among other cases which defendants cite, they most heavily regard *Gardner v. Gardner*, 334 N.C. 662, 435 S.E.2d 324 (1993), and *Andersen v. Baccus*, 335 N.C. 526, 439 S.E.2d 136 (1994), as factually analogous to, and legally controlling on, the facts of the case at bar.

In *Gardner*, the plaintiff, the mother of a thirteen-year-old son, sued the child's father for negligent infliction of emotional distress after the youngster, while riding in a truck being operated by the father, was injured when the father negligently drove the vehicle into a bridge abutment, seriously injuring the child. *Gardner*, 334 N.C. at 663, 435 S.E.2d at 326. The mother was alerted to the accident by a telephone call and upon rushing to the hospital where her son had been transported, saw the child being wheeled into the emergency room by medical personnel as resuscitation efforts were instituted. *Id.* at 663–64, 435 S.E.2d at 326. The mother did not see her child again but shortly thereafter was informed that her son had died. *Id.* at 664, 435 S.E.2d at 326. In rendering the opinion in *Gardner*, this Court stated that

> [t]he trial court treated defendant's motion to dismiss as a motion for summary judgment. For purposes of that motion the parties stipulated that their son had died as a result of defendant's negligence and that plaintiff had suffered severe emotional distress as a result of the accident and death. The trial court granted summary judgment as to plaintiff's claim for [negligent infliction of emotional distress] and dismissed that claim with prejudice. It ruled that, as a matter of law, plaintiff could not establish a claim for [negligent infliction of emotional distress] because she did not witness the accident nor was she in sufficiently close proximity thereto to satisfy the "foreseeability factors" set forth in *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85 (1990).
>
> On appeal, the Court of Appeals held that plaintiff's emotional distress as a result of defendant's negligence was foreseeable. Emphasizing that the [*Johnson*] factors were not requirements for foreseeability but were "*to be considered* on the question of foreseeability," the court stated:
>
> > In common experience, a parent who sees its mortally injured child soon after an accident,

> albeit at another place, perceives the danger to the child's life, and experiences those agonizing hours preceding the awful message of death may be at no less risk of suffering a similar degree of emotional distress than . . . a parent who is actually exposed to the scene of the accident.
>
> *Gardner v. Gardner*, 106 N.C. App. 635, 639, 418 S.E.2d 260, 263 (1992). The [Court of Appeals] held that defendant "could have reasonably foreseen that his negligence might be a direct and proximate cause of the plaintiff's emotional distress," *id.*, and it accordingly reversed the trial court.

Id. at 664-65, 435 S.E.2d at 326 (fifth alteration in original). The dissenting judge at the Court of Appeals in *Gardner* opined that the claim for negligent infliction of emotional distress must fail because the plaintiff "did not observe and was not in close proximity to the negligent act," the truck accident. *Id.* at 665, 435 S.E.2d at 326. Upon review, this Court quoted the *Johnson* factors, but emphasized that in *Johnson* itself

> [n]otably, these factors were not termed "elements" of the claim. They were neither requisites nor exclusive determinants in an assessment of foreseeability, but they focused on *some* facts that could be particularly relevant in any one case in determining the foreseeability of harm to the plaintiff. Whatever their weight in this determination, we stressed that "[q]uestions of foreseeability and proximate cause must be determined under *all* the facts presented" in each case.

Id. at 666, 435 S.E.2d at 327 (second alteration in original) (citing *Johnson*, 327 N.C. at 305, 395 S.E.2d at 98). Thus, this Court in *Gardner*, just as in *Johnson*, continued to focus on the importance of flexibility regarding the pertinent factors to be considered in evaluating allegations of foreseeability when reviewing a claim for negligent infliction of emotional distress. Ultimately, in *Gardner*, this Court reversed the decision of the Court of Appeals, finding that the plaintiff's allegations were not sufficient to sustain her claim for negligent infliction of emotional distress.

> [The p]laintiff was not . . . in close proximity to, nor did she observe, defendant's negligent act. At the time defendant's vehicle struck the bridge abutment, plaintiff was at her mother's house several miles away. This fact, *while not*

> *in itself determinative*, unquestionably militates against defendant's being able to foresee, at the time of the collision, that plaintiff would subsequently suffer severe emotional distress as a result of his accident. Because she was not physically present at the time of defendant's negligent act, plaintiff was not able to see or hear or otherwise sense the collision or to perceive immediately the injuries suffered by her son. Her absence from the scene at the time of defendant's negligent act, *while not in itself decisive*, militates against the foreseeability of her resulting emotional distress.

Id. at 666–67, 435 S.E.2d at 328 (emphases added).

In *Andersen*, the plaintiff husband filed a complaint against defendant which included a claim for negligent infliction of emotional distress as a result of a traffic accident in which the vehicle being driven by defendant collided with the vehicle being operated by plaintiff's wife upon defendant's driving maneuver to avoid a collision with a third vehicle. Plaintiff did not see the accident occur but was present at the scene of the accident before his wife—who was with child at the time—was removed from her wrecked vehicle and accident site. *Andersen*, 335 N.C. at 527, 439 S.E.2d at 137. After being freed, "[the plaintiff's wife] was taken to a local hospital and the next day gave birth to a stillborn son . . . . [The] plaintiff's wife died from injuries allegedly received in the accident." *Id.* Defendants prevailed in the trial court on summary judgment on plaintiff's claim of negligent infliction of emotional distress. *Id.* at 528, 439 S.E.2d at 137. The Court of Appeals reversed the trial court on this issue, concluding that it was reasonably foreseeable that the plaintiff would suffer such distress as a result of the alleged negligence. *Id.* at 530, 439 S.E.2d at 138–39. This Court reversed, interspersing in our analysis the law of *Johnson* with the salient facts of *Sorrells*—a case in which this Court held that it was not reasonably foreseeable that defendant business which served alcohol to the twenty-one-year-old son of plaintiff parents would negligently inflict emotional distress upon the parents as a result of the son's death when his loss of control of his motor vehicle caused him to strike a bridge abutment—as we explained the rationale for our determination of the lack of foreseeability in *Andersen*:

> Holding that [the] plaintiffs' alleged distress arising from their concern for their son was a possibility too remote to be reasonably foreseeable, the Court [in *Sorrells*] said:
>
> > Here, it does not appear that the defendant had any actual knowledge that the plaintiffs existed.

> Further, while it may be natural to assume that any person is likely to have living parents or friends [who might] suffer some measure of emotional distress if that person is severely injured or killed, those factors are not determinative on the issue of foreseeability. The determinative question for us in the present case is whether, absent specific information putting one on notice, it is reasonably foreseeable that such parents or others will suffer "severe emotional distress" as that term is defined in law. We conclude as a matter of law that the *possibility* (1) the defendant's negligence in serving alcohol to [the plaintiffs' child] (2) would combine with [the plaintiffs' child's] driving while intoxicated (3) to result in a fatal accident (4) which would in turn cause [the plaintiffs' child's] parents (if he had any) not only to become distraught, but also to suffer "severe emotional distress" as defined in [*Johnson*], simply was a possibility too remote to permit a finding that it was reasonably foreseeable. This is so despite the parent-child relationship between the plaintiffs and [their child]. With regard to the other factors mentioned in [*Johnson*] as bearing on, *but not necessarily determinative of*, the issue of reasonable foreseeability, we note that these plaintiffs did not personally observe any negligent act attributable to the defendant. However, we reemphasize here that any such factors are merely matters to be considered among other matters bearing on the question of foreseeability.

Id. at 531–32, 439 S.E.2d at 139 (third alteration in original) (quoting *Sorrells*, 334 N.C. at 674, 435 S.E.2d at 323)). Utilizing the unique, though comparable facts presented by the *Gardner* and *Sorrells* cases, in *Andersen* we held that the defendant

> could not reasonably have foreseen that her negligent act, if any, would cause [the] plaintiff to suffer severe emotional distress. While in this case [the] plaintiff observed his wife before she was freed from the wreckage, as in *Gardner*, plaintiff was not in close proximity to and did

> not observe [the] defendant['s] negligent act, if any. As in *Sorrells*, nothing suggests that [the defendant] knew of [the] plaintiff's existence. The forecast of evidence is undisputed that at the moment of impact [defendant] did not know who was in the car which her vehicle struck and had never met [plaintiff's wife]. Both *Gardner* and *Sorrells* teach that the family relationship between plaintiff and the injured party for whom [the] plaintiff is concerned is insufficient, standing alone, to establish the element of foreseeability. In this case as in *Sorrells* the possibility that the decedent might have a parent or spouse who might live close enough to be brought to the scene of the accident and might be susceptible to suffering a severe emotional or mental disorder as the result of [the defendant's] alleged negligent act is entirely too speculative to be reasonably foreseeable.

Andersen, 335 N.C. at 532–33, 439 S.E.2d at 140. Accordingly, this Court reversed the decision of the Court of Appeals, reinstating the trial court's entry of summary judgment for the defendants on the claim for negligent infliction of emotional distress. *Id.* at 533, 439 S.E.2d at 140.

The factual circumstances presented in this Court's opinions of *Gardner*, *Andersen*, and *Sorrells* upon which defendants, as well as our learned dissenting colleague, primarily rely to advance the position that the trial court was correct to grant a judgment on the pleadings to defendants regarding plaintiffs' claim for negligent infliction of emotional distress are readily distinguishable from those which are existent in the instant case. Fundamentally, here the concept of the foreseeability of the infliction of emotional distress resulting from defendants' negligent act of leaving a loaded and unsecured shotgun in an unattended state within reach of a group of young children—as compared to the foreseeability of a defendant father inflicting emotional distress upon the mother for the alleged negligent act of having a traffic accident which killed their passenger son in *Gardner*, the foreseeability of the infliction of emotional distress resulting from defendant motor vehicle operator's alleged negligent act in killing an expecting mother and causing the baby to be stillborn because defendant swerved to avoid a collision with a third vehicle in *Andersen*, and the foreseeability of the infliction of emotional distress upon the parents of an adult son who was killed in the operation of his motor vehicle after defendant business committed the allegedly negligent act of serving alcoholic beverages to the son of plaintiffs during his patronage of defendant business—is a measure

of foreseeability indisputably governed by the factors which this Court articulated in *Johnson* which is necessary for a jury to determine in light of the "case-by-case basis" premised upon "all the facts presented" which this Court expressly discussed in *Sorrells*. 334 N.C. at 673, 435 S.E.2d at 322 (quoting *Johnson*, 327 N.C. at 305, 395 S.E.2d at 98).

While the dissenting opinion is careful to quote the direction given in *Sorrells* that the guiding "factors are not mechanistic requirements" and the mandate established by *Johnson* that negligent infliction of emotional distress "cases must be resolved on a case-by-case basis, considering all facts presented," the dissent nevertheless acquiesces in its acceptance of defendants' automated application of the *Johnson* factors without expending the requisite effort to navigate the nuances of the configuration of fact patterns. For example, in the present case, plaintiffs and defendants knew each other to such a degree that plaintiffs allowed their young child to spend appreciable amounts of time in defendants' home; however, in *Sorrells*, in noting that foreseeability was not reasonable for a negligent infliction of emotional distress claim, this Court expressly recognized that "it does not appear that the defendant had any actual knowledge that the plaintiffs existed." *Sorrells*, 334 N.C. at 674, 435 S.E.2d at 323. In *Andersen*, in noting that defendant "could not reasonably have foreseen that her negligent act, if any, would cause plaintiff to suffer severe emotional distress," we deemed it to be germane that "nothing suggests that [the defendant] knew of plaintiff's existence. The forecast of evidence is undisputed that at the moment of impact [the defendant] did not know who was in the car which her vehicle struck and had never met [the plaintiff's wife]." *Andersen*, 335 N.C. at 532–33, 439 S.E.2d at 140.

The same cases from this Court which the dissent and defendants invoke to support their position in the case sub judice that the foreseeability factors set forth in *Johnson* did not allow plaintiffs to sustain actions for negligent infliction of emotional distress are the same cases which this Court now reaffirms afford plaintiffs in the instant case the right to pursue their claim for negligent infliction of emotional distress beyond the pleading stage. Although we held in the cited series of cases that the foreseeability factor of *Johnson* did not exist due to such circumstances as the defendant's lack of knowledge of plaintiff's existence, the prospect of parents suffering "severe emotional distress," and the inability of the defendant to know the identity of the fatally injured party, conversely we hold that the foreseeability factor of *Johnson* does exist in the case at bar because defendants have knowledge of plaintiffs' existence, there is the prospect of plaintiffs suffering severe emotional

distress, and defendants were able to know the identity of the fatally injured party Abby.

Conclusion

We conclude that plaintiffs' allegations regarding the factor of foreseeability as addressed in *Johnson* were sufficient to support their claim for negligent infliction of emotional distress against defendants. Consequently, the trial court erred in entering judgment on the pleadings in favor of defendants. In affirming the Court of Appeals, we reiterate the established standard for a trial court's consideration of a defending party's motion to for judgment on the pleadings and, when such a motion is made in a negligent infliction of emotional distress action, the question of reasonable foreseeability must be determined under all of the facts presented and should be resolved on a case-by-case basis instead of mechanistic requirement associated with the presence or absence of the *Johnson* factors.

AFFIRMED.

Justice NEWBY dissenting.

The heartbreak a parent endures from the loss of a child simply cannot be overstated. "The shock and anguish suffered by plaintiffs upon learning of the wholly unexpected death of their young daughter is unfathomable to anyone not experiencing a similar loss." *Newman v. Stepp*, 267 N.C. App. 232, 242, 833 S.E.2d 353, 360 (2019) (Tyson, J., dissenting). I also agree with the dissent at the Court of Appeals that, "[w]hile nothing can change these facts nor restore the child plaintiffs have lost, the law affords these parents a claim and remedy of monetary compensation for damages they suffered through a claim for wrongful death." *Id*. In an attempt to fashion a different legal remedy to address this tragedy, the majority strays from our jurisprudence regarding claims for negligent infliction of emotional distress (NIED). Were we writing on a blank slate, I could agree as my sympathies lie with plaintiffs; however, we have several cases that determine foreseeability in the context of a NIED claim by applying the factors this Court articulated in *Johnson v. Ruark Obstetrics and Gynecology Associates, P.A.*, 327 N.C. 283, 305, 395 S.E.2d 85, 98 (1990). These cases also have tragic facts where individuals lost dear loved ones—children, spouses, and parents—under terrible circumstances. In each of these cases we held that the alleged NIED was not foreseeable. Faithfully applying this precedent, the trial court correctly dismissed this action. I respectfully dissent.

To properly plead a claim for NIED, "a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as 'mental anguish'), and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97. In this case, we address whether it was reasonably foreseeable that the negligent conduct would cause plaintiffs severe emotional distress. We have previously set forth factors to be considered in determining whether it was reasonably foreseeable that the conduct at issue would cause severe emotional distress. These factors "include the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act." *Id.* at 305, 395 S.E.2d at 98. Our cases emphasize that "such factors are not mechanistic requirements," *Sorrells v. M.Y.B. Hosp. Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 322 (1993) (emphasis omitted), and that courts must evaluate NIED claims on a case-by-case basis, considering all facts presented. *Johnson*, 327 N.C. at 305, 395 S.E.2d at 98. Nonetheless, our case law has emphasized that the parent-child relationship standing alone is not enough. We have never previously focused on the nature of the negligent act. Generally, foreseeability requires plaintiffs to be present during the negligent act and perhaps observe the resulting injury. The majority fails to apply these factors and places the foreseeability determination with a jury.

The case before us is controlled by our decision in *Gardner v. Gardner*, 334 N.C. 662, 435 S.E.2d 324 (1993), which has all of the factors present in this case. There, a thirteen-year-old child was injured in a vehicular wreck when his father recklessly ran into a bridge abutment on a rural road. *Id.* at 663–64, 435 S.E.2d at 326. The plaintiff, the child's mother, found out about the accident over the phone. *Id.* at 663, 435 S.E.2d at 326. She then went directly to the local hospital's emergency room (ER) where she saw her son being wheeled into the ER and medical professionals attempting to resuscitate him. *Id.* at 663–64, 435 S.E.2d at 326. The plaintiff did not see her son thereafter and was later informed that he had died. *Id.* at 664, 435 S.E.2d at 326.

The plaintiff sued, claiming NIED. *Id.* She alleged that her husband's reckless driving that caused the accident violated at least four criminal statutes. The trial court granted summary judgment for the defendant-husband on the NIED claim. *Id.* The wife appealed to the Court of Appeals. *Gardner v. Gardner*, 106 N.C. App. 635, 418 S.E.2d 260 (1992). After considering the above facts and stating its view of the rules set

forth in *Johnson*, the Court of Appeals reversed the trial court's judgment for many of the same reasons that the majority utilizes in its opinion in the present case. *Id.* at 639, 418 S.E.2d at 263. In analyzing the impact of the parent-child relationship and a plaintiff's proximity to the scene of the accident, the Court of Appeals stated that

> [i]n common experience, a parent who sees its mortally injured child soon after an accident, albeit at another place, perceives the danger to the child's life, and experiences those agonizing hours preceding the awful message of death may be at no less risk of suffering a similar degree of emotional distress than . . . a parent who is actually exposed to the scene of the accident.

Id. Thus, the Court of Appeals ultimately concluded that the parent-child relationship combined with the fact that the plaintiff saw the child soon after the accident was sufficient to establish the foreseeability element required for a NIED claim. *Id.*

This Court, however, reversed the Court of Appeals' decision, rejecting its reasoning. *Gardner*, 334 N.C. at 668, 435 S.E.2d at 328. We held that the trial court properly granted summary judgment on the plaintiff-wife's NIED claim. *Id.* In doing so, this Court again explained the *Johnson* foreseeability factors and utilized those factors to reach its result. *Id.* at 666–68, 435 S.E.2d at 327–28. We found persuasive that the wife was not in close proximity to her husband's negligent act, nor did she observe the resulting wreck; instead, the plaintiff was several miles away when the accident happened, which "militates against the foreseeability of [the plaintiff's] resulting emotional distress." *Id.* at 667, 435 S.E.2d at 328. Despite the fact that the complaint alleged that the husband's reckless driving violated at least four criminal statutes, this Court did not even mention that the nature of the negligent act could be a factor.

Moreover, recognizing that there must be a showing of foreseeability of severe emotional distress, this Court reasoned that the plaintiff-wife had not alleged that the husband knew that she would be especially susceptible to severe emotional distress. Severe emotional distress as defined by law requires allegations or a forecast of evidence of "any emotional or mental disorder, such as . . . neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Id.* (alteration in original) (quoting *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97). As this Court explained,

"[w]hile anyone should foresee that virtually any parent will suffer *some* emotional distress—'temporary disappointment . . . or regret'—in the circumstances presented, to establish a claim for NIED the law requires reasonable foresight of an emotional or mental disorder or other severe and disabling emotional or mental condition." *Id.* (second alteration in original). Thus, despite the fact that the husband certainly knew of his wife's relationship with their son, without the husband having knowledge or foresight that the wife would suffer *severe* emotional distress, we stated that the reasonable foreseeability element was not satisfied. *Id.* at 667–68, 435 S.E.2d at 328. Therefore, this Court concluded that the defendant-husband could not be held accountable for his actions though a NIED claim. *Id.* at 668, 435 S.E.2d at 328.

The facts in the present case are similar to those in *Gardner*. Though defendants here knew of plaintiffs' parent-child relationship, that fact alone is inadequate. We rejected that same reasoning in *Gardner*. Moreover, like *Gardner*, defendants here had no reason to know that plaintiffs would suffer severe emotional distress as defined by law, meaning emotional distress exceeding that distress any parent would suffer when losing a child. In *Gardner*, defendant-husband would have had even more of an intimate understanding of the potential of severe emotional distress his wife would have suffered from losing their child. Certainly a husband would have been in a better position to know of any particular susceptibility of his wife to suffer severe emotional distress than a daycare owner interacting with a child's parents.

Plaintiffs here were not present when the negligent act or the accident occurred, as they neither saw the shotgun negligently being placed and left on the table nor did they see the discharge of the shotgun that ultimately led to their daughter's death. The same was true in *Gardner*, where the plaintiff did not observe the accident, but only saw her child arriving at the hospital after learning of the accident through a phone call, just as the father here learned of the accident through a CB-radio communication. Further, in *Gardner*, the mother saw the child while emergency personnel were attempting to resuscitate him at the hospital, whereas neither parent did so here. Our cases repeatedly consider a plaintiff's absence from the scene of the negligent act or accident as militating against foreseeability, despite how soon after the accident plaintiffs saw an injured or deceased individual. Simply put, while certainly these facts are tragic and heartbreaking, under our existing case law, it was not reasonably foreseeable that plaintiffs would endure severe emotional distress as defined by law to support a NIED claim.

The majority seeks to distinguish this case from *Gardner* because of the nature of the negligent act, noting that defendants' actions of leaving a loaded shotgun accessible to minors was egregious. The majority holds that severe emotional distress arising from that negligent act is more foreseeable than severe emotional distress caused by other types of negligent acts that also result in injury. The complaint in *Gardner* indicates the defendant's actions violated numerous criminal statutes as he carelessly and recklessly ran his truck into the bridge abutment. Nonetheless, our decision in *Gardner* did not attempt to evaluate the nature of the father's negligent act. It was simply not a factor in the foreseeability determination in *Gardner* or any of our other relevant cases. The question is not whether it *could be* reasonably foreseeable that a plaintiff would suffer severe emotional distress, but whether, under the specific facts presented, it *was* reasonably foreseeable that the plaintiff would suffer severe emotional distress as defined by law. Therefore, the majority's analysis primarily relies on a factor that this Court has not adopted in the past. Further, the majority now places the foreseeability determination with the jury, not the trial court.

Our foreseeability analysis in *Gardner* is consistent with our analysis of other cases where we have considered and rejected a plaintiff's NIED claim. In *Andersen v. Baccus*, the plaintiff-husband's pregnant wife had a car accident when the defendant swerved to avoid a vehicle driven by the a third person. 335 N.C. 526, 527, 439 S.E.2d 136, 137 (1994). The plaintiff did not witness the accident, but he went to the scene and saw his wife before she was freed from the wreckage. *Id.* The plaintiff's wife ended up giving birth to their baby, who was stillborn, and she later passed away as well. *Id.* The plaintiff brought a claim for punitive damages based on NIED, and the trial court granted summary judgment in the defendant's favor. *Id.* at 528, 439 S.E.2d at 137. Reviewing the case on appeal, this Court stated that the defendant's actions, while negligent, were not actions that were reasonably foreseeable to cause the plaintiff's severe emotional distress. *Id.* at 532, 439 S.E.2d at 140. Though the plaintiff observed his pregnant wife in her car before she was freed from the wreckage, even that was not enough to establish a NIED claim since the plaintiff was not in close proximity to nor did he observe the negligent act that caused his wife's and child's deaths. *Id.* at 532–33, 439 S.E.2d at 140. Moreover, we noted that the defendant did not know who was in the vehicle that the defendant struck. *Id.* at 533, 439 S.E.2d at 140. Specifically, "the family relationship between plaintiff and the injured party for whom plaintiff is concerned is insufficient, standing alone, to establish the element of foreseeability." *Id.* Therefore, this Court upheld

the trial court's grant of summary judgment because it was not reasonably foreseeable that plaintiff would suffer severe emotional distress. *Id.* Notably again, we did not address whether the defendant's negligent actions violated any criminal laws.

In another case, *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, a 21-year-old college student was drinking alcohol at a bar. 334 N.C. at 671, 435 S.E.2d at 321. The student's friends asked the bartenders not to serve the student any more drinks due to his intoxication and explained that the student had to drive himself home that evening. *Id.* Nevertheless, the employees continued to serve him alcohol. *Id.* When he was driving home, the student lost control of his car, struck a bridge abutment, and was killed. *Id.*

The student's parents brought a claim against the defendant-bar for NIED, which the trial court dismissed. *Id.* The Court of Appeals, however, reversed the trial court's decision. *Sorrells v. M.Y.B. Hosp. Ventures of Asheville*, 108 N.C. App. 668, 672, 424 S.E.2d 676, 680 (1993). In doing so, the Court of Appeals focused on the fact that the parents, despite not being at the scene, learned their son was killed in an automobile accident and that his body had been mutilated, which the Court of Appeals determined could be found to be reasonably foreseeable to cause severe emotional distress. *Id.* at 672, 424 S.E.2d at 679.

This Court, however, rejected the Court of Appeals' reasoning. *Sorrells*, 334 N.C. at 675, 435 S.E.2d at 323. In doing so, this Court applied the *Johnson* factors to determine whether the plaintiffs had established foreseeability. *Id.* at 672–73, 435 S.E.2d at 322. We first reasoned that the determinative question in the case was "whether, absent specific information putting one on notice, it is reasonably foreseeable that such parents or others will suffer 'severe emotional distress' as that term is defined in law." *Id.* at 674, 435 S.E.2d at 323. We noted that the defendant did not specifically know of the plaintiff-parents' existence, and more so, the defendant did not know that the plaintiffs would suffer emotional distress like that described in *Gardner*, i.e., manifesting itself in mental and/or physical disorders. *Id.* Because of the lengthy chain of events that led to the student's death as well as the fact that the plaintiffs did not observe the accident or any of the defendant's negligent actions attributable to the student's death, this Court concluded that the trial court properly dismissed the plaintiffs' NIED claim. *Id.* at 675, 435 S.E.2d at 323.

The Court of Appeals has also utilized the *Johnson* foreseeability factors to reach similar results despite the tragic circumstances involved

in those cases. *See Fields v. Dery*, 131 N.C. App. 525, 529, 509 S.E.2d 790, 792 (1998) (concluding that the plaintiff had not established foreseeability to maintain a NIED claim, despite the fact that she was driving behind her mother and saw the defendant violate a criminal statute and crash into her mother's car, since the defendant could not reasonably have foreseen that the deceased's daughter would be driving behind her and see the accident that caused her mother's death); *see also Riddle v. Buncombe Cnty. Bd. of Educ.*, 256 N.C. App. 72, 77, 805 S.E.2d 757, 762 (2017) (concluding that, despite the fact that the plaintiff, a close friend of the deceased, was present at and observed the accident, there was no allegation of a relationship making him particularly susceptible to suffering severe emotional distress, meaning that the plaintiff could not advance a NIED claim).

An analysis of the egregious nature of the negligent act is not mentioned as a foreseeability factor in any of our prior cases. The majority adds this new factor, whether leaving a loaded shotgun accessible to minors was involved, to our NIED foreseeability jurisprudence and places the foreseeability determination with the jury. The *Johnson* factors have worked well for thirty years. We now embark into uncharted territory. The majority assures us that these new considerations will not open a floodgate of new NIED claims—only time will tell. The proper remedy under these circumstances is a wrongful death action, not a change to our NIED jurisprudence. Because I believe the trial court faithfully applied our NIED jurisprudence, I would affirm its decision. I respectfully dissent.

PARKES v. HERMANN

[376 N.C. 320 (2020)]

ANITA KATHLEEN PARKES
v.
JAMES HOWARD HERMANN

No. 241PA19

Filed 18 December 2020

Medical Malpractice—loss of chance—for improved outcome—proximate cause—stroke

In a medical malpractice case, the Supreme Court declined to recognize a new cause of action—"loss of chance"—where a stroke patient (plaintiff) showed only, at most, that defendant-physician's negligence in failing to timely diagnose her stroke lost her the opportunity to receive a time-sensitive treatment that could have given her a 40 percent chance of improved neurological outcome. Plaintiff's claim failed to meet the "more likely than not" (greater than a 50 percent chance) threshold for proximate cause, making summary judgment for defendant-physician proper.

Justice EARLS dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 265 N.C. App. 475, 828 S.E.2d 575 (2019), affirming an order entered on 25 May 2018 by Judge Jesse B. Caldwell III in Superior Court, Lincoln County, granting defendant's motion for summary judgment. Heard in the Supreme Court on 1 September 2020.

Melrose Law, PLLC, by Mark R. Melrose and Adam R. Melrose, for plaintiff-appellant.

Roberts & Stevens, P.A., by Phillip T. Jackson, David C. Hawisher, and Elizabeth Dechant, for defendant-appellee.

D. Hardison Wood and Charles Monnett III for North Carolina Advocates for Justice, amicus curiae.

John H. Beyer and Katherine H. Graham for North Carolina Association of Defense Attorneys, amicus curiae.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Christopher G. Smith, for North Carolina Chamber Legal Institute, amicus curiae.

Linwood Jones for North Carolina Healthcare Association, amicus curiae.

Norman F. Klick Jr., Jerry A. Allen, and Jocelyne Riehl for North Carolina Medical Society and North Carolina College of Emergency Physicians, amici curiae.

NEWBY, Justice.

In this case we are asked to change our existing jurisprudence regarding proximate causation and to establish a new cause of action, "loss of chance." We decline to make these significant changes because they are best left to the legislative branch. Specifically, this case is about whether a patient who experienced a stroke failed to show, more likely than not, that the physician's negligence caused her diminished neurological function. Further, this case raises the question of whether the patient's "loss of chance" at a better outcome following her stroke is a separate type of injury for which she could recover in medical malpractice action. Plaintiff concedes that she failed to show that it was more likely than not that defendant's negligence caused her diminished neurological function. Nonetheless, plaintiff argues her claims should stand because defendant's negligence diminished her likelihood of full recovery, thus proximately causing her injury. Further, plaintiff argues that her "loss-of-chance" claim is a separate claim. We now affirm the decision of the Court of Appeals, which affirmed the trial court's decision to grant summary judgment to defendant.

Because the trial court granted summary judgment, we review the facts in the light most favorable to plaintiff, the nonmoving party. As alleged in plaintiff's complaint, at approximately 12:15 a.m. on or about 24 August 2014, plaintiff told her husband she thought she might be having a stroke as "her left arm and left leg felt heavy and weak and . . . her tongue felt thick and her speech was slurred." Her family rushed her to the nearby hospital. By approximately 1:35 a.m. plaintiff was in triage at the hospital complaining of slurred speech and numbness in her left arm, symptoms that had started about one hour earlier. Plaintiff received a CT scan of her head at approximately 1:35 a.m., and those results were available soon after. At approximately 3:00 a.m. defendant contacted plaintiff's primary care physician, Dr. Wheeler, and erroneously communicated that plaintiff "had no neurological deficits." Plaintiff's same symptoms continued and at about 6:00 a.m. the hospital staff noted that plaintiff "had left facial droop, left arm drift and slightly slurred

speech." At approximately 7:15 a.m. Dr. Wheeler arrived at the hospital, noted plaintiff's neurological signs and symptoms, ordered a neurological consult, and admitted plaintiff to the hospital. After the neurological consult, Dr. Wheeler spoke with the neurologist who advised her that plaintiff's opportunity to benefit from certain time-sensitive treatment, namely administering alteplase, a tissue plasminogen activator ("tPA"), had passed.

In her complaint, plaintiff alleged that, "[d]ue to the delay in diagnosis, the Plaintiff has suffered additional harms, damages and losses, including permanent injuries, and including additional medical expenses for which the Defendant is liable." Plaintiff claimed defendant "was negligent and failed to use reasonable care and diligence" to timely diagnose plaintiff's stroke using the methods and techniques available, assess and reassess plaintiff's conditions which demonstrated the signs of an ongoing stroke, and timely treat plaintiff with tPA. Plaintiff alleged that her injury was "a direct and proximate result" of defendant's negligence and, "[h]ad timely and appropriate medical care been provided to the Plaintiff, then her ultimate medical outcome would have had an increased opportunity for an improved neurological outcome." This secondary claim, that plaintiff lost an increased opportunity for an improved neurological outcome by defendant's failure to timely treat her with tPA, is referred to as plaintiff's loss-of-chance claim.

Defendant moved for summary judgment, arguing that the stroke caused plaintiff's injuries, not defendant's failure to treat plaintiff with tPA, and that plaintiff's loss-of-chance claim is not a recognized claim in North Carolina. The trial court, having reviewed the pleadings, depositions, and memoranda of law submitted by both parties, granted summary judgment in favor of defendant.

On appeal, a unanimous panel of the Court of Appeals acknowledged that plaintiff's injury was proximately caused by the stroke and not by defendant's negligence. *Parkes v. Hermann*, 265 N.C. App. 475, 477, 828 S.E.2d 575, 577 (2019). The evidence in the light most favorable to plaintiff only showed a 40% chance that defendant's negligence caused plaintiff's injury. In other words, there was only a 40% chance that plaintiff's condition would have improved if defendant had properly diagnosed plaintiff and timely administered tPA. *Id.* By presenting evidence of only a 40% chance, plaintiff failed to show it was more likely than not that defendant's negligence caused plaintiff's current condition. *Id.*

Plaintiff also claimed that the loss of the 40% chance itself was a cognizable and separate type of injury—her loss of chance at having

a better neurological outcome—that warranted recovery. *Id.* at 478, 828 S.E.2d at 577–78. The Court of Appeals discussed that a plaintiff cannot recover for a loss of less than a 50% chance under "the 'traditional' approach" applied to loss-of-chance claims in other jurisdictions, but a plaintiff may recover the full value of a healthier outcome if he or she can show that, more likely than not, the outcome could have been achieved absent the defendant's negligence. *Id.* at 478, 828 S.E.2d at 578 (citing *Valadez v. Newstart, LLC*, No. W2007-01550-COA-R3-CV, 2008 WL 4831306, at *4 (Tenn. Ct. App. Nov. 7, 2008)). Here plaintiff's loss was at best a 40% chance; thus, plaintiff could not recover under this traditional approach.

Regardless, relying in part on this Court's precedent in *Gower v. Davidian*, 212 N.C. 172, 193 S.E. 28 (1937), the Court of Appeals stated that this Court had not adopted "loss of chance" as a separate cause of action, *Parkes*, 265 N.C. App. at 478, 828 S.E.2d at 578, and concluded that "any change in our negligence law lies 'within the purview of the legislature and not the courts,' " *id.* at 478–79, 828 S.E.2d at 578 (quoting *Curl v. Am. Multimedia, Inc.*, 187 N.C. App. 649, 656–57, 654 S.E.2d 76, 81 (2007)). Thus, the Court of Appeals affirmed the trial court's order granting summary judgment in favor of defendant. *Id.* at 479, 828 S.E.2d at 578.

Summary judgment is proper if "there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2019). "The movant is entitled to summary judgment . . . when only a question of law arises based on undisputed facts." *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 334, 777 S.E.2d 272, 278 (2015) (citation omitted). "All facts asserted by the [nonmoving] party are taken as true [and] . . . viewed in the light most favorable to that party." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). "This Court reviews appeals from summary judgment de novo." *Ussery*, 368 N.C. at 334–35, 777 S.E.2d at 278 (citation omitted).

Here plaintiff's filings and discovery showed that for tPA to be possibly beneficial, it must be administered within three hours of the onset of a certain kind of stroke. A medical study reviewed by plaintiff's expert showed that stroke patients who receive placebo treatment, or in other words are not treated with tPA, have roughly a 20% to 26% chance of a good neurological outcome, such as a full or nearly full recovery. Those patients who receive the treatment add an additional thirteen percentage points to their chance of recovery, resulting in a 39% total chance of a good neurological outcome. Based on the expert's testimony, with the treatment also comes a certain degree of risk, dependent on the patient,

with a 6.4% risk of doing harm. According to plaintiff's expert, plaintiff "had an opportunity for [a] maximum benefit of 35 [percent]—well, according to the trial, I say about 30 to 35, the trial is up to 39 percent, but yes, under 40 percent."[1] Plaintiff claims that these percentages represent the lost chance of an increased opportunity for an improved neurological outcome had tPA been administered in time and constitute a compensable injury separate from traditional negligence.

As determined by the Court of Appeals, neither the additional thirteen percentage points, the 30% to 35% total chance, nor the 40% total chance of an improved neurological outcome meets the "more likely than not," or greater than a 50% chance, threshold for proximate cause in a traditional medical malpractice claim. But, plaintiff argues that the loss-of-chance claim is appropriate when a plaintiff cannot meet the greater than a 50% threshold, thereby allowing a plaintiff to present a loss-of-chance claim to the jury when a traditional negligence claim may not survive summary judgment. Plaintiff advocates for lowering the proximate cause standard for cases like this one because the loss of chance for an improved outcome, whether it be the additional thirteen percentage points, the 30% to 35% total chance, or the 40% total chance of an improved neurological outcome, represents a compensable injury separate from a traditional medical malpractice claim. Plaintiff maintains that advances in medicine allow these percentages to translate to calculable damages. The issue presented to this Court is whether losing the chance for an increased opportunity for an improved outcome is a cognizable and compensable claim in North Carolina. We hold that it is not.

In *Gower*, the plaintiff sustained a neck fracture during a motor-vehicle accident. 212 N.C. at 173, 193 S.E. at 29. This Court considered whether a physician was negligent in failing to timely diagnose the neck fracture, which resulted in about a thirteen-day delay in diagnosis. *Id.* at 174, 193 S.E. at 29. The plaintiff argued that the delay in the diagnosis caused the fracture to develop a callus, preventing it from being set properly once diagnosed. *Id.* at 174, 193 S.E. at 29–30. To have the opportunity to present his case to the jury, "the burden rested upon the plaintiff to offer evidence tending to show a causal connection between his injury and the negligent conduct of the defendant." *Id.* at 175, 193 S.E. at 30.

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1. The Court of Appeals assumed a 40% total chance of an improved neurological outcome when viewing the evidence in the light most favorable to plaintiff. *See Parkes*, 265 N.C. App. at 477, 828 S.E.2d at 577.

In an attempt to show that causal connection, the plaintiff offered testimony of an expert witness who opined "that had this case received immediate attention and had that fracture and dislocation reduced, his chances for further recovery, or for perfect recovery, would have been much greater." *Id.* "Analyzing this statement," the Court "found [it] to be entirely conditional." *Id.* The expert opinion simply failed to establish proximate cause between the defendant's delay in diagnosis and the injury sustained by the plaintiff: "His opinion in this respect is based entirely upon an actual reduction of the fracture, which the evidence discloses could not be reduced, and he merely says that the chances for further recovery would have been much greater. The rights of the parties cannot be determined upon chance." *Id.* at 176, 193 S.E. at 30. In short, the injury sustained by the plaintiff was attributable to the motor-vehicle accident rather than a delay in diagnosis. *See id.* In the light most favorable to the plaintiff, the expert testimony that the plaintiff would have had an improved chance of recovery if certain facts were true was inadequate. *Id.* The loss of that chance was not a compensable injury that could support a negligence claim. *Id.* at 176, 193 S.E. at 30–31.

Even if the Court in *Gower* did not outright reject what is today called a loss-of-chance claim, it firmly framed medical malpractice claims within the confines of traditional proximate cause, which allows a negligence claim to proceed when the evidence shows that the negligent act more likely than not caused the injury. If the evidence falls short of this causation standard, then there is no recovery. The Court did not relax the proximate cause requirement for a medical malpractice claim when presented with the opportunity. *See*, *e.g.*, *Buckner v. Wheeldon*, 225 N.C. 62, 65, 33 S.E.2d 480, 483 (1945) (A physician is liable "only when the injurious result flows proximately" from the physician's negligence.). Under a lesser standard, a plaintiff alleging medical malpractice need only offer evidence tending to show that the defendant's negligence "possibly" caused his injury, rather than "probably" caused it. Such a standard would create an anomaly in medical malpractice actions. Moreover, damages for a possible chance simply cannot fit within our traditional framework.

Here the evidence showed that if plaintiff had received the tPA medication in time and if the tPA medication had worked in her favor, then her chances for a better recovery would have been greater. The expert's opinion relied on the assumption that the tPA medication would have improved plaintiff's condition. To reach plaintiff's desired result would require a departure from our common law on proximate causation and damages since a loss-of-chance claim would award for the possibility

that defendant's negligence contributed to plaintiff's condition. We decline to do so. Such a policy judgment is better suited for the legislative branch of government.[2] *See Henson v. Thomas*, 231 N.C. 173, 176, 56 S.E.2d 432, 434 (1949). Accordingly, the trial court properly granted summary judgment to defendant. We affirm the holding of the Court of Appeals.

AFFIRMED.

Justice EARLS dissenting.

Early in the morning on 24 August 2014, plaintiff Anita Parkes began experiencing concerning neurological symptoms.[1] She believed she was having a stroke. Her family rushed her to Highlands-Cashiers Hospital. Dr. Hermann, an emergency physician, evaluated her at 1:47 a.m., approximately one and a half hours after the initial onset of her neurological symptoms. Ms. Parkes complained of left arm weakness and slurred speech. Defendant called Ms. Parkes' primary care physician and said that Ms. Parkes' speech was slurred but that he "was not seeing it." He attempted to discharge plaintiff from the hospital, but her family protested, and Dr. Hermann agreed to keep her overnight "for observation." The following morning, Ms. Parkes' family returned to the hospital, where they found Ms. Parkes laying on a stretcher in the emergency-room area suffering from obvious facial drooping. It would later be determined that plaintiff had suffered an acute ischemic stroke.

The standard of care for treating a patient who incurs an ischemic stroke is to administer alteplase, a tissue plasminogen activator (tPA), which is the only known FDA-approved treatment for this condition. A patient who receives tPA within three hours of the onset of neurological symptoms has an approximately 30%–35% chance of ultimately experiencing improved neurological functioning. While administering tPA is

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2. The General Assembly has already modified the common law in this area and is certainly equipped to do so again if it so desires.

1. At the motion for summary judgment stage, "[a]ll facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citations omitted). Accordingly, on appeal, we consider the facts as alleged by Ms. Parkes to be true. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) ("On appeal of a trial court's allowance of a motion for summary judgment . . . [e]vidence presented by the parties is viewed in the light most favorable to the non-movant.").

not without risk, a patient who receives tPA has a measurably better chance of recovery than a patient who does not receive the treatment. Sadly, Ms. Parkes did not recover, and she continues to suffer neurological symptoms to this day, including severely impaired functioning on the left side of her body.

As alleged by Ms. Parkes, if Dr. Hermann had administered tPA at or around the time he initially examined her, she would have had a significantly better chance of recovering from her stroke. Ms. Parkes asserts that she lost her chance of recovery due to Dr. Hermann's failure to adhere to the appropriate standard of medical care. Our decision today denies Ms. Parkes the opportunity to seek to hold Dr. Hermann liable for the consequences of his assertedly negligent actions. According to the majority, this result is necessary because Ms. Parkes "failed to show that it was more likely than not that defendant's negligence caused her diminished neurological function." The majority is correct that, in North Carolina, a plaintiff who brings a common law negligence claim has the burden of proving a probabilistic connection between his or her alleged injury and the defendant's purportedly negligent conduct. *See Phelps v. City of Winston-Salem*, 272 N.C. 24, 30, 157 S.E.2d 719, 723 (1967) ("If the connection between negligence and the injury appears unnatural, unreasonable and improbable in the light of common experience, the negligence, if deemed a cause of the injury at all, is to be considered a remote rather than a proximate cause.") Ms. Parkes concedes that the scientific evidence cannot support the conclusion that Dr. Hermann's failure to administer tPA was more likely than not the cause of the neurological symptoms she continues to experience. Nevertheless, she asserts that she can carry her burden by showing that Dr. Hermann's negligent conduct more likely than not caused her to lose her chance of recovering from the stroke.

In so arguing, Ms. Parkes urges us to adopt the "loss of chance" doctrine, which has been recognized by courts applying the common law of negligence in no less than twenty-five jurisdictions. *See* Lauren Guest, David Schap & Thi Tran, *The "Loss of Chance" Rule as a Special Category of Damages in Medical Malpractice: A State-by-State Analysis*, 21 J. Legal Econ. 53, 58–60 (2015) (reviewing case law as of 2014 and concluding that 41 states had addressed loss of chance, with 24 states having adopted some version of the doctrine).[2] Under the loss of chance doctrine, the injury that Ms. Parkes seeks redress

2. Since then, the Oregon Supreme Court has also recognized the loss of chance doctrine. *Smith v. Providence Health & Servs.-Oregon*, 361 Or. 456, 393 P.3d 1106 (2017).

for is not her diminished neurological functioning.[3] Instead, Ms. Parkes asserts that Dr. Hermann's negligent conduct deprived her of the opportunity to recover from her ischemic stroke. In other words, Ms. Parkes claims that due to Dr. Hermann's failure to administer tPA, she lost the 30%–35% chance of an improved outcome that she would have enjoyed if Dr. Hermann had adhered to the standard of care. Even under this theory, Ms. Parkes must still satisfy the four elements of a common law negligence claim: she must show that "(1) the defendant owed the plaintiff a duty of care; (2) the defendant's conduct breached that duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; and (4) damages resulted from the injury." *Parker v. Town of Erwin*, 243 N.C. App. 84, 110, 776 S.E.2d 710, 729–30 (2015) (citation omitted). The only difference is that in a loss of chance claim, the injury is defined as the plaintiff's diminished opportunity to recover due to the defendant's negligent conduct, not the plaintiff's physical condition itself. *See Delaney v. Cade*, 255 Kan. 199, 215, 873 P.2d 175, 185 (1994). ("In an action to recover for the loss of a chance to survive or for the loss of a chance for a better recovery, the plaintiff must first prove the traditional elements of a medical malpractice action by a preponderance of the evidence."). On this theory, Ms. Parkes argues her claim should survive defendant's motion for summary judgment because she has alleged that (1) Dr. Hermann owed her a duty of care when he treated her in the emergency room, (2) Dr. Hermann's failure to diagnose her stroke and administer tPA breached that duty, (3) Dr. Hermann's actions were the actual and proximate cause of her foregone 30%–35% chance of recovering from the stroke, and (4) damages resulted from her lost chance of recovery.

To date, North Carolina courts have not recognized a common law negligence claim under the loss of chance theory Ms. Parkes advances in the present case. Despite the majority's characterization of our precedents, this Court has never squarely considered the loss of chance doctrine. Ms. Parkes does not ask this Court to allow her claim as an exercise of sound policy judgment, nor does she ask us to invent a new

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3. In stating that Ms. Parkes "advocates for lowering the proximate cause standard," the majority appears to conflate two distinct theories of recovery—one that does argue for relaxing the proximate cause standard to allow a plaintiff to recover directly for his or her physical injuries even if there is a less than 50% chance that the injuries were caused by a defendant's negligent conduct and one that argues for leaving the proximate causation standard unaltered but defining the plaintiff's lost chance of recovery as a distinct, cognizable category of injury. Plaintiff advocates for the latter, which still requires a showing that the defendant's conduct was the proximate, probable cause of the plaintiff's injury. I examine the merits of Ms. Parkes' argument on the basis of this theory alone.

cause of action. Instead, Ms. Parkes invites this Court to do something it routinely and necessarily does: she invites us to adapt and apply common law principles to evolving conditions and new factual circumstances. *See*, *e.g.*, *Young v. W. Union Tel. Co.*, 107 N.C. 370, 385, 11 S.E. 1044, 1048 (1890) (recognizing for the first time that "mental anguish is actual damage"); *Jackson v. Bumgardner*, 318 N.C. 172, 178, 347 S.E.2d 743, 747 (1986) (recognizing for the first time that pregnancy can be a kind of legal injury); *Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 178 (1992) (recognizing for the first time "a common law negligence claim against a social host for serving alcoholic beverages"). Indeed, when this Court abolished the doctrine of charitable immunity in 1967, it looked to how the common law had been evolving in other states, quoting with approval the following observation from an opinion of the Oregon Supreme Court which abandoned the rule in 1963:

> [I]t is neither realistic nor consistent with the common-law tradition to wait upon the legislature to correct an outmoded rule of case law. . . . Negligence law is common law. . . . The fact that a rule has been followed for fifty years is not a convincing reason why it must be followed for another fifty years if the reasons for the rule have ceased to exist. . . . Tort law in 1963 differs from tort law in 1863 for the most part because of the work of the courts. When courts have recognized the need for remedies for new injuries, the remedies have been found.

Rabon v. Rowan Mem'l Hosp., Inc., 269 N.C. 1, 15, 152 S.E.2d 485, 494 (1967) (alterations in original) (quoting *Hungerford v. Portland Sanatorium & Benev. Ass'n*, 235 Or. 412, 414–15, 384 P.2d 1009, 1010–11 (1963)). This Court has an obligation to do justice when interpreting the common law. *See*, *e.g.*, *State v. Jones*, 367 N.C. 299, 313, 758 S.E.2d 345, 354 (2014) ("The common law 'is not inflexible, and therefore we will not hesitate to abandon a rule which has resulted in injustices, whether it be criminal or civil.' "); *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892–93 (1998) ("Nonetheless, we also are aware that '[i]t is the tradition of common-law courts to reflect the spirit of their times and discard legal rules when they serve to impede society rather than to advance it.' "). Abdicating our responsibility, as the majority does here, based on a vague, legally unsupported intuition that this decision should be made by the legislature is just as improper as overriding a legislative enactment to implement a different policy option. The possibility that the legislature could act in an area of the common law in which it has not yet enacted legislation is an excuse, not a reasoned explanation

for eschewing our judicial duty, no matter how strenuously the majority invokes the need for deference to our coordinate branch of government.

Ultimately, I do not believe that the harsh result of denying Ms. Parkes the opportunity to hold Dr. Hermann liable for his negligent conduct is compelled by our precedents, by "traditional" principles of tort law, or by the separation of powers. Instead, I agree with the courts in the majority of jurisdictions which have examined the loss of chance doctrine and concluded that claims like Ms. Parkes' are cognizable. Accordingly, I dissent and would permit Ms. Parkes to present her claim to a jury on the theory that her lost chance of recovering from her ischemic stroke is a cognizable injury.

Both the Court of Appeals and the majority erroneously state that recognizing the loss of chance doctrine would create tension with this Court's settled precedents. The precedents the Court of Appeals and the majority rely upon are simply irrelevant to the issue before this Court today. First, *Gower v. Davidian*, 212 N.C. 172, 193 S.E. 28 (1937), did not "outright reject what is today called a loss of chance claim," nor did it "firmly frame[ ] medical malpractice claims within the confines of traditional proximate cause." A close reading of *Gower* demonstrates that it is neither controlling nor persuasive authority because the evidence presented in that case conclusively defeated plaintiff's negligence claim under any theory of injury.

The plaintiff in *Gower* was injured in an automobile accident. *Id.* at 173, 193 S.E. at 29. On the day of the accident, the plaintiff was admitted to a hospital, where he was examined by the defendant. *Id.* at 173–74, 193 S.E. at 29. At the summary judgment stage, the Court accepted as alleged that the defendant had failed to conduct a thorough physical examination before discharging the plaintiff to his home without treatment. *Id.* Less than two weeks after the accident, the plaintiff was admitted to Duke Hospital, where physicians diagnosed him with a fractured neck. *Id.* at 174, 193 S.E. at 29. Surgeons at Duke Hospital attempted to reset the fracture, but "[d]ue to the condition and location of his injury it was impossible to apply sufficient traction to reset the bone, and [the plaintiff suffered] a permanent injury." *Id.* Subsequently, the plaintiff filed suit against the defendant seeking damages for the defendant's assertedly negligent failure to appropriately diagnose and treat the plaintiff's neck fracture. *Id.*

At trial, the plaintiff's expert witness testified that "had that fracture and dislocation been replaced, put in proper position immediately it would have been much easier [to fix], but to wait until after two

weeks it would be almost impossible to replace it owing to callus." *Id.* at 175, 193 S.E. at 30. In modern parlance, the expert witness testified that the standard of care for resetting fractures demanded an attempt to reset the bone within two weeks. *Id.* After two weeks, the risk of calluses forming significantly diminished the likelihood that treatment would be successful. *Id.* It was undisputed that the defendant did not attempt to reset the plaintiff's fracture. *Id.* However, the plaintiff still received a thorough examination by physicians at Duke Hospital within two weeks of his injury. *Id.* The physicians determined that the fracture could not be reset, but it was not because calluses had formed. As the Court explained, "[a]ll the evidence tends to show that [a] callus does not develop to an extent that would interfere with the resetting of a fracture within a minimum of two weeks, and that there was no evidence of [a] callus around the fracture of plaintiff's neck which would impede or interfere with the resetting of the bone [at the time he was examined at Duke Hospital]." *Id.* The evidence established that the plaintiff's chances of recovery were the same on the day he was appropriately treated by the Duke Hospital physicians as they were on the day the defendant negligently failed to adhere to the standard of care. *Id.* at 176, 193 S.E. at 30–31. The fact that the Duke Hospital physicians could not reset the plaintiff's fracture resulted from "the condition and location of his injury," not because of the time that had elapsed between the defendant's examination and the examination conducted by the Duke Hospital physicians. *Id.* at 174, 193 S.E. at 29. Accordingly, the defendant could affirmatively prove that his actions had no impact on either the plaintiff's actual recovery or his chances of recovering. *Id.*

> The evidence discloses that the use of modern equipment and methods by trained and skillful surgeons at a time when callus had not developed [e.g., within two weeks of incurring the fracture] sufficiently to interfere with proper setting of the bone has availed nothing. The character and location of the fracture is such that proper traction cannot be successfully used. Unfortunately, upon this record as it now appears, the plaintiff has suffered an injury that *could not then and cannot now* be relieved by the medical profession, except by performing a most dangerous operation. *There is no evidence of any injury which the plaintiff sustained by reason of the delay of less than two weeks caused by the alleged conduct of the defendant*. In so far as plaintiff's right to recover is concerned, what boots it that the defendant did not make a thorough clinical and X-ray examination? Plaintiff's

> unfortunate condition results from his own act and not from any negligent conduct of the defendant.

Id. at 176, 193 S.E. at 30–31 (emphases added).[4] Unlike the plaintiff in *Gower*, Ms. Parkes did not receive appropriate treatment within the time period prescribed by the applicable standard of care.

These facts help contextualize this Court's statement in *Gower* that "[t]he rights of the parties cannot be determined upon chance." *Id.* at 176, 193 S.E. at 30. Of course, the "rights of the parties" are, to some extent, "determined upon chance" in every medical malpractice case. Any individual patient's right to hold a physician liable for negligent conduct inevitably depends on circumstances out of either parties', or any parties', forecast and control.[5] Denying Ms. Parkes an opportunity to bring her loss of chance claim to a jury will not purge "chance" from North Carolina's medical malpractice law. Instead, our statement that "[t]he rights of the parties cannot be determined upon chance" only refers to the nature of the evidence required to establish a causal link between a defendant's conduct and a plaintiff's alleged injury. *See Shumaker v. United States*, 714 F. Supp. 154, 163 (M.D.N.C. 1988) ("The supreme court's principal concern [in *Gower* and its progeny] was the sufficiency of the evidence of causation, not recognition of a different type of harm."). In *Gower*, the only evidence the plaintiff presented which supported his argument that the defendant's negligence caused his injury was speculative testimony that "had this case received immediate attention and had that fracture and dislocation reduced, [the plaintiff's] chances for further recovery, or for perfect recovery, would have been much greater." *Gower*, 212 N.C. at 175, 193 S.E. at 30. Yet, the plaintiff's

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4. To analogize the facts of *Gower* to the present case, it would be as if thirty minutes after Dr. Hermann initially examined Ms. Parkes, a second physician examined her, correctly diagnosed her stroke, and administered tPA within three hours of the onset of her neurological symptoms. If Ms. Parkes failed to recover despite receiving tPA within the three-hour window, a court could ascertain that Dr. Hermann's negligent failure to diagnose and treat Ms. Parkes had not deprived her of an opportunity to recover from her stroke.

5. For example, imagine that Treatment X is the only available treatment for Condition Y. When administered, Treatment X is effective for 80% of patients who suffer from Condition Y. If left untreated, Condition Y is fatal for 90% of patients and inconsequential for all others. If a physician negligently fails to administer Treatment X to a patient suffering from Condition Y, the "rights of the parties" will be fixed by "chance"—the 20% chance that the patient would not have recovered even if she had received Treatment X (creating liability for an action that did not contribute to the patient's death) or the 10% chance that the patient will recover without treatment (absolving liability for an otherwise negligent act).

evidence also established that even if he had received "immediate attention," there was no chance that his "fracture and dislocation" could have been "reduced." *Id.* at 176, 193 S.E. at 30. The expert witness "testified that an effort to reset [a fracture] should be made within two weeks," and other testimony established that "an effort was actually made by [a] competent physician[ ] to reset the fracture within the two weeks." *Id.* The expert witness's testimony that "the chances for further recovery would have been much greater [if the plaintiff received immediate treatment]" was both unsupported by medical evidence and affirmatively repudiated by events as they unfolded. *Id.* A naked assertion that there is a "chance" the plaintiff might have recovered if the defendant had not acted negligently is, without supporting evidence, insufficient to meet the plaintiff's burden of proof. That is no less true in the context of loss of chance claims. If the only evidence Ms. Parkes presented was an expert witness's bare testimony that there was a "chance" tPA would have improved her odds of recovery, the trial court certainly would not have erred in denying her claim.

The majority's reliance on *Buckner v. Wheeldon*, 225 N.C. 62, 33 S.E.2d 480 (1945), is similarly misplaced. In *Buckner*, this Court did not pass up on an "opportunity" to "relax the proximate cause requirement for a medical malpractice claim" as the majority asserts. Instead, the Court in *Buckner* merely reaffirmed that a qualified physician who treats a patient in accordance with the applicable standard of care cannot be held liable for the patient's subsequent failure to fully recover.

> [I]t has been repeatedly held here that the physician or surgeon who undertakes to treat a patient implies that he possesses the degree of professional learning, skill and ability which others similarly situated ordinarily possess; that he will exercise reasonable care and diligence in the application of his knowledge and skill to the patient's care; and exert his best judgment in the treatment and care of the case entrusted to him.
>
> And in accordance with rules of general application *the liability of a surgeon cannot be predicated alone upon unfavorable results of his treatment*, and he may be held liable for an injury to his patient only when the injurious result flows proximately from want of that degree of knowledge and skill ordinarily possessed by others of his profession, or from the omission to exercise reasonable care and diligence in the application of his knowledge and skill to the treatment of his patient.

Id. at 65, 33 S.E.2d at 483 (cleaned up) (emphasis added). It is incorrect to construe *Buckner* to stand for anything beyond the uncontroversial proposition that a qualified physician who provides appropriate medical care to a patient will not be held liable because he or she has not acted negligently, even if the patient does not fully recover.

Regardless, the disposition in *Buckner* was reversal of the trial court's grant of defendant's motion for summary judgment, which allowed the plaintiff to bring his case to trial. *Id.* at 66, 33 S.E.2d at 483 ("While all the injurious results complained of may not be attributed to the negligence of the attending physician . . . we think there was sufficient evidence to warrant submission of the case to the jury . . . ."). Thus, even if there were some indication that the *Buckner* plaintiff had invited this Court to recognize the loss of chance doctrine and even if there were some language in the opinion that could be fairly construed as expressing skepticism about the doctrine—and there is neither—the statement the majority relies upon would be dicta, at most. *See Moose v. Bd. of Comm'rs of Alexander Cnty.*, 172 N.C. 419, 433, 90 S.E. 441, 448 (1916) ("The doctrine of stare decisis contemplates only such points as are actually involved and determined in a case, and not what is said by the court or judge outside of the record or on points not necessarily involved therein. Such expressions, being obiter dicta, do not become precedents."). The view of a federal district court called upon to apply North Carolina negligence law further confirms that *Gower*, *Buckner*, and more recent Court of Appeals' decisions have not expressed a clear opinion one way or the other on loss of chance claims. *Shumaker*, 714 F. Supp. at 163–64 (previous decisions by North Carolina courts "can, but need not, be construed as inconsistent with recognizing lost possibility as a compensable loss.").

In straining to apply extraneous precedents to the novel legal question presented to us today, the majority overlooks numerous more relevant precedents which indicate that recognizing the loss of chance doctrine is not inconsistent with our common law tort jurisprudence. For example, when this Court has previously confronted an issue "of first impression" under North Carolina's common law, "[w]e have accordingly investigated the law in other jurisdictions to see how these jurisdictions have ruled on cases similar to the one at bar." *Jackson*, 318 N.C. at 178, 347 S.E.2d at 747; *see also Gillikin v. Bell*, 254 N.C. 244, 246–47, 118 S.E.2d 609, 611 (1961) (citing numerous cases from sister jurisdictions in "ascertain[ing] if [the common law] afforded such a right of action"); *Rabon*, 269 N.C. at 12, 152 S.E.2d at 493 (examining the "view[s] expressed in the recent decisions of our sister States" before

overturning North Carolina precedent and abolishing the charitable immunity doctrine). Of course, decisions from sister jurisdictions are only instructive in this Court to the extent that we find their "reasoning and the results . . . persuasive." *Jackson*, 318 N.C. at 179, 347 S.E.2d at 748. Nonetheless, it is notable that the majority omits any reference to the numerous well-reasoned decisions from our sister jurisdictions recognizing the loss of chance doctrine as consonant with common law tort principles. *See*, *e.g.*, *Matsuyama v. Birnbaum*, 452 Mass. 1, 4, 890 N.E.2d 819, 823 (2008) ("We conclude that recognizing loss of chance in the limited domain of medical negligence advances the fundamental goals and principles of our tort law."); *Smith v. Providence Health & Servs.-Oregon*, 361 Or. 456, 479, 393 P.3d 1106, 1118 (2017) ("We agree with plaintiff that . . . the causation element of a medical negligence cause of action in Oregon . . . can apply to the loss of chance when it is understood as an injury." (cleaned up)).

A fair reading of our precedents confirms that recognizing the loss of chance doctrine serves the animating purposes and principles of North Carolina's common law of torts. This Court has endorsed the idea that, under the common law, "liability for tortious conduct is the general rule; immunity is the exception." *Rabon*, 269 N.C. at 4, 152 S.E.2d at 487; *see also Young*, 107 N.C. at 373, 11 S.E. at 1045 ("The principle that for the violation of every legal right, nominal damages, at least, will be allowed, applies to all actions, whether for tort or breach of contract, and whether the right is personal, or relates to property."). We have refused to permit concerns regarding how damages should be calculated to deter us from recognizing novel categories of injury. *Id.* at 385, 11 S.E. at 1049 ("The difficulty of measuring damages to the feelings is very great, but it is submitted to the jury in many other instances, as above stated, and it is better it should be left to them under the wise supervision of the presiding judge, with his power to set aside excessive verdicts, than, on account of such difficulty, to require parties injured in their feelings by the negligence, the malice, or wantonness of others, to go without remedy."). We have held that recognizing that a plaintiff has "stated a cognizable claim" arising from a novel factual context "for liability under common law principles of negligence" is not in tension with our judicial role, nor should recognition of the claim be avoided for prudential reasons, even when the result of our decision creates liability in a circumstance where none existed previously. *Hart*, 332 N.C. at 304, 420 S.E.2d at 177.

In departing from our historic approach to novel tort claims, the majority establishes a rule that immunizes physicians from liability for their negligent conduct any time they fail to administer a treatment that

cannot be proven to be effective 50% of the time or more. *See Smith*, 361 Or. at 480, 393 P.3d at 1119 ("[A] negligent medical provider who prevents a patient from having a shot at a 45 percent chance of a favorable medical outcome need not compensate that patient at all. That patient bears the entire cost of the negligent conduct, a result that does not spread the risk of the negligent conduct to the negligent party, although a function of the tort system is to distribute the risk of injury to or among responsible parties." (cleaned up)). This "all or nothing rule is inadequate to advance the fundamental aims of tort law" because it "does not serve the basic aim of 'fairly allocating the costs and risks of human injuries' " and also " 'fails to deter' medical negligence because it immunizes 'whole areas of medical practice from liability.' " *Matsuyama*, 452 Mass. at 13, 890 N.E.2d at 830. This approach is likely to have harmful consequences given that "[m]uch treatment of diseases is aimed at extending life for brief periods and improving its quality rather than curing the underlying disease. Much of the American health care dollar is spent on such treatments, aimed at improving the odds." *McMackin v. Johnson Cnty. Healthcare Ctr.*, 73 P.3d 1094, 1099 (Wyo. 2003), *on reh'g*, 2004 WY 44, 88 P.3d 491 (Wyo. 2004).

Further, I firmly disagree with the majority's conclusion that it would be improper for this Court to recognize the loss of chance doctrine because doing so "would require a departure from our traditional common law on proximate causation and damages . . . [because s]uch a policy judgment is better suited for the legislative branch of government." Recognizing loss of chance as a cognizable injury does not require us to create a new cause of action—the cause of action is the common law cause of action of negligence. *Cf. Hart*, 332 N.C. at 305–06, 420 S.E.2d at 178 ("The defendants, relying on cases from other jurisdictions, say that there is not a common law negligence claim against a social host for serving alcoholic beverages. . . . Our answer to this is that we are not recognizing a new claim. We are applying established negligence principles and under those principles the plaintiffs have stated claims."). As we have long held, it is entirely appropriate for this Court to "re-examine our rule[s] in the light of current conditions [and] the tide of judicial decision elsewhere." *Rabon*, 269 N.C. at 4, 152 S.E.2d at 487.

The majority approvingly quotes the Court of Appeals opinion for the proposition that "any change in our negligence law lies 'within the purview of the legislature and not the courts.' " *Parkes v. Hermann*, 265 N.C. App. 475, 478, 828 S.E.2d 575, 578 (2019) (quoting *Curl v. Am. Multimedia, Inc.*, 187 N.C. App. 649, 656–57, 654 S.E.2d 76, 81 (2007)). However, "[a]bsent a legislative declaration, this Court possesses the

authority to alter judicially created common law when it deems it necessary in light of experience and reason." *State v. Freeman*, 302 N.C. 591, 594, 276 S.E.2d 450, 452 (1981). Interpreting and applying the common law in no way arrogates for this Court a function "better suited for the legislative branch of government." *See Funk v. United States*, 290 U.S. 371, 383 (1933) ("It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions."). Common law adjudication is not transformed into impermissible policymaking every time we "adapt[ ] [the common law] to changing scientific and factual circumstances." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011). Rather, it is how this Court discharges one of its core judicial functions. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 784 (2002) ("[S]tate-court judges possess the power to 'make' common law . . . ."). Evolution of the common law through the application of existing principles in novel circumstances is both appropriate and obligatory because

> [o]ne of the great virtues of the common law is its dynamic nature that makes it adaptable to the requirements of society at the time of its application in court. There is not a rule of the common law in force today that has not evolved from some earlier rule of common law, gradually in some instances, more suddenly in others, leaving the common law of today when compared with the common law of centuries ago as different as day is from night. The nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice.

Gastonia Pers. Corp. v. Rogers, 276 N.C. 279, 287, 172 S.E.2d 19, 24 (1970) (quoting *State v. Culver*, 23 N.J. 495, 129 A.2d 715 (1957)). Thus, it in no way threatens the separation of powers that "from time to time when this Court has been convinced that changes in the way society or some of its institutions functioned demanded a change in the law, it rejected older rules which the Court itself developed in order that justice under the law might be better achieved," even if "[t]hese decisions were sometimes made in the face of arguments that such changes ought to be made, if at all, by the legislature." *Mims v. Mims*, 305 N.C. 41, 55, 286 S.E.2d 779, 788 (1982).

It is certainly possible that recognizing the loss of chance doctrine would have consequences for the practice of medicine and the market

for health insurance in North Carolina, both of which are subjects fit for regulation by the legislature. But the majority's decision to deny Ms. Parkes the opportunity to recover for her lost chance of recovery will have policy consequences all the same. *Cf.* Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV. 821, 852 (1994) ("A rule of law is a policy, however it is explained."). What distinguishes a permissible judicial adjudication from an impermissible policymaking exercise is not the existence or nonexistence of attendant policy effects: it is whether or not the decision is justified by precedent and the reasonable application of legal principles and methods. While this Court must remain attuned to the real-world consequences of our decisions, we intrude upon an authority exclusively reserved to the legislature when we base our decisions on extrinsic policy considerations. *Id.* at 855 ("[Courts] must resolve novel issues of liability within a matrix of statutes and tort principles without claiming public policy for its own decision. Only this preserves the distinction between the adjudicative and the legislative function."). For example, I have no doubt that it would be improper for this Court to resolve Ms. Parkes' claim based upon our own determination that "the benefits of allowing loss of chance damages . . . offset the detriments of a probable increase in medical malpractice litigation and malpractice insurance costs." *Fennell v. S. Maryland Hosp. Ctr., Inc.*, 320 Md. 776, 794, 580 A.2d 206, 215 (1990). But it does not follow that a decision arrived at through the application of sound legal principles is a "policy judgment" merely because it allows (or disallows) a claim that, inevitably, will have benefits and detriments when judged as a matter of policy. Indeed, because our resolution of this case solely involves our interpretation of the common law, the legislature may choose to override our judgment by statutory enactment, just as it would have been able to if we had instead decided to adopt the loss of chance doctrine. *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 356, 416 S.E.2d 166, 171 (1992) ("[I]f our state legislature has expressed its intent to supplant the common law with exclusive statutory remedies, then common law actions . . . will be precluded.").

Our decision today unnecessarily creates an unjust rule. Because of our decision, Ms. Parkes and patients like her are denied any opportunity to seek recompense for the harms caused by the negligent conduct of the medical professionals to whom they have entrusted their care. It accords with our precedents and principles to recognize Ms. Parkes' lost chance of recovery for what it truly was: a tangible injury caused by defendant's negligent conduct which is susceptible to valuation and is redressable in tort law. The fact that advances in medical science allow researchers to demonstrate that a treatment is 35% (or 49.9%) effective,

rather than 50.01% effective, is not a reason for denying the sole remedy available to patients wronged by medical malpractice. In contrast to the majority, I would recognize that when a physician's negligent conduct "reduces or eliminates the patient's prospects for achieving a more favorable medical outcome, the physician has harmed the patient" by destroying "something of value, even if the possibility of recovery was less than even prior to the physician's tortious conduct." *Matsuyama*, 452 Mass. at 3, 890 N.E.2d at 823. I agree with Professor Joseph King, who wrote in an influential article that

> [o]n a more visceral level [ ] the question [is] whether one who loses a not-better-than-even chance of achieving some favorable result, perhaps life, really loses nothing worthy of redress. The loss includes not only the then-existing chance, but also the loss of the opportunity to benefit from potential scientific breakthroughs that could transform the chance into reality. From a psychological standpoint, there is a qualitative difference between a condition that affords a chance of recovery and one that offers no chance at all, as any patient with terminal cancer will confirm. This inherent worth of a chance is added reason for recognizing its loss as a compensable interest.

Joseph H. King Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale L. J. 1353, 1378 (1981). Extending existing common law principles to allow Ms. Parkes' claim would serve the predominant goal of tort law by providing a remedy to a "victim of medical malpractice" who otherwise lacks "any remedy at all if the common law does not provide one." *Smith*, 361 Or. at 478, 393 P.3d at 1118. The Court of Appeals decision should be reversed, and Ms. Parkes should be allowed to present her case to a jury.

Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
NORFOLK JUNIOR BEST

No. 300A93-3

Filed 18 December 2020

Constitutional Law—due process—Brady violation—exculpatory evidence—materiality

In a trial for first-degree murder, the State violated defendant's due process rights by failing to disclose exculpatory evidence—including a witness interview, unidentified hairs found on the victim, and forensic lab notes regarding blood residue—which would have allowed defendant to impeach the State's principal witness and undermine the persuasiveness of the State's forensic evidence. Given the lack of overwhelming evidence of defendant's guilt presented by the State at trial, combined with the materiality of some of the previously undisclosed evidence, there was a reasonable probability that, had the evidence been disclosed, the jury's verdict would have been different.

Justice NEWBY dissenting.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 23 January 2018 by Judge Douglas B. Sasser, Sr. in Superior Court, Bladen County denying defendant's motion for appropriate relief. Heard in the Supreme Court on 1 September 2020.

Joshua H. Stein, Attorney General, by Jonathan P. Babb, Special Deputy Attorney General, for the State-appellee.

Thomas, Ferguson & Mullins, LLP, by Jay H. Ferguson, and Center for Death Penalty Litigation, by Ivy A. Johnson, for defendant-appellant.

EARLS, Justice.

In December 1991, the bodies of an elderly couple, Gertrude and Leslie Baldwin, were found in their home in Whiteville, North Carolina. The couple had been beaten, stabbed, and apparently robbed. Norfolk Junior Best, the defendant in this case, was indicted for first-degree burglary, first-degree rape, robbery with a dangerous weapon, and two

counts of first-degree murder. Following a jury trial, he was convicted of all counts and sentenced to death. His conviction was affirmed on direct appeal by this Court. *State v. Best*, 342 N.C. 502, 467 S.E.2d 45 (1996).

In postconviction proceedings, it became clear that the State failed to produce certain pieces of evidence to Mr. Best prior to the 1993 trial. Instead, the evidence was, in part, voluntarily provided to Mr. Best's postconviction counsel in 2011. Later that year, postconviction counsel located additional evidence in the attic of Whiteville City Hall. After the additional evidence was produced and uncovered, Mr. Best filed a motion for appropriate relief arguing, *inter alia*, that the State's failure to disclose exculpatory evidence was a violation of his right to due process pursuant to the United States Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). The trial court denied the motion, concluding that Mr. Best had not shown prejudice.

Mr. Best claims, and the State denies, that the undisclosed evidence was material to his guilt such that he was prejudiced by the State's failure to produce it. Mr. Best argues, and the State denies, that had the evidence been disclosed, there is a reasonable probability that the outcome of his trial would have been different. We conclude that the undisclosed evidence was material. It was reasonably probable that, had it been disclosed to Mr. Best prior to trial, the outcome would have been different. Therefore, we reverse the trial court's denial of Mr. Best's motion for appropriate relief, remanding with instructions to grant the motion and order a new trial.

Background[1]

Prior to trial, Mr. Best had requested discovery from the State several times regarding the case against him. On 20 December 1991, Mr. Best filed a motion for discovery requesting, *inter alia*, the following:

> 6. To permit the defendant to inspect and copy or photograph books, papers, documents, photographs, motion picture, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the State and which are

1. The State does not dispute that the evidence identified by Mr. Best was not disclosed prior to trial, arguing instead that Mr. Best has not shown that there is a reasonable probability that the undisclosed evidence affected the outcome of Mr. Best's trial. We note this only to emphasize our sensitivity to the principle that "[f]act finding is not a function of our appellate courts." *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986). If there was a factual dispute to be resolved in this case, the appropriate remedy would likely be to remand to the trial court for an evidentiary hearing.

> material to the preparation of this defendant's defense, which the State intends to use as evidence at defendant's trial or which were obtained from or belong to the defendant (G.S., 15A-903(d);
>
> 7. To provide a copy or permit the defendant or his attorney to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with this case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor (G.S. 15A-903(e);
>
> 8. The District Attorney is also given notice that these requests are continuing, and the State is under a duty to disclose any of the requested material promptly to the defendant or his attorney if discovered or the State decides to use it at the captioned defendant's trial (G.S. 15A-907);

On 12 March 1992, Mr. Best filed a motion (dated 7 January 1992) seeking to inspect, examine, and test physical evidence in the State's control. On the same date, remarking that the 20 December 1991 request had gone unanswered, Mr. Best filed a motion to compel the State to produce discovery. The motion to compel specifically requested test results, exculpatory information, and potentially favorable evidence. After being told that the District Attorney had an "open file policy," defense counsel attempted on 19 March and 20 March 1992 to review Mr. Best's file at the District Attorney's office, but in both instances was told that the file was unavailable. On 2 April 1992, the District Attorney provided defense counsel with discovery, and continued to produce materials until shortly before trial.

Although the file stamps are unclear, it appears that Mr. Best filed two more discovery requests on 24 June and 16 September 1992. In the first, Mr. Best requested DNA test results from samples referenced in a report that had been produced to him. In the second, he requested information relevant to the reliability of the DNA testing expected to be offered as evidence during trial.

In the preliminary statement that appears before our decision on Mr. Best's direct appeal, the evidence presented at trial was described as follows:

> The defendant was tried on two charges of first-degree murder and one charge each of first-degree burglary, robbery with a dangerous weapon, and first-degree rape.

> The State's evidence showed that Leslie Baldwin and his wife, Gertrude Baldwin, were eighty-two and seventy-nine years of age, respectively. They were killed in their home during the night of 30 November [1991]. Earlier that day, the defendant had done yard work for them.
>
> Mr. Baldwin died as a result of the cutting of his carotid artery, and Mrs. Baldwin died of blunt-force trauma to the head. Money was missing from Mr. Baldwin's wallet and from Mrs. Baldwin's purse. The defendant's DNA matched one of the semen samples taken from Mrs. Baldwin, and his fingerprint matched one on a paring knife found beside Mr. Baldwin's body. The defendant bought between $700 and $1,000 worth of crack cocaine within two days after the killings.

Best, 342 N.C. at 508–09, 467 S.E.2d at 49–50.

The Baldwins were discovered dead in their home on Tuesday, 3 December 1991. At trial, the State presented evidence that the Baldwins were robbed of several hundred dollars, killed in their home, and that Mrs. Baldwin had been raped. The couple's daughter testified that Mrs. Baldwin, who took various medications, filled her pillbox regularly each Thursday. The medicine in the pillbox was arranged by time of day, as well as day of the week. Based on the slots that were filled with medicine in the pillbox, the couple's daughter testified that Mrs. Baldwin had last taken her medication at 11:00 p.m. on Saturday, 30 November 1991. The couple's daughter also testified that Mr. Baldwin habitually turned on a light in the kitchen before retiring to bed. The light was discovered to be on in the kitchen. Similarly, she testified that Mr. Baldwin, by routine, retrieved and read the newspaper every morning, and that it was the first thing he did after rising, getting dressed, and taking his medicine. When the Baldwins' bodies were discovered, the papers for Sunday, 1 December; Monday, 2 December; and Tuesday, 3 December 1991 were all laying on the front porch. The State points to this evidence as support for the conclusion that the deaths occurred in the late evening of Saturday, 30 November 1991. A witness for the State testified that she was with Mr. Best at a night club beginning at 12:30 a.m. or 1:00 a.m. on 1 December 1991.

At trial, the State also tendered evidence that Mr. Best was the perpetrator. The trial evidence identified by the State consists of (1) a latent bloody fingerprint, matched to Mr. Best, found on the blade of a paring knife which was lying near Mr. Baldwin's body; (2) the results of a DNA test showing that sperm found in Mrs. Baldwin's vagina was a partial

match to Mr. Best, and that the probability of another unrelated person matching the tested profile was "approximately 1 in 459 for the North Carolina white population, 1 in 18 for the North Carolina black population,[2] and 1 in 484 for the North Carolina Lumbee population;" and (3) testimony from Tammy Rose Smith that Mr. Best spent one or two hundred dollars on cocaine in the early morning hours of 1 December 1991, and from Carolyn Troy that Mr. Best spent several hundred dollars on cocaine during the evening of 2 December 1991.

At the trial's conclusion, Mr. Best was convicted and sentenced to death. After we affirmed the conviction, Mr. Best sought postconviction relief. He filed a motion for appropriate relief in August 1997, which the trial court denied in April 1998. We denied certiorari review. *State v. Best*, 349 N.C. 365, 525 S.E.2d 179 (1998).

In March and August of 2011, the State voluntarily produced parts of its file to Mr. Best's new postconviction counsel. After defense counsel filed a motion seeking complete discovery pursuant to N.C.G.S. § 15A-1415(f), defense counsel discovered additional evidence "in a storage room in the attic of the Whiteville City Hall." The following evidence arose in postconviction discovery:

Undisclosed Forensic Evidence

At trial, a witness for the State testified that hairs were collected from the crime scene. Further, testimony established that, in addition to Mr. Best, head and pubic hair samples were collected from two other suspects, Eddie Best and Daniel Blanks, and from Mr. and Mrs. Baldwin. The hair was analyzed. At trial, Mr. Best's counsel attempted to elicit that none of the hairs had been identified as coming from a Black person but was unable to cross-examine the witness on the findings of a nontestifying expert. However, the State never disclosed that more than 70 hairs collected from the crime scene, found on Mrs. Baldwin's arm, in her pubic hair combings, and beneath Mr. Baldwin's fingernails, were identified as Caucasian and were not a match to anyone who was tested.

At trial, a witness for the State testified that tapings from the crime scene were taken and tested for trace hair and fiber evidence. The State did not disclose, however, that a fiber comparison analysis was conducted between (1) a number of items, including various items of clothing and shoes, from Mr. Best's home and person; and (2) various items from the crime scene, including bedding, tapings, clothing, fingernail scrapings, a place mat, and carpeting. The results of the undisclosed

2. Mr. Best is African-American.

comparison were that no association was found between Mr. Best's effects and the items from the crime scene.

As discussed previously, Mr. Best's fingerprint was located on a paring knife that was lying next to Mr. Baldwin's body at the crime scene. Lab notes which had not been disclosed prior to trial contained the following statement pertaining to the possible fingerprint: "The ridge detail on item #4 was examined & determined to be of no value @ this time however; major case inked impressions will be needed in order to effect any kind of conclusive comparison."

At trial, witnesses for the State testified that blood remnants were found as a result of luminol testing "on the carpet in Gertrude Baldwin's bedroom and in the hallway" near where Mr. Baldwin was found. Another witness testified that she tested a pair of Mr. Best's shoes and determined that they did not have blood on them. Undisclosed lab notes indicated that the luminol tests had revealed shoe tracks of blood residue, about which the witness did not testify and of which defense counsel was not aware.

Undisclosed Witness Interviews

As discussed previously, Carolyn Troy testified at trial that Mr. Best spent hundreds of dollars during the evening of 2 December 1991, near the time that the State believes the Baldwins were robbed and murdered. However, the State did not disclose Ms. Troy's initial witness interview, during which Ms. Troy stated that she was with Mr. Best at the time, but that he only had $30 to $40 on him.

Other Evidence

The evidence at trial also indicated that the assailant broke a pane of glass to enter the home. A lab report discussing the analysis of the glass indicated that clothing and two pairs of shoes from Mr. Best did not have any glass that matched the glass collected from the crime scene—although one of the pairs of shoes showed glass particles which did not match the glass from the crime scene. The record includes an affidavit from Mr. Best's trial counsel indicating that the report was included in postconviction discovery, and had not been previously disclosed to trial counsel.

The State also did not disclose that three one-hundred-dollar bills were found in a money holder in Mrs. Baldwin's purse.

Undisclosed Alternate Suspects

Finally, the State failed to disclose evidence regarding two alternate suspects: Ricky Winford and Destene Harris.

Ricky Winford

The State's 2011 disclosures contained a number of documents relating to Ricky Winford, an alternate suspect in the crime. Interview notes suggest that a woman called police on the evening of 4 December 1991 to report that, on the morning of 3 December 1991, someone named "Rick" was driving around the Baldwins' neighborhood without lights. The driver drove up and down the street three or four times until someone exited the car and walked away. The car drove off and returned about forty-five minutes later, at which time a friend of the woman's asked the driver what he was doing. The driver stated that he was looking for a friend. This occurred before the Baldwins' bodies were discovered. Police ran the license plate and connected the vehicle to someone named Gary Clayton Derrick, who apparently knew Mr. Winford. Mr. Derrick reported that Mr. Winford had stolen his car and taken off, and later reported speaking with a third person, Janet. The notes indicate that Mr. Winford told Janet "that he had killed some people in Whiteville." In a record of a phone interview, Mr. Derrick reported that Winford had previously bragged about killing people, had previously committed burglaries, and had once pulled a knife on Derrick.

Destene Harris

The State's 2011 disclosures also included a number of documents pertaining to Destene Harris. According to a 5 December 1991 report from Alice Cooke, Mr. Harris threatened to kill some "old farts" that lived hear him. He apparently also often carried a knife. Ms. Cooke also reported that, on 2 December 1991 (a Monday), she had heard Mr. Harris state that he had killed two "old farts" over the weekend. Mr. Harris was incarcerated in Alamance County from 29 November until 3 December 1991.

Mr. Best filed the instant motion, his second motion for appropriate relief, on 16 January 2014. He argued (1) that the State withheld exculpatory evidence in violation of his constitutional rights established in *Brady* and its progeny; (2) that the State misled the jury as to the victims' time of death, or, in the alternative, that his trial counsel was ineffective for failing to refute the State's theory on time of death; and (3) that the State misled the jury as to the reliability of the DNA evidence it presented against him, or, in the alternative, that his trial counsel was ineffective for failing to refute the DNA evidence. Because we determine that Mr. Best's *Brady* claim is meritorious, we need not address the remaining claims.

As to Mr. Best's claim that he is entitled to a new trial due to the State's failure to disclose favorable evidence, the superior court made the following conclusions of law:

7. In his MAR2 Claim I, Best claims that he is entitled to a new trial because the state wrongfully concealed exculpatory evidence regarding (a) two alternate suspects[,] (b) exculpatory forensic testing results[,] and (c) key evidence undermining its theory of motive and identity.

8. Best has failed to show the existence of the asserted ground for relief. N.C. Gen[.] Stat. § 15A-1420(c)(6); Brady v. Maryland, 373 U.S. 83 (1963); State v. Strickland, 346 N.C. 443, 488 S.E.2d 194 (1997).

9. In the present case there was overwhelming evidence at trial against defendant and none of the alleged Brady material would have amounted to a reasonable probability of a different result. Therefore, defendant's Brady claim must fail. Strickland at 457, 488 S.E.2d at 202.

10. In post-conviction, the overwhelming evidence presented at trial was not refuted or weakened. Instead the post-conviction DNA removed any doubt, reasonable or unreasonable, of defendant's guilt. Both experts testified in post-conviction that the sperm fraction, not the skin fraction, taken from the rape/murder victim was an exact match for defendant's DNA profile. (See 11 April 2016 Post-conviction hearing transcript pp. 56 [testimony of Maher Noureddine] and 68 [testimony of Mark Boodee].)

11. Given the evidence showing defendant's guilt presented at trial, none of the complained of evidence in Claim I, if turned over could have amounted to a reasonable probability of a different result. Additionally, the post-conviction DNA testing results further illustrate the lack of any possible prejudice.

12. As this Court can determine from the motion and any supporting or opposing information presented that this claim is without merit, an evidentiary hearing is not necessary to decide the issues raised in this claim. N.C. Gen. Stat. § 15A-1420(c)(1) and State v. McHone, 348 N.C. 254, 257, 499 S.E.2d 761, 762-63 (1998), cert. denied, 528 U.S. 1095, 120 S. Ct. 835, 145 L. Ed. 2d 702 (2000).

Mr. Best petitioned for a writ of certiorari to this Court, which we allowed.

Standard of Review

The trial court denied Mr. Best's motion for appropriate relief without an evidentiary hearing, deciding that it could "determine from the motion and any supporting or opposing information presented that this claim is without merit." *See* N.C.G.S. § 15A-1420(c)(1) (2019) (permitting a trial court to forgo an evidentiary hearing on a motion for appropriate relief if "the court determines that the motion is without merit"). Because the trial court did not make findings of fact, instead concluding that Mr. Best was not entitled to relief as a matter of law, our review of the trial court's decision is de novo. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) ("Conclusions of law are reviewed de novo and are subject to full review.").

Analysis

The State violates the federal constitution's Due Process Clause "if it withholds evidence that is favorable to the defense and *material* to the defendant's guilt or punishment." *Turner v. United States*, 137 S. Ct. 1885, 1888 (2017) (quoting *Smith v. Cain*, 565 U.S. 73, 75, 132 S. Ct. 627, 630 (2012)). However, not every failure to disclose violates the Constitution. Instead, "prejudicial error must be determined by examining the materiality of the evidence." *State v. Tirado*, 358 N.C. 551, 589, 599 S.E.2d 515, 540 (2004) (quoting *State v. Howard*, 334 N.C. 602, 605, 433 S.E.2d 742, 744 (1993)). To establish prejudice on such a claim, often referred to as a *Brady* claim,[3] a defendant must show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985)).

A reasonable probability is one "sufficient to undermine confidence in the outcome" of the proceeding. *State v. Byers*, 375 N.C. 386, 400, 847 S.E.2d 735, 741 (2020) (quoting *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006)). The defendant's burden to show a reasonable probability is less than that for showing a preponderance. *Smith*, 565 U.S. at 75, 132 S. Ct. at 630 ("A reasonable probability does not mean that the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial." (cleaned up)); *accord Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct.

3. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

1555, 1565–66 (1995). However, a reasonable probability is more than a mere possibility. *Strickler v. Greene*, 527 U.S. 263, 291, 119 S. Ct. 1936, 1953 (1999). A defendant's burden, then, on a *Brady* claim, is more than showing that withheld evidence might have affected the verdict, but less than showing that withheld evidence more likely than not affected the verdict. When we consider whether there was a reasonable probability that the undisclosed evidence would have altered the jury's verdict, we consider "the context of the entire record." *United States v. Agurs*, 427 U.S. 97, 112, 96 S. Ct. 2392, 2402 (1976).

While we review the entire record, we need not consider every piece of undisclosed material evidence identified by the defendant. Where any portion of the evidence "alone suffice[s] to undermine confidence in [the defendant's] conviction, we have no need to consider his arguments that the other undisclosed evidence also requires reversal under *Brady*." *Smith*, 565 U.S. at 76, 132 S. Ct. at 631. As a result, any piece of undisclosed evidence, if sufficiently material to undermine confidence in the outcome of the trial, is sufficient to satisfy the defendant's burden on a *Brady* claim.

The question that we must answer when deciding such a claim is not whether the defendant is guilty or innocent, but whether he received a fair trial in accordance with the requirements of due process. *See Brady*, 373 U.S. at 87, 83 S. Ct. at 1196–97 (holding that nondisclosure of favorable evidence to the defense violates due process). As a result, we cannot, and do not here, consider new evidence produced after conviction which may tend to support or negate either guilt or innocence.[4] After a thorough review of the record, and consideration of the arguments of the parties, we are convinced that Mr. Best has met his burden.

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4. The State refers at various points in its brief to the results of a postconviction DNA test which Mr. Best requested pursuant to N.C.G.S. § 15A-269. Results indicated an exact match between Mr. Best's DNA profile and that of a sperm fraction recovered from a vaginal swab of Mrs. Baldwin's body. While this result may be relevant to subsequent proceedings designed to prove Mr. Best's guilt or innocence, that is not the question before us now. Instead, we must decide whether Mr. Best's *original trial*, which took place in 1993, was procedurally fair. *See United States v. Bagley*, 473 U.S. 667, 678, 105 S. Ct. 3375, 3381 (1985) ("[A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome *of the trial*." (emphasis added)); *see also id.* at 699, 105 S. Ct. at 3392 (Marshall, J., dissenting) ("[The Court] defines the right . . . by reference to the likely effect the evidence will have on the outcome of the trial."). Because the postconviction DNA test result identifying Mr. Best did not exist until decades after the trial took place, it could not have affected the outcome of the trial. As a result, we do not consider it here. We note also defense counsel's assertions that the test sample may have been contaminated—although, again, the test result does not factor into our analysis.

According to the State, the principal evidence presented at trial which proved Mr. Best's guilt consisted of: (1) Best's fingerprint on a paring knife; (2) the partial DNA match between Mr. Best and the semen found in Mrs. Baldwin's vagina; and (3) testimonial evidence that the Baldwins had been robbed, and that Mr. Best was spending large amounts of money on drugs around the time of the murders. This evidence was strong enough at trial for the jury to have convicted Mr. Best. However, upon consideration of the undisclosed evidence, the case is far less compelling.

Regarding the assertion that Mr. Best was spending large sums of money around the time of the murders, the State relied upon the testimony of both Carolyn Troy and Tammy Rose Smith. The State's undisclosed witness interview of Carolyn Troy, in which she stated that Mr. Best had only thirty or forty dollars on him on the night of 2 December 1991, would have permitted Mr. Best to impeach Ms. Troy's testimony. In addition to directly contradicting what Ms. Troy testified to at trial, the fact that Ms. Troy's story had changed over time, if admitted to at trial, could have been used by Mr. Best to impeach her credibility. We have previously stated that "exculpatory evidence is evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed, . . . including impeachment evidence." *State v. Lewis*, 365 N.C. 488, 501, 724 S.E.2d 492, 501 (2012) (cleaned up). Ms. Troy was the principal witness testifying to what the State identifies as a principal piece of evidence—namely, that Mr. Best was spending the money stolen from the Baldwins.

The State argues that the undisclosed witness interview is not material because another witness, Tammy Rose Smith, testified that Mr. Best was spending money on 1 December 1991. However, according to the State, Ms. Smith testified that Mr. Best spent about two hundred dollars, and may have also paid for a hotel room. This is a far cry from the $1,800 that the State claims were stolen from the Baldwins. More importantly, it is a significant departure from the testimony of Ms. Troy, who testified at trial that she saw Mr. Best with $300 and saw him purchase $750 to $900 worth of drugs during the late night of Monday, 2 December 1991 and early morning of Tuesday, 3 December 1991. The State cannot credibly claim that the evidence undermining the testimony of Ms. Troy, who claimed that Mr. Best used over $1000 to buy drugs, is inconsequential because another witness testified that Mr. Best had about $200 and paid for a hotel room.[5]

5. The dissent refers to three additional persons who might have, but did not, testify that Mr. Best was spending money around the time the State argued the Baldwins were

While the other evidence identified by Mr. Best does not directly refute the DNA and fingerprint evidence presented at trial, it does undermine its persuasive effect. For example, because the State failed to disclose the lab notes for the luminol tests conducted in the Baldwins' home, the jury did not learn that the State found "shoe tracks" in the hallway and kitchen areas, suggesting that the assailant left bloody footprints during the attack. This increases the exculpatory relevance of the testimony, presented at trial, that Mr. Best's shoes were tested and found to be devoid of blood. Had these pieces of evidence been presented together, it is more likely that the jury may have concluded that Mr. Best was not in the home during the murders. Similarly, due to the State's failure to disclose, the jury never learned that the State had discovered 70 Caucasian hairs on the bodies of the victims which were not yet matched to anyone in the case. Mr. Best could have easily pointed out at trial that, as a Black man, he could not have left those hairs on the victims' bodies and underneath the fingernails of Mr. Baldwin. It also does not appear from the lab notes that the hairs were tested to see if they matched Ricky Winford. We do not conclude or suggest that this proves Mr. Best's innocence. Instead, we conclude only that this evidence creates a reasonable probability that the jury would have returned a different verdict had it been presented with the undisclosed evidence. *See Tirado*, 358 N.C. at 589, 599 S.E.2d at 540 (stating that establishing prejudice requires a showing that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" (quoting *Bagley*, 473 U.S. at 682, 105 S. Ct. at 3383)); *see also Smith*, 565 U.S. at 75, 132 S. Ct. at 630 ("A reasonable probability does not mean that the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial." (cleaned up)).

Not all of the withheld evidence described by Mr. Best is material. Mr. Best makes much in his brief of a statement in the fingerprint analyst's lab notes that "[t]he ridge detail on [the knife] was examined

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murdered. However, the question before us is whether there is a reasonable probability that the result of the proceeding would have been different if the undisclosed evidence had been provided to the defense. *State v. Tirado*, 358 N.C. 551, 589, 599 S.E.2d 515, 540 (2004). As a result, we cannot speculate as to what evidence the State could have, but did not, put on. We must instead look to the record of the proceeding as it exists, and determine whether there is a reasonable probability that the outcome of *that* proceeding, rather than a hypothetical proceeding with stronger evidence from the State, would have changed with the undisclosed evidence. *Cf. Browning v. Trammell*, 717 F.3d 1092, 1105 (10th Cir. 2013) (confining *Brady* analysis "to the record before the state trial court").

& determined to be of no value." As the State correctly points out, Mr. Best ignores the rest of the sentence, which clarifies that the ridge detail is not of value "[at] this time" and that a conclusive comparison will require "major case inked impressions." As to Mr. Best's fingerprint on the knife, then, the evidence highlighted by Mr. Best does not undercut the reliability of the fingerprint identification.

That being said, the evidence against Mr. Best is not as strong as the State claims it is. The State's evidence establishes that Mr. Best touched the knife while he had blood on his finger—Mr. Best testified at trial that he was using the knife to clean the gutters, which he had been hired to do that day, and had scraped the backs of his hands. While the dissent claims that the fingerprint on the knife consisted of Mr. Baldwin's blood, this claim is unsupported by the record.[6] While the jury certainly did not have to believe Mr. Best's testimony, the existence of a ready explanation for the fingerprint on the knife undermines the State's argument that the fingerprint is such overwhelming evidence so as to render harmless the State's failure to disclose other exculpatory evidence.

Finally, the State relies on the partial DNA match between Mr. Best and the semen recovered from Mrs. Baldwin. However, this evidence is similarly underwhelming. The State's expert testified that, regarding the reliability of the DNA match, one out of every eighteen African-American men would match the sample recovered from Mrs. Baldwin. To put that into perspective, out of every 90 African-American men, five would match the sample, but at least four of them would not be the actual source of the DNA sample. Typically DNA evidence is significantly more compelling. *See*, *e.g.*, *State v. Honeycutt*, 235 N.C. App. 656, 764 S.E.2d 699 (2014) (stating that a DNA analysis of the victim's bedsheet indicated "a DNA match probability with defendant of one in 730 billion Caucasians, and her rape kit had a match probability with defendant of one in 36.2 billion Caucasians" and that another victim's "rape kit was consistent with defendant with a match probability of one in 16.2 million Caucasians"). Where, here, the DNA evidence presented at trial indicated that the tested DNA sample would match one out of

6. It appears that the dissent takes a stray statement from the State's brief and attempts to create a factual dispute in the evidence regarding the source of the blood that made up the fingerprint on the knife. Contrary to the dissent's assertion, the State's brief claims only that the knife had Mr. Baldwin's blood on it, not that the fingerprint was composed of Mr. Baldwin's blood. It is unsurprising that the State made no such claim, as Special Agent Lucy Milks, testifying for the State at Mr. Best's trial, stated that she tested the blood from the fingerprint and was able to determine only that it was blood—she was unable to determine a blood type, or even whether it was animal or human blood.

every eighteen African-American men, we conclude that it is not nearly the overwhelming evidence that the State suggests it is.

While it is not relevant to our analysis on Mr. Best's *Brady* claim, Mr. Best also raised a claim of ineffective assistance of counsel which casts doubt on the State's timeline of events. At trial, the State relied upon the testimony of the Baldwins' daughter to establish that, based on the contents of Mrs. Baldwin's pillbox, the presence of newspapers on the Baldwins' front porch, and the fact that a light in the kitchen was on which Mr. Baldwin habitually turned on before retiring to bed, the Baldwins had been killed after 11 p.m. on 30 November 1991 and before Mr. Baldwin would have normally awoken the following morning. The State also presented testimony that Mr. Best was out at a nightclub at approximately 12:30 a.m. or 1:00 a.m. on 1 December 1991. The State, in its brief, argues that the killings must have occurred between 11:00 p.m. on 30 November 1991 and 12:30 a.m. on 1 December 1991:

> To sum up – all the physical evidence at the crime scene indicated the victims were killed after 11:00 p.m. Saturday night and before Mr. Baldwin went to bed, and certainly before the next morning. At some point between 12:30 am Sunday morning and 1:00 a.m. Sunday morning defendant was seen paying for hotel rooms, beer, and drugs with cash. Ms. Smith was called by defendant at trial and was the witness who testified about the large amount of cash spent by defendant after midnight Saturday night.

Mr. Best argued that effective trial counsel would have challenged this timeline, pointing out that the State's theory that Mr. Best killed the Baldwins required that the crime occur during an exceedingly narrow window of time, unsupported by expert testimony as to time of death. Mr. Best points to medical evidence gathered after conviction by post-conviction counsel, which suggests the Baldwins did not die during the narrow window of time posited by the State. While the dissent views the State's evidence on this point as persuasive, the combination of (1) no medical evidence confirming the State's timeline and (2) the postconviction medical evidence suggesting that the State's timeline was inaccurate confirms our independent view that the State's evidence presented at trial was weak enough that there is a reasonable probability of a different outcome if the State had disclosed the exculpatory evidence.

We are not considering and do not decide whether Mr. Best received effective assistance of counsel during his original trial. Further, we cannot and do not decide that the production of this additional evidence

postconviction supports a reasonable probability that the jury in Mr. Best's trial would have come to a different result if presented with evidence that the State failed to disclose. Instead, we mention Mr. Best's ineffective assistance of counsel claim, and the evidence supporting it, only to underscore the weakness of the State's case at trial, and the likelihood that the jury may have decided to acquit if it had been presented with all of the evidence.

Our decision is based upon Mr. Best's claim that the State failed to disclose material exculpatory evidence. We are sufficiently disturbed by the extent of the withheld evidence in this case, and by the materiality of that evidence, that it undermines our confidence in the jury's verdict. The exculpatory evidence withheld by the State for approximately twenty years was material. It either negated or cast doubt upon the principal evidence presented by the State at Mr. Best's trial. For that reason, we are of the opinion that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Tirado*, 358 N.C. at 589, 599 S.E.2d at 540.

We have not discussed all of the evidence which the State failed to disclose, but "we have no need to consider [Mr. Best's] arguments that the other undisclosed evidence also requires reversal under *Brady*." *Smith*, 565 U.S. at 76, 132 S. Ct. at 631. The undisclosed witness interview of Carolyn Troy and the undisclosed forensic evidence, particularly the unidentified Caucasian hairs and luminol test notes indicating the presence of bloody shoe tracks, are sufficiently material. When considered against the facts that (1) the State relied heavily on the testimony of Ms. Troy that Mr. Best was spending the proceeds of the robbery on drugs; (2) Mr. Best is not white and could not have contributed the "Caucasian" hairs recovered from the crime scene, while no "Negroid" hairs were recovered; and (3) Mr. Best's shoes were tested and revealed no traces of blood, there is a reasonable probability that the jury would have returned a different verdict if presented with the undisclosed evidence.

Conclusion

We have not decided today that Mr. Best is guilty or innocent, that the district attorney was right or wrong to charge him, or that Mr. Best should be convicted or acquitted on retrial. Instead, our review of the record in this case shows that the failure to disclose exculpatory evidence prejudiced Mr. Best's ability to present a defense. Every criminal defendant in this state is entitled to a fair trial with full opportunity to confront the evidence against him and to attempt to rebut the charges of which he is accused. The state and federal constitutional guarantees

of due process require that the State turn over favorable evidence that is material to the defendant's guilt or punishment prior to trial. That did not happen in this case. Accordingly, we reverse the superior court's denial of Mr. Best's motion for appropriate relief and remand this case to the Superior Court, Bladen County, with instructions to grant the motion and order a new trial.

REVERSED AND REMANDED.

Justice ERVIN did not participate in the consideration or decision of this case.

Justice NEWBY dissenting.

The issue in this case is whether evidence that the State presumably should have disclosed before defendant's trial under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), creates a reasonable probability of a different outcome of that trial. Because the undisclosed evidence is not sufficient to undermine the substantial evidence of defendant's guilt presented at trial, any *Brady* violation did not meet the standard of being prejudicial to defendant. The majority inflates the significance of vague undisclosed evidence and improperly minimizes the weight of the State's strong evidence presented at trial. The majority seems to find facts, weighing conflicting evidence in the light most favorable to defendant. The decision of the superior court denying defendant's motion for appropriate relief should be affirmed. I respectfully dissent.

Due process guards a defendant's right to a fair trial free from prejudicial error. The State may deprive a defendant of due process when it fails to disclose evidence that is favorable to the defendant and material to the defendant's guilt or punishment. *Smith v. Cain*, 565 U.S. 73, 75, 132 S. Ct. 627, 630 (2012). As the majority notes, however, not every failure to disclose amounts to a constitutional violation. Instead, a defendant also must show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985).

The following evidence presented at trial supported defendant's conviction and sentencing: Eighty-two-year-old Leslie Baldwin met defendant at a gas station the evening of 29 November 1991. The details of their encounter are unclear, but the evidence shows that Mr. Baldwin hired defendant to perform yard work for him the next day. Defendant

walked to the home of Mr. Baldwin and his wife, seventy-nine-year-old Gertrude Baldwin, on 30 November 1991. He performed yard work, including cleaning the gutters. Mr. Baldwin fed him lunch. At the completion of defendant's work, Mr. Baldwin paid him $30.

Mr. and Mrs. Baldwin were then murdered—Mr. Baldwin by a cut to his carotid artery on his neck and other trauma and Mrs. Baldwin by blunt force trauma to her head and multiple knife wounds. The State put on substantial evidence that the murders occurred the night of defendant's work at the victims' home. Specifically, testimony indicated that Mrs. Baldwin's niece spoke to her on the phone at 7:00 p.m. that evening and that Mrs. Baldwin's medication dose, which she habitually took at 11:00 p.m. before going to bed, was gone when the bodies were later discovered. Testimony also showed that the 1 December 1991 newspaper, which Mr. Baldwin typically would have retrieved by around 5:00 a.m. that day, was still on the front porch, along with the papers for the following few days. Thus, evidence showed that the Baldwins were likely killed late at night on 30 November 1991 or very early in the morning on 1 December 1991.

Mrs. Baldwin was also raped, and the evidence at trial showed a DNA sample taken from her vaginal swab matched defendant's DNA.[1] A paring knife found at the crime scene, under Mr. Baldwin's body and covered in his blood, bore a fingerprint in the blood that matched defendant's print.

Defendant claimed that the bloody print came from him using a similar knife to clean gutters, and that during that process, he scraped the back of his hand. Defendant alleges that the scrapes on the back of his hand would have produced the blood for the fingerprint later found on the knife. But defendant's testimony is undermined by the fact that his bloody fingerprint was placed on the paring knife since it was last washed. Further, testimony indicated that the paring knife was typically stored in a kitchen drawer and that Mr. Baldwin never used kitchen utensils for yard work.

The Baldwins were also robbed of between one and two thousand dollars cash, some of which consisted of one-hundred-dollar bills. Witness testimony indicated that defendant possessed several

1. The DNA test ruled out about a 99.7% of unrelated members of North Carolina's Caucasian population, about 99.7% of the Lumbee population, and about 94.4% of the Black population. A second DNA test conducted at defendant's request showed a 100% match to defendant. While not considered in this *Brady* analysis, the second DNA test further confirms the reliability of the first test.

one-hundred-dollar bills after the murders, spent one hundred dollars on cocaine just hours after the murders, and spent several hundred dollars more on cocaine within a couple days of the murders. When defendant filed this motion for appropriate relief over twenty years later, alleging certain evidence not disclosed before trial could have been used for his benefit, the superior court determined any nondisclosed evidence could not create a reasonable probability that the evidence's disclosure would have produced a different result. The superior court thus denied his motion.

The majority reverses that decision and awards defendant a new trial nearly thirty years after this tragedy. It does so because in its view the evidence defendant presents that was not disclosed by the State before the trial would have a reasonable probability of bringing about a different trial outcome. The evidence defendant identifies would not do so. It does not begin to outweigh the evidence the jury considered at trial that is highly probative of defendant's guilt.

First, the majority properly rejects defendant's argument that the State failed to disclose evidence related to defendant's bloody fingerprint on the knife. Although records indicate that the print was not useful on its own at first, an analyst went on to explain how the print was eventually evaluated and found to be a match with defendant. This evidence does not benefit defendant; thus, it cannot serve as a foundation for establishing a *Brady* violation.

Second, defendant asserts that the State's failure to disclose evidence of two other potential culprits prejudiced his defense. The majority does not appear to give this evidence much weight. Rightly so, because one of the potential suspects was incarcerated during the time the murders likely occurred, and the other was excluded as a possible source of the DNA found from Mrs. Baldwin's vaginal swab.

Next, defendant argues that the State improperly withheld evidence from a witness interview with Carolyn Troy. Troy testified at trial that defendant spent hundreds of dollars a couple nights after the murders, but the prior witness interview indicates that Troy originally stated defendant had around $40 on his person on that same night. The majority claims that this evidence could have been used to impeach Troy's testimony, which helped the State show that defendant was spending money he stole from the Baldwins.

There are two problems with the majority's position. First, in addition to Troy's testimony, the State was able to present testimony from Tammy Rose Smith, who testified that defendant spent a couple hundred

dollars or more just a couple hours after the crime likely occurred. The majority sidesteps this evidence and says that amount "is a far cry from the $1,800[2] that the State claims were stolen from the Baldwins." That response is unsatisfying. The evidence shows that defendant spent one-hundred dollar bills shortly after the robbery. That testimony is probative enough in its own right. There is no reason whatsoever to expect that someone who stole over one thousand dollars would spend the entirety of that sum only hours after acquiring it. Second, Troy's later testimony went into far greater detail about the large bills defendant possessed and the sums he spent on various purchases. This more detailed testimony would likely weaken the impact of any vague earlier statement she made. Therefore, a jury would still have substantial reason to believe Troy's subsequent testimony, and the State had presented other evidence of defendant's substantial spending after the crime on which it could rely even if Troy's testimony were undermined. Additionally, the SBI interviewed three other people who gave witness statements about defendant possessing one-hundred-dollar bills and spending them on cocaine. Thus, if the evidence of defendant's possession and spending of cash presented at trial had been at all questioned, these other three witnesses were available to support the State's case.

The majority also relies on undisclosed luminol tests and hair follicle samples. But these pieces of potential evidence have minimal probative value at best. The luminol tests indicated that bloody footprints were found in the home. The majority suggests that if such prints were found, then blood perhaps should have been found on defendant's shoes after the crime. The hair follicle collections revealed Caucasian hairs on the victims' bodies which could not have been left by defendant, who is Black. Yet, DNA testing and fingerprint analysis are well known to be more probative than hair follicle comparisons. Moreover, it is unclear that reports of Caucasian hair particles found on the victims would be helpful to defendant. The DNA test implicating defendant left only a 0.3% chance that the DNA left by the rapist belonged to a Caucasian person. Despite the fact that the footprints and the hair follicles do not point to anyone in particular, however, it is key that the DNA testing and fingerprint evidence *did* specifically implicate defendant. Evidence that implicates no one does not invalidate or even significantly undermine solid evidence that implicates one person. Therefore, any introduction of evidence not pointing to a specific individual does not raise a

2. It is unclear precisely how much money was stolen from the Baldwins, but testimony indicates that about $1000 was likely stolen from Mr. Baldwin and as much as $800 from Mrs. Baldwin.

reasonable probability that a different result would have been reached at trial, especially considering the two pieces of evidence that specifically implicate defendant.

In light of the strength of the evidence from the DNA and fingerprint testing, the majority finally resorts to attacking those things. Though the majority cannot point to any new evidence that would undermine the credibility of either the DNA test or the bloody fingerprint, it asserts that "the evidence against Mr. Best is not as strong as the State claims it is." As to the fingerprint, the majority states that defendant testified at trial that his bloody fingerprint was on the knife because he used a similar one to clean the gutters and scraped the back of his hand, meaning he could have touched the knife while he had blood on his fingers. The majority admits that defendant already tried this explanation at trial and that the jury did not have to believe him. Indeed, it would be implausible for the jury to believe him because the knife (1) bore defendant's fingerprint in Mr. Baldwin's blood after the knife had just been washed; (2) was found underneath the body of Mr. Baldwin, whose neck was sliced open;[3] and (3) rarely left the kitchen and was not used for yard work. But the majority nonetheless considers defendant's bare assertion significant as evidence that could undermine the State's case.

The majority then, confusingly, describes the DNA test results directly implicating defendant as "similarly underwhelming." It notes that "[t]he State's expert testified that, regarding the reliability of the DNA match, one out of every eighteen African-American men would match the sample recovered from Mrs. Baldwin." Stated another way, the DNA test revealed that if defendant were being falsely accused, there is only a one-in-eighteen chance, just over a five percent chance, that he would be a match to the sample taken from Mrs. Baldwin's vaginal swab. Thus, the DNA test alone (without even considering the other evidence of defendant's guilt) presents a high likelihood that he raped Mrs. Baldwin. Of course, on top of that, defendant has been unable to point to a plausible alternative suspect of the same race to whom the DNA sample could belong. The majority simply asserts, contrary to logic and evidence, that the incriminating result of the DNA test is underwhelming.

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3. The majority contests whose blood was on the knife as well as the location of the knife. The State reiterated multiple times throughout this case and in its brief that the blood found on the knife was Mr. Baldwin's and that the knife was found under the victim. If there is a dispute over this evidence, this dispute should be resolved by the trial court. The majority states that it is not their job to weigh facts or find evidence, but that is exactly what the majority does here by making a finding about the placement of the knife.

The majority's ultimate contention is that, in its view, the State's evidence presented at trial is weak, and thus there is a reasonable probability the withheld evidence defendant identifies, had it been disclosed, would have produced a different result in the proceeding. But the evidence the State presented at trial is indeed strong, and the evidence defendant argues should be included is weak. The State has shown: a statistically reliable DNA test directly implicating defendant as Mrs. Baldwin's rapist; defendant's bloody fingerprint on a likely murder weapon; uncontradicted testimony that defendant was at the Baldwin's home before the crime; and testimony that defendant possessed and spent considerable sums of cash soon after the Baldwins were robbed of a considerable sum of cash. Defendant, on the other hand, has only: minimally called into question just one witness's statement as to precisely how much cash defendant carried a couple days after the murders; pointed to two other potential culprits, whom the evidence has generally ruled out as the assailants; and identified some tests and samples that do not implicate defendant (or anyone else in particular). As the superior court determined, a rational jury would not conclude that any reasonable doubt existed as to defendant's guilt.[4]

Thus, even if the additional evidence to which defendant points had been available for trial, there is not a reasonable probability that the jury would have reached a different result. Holding otherwise, the majority weighs the evidence in favor of defendant, inappropriately attempts to undermine strong evidence supporting the State's case, and inflates the significance of flimsy evidence defendant uncovered later. If there is a conflict in the evidence, this issue should be remanded to the trial court. The superior court's denial of defendant's motion for appropriate relief should be affirmed. I respectfully dissent.[5]

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4. The evidence here indicates that the knife was found under the victim. The State reiterated this point multiple times throughout the case and in its brief. If there is a dispute over this evidence, this dispute should be resolved by the trial court. The majority states that it is not their job to weigh facts or find evidence, but that is exactly what the majority does here by making a finding about the placement of the knife.

5. Defendant also asserts that his trial counsel's representation was unconstitutionally deficient. I disagree. Defendant has not shown either that his trial counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment or that there is a reasonable probability that, but for counsel's purported errors, the result of the proceeding likely would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687–96, 104 S. Ct. 2052, 2064–69 (1984).

STATE OF NORTH CAROLINA
v.
KENNETH CALVIN CHANDLER

No. 189A19

Filed 18 December 2020

1. Appeal and Error—preservation of issues—automatic preservation—statutory mandate—acceptance of guilty plea

Defendant's argument that the trial court erred by rejecting his guilty plea was automatically preserved for appellate review because the trial court acted contrary to the statutory mandate in N.C.G.S. § 15A-1023(c), which required a specific act by the trial court—that the "judge must accept the plea if he determines that the plea is the product of the informed choice of the defendant and that there is a factual basis for the plea."

2. Criminal Law—guilty plea—rejection by trial court—refusal to admit factual guilt

The trial court erred by rejecting a defendant's guilty plea based on defendant's refusal to admit his factual guilt where the plea was based on defendant's informed choice, a factual basis existed for the plea, and the sentencing was left to the trial court's discretion. There is no requirement that a defendant admit to factual guilt in order to enter a guilty plea.

3. Criminal Law—guilty plea—rejection by trial court—error—prejudice analysis—remedy

The trial court's error in rejecting defendant's guilty plea (based on defendant's refusal to admit his factual guilt) was prejudicial because the maximum sentence defendant could have received under the plea was 59 months and when he was convicted at trial he was sentenced to a minimum of 208 months and a maximum of 320 months imprisonment. The matter was remanded with instruction to the district attorney to renew the plea that the trial court erroneously rejected and for the trial court to consider the plea if defendant accepts it.

Justice MORGAN dissenting.

Justice NEWBY joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 265 N.C. App. 57 (2019), determining no error upon review of a judgment entered on 11 August 2017 by Judge Mark E. Powell in Superior Court, Madison County. Heard in the Supreme Court on 10 December 2019.

Joshua H. Stein, Attorney General, by Jennifer T. Harrod, Special Deputy Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Katherine Jane Allen, Assistant Appellate Defender, for defendant-appellant.

HUDSON, Justice.

Here we consider whether a trial court erred in refusing to accept a criminal defendant's tendered guilty plea. Because we conclude that the trial court lacked discretion to reject defendant's plea pursuant to N.C.G.S. § 15A-1023(c) (2019), we reverse the decision of the Court of Appeals and remand with instructions to the district attorney to renew—and the trial court to consider if defendant accepts—the rejected plea offer.

I. Factual and Procedural History

On 3 August 2015, defendant was indicted on one count of first-degree sexual offense with a child and one count of indecent liberties with a child. Prior to trial, defendant negotiated a plea arrangement with the State. Pursuant to the plea arrangement, defendant agreed to plead guilty to the offense of taking indecent liberties with a child in exchange for the State's dismissal of the first-degree sexual offense charge.

On 6 February 2017, defendant, his trial counsel, and the assigned prosecutor signed a standard Transcript of Plea form. The first page of the Transcript of Plea displays three checkbox options to indicate the type of plea that a defendant is entering: (1) guilty, (2) guilty pursuant to *Alford* decision, or (3) no contest. Defendant checked the "guilty" box. In other places throughout the Transcript of Plea form, defendant reiterated that he was pleading guilty: defendant checked the "guilty" box to indicate that he understood that he was pleading guilty to one count of the charged offense of the Class F felony of "indecent liberties" with a maximum punishment of 59 months; defendant checked the "guilty" box to indicate that he personally pleaded guilty to the charge described by the trial judge; and defendant checked the "guilty" box to indicate that he agreed to plead guilty as part of a plea arrangement.

On the following day, 7 February 2017, defendant appeared in the Superior Court, Madison County for the entry of the guilty plea. During the colloquy required under N.C.G.S. § 15A-1022 (2019)—the statute which establishes the components of a criminal defendant's plea and a trial judge's acceptance of such a plea—defendant stated that he was guilty, but went on to explain to the trial judge that he did not commit the act he was accused of perpetrating and was only pleading guilty to the charged offense in order to prevent his granddaughter (the victim) from having to endure court proceedings. Ultimately, the trial judge chose to reject defendant's plea.

During the colloquy defendant and the trial judge had the following exchange:

> [The Court:] Do you understand that you are pleading guilty to the following charge: 15 CRS 50222, one count of indecent liberties with a minor child, the date of offense is April 19 to April 20, 2015, that is a Class F felony, maximum punishment 59 months?
>
> [Defendant:] Yes, sir.
>
> [The Court:] Do you now personally plead guilty to the charges I just described?
>
> [Defendant:] Yes, sir.
>
> [The Court:] Are you, in fact, guilty?
>
> [Defendant:] Yes, sir.
>
> [The Court:] Now, I want to make sure you understand—you hesitated a little bit there and looked up at the ceiling. I want to make sure that you understand that you're pleading guilty to the charge. If you need additional time to talk to [defense counsel] and discuss it further or if there's any question about it in your mind, please let me know now, because I want to make sure that you understand exactly what you're doing.
>
> [Defendant:] Well, the reason I'm pleading guilty is to keep my granddaughter from having to go through more trauma and go through court.
>
> [The Court:] Okay.
>
> [Defendant:] I did not do that, but I will plead guilty to the charge to keep her from being more traumatized.

[The Court:] Okay, I understand, [Defendant]. Let me explain something to you. I practiced law 28 years before I became a judge 17 years ago, and I did many trials and many pleas of guilty and represented a lot of folks over the years. And I always told my clients, I will not plead you guilty unless you are, in fact, guilty. I will not plead you guilty if you say "I'm doing it because of something else. I didn't do it." And that's exactly what you told me just then, "I didn't do it." So for that reason I'm not going to accept your plea. Another judge may accept it, but I will never, ever, accept a plea from someone who says, "I'm doing it because of another reason, I really didn't do it." And I'm not upset with you or anything like that, I just refuse to let anyone do anything, plead guilty to anything, that they did not—they say they did not do. I want to make sure that you understand you have the right to a trial, a jury trial. Do you understand?

[Defendant:] Yeah, I understand that. We discussed that, me and my lawyer.

[The Court:] Okay.

[Defendant:] And like I say, I did not intentionally do what they say I've done.

[The Court:] Okay, that's fine. That's good.

[Defendant:] But like I say, I told [defense counsel] that I would be willing to plead guilty to this, have a plea deal, to keep this child from having to be drug [sic] through the court system.

[The Court:] That's fine. I'm not going to accept your plea on that basis because I really don't want you to plead guilty to anything that you stand there, uh, and you've said you didn't do. So I'm not going to accept your plea. We'll put it over on another calendar where another judge will be here. If you want to do that, you be sure and tell the judge what you told me if you still feel that way. I'm going to write it down here on this transcript of plea of why I didn't take your plea.

See, the easy thing for me to do is just take pleas and put people in jail or do whatever I need to do, or think is best for their sentence, and that's easy. But I can't lay down and

> go to sleep at night knowing that I put somebody in jail or entered a sentence of probation or whatever to something they did not do, or they say they did not do. I don't know any of the facts of your case; I don't know anything except what I just read in the indictment. That's all I know. But when a man or woman says, I didn't do something, that's fine, I accept that.

As a result of this conversation, defendant's case was continued until a later court date. Upon his subsequent arraignment on 7 August 2017, defendant entered a plea of not guilty and did not raise any issue with the previous trial judge's rejection of defendant's attempted guilty plea on 7 February 2017.

Upon his plea of not guilty, defendant's trial began on 7 August 2017 with a different trial judge presiding. Defendant did not raise any argument, challenge, or issue regarding the first trial judge's rejection of defendant's attempt to plead guilty under the plea arrangement. During his trial, defendant maintained his factual innocence and testified that he had never knowingly touched his granddaughter in a sexual manner. After its deliberations, the jury returned guilty verdicts against defendant on the charges of first-degree sex offense and taking indecent liberties with a child. The trial court sentenced defendant to consecutive sentences of 192 to 291 months for the first-degree sex offense conviction and 16 to 29 months for the indecent liberties with a child conviction. Defendant appealed to the Court of Appeals.

At the Court of Appeals, defendant raised the argument for the first time that the original trial judge erred in rejecting defendant's attempted guilty plea on 7 February 2017. Defendant argued that a trial judge is required to accept a guilty plea pursuant to N.C.G.S. § 15A-1023(c) even when a defendant maintains his innocence. Defendant further asserted that, if the first trial judge had accepted defendant's guilty plea, defendant would not have been exposed to trial for, and conviction of, the charges of first-degree sex offense and taking indecent liberties with a child, and thus would not have been subject to the punishment that he consequently received.

The Court of Appeals panel agreed that defendant had attempted to enter a guilty plea before the first trial judge. The majority concluded that "[t]he trial court correctly rejected [d]efendant's tendered guilty plea because the trial court did not and could not find that it was the product of his informed choice." *State v. Chandler*, 265 N.C. App. 57, 62 (2019). The dissenting judge would have held that the first trial judge

was obligated to accept defendant's guilty plea pursuant to N.C.G.S. § 15A-1023(c) which mandates that a trial judge "must accept the plea." *Id.* at 65–66 (Dillon, J., dissenting).

On 21 May 2019, defendant gave notice of appeal pursuant to N.C.G.S. § 7A-30(2) (2019) based upon the dissent in the Court of Appeals.

II. Analysis

[1] We must first determine whether defendant's argument about the guilty plea has been properly preserved for appellate review.

"[I]t is well established that when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *In re E.D.*, 372 N.C. 111, 116 (2019) (cleaned up); *see also State v. Hucks*, 323 N.C. 574, 579 (1988) ("When a trial court acts contrary to a statutory *mandate*, the error ordinarily is not waived by the defendant's failure to object at trial."). A statute contains a statutory mandate when it "is clearly mandatory, and its mandate is directed to the trial court." *In re E.D.*, 372 N.C. at 117 (quoting *Hucks*, 323 N.C. at 579). A statutory mandate is directed to the trial court when it, either "(1) requires a specific act by a trial judge; or (2) leaves no doubt that the legislature intended to place the responsibility on the judge presiding at the trial or at specific courtroom proceedings that the trial judge has authority to direct." *Id.* at 121 (cleaned up).

Here, N.C.G.S. § 15A-1023(c) is clearly a statutory mandate that "requires a specific act by a trial judge." Specifically, it states that "[t]he judge *must* accept the plea if he determines that the plea is the product of the informed choice of the defendant and that there is a factual basis for the plea." N.C.G.S. § 15A-1023(c) (emphasis added). Accordingly, any error that the trial court committed under the statute which prejudiced defendant is an issue that is automatically preserved for appellate review.

[2] Next, we must determine whether the trial court committed any error of law that prejudiced defendant. It appears from the transcript of the colloquy that the first trial judge rejected defendant's guilty plea because defendant refused to admit he was factually guilty.

Under our general statutes, a defendant is not required to admit factual guilt in order for a trial judge to accept a guilty plea. *See* N.C.G.S. § 15A-1022(a). In fact, we have explicitly held that nothing in N.C.G.S. § 15A-1022 requires the court to make an inquiry into whether a defendant is factually guilty. *State v. Bolinger*, 320 N.C. 596, 603 (1987).

Here, in rejecting defendant's guilty plea, the trial court stated:

> [The Court:] . . . I will not plead you guilty unless you are, in fact, guilty. I will not plead you guilty if you say "I'm doing it because of something else. I didn't do it." And that's exactly what you told me just then, "I didn't do it." So for that reason I'm not going to accept your plea.

Nothing in N.C.G.S. § 15A-1022 or our case law announces a statutory or constitutional requirement that a defendant admit factual guilt in order to enter a guilty plea. Accordingly, the trial court erred by rejecting defendant's guilty plea because he would not admit that he was factually guilty.

As explained by the dissenting judge below, N.C.G.S. § 15A-1023(c) requires a trial judge to accept a guilty plea where (1) the plea is based on defendant's own informed choice, (2) a factual basis exists for the plea, and (3) sentencing is left to the discretion of the court. N.C.G.S. § 15A-1023(c). Here, the plea arrangement did not include a sentencing recommendation. Therefore, the trial court could only have rejected the plea if it found either (1) that the plea was not the product of defendant's informed choice or (2) there was not a factual basis for the plea.

There is no indication in the record that defendant did not make an informed choice. The Court of Appeals majority concluded that because defendant wanted to plead guilty, but maintained that he was in fact innocent, his guilty plea could not be based on his informed choice. But as the dissenting judge below explained, "[i]n North Carolina there is no constitutional or statutory barrier for a defendant to plead guilty while maintaining his innocence." *Chandler*, 265 N.C. App. at 65 (Dillon, J., dissenting).

From the colloquy, it is clear that defendant was making the informed decision to plead guilty. When asked if he understood he was pleading guilty to the charge described by the trial judge, he answered "Yes, sir." He then cogently explained that he had a reason for pleading guilty: "to keep [his] granddaughter from having to go through more trauma and go through court." When the trial judge followed up to ensure defendant knew he had a right to a jury trial, defendant responded, "Yeah, I understand that. We discussed that, me and my lawyer." Nothing in the colloquy, the Transcript of Plea form, or anything else in the record indicates that defendant was not informed in his choice to plead guilty.

It is also apparent from the record that there was a sufficient factual basis for defendant's plea. The factual basis prong of N.C.G.S.

§ 15A-1023(c) requires only "that some substantive material independent of the plea itself appear of record which tends to show that defendant is, in fact, guilty." *State v. Sinclair*, 301 N.C. 193, 199 (1980); *see also Bolinger*, 320 N.C. at 603 (stating that nothing in N.C.G.S. § 15A-1022 requires the court to make an inquiry into whether defendant was in fact guilty). Thus, whether or not defendant admits to the crime is not part of the information the trial court should consider under the factual basis prong of N.C.G.S. § 15A-1023(c). Here, although the trial court rejected the plea before the prosecution offered a factual basis for the plea, when the evidence was eventually presented at trial, the jury found that defendant had committed both crimes beyond a reasonable doubt. Therefore, it is clear that there would have been a sufficient factual basis for defendant's plea at the time it was tendered to the trial court.

Because the plea was based on defendant's informed choice, a factual basis existed for the plea, and the sentencing was left to the discretion of the trial court, the trial court was required to accept defendant's guilty plea pursuant to N.C.G.S. § 15A-1023(c). Rejecting defendant's plea was error.

[3] We further conclude that the trial court's error prejudiced defendant. Specifically, under the plea arrangement, defendant agreed to plead guilty to indecent liberties in exchange for the State dismissing the charge of first-degree sexual offense with a child. As a result, the maximum sentence that defendant could have received on the indecent liberties charge, a Class F felony, was fifty-nine months imprisonment. However, after the trial court rejected defendant's plea arrangement, his case proceeded to trial where he was eventually convicted of both indecent liberties and first-degree sexual offense with a child. Pursuant to those convictions, defendant was ultimately sentenced to a minimum of 208 months and a maximum of 320 months in prison. This subjected defendant to more than three times the maximum amount of jail time he would have had to serve under the plea agreement. Thus, defendant was prejudiced by the trial court's error in rejecting his guilty plea.

Finally, we conclude that the proper remedy for the trial court's error is to remand this case, consistent with *State v. Lineberger*, 342 N.C. 599 (1996), with an instruction to the district attorney to renew—and the trial court to consider if defendant accepts—the plea offer that was rejected by the trial court. In *Lineberger*, we concluded that:

> A new trial . . . cannot wholly remedy the prejudice to defendant resulting from the trial court's refusal to consider the plea agreement. Since defendant's due process

> rights have been affected by these unique circumstances, we must fashion a remedy. Accordingly, we instruct the district attorney on remand to renew the plea offer accepted by defendant and presented to the trial court. If defendant accepts the offer, then we instruct the trial court to consider the offer and exercise its discretion whether to approve the plea agreement and enter judgment or, subject to the provisions of N.C.G.S. § 15A–1023(b), to proceed to trial.

342 N.C. at 607.

As in *Lineberger*, merely remanding for a new trial will not "wholly remedy the prejudice to defendant resulting from the trial court's refusal to consider the plea agreement," *id.*, because without an instruction to renew the rejected plea agreement, the district attorney could simply decide not to renew the plea agreement, leaving defendant with essentially no remedy for the prejudicial error committed by the trial court in this case. Accordingly, we remand this case with instructions to the district attorney to renew—and the trial court to consider if defendant accepts—the rejected plea offer.

III. Conclusion

In sum, we conclude that the trial court erred by rejecting defendant's guilty plea, that the error prejudiced defendant, and that this issue was automatically preserved for appellate review. Accordingly, we reverse the decision of the Court of Appeals and remand with an instruction to the district attorney to renew—and the trial court to consider if defendant accepts—the plea offer that was rejected by the trial court.

REVERSED AND REMANDED.

Justice MORGAN dissenting.

My distinguished colleagues in the majority conclude that the original trial judge did not have the discretion to reject defendant's attempted guilty plea and, because the judge erred by acting contrary to a statutory mandate by refusing to accept the guilty plea and thereby prejudicing defendant, the error which the majority has determined was committed has been deemed to be automatically preserved for appellate review. In my view, the issue of the first trial judge's rejection of defendant's attempted guilty plea was not automatically preserved and the lack of an objection by defendant at the trial level to the original trial judge's

rejection of defendant's guilty plea negates defendant's opportunity for review of the matter by this Court. Since I am of the opinion that this Court does not have proper authority to entertain this appeal of defendant because the refusal of his guilty plea by the first trial judge was not properly preserved for appellate review, I respectfully dissent from the opinion of the majority.

Early in their analysis, the members of the majority take an unfortunate step in their application of N.C.G.S. § 15A-1023(c) (2019) to the present case, thus predictably embarking upon a wayward journey to their ultimate conclusion. The statutory provision states, in pertinent part: "The judge must accept the plea *if* he determines that the plea is the product of the informed choice of the defendant *and* that there is a factual basis for the plea." N.C.G.S. § 15A-1023(c) (emphasis added). It is clear from the plain words of this segment of N.C.G.S. § 15A-1023(c) that (1) it is the trial judge who makes the determination that a defendant's guilty plea is the product of an informed choice and, in addition to this decision which is reserved for the trial judge, (2) it is the trial judge who makes the determination that there is a factual basis for the plea. In the event that the trial judge is satisfied that *both* of these components of N.C.G.S. § 15A-1023(c) exist, only then does the mandate of the statute operate to require that the trial judge accept the guilty plea. I agree that, in the instant case, the first trial judge was required to accept defendant's guilty plea if it was the product of an informed choice and if there existed a factual basis for the plea, irrespective of any direct admission of guilt. *See State v. Melton*, 307 N.C. 370, 377, 298 S.E.2d 673, 678 (1983) (holding that "once the trial judge determined that the defendant's guilty plea had been made voluntarily and that there was a factual basis for the plea, he was required by statute to accept the plea").

During the plea arrangement colloquy at trial between the first trial judge and defendant, the following exchange occurred:

> [The Court:] Do you understand that you are pleading guilty to the following charge: 15 CRS 50222, one count of indecent liberties with a minor child, the date of offense is April 19 to April 20, 2015, that is a Class F felony, maximum punishment 59 months?
>
> [Defendant:] Yes, sir.
>
> [The Court:] Do you now personally plead guilty to the charges I just described?
>
> [Defendant:] Yes, sir.

[The Court:] Are you, in fact, guilty?

[Defendant:] Yes, sir.

[The Court:] *Now, I want to make sure you understand—you hesitated a little bit there and looked up at the ceiling. I want to make sure that you understand that you're pleading guilty to the charge.* If you need additional time to talk to [defense counsel] and discuss it further or if there's any question about it in your mind, please let me know now, because *I want to make sure that you understand* exactly what you're doing.

[Defendant:] Well, *the reason I'm pleading guilty is to keep my granddaughter from having to go through more trauma and go through court.*

[The Court:] Okay.

[Defendant:] *I did not do that, but I will plead guilty to the charge to keep her from being more traumatized.*

[The Court:] Okay, I understand, [Defendant]. Let me explain something to you. I practiced law 28 years before I became a judge 17 years ago, and I did many trials and many pleas of guilty and represented a lot of folks over the years. And I always told my clients, *I will not plead you guilty unless you are, in fact, guilty.* I will not plead you guilty if you say "I'm doing it because of something else. I didn't do it." And that's exactly what you told me just then, "I didn't do it." So for that reason I'm not going to accept your plea. Another judge may accept it, but I will never, ever, accept a plea from someone who says, "I'm doing it because of another reason, I really didn't do it." And I'm not upset with you or anything like that, I just refuse to let anyone do anything, plead guilty to anything, that they did not—they say they did not do. *I want to make sure that you understand you have the right to a trial, a jury trial. Do you understand?*

[Defendant:] Yeah, I understand that. We discussed that, me and my lawyer.

[The Court:] Okay.

[Defendant:] *And like I say, I did not intentionally do what they say I've done.*

> [The Court:] Okay, that's fine. That's good.
>
> [Defendant:] *But like I say, I told [defense counsel] that I would be willing to plead guilty to this, have a plea deal, to keep this child from having to be drug [sic] through the court system.*

(Emphasis added.)

I construe the original trial judge's repeated statement to defendant throughout the colloquy, "I want to make sure that you understand," to be the original trial judge's effort to comply with the duty imposed upon the judge by N.C.G.S. § 15A-1023(c) to determine if defendant, through understanding the explored aspects of the plea, is making an informed choice. I interpret defendant's consistent statements to the first trial judge during the colloquy such as "I did not do that, but I will plead guilty to the charge" and "like I say, I did not intentionally do what they say I've done," along with other similar representations of defendant's position, as amounting to a circumstance justifiably comprehended by the first trial judge that there was not a factual basis for the plea. These words which are contained in the record of this case, coupled with the first trial judge's chronicled observation that defendant "hesitated a little bit . . . and looked up at the ceiling" during this portion of the plea arrangement colloquy, convince me that the first trial judge gleaned sufficient information during this exchange with defendant to provide the judge with a legitimate basis to determine that *neither* of the two required aspects of N.C.G.S. § 15A-1023(c) existed to compel the judge to accept defendant's guilty plea.

However, the majority here sees fit to substitute its judgment for the determination exclusively exercised by the original trial judge pursuant to N.C.G.S. § 15A-1023(c) by ignoring the statute's singular recognition of a trial judge as the determiner of a statutory provision's elements, diminishing the sanctity of a trial judge's ability to assemble all of the circumstances of the courtroom proceedings in ascertaining and considering the appropriateness of accepting the proffered guilty plea, and dismissing a trial judge's wherewithal under N.C.G.S. § 15A-1023(c) to exercise the judge's ability to identify the existence of a defendant's informed choice and a guilty plea's factual basis. Instead, the majority opts to look at the cold record before this Court, clinically read the words in a vacuum that were interspersed by defendant throughout the colloquy, combine the operative terms and phrases from these various statements of defendant to invoke the majority's view of a trial judge's requirement under N.C.G.S. § 15A-1023(c) that the guilty plea

must be accepted, and then ultimately decide that the trial judge's failure to comply with the majority's identified applicable mandate here under N.C.G.S. § 15A-1023(c) automatically preserved defendant's issue for appellate review by this Court after defendant failed to raise the issue in any fashion in any previous legal forum. I agree with the majority that when a trial court acts contrary to a statutory mandate the right to appeal the trial court's action is preserved, notwithstanding the failure of the appealing party to object at trial. *State v. Golphin*, 352 N.C. 364, 411, 533 S.E.2d 168, 202 (2000). This circumstance, however, does not exist here. As a result, my recognition of the established principles of statutory construction, deference to recognized determinations by trial judges, and the application of the North Carolina Rules of Appellate Procedure dictate my dissenting view.

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure reads as follows:

> 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.

N.C. R. App. P. 10(a)(1).

In the present case, upon the original trial judge's rejection of defendant's attempted guilty plea, defendant did not object to the trial judge's refusal to accept defendant's plea and the corresponding plea arrangement. Similarly, defendant did not present to the trial court any request or motion which stated the specific grounds for a ruling which defendant desired the trial court to make in order to effect acceptance of defendant's guilty plea. Without such an objection, request, or motion made by defendant at the trial level regarding the trial judge's rejection

of defendant's guilty plea, Rule 10(a)(1)'s necessitation for defendant's attainment of a ruling from the trial court on the determination to reject defendant's attempted guilty plea obviously was not satisfied. The cited rule expressly specifies that an issue is properly preserved for review and may be made the basis of an issue presented on appeal when there is action taken during the course of the proceedings in the trial tribunal by a noted objection, or which by rule or law was deemed preserved or taken without any such action.

Due to the lack of any action taken by defendant to comply with the requirements of Rule 10(a)(1) regarding the preservation of an issue for appellate review upon the first trial judge's rejection of defendant's attempted guilty plea, defendant has not preserved this issue for appellate review. The rule is clear that defendant *must* have presented to the first trial judge a timely request, objection, or motion during the course of the proceedings in Superior Court, Madison County, which stated the grounds for defendant's position that the trial judge was required to accept defendant's plea and that it was also necessary for defendant to obtain a ruling upon the request, objection, or motion in order to present the issue on appeal. Defendant failed to satisfy the mandates of Rule 10(a)(1) which govern preservation of issues for appellate review. The liberties which the majority has taken with its construction of N.C.G.S. § 15A-1023(c) and its concomitant diminution of principles otherwise routinely recognized by this Court do not obviate, in my view, the requirement for defendant's compliance with Rule 10(a)(1) in order to properly obtain appellate review of the matter which he has raised.

For these reasons, I would modify and affirm the decision of the Court of Appeals. Accordingly, I respectfully dissent.

Justice NEWBY joins in this dissenting opinion.

STATE v. CRUMP

[376 N.C. 375 (2020)]

STATE OF NORTH CAROLINA
v.
RAMAR DION BENJAMIN CRUMP

No. 151PA18

Filed 18 December 2020

Jury—voir dire—limits on questioning—police officer shootings—racial bias

In a prosecution for multiple crimes arising from a robbery committed during an underground poker game and a subsequent incident during which defendant exchanged gunfire with police officers, the trial court abused its discretion by restricting defendant's questioning during voir dire that prevented any inquiry into whether prospective jurors harbored implicit or racial bias or to explore what opinions those jurors might have regarding police shootings of black men. The trial court's limitations were prejudicial where defendant's attempted questioning, which did not include impermissible stakeout questions, involved issues pertinent to the case.

Justice DAVIS dissenting.

Justices NEWBY and MORGAN join 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. 144, 815 S.E.2d 415 (2018), finding no error after appeal from judgments entered on 7 June 2016 by Judge Gregory R. Hayes in Superior Court, Mecklenburg County. Heard in the Supreme Court on 12 October 2020.

Joshua H. Stein, *Attorney General*, *by Mary Carla Babb*, *Assistant Attorney General*, *for the State-appellee.*

Ann B. Petersen for defendant-appellant.

EARLS, Justice.

This case requires us to determine whether the Court of Appeals erred by finding no error in the judgments arising from an incident involving a black male defendant who exchanged gunshots with two officers from the Charlotte-Mecklenburg Police Department. Without deciding

whether or not the trial court abused its discretion when it "flatly prohibited questioning as to issues of race and implicit bias during *voir dire*," *State v. Crump*, 259 N.C. App. 144, 145, 815 S.E.2d 415, 417 (2018), and "categorically denied [defendant] the opportunity to question prospective jurors not only about a specific police officer shooting, but also even *generally* about their opinions and/or biases regarding police officer shootings of (specifically) black men," *id.* at 155, 815 S.E.2d at 423, the Court of Appeals held that "[o]n the specific facts of the instant case . . . the trial court's rulings were not ultimately prejudicial to defendant," *id.* at 156, 815 S.E.2d at 424. We conclude that the trial court did abuse its discretion and that the trial court's improper restrictions on defendant's questioning during voir dire did prejudice defendant. Accordingly, we reverse.

Background

At around 3:00 a.m. on 24 September 2013, two black men gained entry to an office suite where about a dozen people were participating in an underground poker game. Both men were armed. The men forced most of the poker players to undress and barricaded them in a restroom. The men then proceeded to ransack the office suite and steal the poker players' clothing, wallets, cell phones, personal identification cards, credit cards, debit cards, and cash.

A few days later, one of the organizers of the underground poker game, Gary Smith, devised a plan to identify the robbers. He knew that one of the robbery victims, Matios Tegegne, had not cancelled the service for his stolen cell phone, hoping to track its location. Smith sent a text message to a group that included Tegegne providing fake information about an upcoming poker game. When someone responded to Smith's text message from Tegegne's cell phone number, Smith provided that person with details of an invented poker game (the "bait game") at a mixed-use office and commercial building at 1801 N. Tryon Street in Charlotte. Smith planned to confront the person using the victim's cell phone—ostensibly, one of the perpetrators of the 24 September 2013 robbery—if and when he arrived at the bait game.

Early on the morning of 29 September 2013, three black males—Jamel Lewis, Warren Lewis, and defendant Ramar Crump—arrived at 1801 N. Tryon Street in defendant's silver Mustang. Defendant was driving. After receiving a text message from Tegegne's phone number seeking to confirm the address of the bait game, Smith pulled his own vehicle into the parking lot in front of the building. At this point, Smith saw defendant's silver Mustang, pulled closer, and noticed that defendant

was armed. Rather than confronting the occupants of the vehicle himself, Smith drove to a nearby Amtrak station parking lot and called 911 to report "a suspicious vehicle . . . occupied by at least two black males [who] appeared [to be] loading up guns." Meanwhile, defendant drove the Mustang to a rear parking area of the complex.

After receiving Smith's 911 call, four officers with the Charlotte-Mecklenburg Police Department—Anthony Holzhauer, David Sussman, Jason Allen, and Luke Amos—were dispatched to 1801 N. Tryon Street. The officers were advised that there were at least two black men inside a silver Mustang in the parking lot with loaded firearms, intending to commit a robbery. Each officer arrived alone in a marked patrol vehicle. Each officer parked his patrol vehicle in a lower portion of the parking lot, out of view from the rear parking lot. None of the officers activated the lights or sirens on his patrol vehicle.

After investigating and clearing a man in a different silver vehicle near the parking lot entrance, Officer Holzhauer and Officer Sussman walked to the rear parking lot. Officer Holzhauer was carrying a shotgun. Officer Sussman was carrying his service weapon. They observed two dump trucks parked parallel to one another, approximately four feet apart and next to a building, and defendant's silver Mustang, parked perpendicular to the rear of the two trucks and facing away from the building. The officers wanted to approach the vehicle surreptitiously in order to investigate its occupants without being detected, so they decided to walk between the two dump trucks, believing that the path would lead them to the rear of defendant's vehicle. Instead, their route brought them directly to the Mustang's passenger-side window. The officers could not see inside the vehicle because the windows were tinted. They did not affirmatively identify themselves as police officers.

Defendant and the officers would later dispute what happened next. What is undisputed is that there was an exchange of gunshots between defendant and the officers. One of the bullets hit one of the dump truck's side-view mirrors, right near Officer Holzhauer's head. Officer Holzhauer and Officer Sussman sought cover in front of one of the dump trucks. Defendant started the Mustang and sought to escape. To exit the parking lot, he drove the Mustang around the side of the dump truck where Officer Holzhauer and Officer Sussman were sheltering. Believing that they were being ambushed, Officer Holzhauer and Officer Sussman began shooting at the Mustang as it passed. Defendant eventually steered his vehicle, which sustained a shattered passenger-side window and a shot-out passenger-side front tire, out of the parking lot. Officer Amos and Officer Allen pursued the Mustang in their

patrol vehicles, with the lights and sirens of their vehicles now activated. They were eventually joined in pursuit by other officers from the Charlotte-Mecklenburg Police Department, the North Carolina Highway Patrol, the Cabarrus County Sherriff's Office, and the City of Concord Police Department.

According to defendant, it was only after he exited 1801 N. Tryon Street that he realized he had exchanged gunshots with law enforcement officers. He began to fear that he "might not make it out of this one" alive and called his mother to say his final goodbyes. While driving down Route 49 into Cabarrus County, defendant and the occupants of the Mustang put their hands and a white t-shirt out the windows, in an apparent effort to signal their intent to surrender. Defendant also called 911 to explain the situation, in the hopes of figuring out a way to surrender without getting shot at by the pursuing officers. However, defendant never stopped his vehicle. Eventually, law enforcement officers deployed stop sticks and blew out the Mustang's tires. Defendant, Jamel Lewis, and Warren Lewis were all arrested.

Law enforcement officers proceeded to search defendant's Mustang. Inside the driver's seat, they found a six-shot .38-caliber revolver and six spent shell casings. Inside the glove box, they found a cell phone, a knife, a wallet with defendant's identification inside, wristwatches, credit cards, and various forms of identification. Inside the trunk, they found two rifles and an additional revolver, a bag containing four cellphones, and a bag containing more credit cards, debit cards, and identification cards along with mail addressed to defendant. It was later determined that the credit cards, debit cards, and personal identifications found in the interior and trunk of the Mustang belonged to victims of the underground poker game robbery committed on 24 September 2013.

A grand jury indicted defendant on eleven counts of robbery with a dangerous weapon, eleven counts of second-degree kidnapping, one count of conspiracy to commit robbery with a dangerous weapon, and one count of possession of a firearm by a felon for his alleged role in the events of 24 September 2013. He was indicted on two counts of assault with a deadly weapon with intent to kill (AWDWIK), two counts of assault on a law enforcement officer with a firearm, and one count of possession of a firearm by a felon arising from his 29 September 2013 confrontation with Officer Holzhauer and Officer Sussman.

At trial, the State and defendant offered differing accounts of both incidents. According to the State, defendant was one of the two black men who robbed the underground poker game at gunpoint on

24 September 2013. The State relied upon testimony from six victims of the poker game robbery who all identified defendant as one of the two perpetrators of the robbery, although the victims offered varying accounts of defendant's precise role in the events of that night. Defendant claimed instead that he lent Jamel Lewis his Mustang on the evening of 23 September 2013 and that Jamel committed the robbery with his brother, Warren Lewis, without defendant's knowledge or permission.

According to the State, defendant came to 1801 N. Tryon Street on 29 September 2013 with the intention of robbing the bait game. Officer Holzhauer and Officer Sussman testified that defendant fired first, unprovoked. Defendant claimed that he drove his Mustang to 1801 N. Tryon Street at Warren's urging, intending only to "check out" the poker game. He testified that as he was sitting in the Mustang, he saw the silhouette of a man with a long gun aimed at him, heard gunshots, and felt an impact on the passenger side of his car. At this point, fearing for his life, defendant testified that he returned fire with the .38-caliber revolver that he always stored in his vehicle.

At the close of the State's evidence, the trial court dismissed two of the robbery with a dangerous weapon charges and one of the second-degree kidnapping charges. During the jury charge, the trial court gave a self-defense instruction for the offenses of AWDWIK and assault on a law enforcement officer with a firearm. Ultimately, the jury found defendant guilty of all remaining charges with the exception of the two counts of assault on a law enforcement officer with a firearm. The trial court consolidated defendant's convictions and entered thirteen separate judgments with thirteen sentencing terms. The trial court ordered defendant to serve the terms consecutively, resulting in a combined sentence of 872 to 1,203 months incarceration. Defendant gave oral notice of appeal in open court.

On appeal, defendant broadly raised three claims. First, defendant challenged the trial court's jury instructions on self-defense, asserting that the trial court erred by failing to include language requiring the jury to find a "causal nexus" between the circumstances leading to defendant's perceived need to use defensive force and the felonious conduct that would otherwise disqualify him from claiming self-defense under N.C.G.S. § 14-51.4(1). Second, defendant challenged the trial court's refusal to allow him to pursue certain lines of inquiry relating to racial bias and police-officer shootings of black civilians while questioning prospective jurors during voir dire. Third, defendant challenged the trial court's admission of evidence during the State's case-in-chief showing that no disciplinary actions were taken against Officer Holzhauer and

Officer Sussman after the shooting on 29 September 2013. In a unanimous opinion, the Court of Appeals rejected each of defendant's claims and found no error in the trial court's judgment. *Crump*, 259 N.C. App. 144, 815 S.E.2d 415. In this Court, defendant presents two of these issues for review: his challenge to the trial court's jury instruction on self-defense and his challenge to the limits imposed by the trial court on his questioning during voir dire. Because of how we resolve defendant's claim regarding the trial court's limitations on his questioning during voir dire, we do not reach his argument regarding the trial court's jury instruction.

The Court of Appeals did not explicitly address whether or not the trial court erred by preventing defendant from asking certain questions of prospective jurors. Nor did the court conclude that defendant's questions were inappropriate or irrelevant subjects for voir dire. Indeed, the court began its analysis by "express[ing its] concern" about the limitations imposed by the trial court on defendant's questioning during voir dire. *Id.* at 145, 815 S.E.2d at 417. Later, the court acknowledged that questions about police-officer shootings of black men "could very well be a proper—even necessary—subject of inquiry as part of the jury voir dire" in a case involving a black male defendant involved in a shooting with police officers "in order to allow both parties—the State and defendant—to intelligently exercise their peremptory challenges." *Id.* at 157, 815 S.E.2d at 424 (cleaned up). However, the court reasoned that even if the trial court erred by restricting defendant's questioning, the trial court's actions could not have been prejudicial because "[p]er defendant's own testimony, it was not until the car chase ensued that he was even aware the individuals he fired on were police officers." *Id.* at 156, 815 S.E.2d at 424.

Analysis

In general, "[r]egulation of the form of *voir dire* questions is vested within the sound discretion of the trial court." *State v. Chapman*, 359 N.C. 328, 346, 611 S.E.2d 794, 810 (2005); *see also State v. Rodriguez*, 371 N.C. 295, 312, 814 S.E.2d 11, 23 (2018) ("[T]he trial judge has broad discretion to regulate jury *voir dire*.") (quoting *State v. Fullwood*, 343 N.C. 725, 732, 472 S.E.2d 883, 887 (1996)). "[D]efendant must show abuse of discretion and prejudice to establish reversible error relating to *voir dire*."[1] *State v. Bishop*, 343 N.C. 518, 535, 472 S.E.2d 842, 850 (1996).

1. In the alternative, defendant argues that he is not required to show prejudice because restrictions on voir dire questioning which "impair[ ] the defendant's ability to exercise his challenges intelligently [are] grounds for reversal, irrespective of prejudice."

Under both the Federal Constitution and the North Carolina Constitution, every criminal defendant has the right to be tried by a fair and impartial jury. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."); N.C. Const. art. I, § 24; *see also State v. Chandler*, 324 N.C. 172, 185–86, 376 S.E.2d 728, 737 (1989) ("Both defendant and the State are entitled to a fair trial and a fair trial requires an impartial jury."). An essential feature of the right to a fair and impartial jury is the right to be tried by jurors who do not judge a party or the evidence based on animus or bias towards a racial group. *See State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987) ("The people of North Carolina have declared . . . that they will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice. They have recognized that the judicial system of a democratic society must operate evenhandedly if it is to command the respect and support of those subject to its jurisdiction. It must also be *perceived* to operate evenhandedly."); *see also Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869, 197 L. Ed. 2d 107 (2017) ("A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right."). A defendant is permitted to challenge any individual prospective juror who he or she believes is "unable to render a fair and impartial verdict." N.C.G.S. § 15A-1212(9) (2019). In order to "exercise intelligently . . . their challenges for cause," defendants typically may inquire into prospective jurors' morals, attitudes, and beliefs during voir dire, provided that the inquiry is relevant to a subject at issue at trial. *State v. Carey*, 285 N.C. 497, 507, 206 S.E.2d 213, 221 (1974). In this manner, "[*v*]*oir dire* plays an essential role in guaranteeing a criminal defendant's Sixth Amendment right to an impartial jury"—and the defendant's concomitant rights under the North Carolina Constitution—"because it is the means by which prospective jurors who are unwilling

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State v. Wiley, 355 N.C. 592, 611–12, 565 S.E.2d 22, 37 (2002), *cert. denied*, 537 U.S. 1117 (2003). He argues that because he was unable to ask prospective jurors about racial bias and their opinions regarding police-officer shootings of black men, he was unable to identify and challenge biased jurors, either peremptorily or for cause, which was necessary to safeguard his constitutional right to a fair and impartial jury. The State disagrees and, regardless, maintains that defendant waived appellate review of any constitutional argument by failing to specifically note an exception on constitutional grounds at trial. Because we ultimately hold that the trial court's actions were an abuse of discretion that prejudiced defendant, we need not reach defendant's constitutional argument.

or unable to apply the law impartially may be disqualified from jury service." *State v. Wiley*, 355 N.C. 592, 611, 565 S.E.2d 22, 37 (2002).

However, a defendant's right to ask questions of prospective jurors during voir dire is circumscribed. "It is well established that while counsel are allowed wide latitude in examining jurors on *voir dire*, the extent and manner of the inquiry rests within the trial court's discretion." *State v. Locklear*, 349 N.C. 118, 142, 505 S.E.2d 277, 291 (1998). Thus, even when a defendant seeks to inquire into a prospective juror's views on an otherwise relevant subject, the trial court may exercise its discretion to restrict the extent and manner of the defendant's questioning. *State v. Cummings*, 361 N.C. 438, 465, 648 S.E.2d 788, 804 (2007) (holding that it is permissible for a trial court to "limit questioning" and "not permit the hypothetical and speculative questions" regarding substantively appropriate topics). For example, a trial court may prevent a defendant from "attempt[ing] to indoctrinate potential jurors as to the substance of [his or her] defense" by asking questions that "tend to stake out a juror as to what his decision would be under a given set of facts." *State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989). A trial court may prevent a defendant from asking prospective jurors "hypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law." *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *vacated in part on other grounds*, 428 U.S. 902 (1976). A trial court does not abuse its discretion when it prevents a defendant from asking questions that are "irrelevant, improper in form, attempts to 'stake out' a juror, questions to which the answer was admitted in response to another question, or questions that contained an incomplete statement of the law." *State v. Gregory*, 340 N.C. 365, 389, 459 S.E.2d 638, 651 (1995).

In the present case, the trial court prevented defendant from asking two related sets of questions during voir dire. First, defendant sought to question prospective jurors about the possibility that they harbored racial biases against African Americans.

> [DEFENSE COUNSEL]: Now, something else I want to talk about. This one is a difficult one. It's called implicit bias. It's the concept that race is so ingrained in our culture that there's an implicit bias against people of a particular race, specifically African Americans, that people experience. What I'm going to do is I'm going to ask a couple of pointed questions of you all about that. . . . When you hear the statement the only black man charged with robbery, what's the first thing that pops into your head?

> [THE STATE]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: Is there anything that pops into your head when I say that statement, any thoughts?
>
> [THE STATE]: Objection.
>
> THE COURT: Sustained.

Second, defendant sought to question prospective jurors about their awareness of and opinions regarding incidents of police-officer shootings of black men. Initially, defense counsel attempted to pursue this line of inquiry by asking prospective jurors about their awareness of a case that had recently occurred in Charlotte where a police officer shot and killed an unarmed black man, Jonathan Ferrell.

> [DEFENSE COUNSEL]: There have been some cases in the recent history of this country dealing with this issue, specifically as to some African-American men and police officers is the first thing that comes to mind. Additionally I expect there to be testimony regarding the Jonathan Ferrell case and what effect that impact—that case had on Mr. Crump's mindset. Is anyone familiar with the Jonathan Ferrell case that happened here in Charlotte approximately September of 2013?
>
> [THE STATE]: Objection, your Honor.
>
> THE COURT: Sustained.

The judge emptied the courtroom and defense counsel explained why he was asking about the Ferrell case. Defense counsel then asked the judge if he could inquire into prospective jurors' opinions regarding police-officer shootings of civilians generally, rather than in the specific context of the Jonathan Ferrell case.

> [DEFENSE COUNSEL]: Your Honor, generally as to incidents, can I inquire of the jury if they have opinions related to incidents of cops firing on civilians that happened in the past couple years?
>
> THE COURT: I think that's another stake-out question. I think he's right. Once you get into a quote, unquote here's a situation, what do you think, how would you vote, I think that's a stake-out question, so I would sustain that objection, also.

> [DEFENSE COUNSEL]: Understood, your Honor. Please note our exception.

As a threshold matter, the State contends that the trial court did not prohibit defendant from asking *all* questions about racial bias and police-officer shootings of black men. The State disputes the Court of Appeals' conclusions that the trial court "flatly prohibited questioning as to issues of race and implicit bias during *voir dire*" and "categorically denied [defendant] the opportunity to question prospective jurors not only about a specific police officer shooting, but also even *generally* about their opinions and/or biases regarding police officer shootings of (specifically) black men." *Crump*, 259 N.C. App. at 145, 155, 815 S.E.2d at 417, 423. Instead, the State argues that the trial court appropriately sustained the State's narrow objections to a limited number of improper questions. The distinction between foreclosing upon entire lines of inquiry and rejecting specific inappropriate questions is, in this case, crucial. While a trial court generally has the discretion to regulate the "*manner and the extent* of inquiries [during] voir dire" by rejecting improper questions, *State v. Allen*, 322 N.C. 176, 189, 367 S.E.2d 626, 633 (1988), it exceeds the trial court's discretion to entirely prevent a party from asking any questions at all about an appropriate subject that is relevant at trial. *State v. Robinson*, 330 N.C. 1, 13, 409 S.E.2d 288, 294–295 (1991) (emphasizing that while a defendant in a capital case "is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias," it is not an abuse of discretion for trial court to manage "the *form and number of questions* on the subject") (quoting *Turner v. Murray*, 476 U.S. 28, 37 (1986)).

In reviewing a challenge to the trial court's management of questioning during voir dire, "we examine the entire record of the jury voir dire, rather than isolated questions." *Parks*, 324 N.C. at 423, 378 S.E.2d at 787. Reading the transcript holistically, we agree with the Court of Appeals that the trial court prevented defendant from pursuing any line of inquiry regarding racial bias, implicit or otherwise. Defendant was unable to ask prospective jurors about racial bias at any point during voir dire. Nor could he ask other related questions that would have elicited information allowing him to identify, and seek to exclude, biased prospective jurors. *Cf. State v. Elliott*, 344 N.C. 242, 263, 475 S.E.2d 202, 209 (1996) (holding that the trial court did not abuse its discretion where "a careful review of the transcript of the *voir dire* shows that the trial court permitted defendant to explore this panel of prospective jurors' understanding of their right to reach their own opinions," the substantive issue defendant's rejected question sought to address).

Viewed in context, it is clear that defendant's effort to question prospective jurors about the Jonathan Ferrell case represented an attempt to cure the purported deficiencies that caused the trial court to reject his first question about implicit bias.[2] He sought to approach the same topic from a different angle. The connection between the question about the Ferrell case and the topic of racial bias was readily apparent. Defense counsel explicitly referenced "African-American men and police officers" in framing the question for the prospective jurors. He also referenced the protests that erupted after a white police officer shot and killed a black man, Michael Brown, in Ferguson, Missouri, in subsequently explaining why he sought to question jurors about the Ferrell case. Defendant was attempting to address the same substantive topic—race and racial bias—in a new manner after the trial court rejected his first attempt. As he explained immediately after the trial court denied his initial question about implicit bias, "[t]here have been some cases in the recent history of this country dealing with *this issue*," by which he meant racial bias against black people. Yet his efforts to inquire into this subject were again rebuffed by the trial court, in contrast to cases where this Court has upheld trial court restrictions on voir dire questioning. Although defendant in this case "made . . . an attempt [after his first attempt was denied] to clarify or rephrase the question," the trial court was not "willing to allow the question [after] defendant had provided more clarity." *State v. Davis*, 340 N.C. 1, 23, 455 S.E.2d 627, 638–39 (1995).

The dissent's claim that "there is simply nothing in the transcript to support the proposition that the trial court would have prohibited defense counsel from asking further questions to the prospective jurors on [the topic of racial bias]" rests on the incorrect belief that after being denied the opportunity to ask prospective jurors the question about implicit bias, defendant abandoned this line of inquiry altogether. Although it is true that defense counsel's question about "incidents of cops firing on civilians . . . did not even mention race," the dissent ignores the numerous contextual indicators which make it clear that

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2. While the dissent is correct that defendant does not separately challenge the trial court's refusal to allow his question about the Jonathan Ferrell case on appeal to this Court, defendant's attempted question is still relevant to our analysis of his claim, which must be based upon our examination of "the entire record of the jury voir dire." *Parks*, 324 N.C. at 423, 378 S.E.2d at 787. Notwithstanding defendant's failure to separately challenge the trial court's restriction of this particular question on appeal, the fact that the trial court rejected defendant's question about the Ferrell case, which came immediately after defendant's question about implicit bias, supports our conclusion that the trial court did more than deny a single discrete question about race.

his question about police-officer shootings—which directly followed a question about implicit racial bias and a question about a prominent incident of a police officer shooting a black man—was a question that was, in substantial part, about race. We are not impermissibly "analyzing the relevance of questions defense counsel *never actually asked*," as the dissent contends, simply because we interpret the meaning of defense counsel's questions by examining the context in which they arose. In our view, the fact that the trial court rejected three questions in a row that related to the topic of racial bias is strong evidence that "the trial court would have prohibited . . . further questions to the jurors" about racial bias, even if defense counsel did not return to the subject again after being repeatedly denied. By the dissent's logic, a trial court does not abuse its discretion even if it rejects every question a defendant asks about a substantively appropriate topic, provided that the trial court never expressly states that the defendant is not allowed to inquire into the subject. Such a proposition finds no support in our precedents and would convert an important right necessary to assure the fairness of a criminal proceeding into a hollow promise.

We agree with the Court of Appeals that the trial court "categorically denied [defendant] the opportunity to question prospective jurors not only about a specific police officer shooting, but also even *generally* about their opinions and/or biases regarding police officer shootings of (specifically) black men." *Crump*, 259 N.C. App. at 155, 815 S.E.2d at 423. The State argues that the trial court possessed the discretion to reject these questions because they were "stake out questions" designed "to ascertain how [a] prospective juror would vote upon a given state of facts." *State v. Burr*, 341 N.C. 263, 286, 461 S.E.2d 602, 614 (1995). This is incorrect. Defendant's questions about the Jonathan Ferrell case specifically, and about police-officer shootings of black men generally, were not impermissible stakeout questions. As this Court has previously explained, a question is "not an improper stakeout of a prospective juror" when "(1) the question did not incorrectly or inadequately state the law, (2) the question 'was not an impermissible attempt to ascertain how this prospective juror would vote upon a given state of facts,' and (3) the question permissibly sought to measure the ability of the prospective juror to be unbiased." *State v. Jones*, 347 N.C. 193, 204, 491 S.E.2d 641, 648 (1997) (citation omitted).[3] Merely asking prospective jurors if

3. We certainly agree with the State, as they argued in their brief, that "depending on the way defendant phrased questions about how incidents of cross-racial officer-involved shootings relate to the factual issue of who fired first in his case, such questions certainly have the potential, at least, to also be stake-out questions." But we examine the questions

they are "familiar with the Jonathan Ferrell case that happened here in Charlotte approximately September of 2013" and if they "have opinions related to incidents of cops firing on civilians that happened in the past couple years" is not an attempt to "predetermine what kind of verdict prospective jurors would render or how they would be inclined to vote." *Id.* Defendant did not present prospective jurors with a "hypothetical fact situation" and then "ask[ ] what kind of verdict they would render under certain named circumstances." *Parks*, 324 N.C. at 423, 378 S.E.2d at 787. He asked if they were aware of a recent case in Charlotte and if they had opinions about police-officer shootings of unarmed black men. Those are not stakeout questions as defined by this Court's precedents.[4]

The mere fact that the question defense counsel asked (or tried to ask) implicated a factual circumstance bearing similarity to the defendant's own case does not transform an appropriate question into an impermissible stakeout question. For example, in *Burr*, we held that it was permissible for counsel to ask prospective jurors if they could "focus . . . on whether or not this defendant, Mr. Burr, is guilty or not guilty of killing the child" if presented with evidence that the child was neglected or abused, even though the case involved the death of a child who had previously been neglected and abused. 341 N.C. at 286, 461 S.E.2d at 614. The question deemed appropriate in *Burr* explicitly asked prospective jurors to forecast how they might approach the question of defendant's guilt or innocence if presented with circumstances that were going to be presented at trial. This question was "substantially more direct in relation to the verdict itself" than the question at issue in the present case, and yet still permissible. *Jones*, 347 N.C. at 204, 491 S.E.2d at 648.

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the defendant actually asked, not the universe of questions a defendant could possibly have asked about a given subject.

4. The dissent would hold that the trial court did not abuse its discretion when it denied defendant the opportunity to ask about the Ferrell case and about police-officer shootings more generally because the questions "were wholly unrelated to the incident for which defendant was on trial . . . [and] were likely to confuse and distract the jurors from the facts of the present case." Questions about the Ferrell case and police-officer shootings of black men were not "wholly unrelated to the incident for which defendant was on trial," given that the trial required the jury to make a determinative assessment of the credibility of, on the one hand, a black man who had been fired upon by police officers, and, on the other hand, the police officers involved in the shooting. Further, the trial court's stated justification for rejecting the question was its determination that the question represented "another stake-out question." Yet there is nothing in the transcript to support the dissent's assertion that the trial court was concerned this question would "confuse and distract the jurors."

Further, defendant's questioning about the Ferrell case and police-officer shootings of black men had a proper purpose in the context of *voir dire*: the questions "sought to measure the ability of the prospective juror[s] to be unbiased," *Jones*, 347 N.C. at 204, 491 S.E.2d at 648, by soliciting responses that would help defendant determine if "the prospective juror[s] could impartially focus on the issue of defendant's guilt or innocence, regardless of" the factual circumstances surrounding the legal question they would be required to resolve. *Burr*, 341 N.C. at 286, 461 S.E.2d at 614. As defense counsel explained at trial, he wanted to ask questions that would enable him to "make sure that the jurors are properly qualified to hear this trial" by assessing whether or not they held "opinions [that] would impact their ability to determine the evidence in this case."[5] Our precedents establish that defendant's proposed question about police-officer shootings of black men was an appropriate inquiry into a relevant topic, not an impermissible stakeout question.[6]

Based on the foregoing analysis, we agree with the Court of Appeals that the trial court "flatly prohibited" questions about racial bias and "categorically denied" defendant the opportunity to ask prospective jurors about police-officer shootings of black men. *Crump*, 259 N.C. App. at 145, 155, 815 S.E.2d at 417, 423. We hold further that in a case such as this one "involving a black male defendant involved in a shooting with police officers," *id.* at 157, 815 S.E.2d at 424, the trial court abused its discretion in so doing. This conclusion does not cast doubt upon the settled proposition that a trial court may discretionarily

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5. The dissent strenuously emphasizes the fact that when defense counsel was asked to explain why he wanted to ask about the Ferrell case, he stated that the question related to an argument defendant planned to raise regarding his state of mind as he was fleeing the scene of the shooting. However, the dissent ignores the additional, broader justification offered by defense counsel in the same colloquy. Even if we agreed with the dissent that the only place to look in the transcript for evidence of defense counsel's purpose in asking the more general question about police-officer shootings is the explanation defense counsel offered for asking a different, preceding question, our characterization of defendant's purpose in asking about police-officer shootings is amply supported by a reading of the transcript of the full colloquy, during which defense counsel also explained that he wanted "to make sure that the jurors are properly qualified to hear this trial" by determining "if [the prospective jurors] have opinions about [the Ferrell] case," and then "explor[ing] if those opinions would impact their ability to determine the evidence in this case."

6. In the alternative, the State contends that it was within the trial court's discretion to prohibit questions about a "divisive, extraneous case which had the potential to inflame the jury's prejudice and passions." Assuming *arguendo* that this explanation justified the trial court's decision to prevent defendant from asking about the Jonathan Ferrell case specifically, the State offers no reason why that explanation applies to defendant's more general question about police-officer shootings.

prevent parties from asking questions during voir dire that are "inherently ambiguous and totally confusing to prospective jurors." *Vinson*, 287 N.C. at 338, 215 S.E.2d at 69. Admittedly, defendant's initial question about implicit bias was somewhat confusingly phrased. However, as we have explained, there is a significant difference between rejecting one confusingly phrased question but permitting follow-up questions that clarify or reframe the inquiry and restricting appropriate questioning on a relevant topic altogether.

Having determined that the trial court's erroneous restriction on defendant's questioning during *voir dire* was an abuse of discretion, we now turn to the question of whether or not defendant "was prejudiced thereby." *State v. Maness*, 363 N.C. 261, 269, 677 S.E.2d 796, 802 (2009). 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 out of which the appeal arises." N.C.G.S. § 15A-1443(a) (2019).

Defendant asserts that he was prejudiced by the trial court's restrictions on his questioning during voir dire because the jurors' determination of his guilt or innocence depended upon their resolution of a core factual dispute—who shot first on the night of 29 September 2013, defendant or the police officers—based solely on their weighing of defendant's and the officers' competing accounts. Thus, defendant contends that if he had been given the opportunity to assess the jurors' possible racial biases and opinions regarding police-officer shootings of black men, he would have been able to intelligently exercise his for-cause and peremptory challenges in a manner that would have allowed him to exclude jurors who might impermissibly base their decision to believe one witness and disbelieve the other on improper biases. In addition, defendant emphasizes that the questions he sought to ask were also relevant to other disputed facts considered by the jury at trial, most notably what inference to draw from defendant's refusal to immediately surrender to law enforcement officers after the shooting. In response, the State echoes the Court of Appeals in first contending that the trial court's restrictions could not have prejudiced defendant because "it was not until the car chase ensued that he was even aware the individuals he fired on were police officers." *Crump*, 259 N.C. App. at 156, 815 S.E.2d at 424. Relatedly, the State asserts that "defendant's race and the officers' occupation were essentially co-incidental to the crimes in this case." Finally, the State also argues that the restrictions on questioning were not prejudicial because defendant was permitted to ask numerous other questions which elicited information about the prospective jurors' attitudes towards law enforcement officers.

Addressing the State's first argument, we disagree with the Court of Appeals that defendant could not have been prejudiced because he did not know the individuals he was shooting at were police officers at the time of the shooting. It is true that defendant testified that he did not know he was firing at law enforcement officers.[7] But it is also true that the law enforcement officers knew that the occupants of the silver Mustang they were approaching were armed black men, given that the dispatch call summoning the officers to 1801 N. Tryon Street reported "two black males inside a Mustang loading firearms." Regardless, defendant's purported lack of awareness that he was shooting at police officers does not alter the possible relevance of any biases held by the jurors to their own resolution of this determinative factual dispute. A juror who harbored racial animus against black people—or who believed that any police officer who shot an unarmed civilian was inevitably in the wrong—might struggle to fairly and impartially determine whose testimony to credit, whose version of events to believe, and, ultimately, whether or not to find defendant guilty.

In addition, there were other important factual disputes at trial where defendant's race, and the jurors' possible biases, were relevant. As defense counsel explained in a colloquy with the trial court, one of the reasons he wanted to ask prospective jurors about police-officer shootings of black men like Jonathan Ferrell was because he intended to argue that defendant's awareness of these incidents "directly impacted [his] state of mind as to why he was not stopping for police when they were firing at him. It goes to rebut the contention that the [S]tate I assume will make that he was fleeing the scene of the crime."[8]

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7. It is notable that during closing argument, the State argued that at the time he fired his weapon, "[d]efendant knew or had reasonable grounds to believe that Anthony Holzhauer and David Sussman were, in fact, police officers. . . . [b]ecause we know that [the officers] did announce themselves. . . . They had their uniforms on with white patches, large white patches on either shoulder, a shiny badge, and a shiny nameplate, both of which reflected light." At a minimum, this indicates that it was an open factual question at trial whether or not defendant knew or had reasonable grounds to believe that he was firing on law enforcement officers.

8. Even if defense counsel had failed to offer sufficiently compelling reasons for asking about the Jonathan Ferrell case at trial, defense counsel was not asked and did not provide his reasons for asking about police-officer shootings of black men more generally. Thus, we also reject the State's argument that we must restrict our examination of defendant's prejudice claim to the explanations defense counsel offered during his colloquy with the trial court. The dissent claims that our willingness to look beyond this colloquy "appears to be saying that this Court is free to come up with arguments of its own that trial counsel could—and perhaps should—have made in the trial court." However, we think it uncontroversial to suggest that when defense counsel offered an explanation for asking the second question in a series of three questions, it does not legally or logically mean that his explanation addressed all of his substantive reasons for asking the third question.

As defense counsel predicted, the State put this exact argument before the jurors, urging them to conclude that defendant's refusal to immediately surrender to law enforcement officers was motivated not by a fear that he would not survive his interaction with the police, but instead by a desire to escape apprehension "because he thought that the Charlotte-Mecklenburg Police Department—maybe they'll stop at the county line." And, as defense counsel previewed, defendant argued in reply that he was reluctant to surrender to law enforcement because he had just been "shot at by someone who he eventually learned was the police" and he "[f]ear[ed] for his life."

Nor was the law enforcement officers' occupation "co-incidental" to the jury's resolution of defendant's case.[9] During closing argument, the State explicitly emphasized Officer Holzhauer and Officer Sussman's occupation in disputing defendant's version of events, asking rhetorically "[w]hy [ ] two Charlotte-Mecklenburg police officers [would] walk up to a car that they didn't know was occupied, that wasn't even turned on, and just open fire with a shotgun. That doesn't make any sense whatsoever, it just doesn't." The State relied upon Officer Holzhauer and Officer Sussman's status as police officers in order to persuade the jury that their account of the incident on 29 September 2013 was more accurate than the one put forward by defendant, a black man who had admitted to shooting at the officers. If the jurors believed the law enforcement officers, it was overwhelmingly likely that they would convict defendant. In this context, defendant's race and the police officers' occupation were not extraneous to the issues resolved by the jury at trial.

Finally, we reject the State's argument that defendant was not prejudiced because the trial court allowed him to ask the prospective jurors other questions about their attitudes toward law enforcement officers. It is correct that both parties asked numerous questions inquiring into the prospective jurors' attitudes regarding police officers, their past interactions and personal relationships with police officers, and their awareness that police-officer witnesses are not to be accorded special credibility. However, none of these questions touched upon issues of race, and none elicited information about the prospective jurors' opinions of police-officer shootings of black men. While we do not impugn the integrity of the jurors who ultimately decided to convict defendant,

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9. It would be wrong to conclude that the law enforcement officers' occupation was "co-incidental to the crimes in this case" when one of the crimes defendant was charged with was assault on a law enforcement officer with a firearm, an essential element of which is the victim's occupation as a law enforcement officer. N.C.G.S. § 14-34.5(a) (2019).

defendant's inability to question prospective jurors about racial bias and police-officer shootings of black men deprived him of a crucial tool needed to mitigate the risk that his trial would be infected by racial prejudice. Peter A. Joy, *Race Matters in Jury Selection*, 109 NW. U. L. Rev. Online 180, 186 (2015) ("Especially in times when issues of race are on the minds of potential jurors, such as currently in the St. Louis area due to the shooting of Michael Brown and continuing protests in Ferguson and several other cities over racial injustices, failing to question about bias in some cases may result in stacking the jury against the accused.") General questioning about prospective jurors' attitudes towards law enforcement is simply no substitute for inquiry into prospective jurors' racial biases when, as in the present case, the defendant's race and the law enforcement officers' occupation are salient at trial.[10] Thus, we conclude the trial court's restrictions on defendant's questioning during voir dire were prejudicial.

Conclusion

It is a jury that is tasked with "find[ing] the ultimate facts beyond a reasonable doubt." *State v. White*, 300 N.C. 494, 503, 268 S.E.2d 481, 487 (1980) (quoting *Cnty. Ct. of Ulster Cnty., N.Y. v. Allen*, 442 U.S. 140, 156 (1979)). To protect a criminal defendant's right to be found guilty or not guilty by a jury that discharges this weighty responsibility fairly and impartially, through "[p]robing and thoughtful deliberation," a defendant is entitled to question prospective jurors on topics that would help him identify, and seek to exclude, those whose "reasoning . . . is prompted

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10. Contrary to the State's assertion that any reference to the Jonathan Ferrell case would have been "highly divisive" and would have "inflame[d] the jury's prejudice and passions," numerous empirical studies have concluded that white jurors are *more* likely to discriminate against black defendants in cases where racial issues are not prominent or referenced explicitly. *See generally* Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 Psychol. Pub. Pol'y & L. 201, 203 (2001). At a minimum, this empirical data suggests that the way to stop jurors' racial biases from undermining the fairness of criminal proceedings is not to stop parties from openly discussing race, but instead to acknowledge and discuss these issues sensitively, appropriately, and forthrightly. *Cf.* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. Rev. 1555, 1563 (2013) (describing studies which show that "making race salient or calling attention to the operation of racial stereotypes encourages individuals to suppress what would otherwise be automatic, stereotype-congruent responses and instead act in a more egalitarian manner. . . . [W]hen race is made salient, individuals tend to treat White and Black defendants the same."); Gary Blasi, *Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*, 49 UCLA L. Rev. 1241, 1277 (2002) (arguing that empirical studies "suggest that there is good reason explicitly to instruct juries in every case, stereotype-salient or not, about the specific potential stereotypes at work in the case").

or influenced by improper biases, whether racial or otherwise." *Pena-Rodriguez*, 137 S. Ct. at 871, 197 L. Ed. 2d at 127. In this case, where there was a clear connection between the questions defendant asked or tried to ask prospective jurors and meaningful factual disputes that the jury was required to resolve to reach a verdict, the trial court abused its discretion and prejudiced defendant by restricting all inquiry into prospective jurors' racial biases and opinions regarding police-officer shootings of black men. Accordingly, we reverse.

REVERSED.

Justice DAVIS dissenting.

The issue in this case is whether the trial court abused its discretion by ruling during voir dire that defense counsel would not be permitted to ask the prospective jurors three specific questions. Defense counsel sought to ask these questions pursuant to a defense strategy involving defendant's state of mind at the time of the incident giving rise to the charges for which he was being tried. Rather than focusing on the specific questions defense counsel actually sought to ask and the reasons he actually articulated to the trial court as his purpose for asking these questions, the majority instead bases its analysis on questions defense counsel *could* have asked and grounds that counsel *could* have asserted as to why these questions were appropriate. Therefore, I respectfully dissent.

Initially, it is important to clarify the proper standard of review to be employed by this Court in reviewing defendant's arguments in this appeal. Defendant contends in his briefs to this Court that the trial court's limitation on his ability to ask certain questions during voir dire amounted to a deprivation of his constitutional right to intelligently exercise his peremptory challenges, thereby entitling him to a new trial—irrespective of whether he can show prejudice. However, defendant has clearly waived this constitutional argument.

It is well established that "[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Meadows*, 371 N.C. 742, 749 (2018) (alteration in original) (citation omitted). Before the trial court, defendant failed to raise any specific constitutional argument as to why he should be allowed to pursue these lines of inquiry with the prospective jurors. Accordingly, any constitutional challenge to the trial court's rulings during voir dire has been waived by defendant.

Therefore, in order to prevail on this issue defendant must show both an abuse of discretion by the trial court and resulting prejudice to him. This Court has previously articulated our standard of review in such cases as follows:

> The primary goal of the jury selection process is to ensure selection of a jury comprised only of persons who will render a fair and impartial verdict. Pursuant to N.C.G.S. § 15A-1214(c), counsel may question prospective jurors concerning their fitness or competency to serve as jurors to determine whether there is a basis to challenge for cause or whether to exercise a peremptory challenge. . . . [T]he trial judge has broad discretion to regulate jury *voir dire*. In order for a defendant to show reversible error in the trial court's regulation of jury selection, a defendant must show that the court abused its discretion and that he was prejudiced thereby.

State v. Rodriguez, 371 N.C. 295, 311–12 (2018) (cleaned up); *see also State v. Ward*, 354 N.C. 231, 255 (2001) ("To demonstrate reversible error in the jury selection process, the defendant must show a manifest abuse of the court's discretion and prejudice resulting therefrom.").

This Court has explained that an abuse of discretion occurs "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). A defendant is prejudiced by a trial court's erroneous ruling 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). Accordingly, the two questions before us are (1) whether the limitations imposed by the trial court during voir dire were arbitrary or manifestly unsupported by reason; and (2) whether defendant can demonstrate that absent those limitations, there is a reasonable possibility that the jury would have reached a different result.

The crux of defendant's argument is that the trial court abused its discretion by prohibiting him from questioning prospective jurors about their views on certain unrelated incidents involving shootings by law enforcement officers. Defendant's entire argument is based upon the following exchange that took place on the fourth day of a lengthy voir dire process after defense counsel had previously asked prospective jurors about their ability to remain impartial when hearing testimony from police officers and persons convicted of crimes, as well as their thoughts

on the use of self-defense, the use of firearms, and illegal gambling. In order to demonstrate why the majority's analysis is incorrect, this portion of the proceedings must be considered in its entirety.

> [DEFENSE COUNSEL]: Now, something else I want to talk about. This one is a difficult one. It's called implicit bias. It's the concept that race is so ingrained in our culture that there's an implicit bias against people of a particular race, specifically African Americans, that people experience. What I'm going to do is I'm going to ask a couple of pointed questions of you all about that. . . . When you hear the statement the only black man charged with robbery, what's the first thing that pops into your head?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: Is there anything that pops into your head when I say that statement, any thoughts?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: There have been some cases in the recent history of this country dealing with this issue, specifically as to some African-American men and police officers is the first thing that comes to mind. Additionally I expect there to be testimony regarding the Jonathan Ferrell case *and what effect that impact—that case had on Mr. Crump's mindset.* Is anyone familiar with the Jonathan Ferrell case that happened here in Charlotte approximately September of 2013?
>
> [PROSECUTOR]: Objection, your Honor.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: Your Honor, it's an issue that we need to discuss.
>
> . . . .
>
> [DEFENSE COUNSEL]: Yes. *There's a reason I'm asking about this. I expect that at some point the [S]tate is going to talk about flight, specifically as relates to the assault charges. I expect that they're going to ask the*

Court at some point for a flight instruction, that that be considered part of guilt. We have the opportunity for Mr. Crump to testify, to talk about his state of mind. Certainly if he's claiming self-defense, he has—is required to testify about his state of mind at that point in time.

My expectation is that this testimony regarding the Jonathan Ferrell case is relevant to Mr. Crump's state of mind in that this case, the Jonathan Ferrell case, happened just two weeks prior to this particular case. The Jonathan Ferrell case, as the Court probably is aware, but for purposes of the record, there was a young black man by the name of Jonathan Ferrell who was involved in some sort of incident that night. Eventually the police were called, and there was an officer that fired and ended up killing . . . Mr. Ferrell that night. I think that that incident happening just two weeks prior to this one, not far on the heels of Ferguson, *directly impacted Mr. Crump's state of mind as to why he was not stopping for police when they were firing at him. It goes to rebut the contention that the [S]tate I assume will make that he was fleeing the scene of the crime. Our intention is to rebut that, saying he was fleeing to save his life and was scared that there were shots fired at him, there were stop sticks deployed that made the tires explode that sounded like further shots. That was the reason that there was flight.*

If that's the case, your Honor, it is imperative that we find out what this jury thinks about that situation, if any. This is an explosive issue, it's an issue that needs to at least be discussed. And they may have no opinions, I don't know. But it's certainly something that I need to be able to inquire about to see if they do have opinions, and if they do, what those opinions are *as related to Mr. Crump and his ability to—or, excuse me—his state of mind at the time of this offense.*

You know, if it's going to be something that's testified about, you know, I think it will be admissible, that this jury should be made aware of that possibility and we be able to gauge their reactions to it.

THE COURT: Okay. Thank you. Yes, sir, [prosecutor].

[PROSECUTOR]: Your Honor, I think before we go any further, there needs to be a *Harbison* inquiry of this defendant. . . .

. . . .

THE COURT: Okay. Now let's talk about the other issue . . . bringing in this extraneous trial, what may not have been on Mr. Crump's mind.

[PROSECUTOR]: Absolutely, your Honor. There's at this point no evidence that has been presented, there's no evidence that Mr. Crump had any idea that that event had happened. The event had been reported on, yes, but there were very few details that were out in the public sphere. Mr. Crump hasn't testified under oath or any other way about any type of knowledge.

Your Honor, this is an improper stake-out question on a particular issue. [Defense counsel] is asking these folks essentially how they would vote based on having this information in front of them, and that's an improper question, your Honor, and there—obviously we haven't got any evidence. So whether or not this is even relevant, whether it will ever come to the jury's attention, is completely speculative at this point and serves only one purpose, your Honor. Thank you.

THE COURT: Yes, sir. [Defense counsel].

[DEFENSE COUNSEL]: Just briefly on that. Frankly, if—we're before evidence. We don't know what any of the evidence will be at this point, so that the argument that we don't know whether or not this is going to come before the jury, we don't. We can only speculate at this point. That's what the job of the attorneys is, to speculate, to preview the evidence. Some things may be deemed admissible or not. We don't know at this point.

The purpose of the jury selection is to make sure that the jurors are properly qualified to hear this trial. I contend this is not a stake-out question. I'm simply asking if anyone had heard about the reporting of this case. It happened two weeks prior to this incident. And then if they had, which is where we're getting to, what, if any, opinions they hold about that case; and then if they have

any opinions about that case, I will explore if those opinions would impact their ability to determine the evidence in this case. That's—I think it's important, I think that it's necessary for the jury to be prepared for these kinds of questions.

THE COURT: So that I'm completely clear on this issue, this case that you're referring to is the Jonathan Ferrell case.

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: I believe that was actually the case that resulted in Officer Kerrick being tried?

[DEFENSE COUNSEL]: That's correct. Yes, your Honor. The defendant was Officer Kerrick. I was referring to the decedent.

THE COURT: Okay. So this is—we're talking about—so I know what we're talking about. The Jonathan Ferrell case is the case where Charlotte-Mecklenburg Police Officer Kerrick was charged and tried for that offense.

[PROSECUTOR]: And acquitted, your Honor.

THE COURT: And acquitted. Okay. But regardless, I just want to make sure I understand what it was. So I'm going to sustain the objection. We're not going to go down that road during jury selection, if it comes to the point during the trial that this becomes an issue, then we can have a lot more discussions about it, but I'm not going to get into an extraneous case that happened in Charlotte during jury selection, so I'm going to sustain that objection.

[DEFENSE COUNSEL]: Your Honor, generally as to incidents, can I inquire of the jury if they have opinions related to incidents of cops firing on civilians that happened in the past couple years?

THE COURT: I think that's another stake-out question. I think [the prosecutor is] right. Once you get into a quote, unquote here's a situation, what do you think, how would you vote, I think that's a stake-out question, so I would sustain that objection, also.

> [DEFENSE COUNSEL]: Understood, your Honor. Please note our exception.

(Emphases added).

In holding that the trial court abused its discretion by making these rulings, the majority's analysis contains two fundamental errors. First, the majority fails to focus on the specific questions that defense counsel actually sought to ask the prospective jurors. Second, it fails to properly acknowledge the reasons articulated by defense counsel as to why he sought to ask those questions.

First, the majority mischaracterizes defense counsel's proposed lines of voir-dire questioning. The majority asserts that "the trial court prevented defendant from pursuing any line of inquiry regarding racial bias." The above-quoted portion of the transcript shows that this assertion is simply not true. In reality, the trial court's rulings were quite narrow—only prohibiting defense counsel from asking three discrete questions: (1) "When you hear the statement the only black man charged with robbery, what's the first thing that pops into your head?"; (2) "Is anyone familiar with the Jonathan Ferrell case that happened here in Charlotte approximately September of 2013?"; and (3) "[G]enerally as to incidents, can I inquire of the jury if they have opinions related to incidents of cops firing on civilians that happened in the past couple years?"

The majority simply ignores the fact that (1) defense counsel never actually asked the prospective jurors non-objectionable questions about the general topic of racial bias; and (2) the trial court never actually ruled that this subject was not a permissible topic for questioning. Indeed, as noted above, the trial court *allowed* defense counsel to explain the concept of implicit bias to the prospective jurors. It was only when the State objected to defense counsel's confusing question—"When you hear the statement the only black man charged with robbery, what's the first thing that pops into your head?"—that the trial court intervened by sustaining the State's objection.

Following the trial court's ruling, defense counsel never returned to the subject of implicit bias or racial bias generally. Thus, there is simply nothing in the transcript to support the proposition that the trial court would have prohibited defense counsel from asking further questions to the prospective jurors on these topics. Accordingly, by asserting that an abuse of discretion occurs when a trial court "entirely prevent[s] a party from asking any questions at all about an appropriate subject that is relevant at trial[,]" the majority is simply building a straw man and then knocking it down, as the trial court did no such thing.

After the trial court informed defense counsel that he could not ask about "incidents of cops firing on civilians that happened in the past couple years"—a question that did not even mention race—defense counsel did not seek clarification as to the boundaries of this ruling or ask any other questions on race-related issues. Instead, he simply moved on to another topic. It was the responsibility of defense counsel to ask appropriate questions during voir dire, and the trial court certainly had no duty to help defense counsel formulate properly worded questions or to suggest possible subjects of inquiry.

The majority purports to recognize this proposition when it states that "we examine the questions the defendant actually asked, not the universe of questions a defendant could possibly have asked about a given subject." This statement is odd, however, because the majority's analysis proceeds to do the exact opposite—that is, analyzing the relevance of questions defense counsel *never actually asked*.

Upon an examination of the three discrete questions that defense counsel actually posed to the prospective jurors, it is clear that the trial court did not abuse its discretion in disallowing them. Defendant's first question to the jurors—"When you hear the statement the only black man charged with robbery, what's the first thing that pops into your head?"—was properly excluded as an awkward and poorly-worded inquiry that was likely to confuse the prospective jurors. This Court has previously explained that it is within the trial court's broad discretion in regulating voir dire to disallow questions that are confusing or ambiguous. *See, e.g.*, *State v. Jones*, 347 N.C. 193, 202 (1997) ("On the *voir dire* . . . of prospective jurors, hypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law are improper and should not be allowed."); *State v. Vinson*, 287 N.C. 326, 338 (1975) (holding that a voir dire question was "properly rejected" by the trial court because the form of the question was "inherently ambiguous and totally confusing to prospective jurors"), *vacated in part on other grounds*, 428 U.S. 902 (1976).

Defense counsel's question here was ambiguous in several respects. To begin with, it is not at all clear what defense counsel was referring to by referencing "the only black man charged with robbery." The two individuals who witnesses identified as the poker-game robbers here—defendant and Jamel Lewis—were both black men. Both defendant and Lewis were subsequently charged with robbery offenses, and Lewis eventually pled guilty to armed robbery while defendant proceeded to trial.

Thus, given that both black men involved in the poker-game robbery were charged with robbery offenses, this statement by defense counsel was based upon a factually inaccurate premise and was appropriately disallowed. *See Vinson*, 287 N.C. at 338 (holding that the trial court properly rejected a voir dire question that was "premised on . . . an assumption [that was] not supported by the record"). Moreover, it is not clear what type of information defense counsel hoped to glean from the prospective jurors by posing this odd hypothetical. If defense counsel was aiming to uncover implicit racial bias in the prospective jurors, there were much simpler and less confusing ways to go about accomplishing that objective.

The trial court's ruling on defendant's second question posed to the jury—"Is anyone familiar with the Jonathan Ferrell case that happened here in Charlotte approximately September of 2013?"—is not before this Court. Defendant's briefs in this Court make clear that he is not challenging the trial court's ruling as to that question in this appeal, stating that "[t]he ruling relating to the Ferrell case is not challenged in this appeal." *See State v. Thompson*, 306 N.C. 526, 533 (1982) ("[A]ssignments of error not briefed and argued by defendant are deemed abandoned under N.C. Rule of Appellate Procedure 28(a)."); N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."). Given defendant's decision not to appeal this issue, the majority has no proper basis for proceeding to analyze the propriety of the trial court's ruling regarding the question about the Ferrell case.

The trial court's refusal to allow defendant's third question—"[G]enerally as to incidents, can I inquire of the jury if they have opinions related to incidents of cops firing on civilians that happened in the past couple years?"—was also not an abuse of discretion. Given the wide discretion that trial courts possess to regulate voir dire, it is difficult to understand how the trial court's prohibition on questions regarding specific police shootings that were wholly unrelated to the incident for which defendant was on trial—questions that were likely to confuse and distract the jurors from the facts of the present case—could amount to an abuse of discretion. Indeed, although the majority pays lip service to the broad discretion possessed by trial courts during voir dire to prohibit questions that have the potential to divert the attention of the jurors from the case at hand, the remainder of its analysis essentially ignores the existence of such discretion.

A second reason why the majority's analysis is erroneous is that it largely ignores the reasons articulated by defense counsel to the trial

court for asking the questions at issue in this appeal. As explained above, defense counsel argued before the trial court that he intended to introduce evidence of the Ferrell case and other unrelated police shootings in order to speak to defendant's "state of mind" at the time of the offense. Defense counsel stated unambiguously that "[m]y expectation is that this testimony regarding the Jonathan Ferrell case is relevant to Mr. Crump's state of mind in that this case, the Jonathan Ferrell case, happened just two weeks prior to this particular case" and "directly impacted Mr. Crump's state of mind" at the time of the offense. Defense counsel further stated that this state-of-mind evidence would "go[ ] to rebut the contention that . . . [defendant] was fleeing the scene of the crime," in addition to being relevant to his self-defense claim. Defense counsel argued that it was "imperative" that he "be able to inquire about . . . what [the prospective jurors'] opinions are as related to Mr. Crump and his ability to—or, excuse me—his state of mind at the time of this offense." Defense counsel never informed the trial court of any other specific reason for wanting to ask these questions.

Rather than assess these specific grounds that defense counsel articulated to the trial court as the basis for asking these questions, the majority instead makes the extraordinary assertion that "we also reject the State's argument that we must restrict our examination . . . to the explanations defense counsel offered during his colloquy with the trial court." In other words, the majority appears to be saying that this Court is free to come up with arguments of its own that defense counsel could—and perhaps should—have made in the trial court and then rely on those same manufactured grounds to hold that the trial court abused its discretion. Needless to say, such a proposition is inconsistent with both law and logic.

By substituting more favorable arguments for the defendant than those actually made by defense counsel in the trial court, the majority is complicit in defendant's attempts to "swap horses" on appeal. *State v. Sharpe*, 344 N.C. 190, 194 (1996) ("This Court has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts . . . .' "). This Court has made clear that such attempts to advance a more favorable legal theory on appeal are impermissible. Instead, our review is limited to the theory upon which defendant actually relied in the trial court. *See, e.g.*, *State v. Hunter*, 305 N.C. 106, 112 (1982) ("The theory upon which a case is tried in the lower court must control in construing the record and determining the validity of [the defendant's] exceptions.").

The majority also errs by concluding that defendant was prejudiced by the trial court's decision to disallow these challenged lines of questioning. I believe that defendant has failed to show prejudice for two main reasons. First, defendant was allowed to ask a myriad of other questions regarding the prospective jurors' opinions of, and experiences with, law enforcement officers. Second, based on the evidence that was introduced at trial, defense counsel's proposed line of questioning about other police shootings was not relevant to his stated rationale for pursuing this line of inquiry—that is, showing defendant's state of mind at the time of the offense, which was the sole purpose offered by defense counsel for his desire to explore this topic.

First, defendant cannot show prejudice because the trial court allowed the parties to ask the prospective jurors a wide variety of other questions regarding their perceptions of the police, the credibility of police officers, and their own personal experiences with the police. In assessing the degree of prejudice a defendant has suffered from a trial court's refusal to allow certain questions on voir dire, a factor that our Court has frequently examined is whether the parties were sufficiently able to elicit the information sought by posing other similar questions to the prospective jurors.

For example, in *Rodriguez*, the defendant contended that the trial court erred by refusing to allow him to ask certain questions about prospective jurors' "ability to follow the applicable law prohibiting the imposition of the death penalty upon an intellectually disabled person." *Rodriguez*, 371 N.C. at 309. We disagreed, reasoning that although the trial court did limit the defense counsel's questioning in some respects, it also allowed defense counsel to ask a broad range of other questions regarding intellectual disabilities and explain relevant legal topics to the jury. *Id.* at 312–13. Specifically, the trial court had allowed defense counsel to (1) question prospective jurors about "their prior experiences with intellectually disabled individuals," "their familiarity with intelligence testing," and "their willingness to consider expert mental health testimony;" and (2) explain to prospective jurors "that '[m]ental retardation is a defense to the death penalty.' " *Id.* (alteration in original). We concluded that "we do not believe that the limitations that the trial court placed upon the ability of defendant's trial counsel to question prospective jurors concerning intellectual disability issues constituted an abuse of discretion." *Id.* at 313.

Other cases from this Court similarly demonstrate that no matter how important the topic being pursued on voir dire—whether it be

racial bias, intellectual disability, or the death penalty—the trial court still "retains discretion as to the form and number of questions on the subject" and may properly use that discretion to allow some, but not all, of counsel's proposed questions. *State v. Robinson*, 330 N.C. 1, 13 (1991) (emphasis added) (quoting *Turner v. Murray*, 476 U.S. 28, 37 (1986)); *see*, *e.g.*, *Ward*, 354 N.C. at 256 (holding that the defendant could not establish prejudicial error stemming from the trial court's restrictions on certain questions related to the death penalty, as "defense counsel was allowed to conduct an exhaustive examination into the prospective jurors' attitudes about the death penalty and whether those attitudes would interfere with their ability to serve"); *Robinson*, 330 N.C. at 12–13 (holding that the trial court did not err by restricting certain questions "with respect to jurors' feelings about racial prejudice" because the trial court allowed defense counsel to ask several other probative questions on the issue of racial bias).

Once again, it is crucial to emphasize that although the trial court disallowed defendant's specific request to question prospective jurors about their thoughts on "incidents of cops firing on civilians that happened in the past couple years," the trial court never ruled that defense counsel was barred from asking any questions about race. The fault lies with defense counsel—not the trial court—for failing to pose such questions in an appropriate manner. Moreover, the trial court allowed defendant to thoroughly question prospective jurors regarding their attitudes on issues of police violence, police officers as witnesses, and their prior personal experiences with the police. Indeed, a careful reading of the transcript reveals that the trial court permitted counsel to do the following:

- Explain and define for prospective jurors the concept of "implicit bias against people of a particular race, specifically African Americans."
- Inform prospective jurors that this case involved an exchange of gunfire between defendant and police officers. Defense counsel further stated the following: "[I]f you haven't heard media reports before [about] officer-involved shootings, then you haven't been watching any news. They're out there. There is another dynamic that is going on here, too . . . I'll tell you, you can see Mr. Crump is an African-American gentleman, and these officers are white officers, okay? So we're going to be talking about some real issues here this afternoon, because people have some real strong feelings because of media reports but also based on their personal experiences."

- Question prospective jurors regarding their general opinions about police officers, their perceptions of the credibility of police officers, whether their prior interactions with the police were positive or negative, and whether they had any friends or family in law enforcement.
- Inform prospective jurors that police officers are not entitled to any special considerations as to their credibility.
- Ask if the prospective jurors had "any opinions regarding the fact of whether or not a person has a right to self-defense if an officer is the aggressor in the case."

These examples demonstrate that the trial court allowed both the State and defense counsel to thoroughly examine prospective jurors regarding their experiences, attitudes, and perceptions of the police. Accordingly, defendant has failed to show how the information gleaned via this questioning was insufficient to allow him to uncover any existing biases of prospective jurors and to intelligently exercise his peremptory challenges.

Second, defendant cannot show that he was prejudiced by the trial court's voir dire rulings because—as noted by the Court of Appeals—the information that defendant sought to elicit by asking about unrelated police shootings was not actually relevant to his state-of-mind defenses based on his own testimony at trial. As the above-quoted portion of the transcript makes abundantly clear, defense counsel informed the trial court that he wanted to question prospective jurors about their thoughts on the Ferrell case and police shootings generally because he believed these topics were relevant to the State's claim that defendant fled the scene as well as to defendant's claim of "self-defense . . . as relat[ing] to the assault charges." Defense counsel asserted that concerns about police violence and the recent Ferrell shooting had "directly impacted [defendant's] state of mind . . . at the time of this offense."

However, defendant's own trial testimony reveals that police shootings were not, in fact, on his mind at the time of the incident. To the contrary, defendant's testimony makes clear that he was not actually aware that the persons shooting at him were police officers until after he had already fired shots and fled the scene. Defendant testified that it was not until "after [he] came out onto" N. Tryon Street and saw sirens that he realized "it was the police that [were] shooting at [him]," and it was only during the subsequent car chase that defendant began to think he "might not make it out of this one." Based on this testimony, even the majority

concedes that "[i]t is true that defendant testified that he did not know he was firing at law enforcement officers."

Thus, because defendant did not know he was interacting with police officers at the time he was actually firing the shots in the parking lot, any apprehensions he had about recent police shootings (either as a result of the Ferrell case or otherwise) could not have motivated his allegedly defensive shots or his flight from the scene. Given this admission by defendant during his testimony, the effect of unrelated police shootings on his state of mind simply was not relevant to the issues that the jury had to decide based on the evidence actually presented at trial. Accordingly, defendant cannot demonstrate that he was prejudiced by the trial court's rulings.

Finally, I wish to note my agreement with the majority that the general issue of racial bias would have been a proper subject of inquiry during voir dire in this case. However, for the reasons explained above, defense counsel failed to pursue this topic through appropriate questioning. Had he actually done so, it likely *would* have been an abuse of discretion for the trial court to disallow such questions. But a trial court cannot be found to have abused its discretion during voir dire based on questions that defense counsel did not actually ask or based on rulings that the trial court did not actually render. Accordingly, I respectfully dissent.

Justices NEWBY and MORGAN join in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
JIMMY LEE FARMER

No. 8A19

Filed 18 December 2020

Constitutional Law—right to speedy trial—Barker balancing test—no prejudice from delay

A five-year delay between an indictment and trial (for a first-degree sex offense with a child and indecent liberties with a child) did not violate defendant's Sixth Amendment right to a speedy trial where the *Barker v. Wingo*, 407 U.S. 514 (1972), four-factor balancing test showed that although the length of delay was unreasonable, the reason for the delay was crowded court dockets rather than negligence or willfulness by the State, defendant waited nearly five years to assert his right to a speedy trial, and defendant failed to present evidence establishing any actual prejudice.

Appeal pursuant to N.C.G.S. § 7A-30(2) from a divided panel of the Court of Appeals, 262 N.C. App. 619, 822 S.E.2d 556 (2018), affirming a judgment entered on 20 July 2017 by Judge Lori I. Hamilton in Superior Court, Rowan County. Heard in the Supreme Court on 11 December 2019.

Joshua H. Stein, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, for the State-appellee.

Jarvis John Edgerton IV for defendant-appellant.

MORGAN, Justice.

This appeal involves a criminal defendant's contention that the passage of time between the issuance of the indictments for the offenses that he was alleged to have committed and his trial for these alleged offenses was so lengthy that it constituted a violation of defendant's right to a speedy trial as provided by the Constitution of the United States and the North Carolina Constitution. In applying the pertinent constitutional provisions, the salient principles which prescribe a criminal defendant's right to a speedy trial which were established by the Supreme Court of the United States in *Barker v. Wingo*, 407 U.S. 514 (1972), and the controlling considerations which govern an alleged offender's right to a speedy trial which were determined by this Court pursuant to *Barker*,

we hold that the scheduling and procedural circumstances existent in the present case, albeit unsettling, do not constitute an infringement upon defendant's constitutional right to a speedy trial.

Factual Background and Procedural History

The evidence at defendant's trial tended to show the following facts. On 8 March 2012, four-year-old "Savannah"[1] was allegedly molested by defendant—her step-grandfather—while Savannah was visiting the home shared by her grandmother and defendant. Savannah's grandmother was married to defendant at this time. On the date of the alleged offenses, Savannah was playing outside of her grandmother's home with members of her family when she asked to go inside for a snack. Defendant volunteered to take Savannah inside in order to get an apple. However, when defendant carried Savannah into the home, he did not take her to the kitchen but instead took Savannah into the master bedroom. Savannah was lying on the bed and defendant removed Savannah's clothing and touched her genitals.

After a while, Savannah's grandmother felt that the amount of time that defendant and Savannah had been inside the home was "odd," and upon entering the residence and going to the kitchen, the grandmother did not see either Savannah or defendant. Upon hearing his wife enter the home, defendant hastily pulled up Savannah's underwear and shorts, leaving them twisted. Savannah's grandmother noticed that the door to the master bedroom was ajar, and when she investigated, she saw Savannah lying on her back on the bed in the master bedroom and noticed that the child's "pants weren't right." Savannah got off of the bed while continuing to pull up her underwear and asked her grandmother to hold her. Defendant rushed out of the room without making eye contact with his wife. Originally, Savannah explained that her underwear had gotten disarranged because she had been jumping on the bed. Savannah gave her grandmother this explanation because it was the version of the story that defendant had instructed Savannah to say. However, on the ride home with her mother from the grandmother's residence later in the day, Savannah told her mother that defendant had touched Savannah's genital area. Savannah's mother contacted the Rowan County Sheriff's Office. It began an investigation into the matter which led to the arrest of defendant on 24 April 2012. At his first appearance in court on 26 April 2012 following his arrest, defendant received court-appointed

1. The name "Savannah" is a pseudonym which has been utilized throughout appellate review of this case to protect the identity of the minor child and to facilitate the ease of reading.

counsel. On 7 May 2012, defendant was indicted on charges of first-degree sex offense with a child and indecent liberties with a child.

Defendant waived arraignment on 24 May 2012 and 5 November 2012. On 15 July 2013, defendant filed a motion requesting a bond hearing to reduce his bond, a motion for funds for a private investigator, and notice of his intent to request expert funds. On 29 July 2013, the trial court allowed defendant's motion for funds for a private investigator; however, defendant's bond hearing was not calendared. On 21 January 2014, defendant filed another notice of his intent to request expert funds and a motion for funds for an expert analyst, and the motion was heard and allowed without objection by the State on the following day of 22 January 2014. Defendant did not meet with any of the experts whom he had retained until 5 March 2014.

Defendant's trial was scheduled to start on 30 January 2017; however, counsel for defendant and the State agreed to continue the case and to reschedule it for the 17 July 2017 trial session of court. On 6 March 2017, defendant filed a motion for a speedy trial and asked the trial court either to dismiss the charges or to schedule the trial for an immovable court date by way of a peremptory setting. Defendant additionally filed a motion to dismiss on 11 July 2017, alleging a violation of the right to a speedy trial as established by the Constitution of the United States. In his motion to dismiss, defendant stated that he had maintained "the same counsel throughout the life of [the] case."

The speedy trial motion came before the Honorable Lori I. Hamilton, who conducted the hearing regarding defendant's motions on 17 July 2017 during the trial session of Superior Court, Rowan County, during which defendant's criminal trial was rescheduled. At the hearing, defendant called Rowan County Assistant Clerk of Court Amelia Linn to testify concerning the allegedly unconstitutional delay in bringing defendant to trial following his indictment. Linn testified that her office was the keeper of legal records in Rowan County and that she was the supervisor of the criminal records division. Linn also represented that no fewer than sixty-five trial sessions had occurred during the period of time between defendant's 7 May 2012 date of indictment and the 17 July 2017 trial date. Within this time period, defendant's case had no trial activity from a calendared date of 9 May 2012 to the 30 January 2017 trial session of court, according to Rowan County court records which were introduced into evidence at the hearing.

After reviewing the evidence which was introduced and hearing the arguments which were made by both parties, the trial court applied

the factors established in *Barker* to assess whether defendant's constitutional right to a speedy trial had been violated. The trial court determined that defendant's right to a speedy trial had not been violated; accordingly, defendant's motion to dismiss was denied and the matter proceeded to trial.

During trial, the evidence regarding the series of events which allegedly occurred on 8 March 2012 involving Savannah and defendant along with the purported actions and circumstances which followed was presented as described above. In addition, defendant's niece testified that defendant had sexually molested her in the late 1970s and early 1980s when the niece was between the ages of five and nine years old. The State offered that the lengthy period of time which elapsed between the alleged incidents involving defendant's activity with the niece and with Savannah was explained, at least in part, by defendant's lengthy imprisonment for two counts of murder in 1983, resulting from defendant's killing of his previous wife and his eight-year-old daughter. Defendant did not offer any evidence at trial. On 20 July 2017, the jury returned verdicts finding defendant guilty as charged of first-degree sex offense with a child and indecent liberties with a child. Thereupon, the trial court entered consecutive sentences totaling 338 months to 476 months with credit given to defendant for time served while awaiting trial. Defendant gave oral notice of appeal in open court.

The Court of Appeals Decision

In the Court of Appeals, defendant argued that the trial court erred by denying defendant's motion to dismiss the charges against him. Defendant contended that the State violated his constitutional right to a speedy trial by failing to calendar his trial date for approximately five years following the issuance of the indictments against him. *See State v. Farmer*, 262 N.C. App. 619, 822 S.E.2d 556 (2018).[2] The majority of the panel of the lower appellate court acknowledged that the five-year delay during which defendant waited to proceed to trial on the charges against him was "significantly long." *Id.* at 621–22, 822 S.E.2d at 559; *see State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003) (noting that a delay between indictment and trial of one year is presumptively prejudicial). However, after reviewing all of the *Barker* factors, the Court of Appeals majority ultimately held that there was no speedy trial violation based on the specific facts of this case and therefore affirmed the trial

2. Defendant did not specifically challenge any of the trial court's findings of fact in the Court of Appeals or in his appellant's new brief, so the findings of fact are binding on appeal before this Court. Similarly, the dissenting opinion of the Court of Appeals in this case did not take issue with any of the lower court's findings.

court's denial of defendant's motion to dismiss. *Farmer*, 262 N.C. App. at 625, 822 S.E.2d at 561.

The Court of Appeals majority cited in its authored opinion our decision in *State v. McKoy*, 294 N.C. 134, 240 S.E.2d 383 (1978), for the proposition that

> [t]he right to a speedy trial is different from other constitutional rights in that, among other things, deprivation of a speedy trial does not per se prejudice the ability of the accused to defend himself; it is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial; and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial.

Farmer, 262 N.C. App. at 622, 822 S.E.2d at 559 (quoting *McKoy*, 294 N.C. at 140, 240 S.E.2d at 388). Under *Barker*, the factors to be considered in making the difficult and highly fact-specific evaluation of whether a possible speedy trial violation has occurred include "(1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant resulting from the delay." *State v. Groves*, 324 N.C. 360, 365, 378 S.E.2d 763, 767 (1989) (citation omitted).

After observing that the length of the delay was constitutionally problematic, the Court of Appeals majority next addressed the reason for the lapse of "nearly 63 months—approximately five years, two months and twenty-four days—before [defendant's] case was tried," noting that a "defendant has the burden of showing that the delay was caused by the neglect or willfulness of the prosecution." *Farmer*, 262 N.C. App. at 622, 822 S.E.2d at 559 (quoting *Spivey*, 357 N.C. at 119, 579 S.E.2d at 255). The lower appellate court perceived that defendant himself was responsible for some part of this delay, in that "defendant was still preparing his trial defense as of late 2014 when he requested funds to obtain expert witnesses." *Farmer*, 262 N.C. App. at 623, 822 S.E.2d at 560. The majority of the Court of Appeals panel further recognized that it was "undisputed that the primary cause for defendant's delayed trial was due to a backlog of pending cases in Rowan County and a shortage of staff of assistant district attorneys to try cases." *Id.* The majority of the panel decided that "defendant did not establish a prima facie case that the delay was caused by neglect or willfulness of the prosecution." *Id.*

As for the third *Barker* factor, the Court of Appeals majority emphasized that defendant only asserted his right to a speedy trial in a formal fashion with the filing of his motion on 6 March 2017, almost five years after he was arrested. *Farmer*, 262 N.C. App. at 624, 822 S.E.2d at 560. The lower appellate court calculated that within four months of defendant's assertion of his right to a speedy trial, his case was calendared and tried. *Id.* In this regard, the panel's majority expressly concluded that "[g]iven the short period between defendant's demand and his trial, defendant's failure to assert his right sooner weighs against him in balancing this *Barker* factor." *Id.*

Lastly, to establish a violation of the right to a speedy trial "[a] defendant must show actual, substantial prejudice." *Spivey*, 357 N.C. at 122, 579 S.E.2d at 257. Here, the prevailing judges of the panel rejected defendant's contention that he was prejudiced by the delay between his indictment and his trial because the witnesses' memories could have deteriorated over time, to defendant's detriment. *Farmer*, 262 N.C. App. at 624–25, 822 S.E.2d at 561. The majority in the Court of Appeals noted that Savannah, who was four years old at the time of the alleged offenses, was able to testify about facts relevant to the incident itself, even though she had trouble remembering some details about what had occurred before and after the incident. *Id.* at 625, 822 S.E.2d at 561. Other witnesses, including Savannah's grandmother were able, however, to testify fully and clearly regarding the events of the day at issue. *Id.* In addition, defendant had access, for the preparation of his case and for impeachment purposes, to all of the witnesses' interviews and statements obtained during the initial investigation of the matter. *Id.* The lower appellate court also expressed that it was "inclined to believe" that defendant "had hoped to take advantage of the delay in which he had acquiesced." *Id.* (citing *Barker*, 407 U.S. at 535). For all of these reasons, the Court of Appeals majority held that defendant's ability to defend his case was not prejudiced and that defendant "failed to demonstrate that his constitutional right to a speedy trial was violated." *Farmer*, 262 N.C. App. at 625, 822 S.E.2d at 561. Therefore, the Court of Appeals affirmed the trial court's denial of defendant's motion to dismiss.

The dissenting judge of the Court of Appeals panel agreed with the majority that the delay of over five years to provide defendant with a trial after defendant's arrest was "presumptively prejudicial" and went on to determine that in "[a]nalyzing the factors to be applied, none of which support the State's position . . . defendant demonstrated that his constitutional right to a speedy trial was violated." *Farmer*, 262 N.C. App. at 626, 822 S.E.2d at 561 (Arrowood, J., dissenting). With regard to

the reason for the delay, the dissenting judge disagreed with the majority that defendant's request for expert funding in 2013 and 2014, defendant's acquiescence to the State's request to continue the case from the January 2017 calendar to the next trial session, and defendant's slowness to formally assert his right to a speedy trial were sufficient to show that defendant consented to the delay in bringing the case to trial. *Id.* at 627, 822 S.E.2d at 562–63. The dissenting judge further opined that any portion of the responsibility for the delay in bringing defendant's case to trial which could be attributed to "congested dockets" and insufficient staffing of the District Attorney's Office in that prosecutorial district "ultimately weighs against the State" because "the State has the responsibility to adequately fund the criminal justice system . . . to timely dispose of cases." *Id.* at 628–29, 822 S.E.2d at 563–64. The dissent viewed the factor of defendant's assertion of the right to a speedy trial as a consideration which "carries only minimal weight in defendant's favor" because "defendant asserted his right to a speedy trial four years and eleven months after he was arrested, and the case was called for trial less than four months later." *Id.* at 630, 822 S.E.2d at 564. As to the final factor of prejudice, the dissenting judge decided that it "weighs only slightly in defendant's favor" since, "absent a more concrete showing of actual prejudice," although "the majority determined defendant was not prejudiced because defendant's ability to defend his case was not impaired," nonetheless "defendant established the presumptive prejudice that naturally accompanies an extended pretrial incarceration." *Id.* at 630–31, 822 S.E.2d at 564.

On 7 January 2019, defendant filed his notice of appeal based upon the dissent in the Court of Appeals. Defendant did not specifically challenge any of the trial court's findings of fact, either in the Court of Appeals or in his brief to our Court; accordingly, those findings of fact are binding. Further, in matters heard by this Court on the basis of a dissenting opinion in the Court of Appeals, the only arguments considered are those where the dissent "diverges from the opinion of the majority" and not those where the "panel agreed." *State v. Hooper*, 318 N.C. 680, 682, 351 S.E.2d 286, 287 (1987).

Analysis

In considering defendant's argument that his constitutional right to a speedy trial was violated here, we must undertake the challenging task—just as the panel members of the lower appellate court did—of evaluating and weighing the following *Barker* factors: "(1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant resulting

from the delay." *Groves*, 324 N.C. at 365, 378 S.E.2d at 767. We must bear in mind the caution of the Supreme Court of the United States that

> none of the four factors identified above [are] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

Barker, 407 U.S. at 533; *see also Spivey*, 357 N.C. at 119, 579 S.E.2d at 255. For this reason, "it is impossible to determine precisely when the right [to a speedy trial] has been denied." *McKoy*, 294 N.C. at 140, 240 S.E.2d at 388 (citing *Barker*, 407 U.S. at 514). "We follow the same analysis when reviewing such claims under Article I, Section 18 of the North Carolina Constitution." *State v. Grooms*, 353 N.C. 50, 62 540 S.E.2d 713, 721 (2000), *cert. denied*, 534 U.S. 838 (2001).

1. Length of the delay

The entire Court of Appeals panel agreed that the passage of time between the initiation of charges against defendant and the occurrence of his trial was too long. Before this Court, defendant argued that the extraordinarily long delay here—specified by both the Court of Appeals majority view and dissenting view as lasting for five years, two months, and twenty-four days—should weigh heavily against the State and in favor of defendant's speedy trial claim under *Barker*. *See Doggett v. United State*s, 505 U.S. 647, 652 (1992) ("[T]he presumption that pretrial delay has prejudiced the accused intensifies over time."). We agree that the prolonged time interval in the present case between the date the indictments against defendant were issued and his resulting trial is striking and clearly raises a presumption that defendant's constitutional right to a speedy trial may have been breached.

This first *Barker* factor itself consequently does not require our further consideration since all of the judges of the Court of Appeals panel agreed on the presumptive prejudice to defendant of his right to a speedy trial in light of the length of the delay here. Both the majority opinion and the dissenting opinion utilize identical language that the length of the delay "triggers an inquiry into the remaining *Barker* factors." *Farmer*, 262 N.C. App. at 267, 822 S.E.2d at 627. This joint assessment comports with the approach adopted by the Supreme Court of the United States in *Barker* regarding the operation of the "length of the delay" factor upon the determination of the factor's existence: "The length of the delay is

to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. In adhering to this guidance, upon the presumption of prejudice to defendant's constitutional right to a speedy trial by virtue of the length of the delay preceding the occurrence of his trial, we proceed to examine the other delineated *Barker* factors.

2. Reason for the delay

With regard to the reason for the length of a delay to bring a criminal defendant to trial where the observance of an accused's right to a speedy trial is challenged, the high court in *Barker* instructs the following:

> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as . . . overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.

Barker, 407 U.S. at 531.

In implementing this *Barker* factor regarding the reason for the delay, we crafted the following evidentiary structure which we conveyed in our opinion in *Spivey*:

> defendant has the burden of showing that the delay was caused by the *neglect* or *willfulness* of the prosecution. Only after the defendant has carried his burden of proof by offering *prima facie* evidence showing that the delay was caused by the neglect or willfulness of the prosecution must the State offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* evidence.

Spivey, 357 N.C. at 119, 579 S.E.2d at 255 (citations omitted).

Defendant contends that the State was both neglectful and willful in its delay to afford him a speedy trial. He depicts the failure of the State to calendar defendant's bond hearing upon the filing of his 15 July 2013 motion as indicative of neglect and the failure of the State to properly

proceed with the scheduling of defendant's trial as representative of willfulness. The State responds to defendant's endeavor to satisfy his burden by asserting that the reasons for the delay in bringing defendant to trial, which it offered into evidence at defendant's 17 July 2017 hearing on his motion to dismiss, included crowded criminal case dockets, older pending cases which were prioritized for resolution at the time, and limited prosecutorial resources. The State also claims that defendant's ongoing preparation for trial and his agreement, both express and tacit, to eventual scheduling of his trial contributed to the delay.

In applying the direction given by the Supreme Court of the United States on this *Barker* factor, we find that this circumstance modestly favors defendant. The nation's highest court is clear that, while different reasons for delay in a criminal trial's execution should be weighed in appropriate increments, a reason such as crowded criminal case dockets—expressly cited by the Supreme Court of the United States in *Barker* and offered as a reason for delay by the State in the instant case—while largely neutral and hence weighted less heavily against the State than a more intentional effort to prejudice a defendant with a delay, nonetheless must be borne by the State rather than by the defendant, since the State bears the responsibility for such a lag in time. We likewise consider here the State's discretion to call other pending criminal cases for trial prior to defendant's case and the State's limited resources for the resolution of criminal cases to weigh, mildly but definitively, against the State. Although defendant's passive and concessionary posture may have been a contributing element to the delay, it is engulfed by the State's more authoritative role in the delay.

While this Court will refrain from characterizing the State's prosecutorial backlog and usage of prosecutorial resources as being demonstrable of neglect or willfulness in its delay of scheduling defendant's trial, we recognize that we have repeatedly held that overcrowded dockets and limited court sessions are valid reasons excusing delay. *See*, *e.g.*, *Spivey*, 357 N.C. at 119–121, 579 S.E.2d at 255–56; *State v. Hill*, 287 N.C. 207, 212, 214 S.E.2d 67, 71 (1975); *State v. Hollars*, 266 N.C. 45, 53–54, 145 S.E.2d 309, 315 (1965); *State v. Brown*, 282 N.C. 117, 124, 191 S.E.2d 659, 664 (1972) ("Both crowded dockets and lack of judges or lawyers, and other factors, make some delays inevitable."). As a result and in light of our interpretation of *Barker* and our own Court's precedent, the second *Barker* factor as to the reason for delay slightly, but firmly, weighs in the favor of defendant.

3. Assertion of the right to a speedy trial

A defendant's belated assertion of his right to a speedy trial "does weigh against his contention that he has been denied his constitutional right to a speedy trial." *State v. Flowers*, 347 N.C. 1, 28, 489 S.E.2d 391, 407 (1997). In describing the third speedy trial factor in *Barker* to be scrutinized with regard to a criminal defendant's contention that his constitutional right was violated, the Supreme Court of the United States once again employed descriptive and straightforward language to illustrate the proper discernment of an accused's claim.

> The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

Barker, 407 U.S. 514, 531–32.

By this measure, the third *Barker* factor of a defendant's assertion of the right to a speedy trial weighs significantly against the alleged offender in the case before us. We have noted that defendant was arrested on 24 April 2012, that he obtained court-appointed counsel on 26 April 2012, and that he was indicted on 7 May 2012. However, as the Court of Appeals majority pointed out in its decision, it was almost five years after defendant's arrest until his formal request for a speedy trial when his motion was filed on 6 March 2017. The dissenting judge in the lower appellate court, while acknowledging the existence of appellate case law which is contrary to defendant's stance on this *Barker* factor, viewed the factor to operate minimally in favor of defendant.

Through the operation of the high court's standard on this *Barker* factor that defendant's assertion of the right to a speedy trial is entitled to a strong evidentiary weight in determining whether defendant in the case sub judice was deprived of his constitutional right to a speedy trial, we find that this factor militates strongly against defendant. The difficulty of defendant to show that he was denied a speedy trial due to the emphasis of Supreme Court of the United States upon a defendant's failure to assert the right is heightened by the happenstance that defendant's case came on for trial four months and eleven days after his speedy trial motion was filed.

4. Prejudice to defendant resulting from the delay

The Supreme Court of the United States in its opinion in *Barker* outlined a final factor for speedy trial infringement evaluation, stating the following:

> A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker, 407 U.S. at 532. We embraced this approach in *State v. Webster*, 337 N.C. 674, 681, 447 S.E.2d 349, 352 (1994).

In examining the most serious component of the prejudice factor which was identified by our country's preeminent legal forum in *Barker*—the possibility that the defense will be impaired—this prospect did not manifest itself in the present case. There has been no contention by defendant that the presentation of his trial defense was impaired, nor any representation by defendant regarding such a compromise of his trial defense. Therefore, the most significant of the three prongs of the prejudice factor does not exist in this case. The first identified prong—the prevention of oppressive pretrial incarceration—inherently exists by virtue of the longevity of defendant's continuous confinement prior to his trial. The remaining feature of the prejudice components—the minimization of defendant's anxiety and concern—would also inherently exist as he awaited the occurrence of his trial which would resolve the charges against him. While we do not disregard nor diminish the deleterious effects of defendant's prolonged pretrial incarceration, as well as anxiety and concern, upon an accused such as defendant who is awaiting trial for an appreciable period of time, we nonetheless are bound to follow the *Barker* formula on prejudice in recognizing that there was no impairment of defendant's defense which was occasioned by the delay of the trial and the standard presence of the remaining two interests did not rise to a level which amounted to any prejudice to defendant's rights.

In assessing the identified interests which compose the prejudice factor established in *Barker*, we agree with the Court of Appeals majority that defendant did not suffer prejudice in this case stemming from

the delay of his trial. While the dissenting view of the Court of Appeals deems this fourth *Barker* factor to weigh slightly in favor of defendant without a demonstration of actual prejudice experienced by defendant, we determine that this final *Barker* factor of prejudice to defendant as a result of the trial's delay significantly weighs against defendant.

Conclusion

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

Barker, 407 U.S. at 533.

After identifying and discussing the four factors in its decision in *Barker* which are established to facilitate and foster a trial court's determination of a defendant's claim that his or her constitutional right to a speedy trial has been violated, the Supreme Court of the United States next included the paragraph cited immediately above to serve as overarching direction in evaluating the factors. Our Court adopts these permeating principles in the instant case to aid our major and important task of deciding whether defendant's right to a speedy trial was violated under the facts and circumstances existent in this case. As we, in the words of the *Barker* Court, "engage in a difficult and sensitive balancing process," the Court ascertains that (1) the first *Barker* factor—the length of the delay—presumptively favors defendant; (2) the second *Barker* factor—the reason for the delay—slightly favors defendant; (3) the third *Barker* factor—defendant's assertion of the right to a speedy trial—strongly weighs against defendant; and (4) the fourth *Barker* factor—prejudice to defendant resulting from the delay—significantly weighs against defendant. *Id.* As we follow the guidance articulated by the Supreme Court of the United States, since the length of the delay was "presumptively prejudicial" which necessitated the inquiry into the other *Barker* factors and since "they are related factors and must be considered together with such other circumstances as may be relevant," we determine that the presumption of prejudice in defendant's case due

to the length of the delay has been sufficiently rebutted by the collective effect of the other *Barker* factors. *See Barker*, 407 U.S. at 533.

Upon engaging in the "difficult and sensitive balancing process" of weighing the *Barker* factors as they apply to the circumstances of this case, we hold that defendant's constitutional right to a speedy trial was not violated. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
BRUCE WAYNE GLOVER

No. 392A19

Filed 18 December 2020

1. Criminal Law—possession—jury instructions—acting in concert—alternative theory to constructive possession

In a trial for possession of multiple controlled substances, the trial court erred by giving jury instructions for the theory of acting in concert where the State failed to present any evidence of a common plan or purpose to possess the controlled substances. The State's evidence that the drugs were stored in defendant's personal area by his housemate, whom he previously did drugs with, could support a theory of constructive possession but failed to demonstrate a common plan or purpose between defendant and his housemate.

2. Criminal Law—jury instructions—unsupported instruction—harmless error analysis—prejudice

The trial court committed prejudicial error in a trial for possession of multiple controlled substances when it instructed the jury on both acting in concert and constructive possession because there was no evidence supporting a theory of acting in concert, there existed a strong possibility of confusing the jury by presenting both theories, and the evidence supporting constructive possession was in dispute and subject to questions regarding its credibility.

Justice NEWBY dissenting.

STATE v. GLOVER

[376 N.C. 420 (2020)]

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 267 N.C. App. 315, 833 S.E.2d 203 (2019), finding no error in part, and reversing and remanding in part, a judgment entered on 20 September 2017 by Judge W. Erwin Spainhour in Superior Court, Henderson County. Heard in the Supreme Court on 9 March 2020.

Joshua H. Stein, Attorney General, by Joseph Finarelli, Special Deputy Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Sterling Rozear, Assistant Appellate Defender, for defendant-appellant.

MORGAN, Justice.

The appeal in this drug possession case presents two questions for our consideration: First, whether the evidence adduced at defendant's trial was sufficient to support the trial court's instruction to the jury on the theory of acting in concert, and second, if the evidence presented was insufficient to support the instruction, whether the error was harmless. On the facts here, we conclude that the evidence did not support the trial court's instruction on acting in concert. Further, given the potential for confusion on the part of the jury between the theories of acting in concert and constructive possession as bases for the return of guilty verdicts on the possession of controlled substance charges against defendant, the erroneous instruction was not harmless. Accordingly, the trial court's judgment in this case must be vacated and the matter remanded to the trial court for a new trial.

Factual Background and Procedural History

The charges in this matter arose from controlled substances discovered on 29 September 2016 by officers with the Henderson County Sheriff's Office who were investigating complaints of drug activity at a home where defendant Bruce Wayne Glover lived with several people, including Autumn Stepp. Stepp was not at the group's residence when the officers arrived, having departed earlier in the day. Stepp, who regularly used controlled substances such as marijuana, heroin, and methamphetamine, kept materials that she collectively called her "hard time stash"—small amounts of heroin, cocaine, marijuana, methamphetamine, a few pills, and various items of drug paraphernalia—in a small yellow tin. Before her departure from the home on 29 September 2016, Stepp placed the yellow tin in the drawer of a dresser that was located in an alcove near defendant's bedroom, without telling defendant or any of her other housemates about this act.

When the officers knocked on the door of the home, defendant stepped outside to speak with them. During the discussion, a detective asked defendant whether defendant had any contraband in his bedroom. Defendant told the detective that defendant had used methamphetamine and prescription pills, admitting that the bedroom likely contained drug paraphernalia in the form of "needles and pipes." However, defendant stated that he did not think that officers would find any illegal substances in his personal space in the home. Defendant gave consent for the officers to search his bedroom as well as the alcove near defendant's bedroom which defendant stated that he considered to be part of his "personal space."

In defendant's bedroom, the detective found a white rectangular pill wrapped in aluminum foil inside a dresser drawer; scales, rolling papers, plastic bags, and glass pipes in a small black pouch; and a small bag containing marijuana in a small safe. Officers also discovered the small yellow tin in the drawer of the dresser in the alcove where Stepp had placed it without defendant's knowledge. Inside the tin, officers discovered three plastic bags with crystallized substances. Field tests on the contents of each bag "gave a positive indication for the presence of methamphetamine, cocaine[,] and heroin." At trial, a State Crime Laboratory analyst testified that the three bags collectively contained 0.18 grams of heroin, 2.65 grams of methamphetamine, and less than 0.1 gram of both methamphetamine and cocaine, respectively.

On 20 March 2017, the Henderson County grand jury indicted defendant on one count each of possession with the intent to sell and deliver methamphetamine, heroin, and cocaine, as well as one count of maintaining a dwelling house for the sale of controlled substances. On 24 July 2017, the grand jury indicted defendant for having attained the status of an habitual felon.

Defendant's case came on for trial at the 18 September 2017 criminal session of Superior Court, Henderson County. In her trial testimony, Stepp testified that the yellow tin containing heroin, methamphetamine, and cocaine was her personal "hard time stash" and that she had not informed defendant or anyone else that she had placed the tin in the dresser drawer before Stepp left the group's house on 29 September 2016. When asked during her testimony if she realized that she was admitting to her own possession of controlled substances, Stepp responded, "Yes. Yes." On cross-examination, Stepp admitted to having used drugs with defendant, but denied that defendant had sold her any controlled substances. When asked again during her testimony about ownership of the drugs discovered in the dresser, Stepp reiterated "if it was in the tin, it was mine."

At the close of the State's evidence, defendant moved to dismiss the charges against him for possessing the controlled substances with the intent to manufacture, sell, and deliver them, and for maintaining a dwelling for the purpose of selling and using controlled substances. The trial court dismissed all charges against defendant except for the charge of simple possession of heroin, methamphetamine, and cocaine. During the jury charge conference, the State requested a jury instruction on the theory of acting in concert in addition to the constructive possession instruction that the trial court had already decided to give to the jury. Defendant objected to the acting in concert instruction; and the trial court denied defendant's request to refrain from giving the instruction. At the end of the jury charge conference, defendant renewed his objection to the acting in concert instruction, which the trial court again overruled. The trial court thereafter gave instructions to the jury on both constructive possession and acting in concert as legal theories underlying the drug possession charges.

The jury began its deliberations at 3:47 p.m. on the day that the case was submitted to it. At 4:02 p.m. of the same day, the trial court brought the jury back in to the courtroom to address a note sent by the foreperson to the trial court, asking for a transcript of Stepp's testimony. The trial court denied the jury's request, and the jury resumed its deliberations. A short time later, the jury returned to the courtroom at 4:30 p.m. in order to render its verdict. The jury found defendant guilty of simple possession of methamphetamine, heroin, and cocaine. The jury subsequently determined that defendant had attained the status of an habitual felon. In its judgment, the trial court imposed two consecutive sentences of 50 to 72 months of imprisonment. Defendant gave notice of appeal in open court to the Court of Appeals.

In the Court of Appeals, defendant raised several issues including, *inter alia*, that the trial court erred in instructing the jury, over defendant's objection, that the jury could find defendant guilty of possession of the controlled substances at issue on the theory of acting in concert in addition to the theory of constructive possession.[1] The Court of Appeals panel divided on this issue: the majority rejected defendant's contention that the evidence produced at trial was insufficient to support an instruction on acting in concert, *State v. Glover*, 267 N.C. App. 315, 320, 833 S.E.2d 203, 207 (2019), while the dissenting judge concluded both

1. Along with his appellate brief, defendant filed a motion for appropriate relief in the Court of Appeals on 7 September 2018. Matters pertaining to the motion for appropriate relief are not before the Court.

that the evidence was insufficient to support the instruction and that the erroneous instruction was not harmless error, thus entitling defendant to a new trial. *Id.* at 329, 833 S.E.2d at 213 (Collins, J., dissenting).

The entire Court of Appeals panel agreed on the pertinent case law applicable to the resolution of defendant's argument regarding the acting in concert jury instruction. "[I]t is error for the trial judge to charge on matters which materially affect the issues when they are not supported by the evidence." *State v. Jennings*, 276 N.C. 157, 161, 171 S.E.2d 447, 449 (1970). The charge at issue here was possession of drugs, which requires proof that the defendant knowingly possessed a controlled substance. *State v. Galaviz-Torres*, 368 N.C. 44, 48, 772 S.E.2d 434, 437 (2015). In turn,

> [w]here the state seeks to convict a defendant using the principle of concerted action, that this defendant did some act forming a part of the crime charged would be strong evidence that he was acting together with another who did other acts leading toward the crimes' commission. . . . It is not . . . necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Joyner, 297 N.C. 349, 356–57, 255 S.E.2d 390, 395 (1979). Thus, in the case at bar, a jury instruction on possession of controlled substances under the theory of acting in concert was proper only if sufficient evidence was produced at defendant's trial showing that defendant acted together with Stepp pursuant to a common plan or purpose to possess the contraband found in the yellow tin. *See id.* at 356, 255 S.E.2d at 395.

In the view of the majority, in this case there

> was sufficient evidence from which the jury could have . . . determined that [d]efendant acted in concert to aid . . . Stepp's constructive possession of the controlled substances found in the metal tin. Specifically, [d]efendant called . . . Stepp, who testified that *she* placed the metal tin in the dresser in [d]efendant's personal space, that the drugs therein were *hers*, that she intended to come back later to use them, and that she and [d]efendant had taken

> drugs together in the past. This testimony is evidence that . . . Stepp possessed (constructively) the drugs in the metal tin. Further, based on . . . Stepp's testimony along with the State's evidence, the jury could have found that [d]efendant was aware of the presence of the drugs in the metal tin: (1) he admitted to the detective to having just used methamphetamine, and the only methamphetamine found in the house was in the metal tin; *and* (2) he admitted to the detective to having just ingested prescription pills, and a pill found in his bedroom matched a pill found in the metal tin. And the evidence was sufficient to support findings that (1) [d]efendant facilitated . . . Stepp's constructive possession by allowing her to keep her drugs in a place where they would be safe from others; (2) [d]efendant did not intend to exert control over the disposition of those remaining drugs, as they belonged to his friend, . . . Stepp, and that she controlled their disposition; and (3) [d]efendant was actually present when the drugs were in . . . Stepp's constructive possession.

Glover, 267 N.C. App. at 319–20, 833 S.E.2d at 207.

The dissenting judge on the Court of Appeals panel noted that

> [a]lthough [d]efendant was present when the narcotics were found in the dresser drawer, and was thus present at the scene of the crime, there is no evidence that [d]efendant was present when the tin containing the narcotics was placed in the dresser drawer. Moreover, . . . Stepp admitted on the stand to her possession of the narcotics. . . . Stepp testified that the tin was hers and that the last place she had it was at Southbrook Drive, where she and [d]efendant used to live amongst other people. When asked where she last left the tin, . . . Stepp answered,
>
> > I put it inside a drawer. I want to say I tried to put something over it. But I didn't intend—I wasn't there. I wasn't arrest[ed] that day, because I had just left. I didn't intend to be gone long. But I didn't get back as quickly as I would like to, and I didn't tell anybody it was there, because I didn't think it was relevant.

Id. at 331, 833 S.E.2d at 214 (Collins, J., dissenting). The dissenting judge opined that the jury instruction on acting in concert was erroneous

because the dissenter could discern no evidentiary support for the majority's conclusion that defendant facilitated Stepp's constructive possession by allowing her to keep her drugs in a place where they would be safe from others, surmising that "the acting in concert theory of possession has become confused with the constructive theory of possession in this case, which is precisely why the acting in concert theory is not generally applicable to possession offenses." *Id.* at 331–32, 833 S.E.2d at 214 (Collins, J., dissenting) (extraneity omitted). Citing our recent decision in *State v. Malachi*, 371 N.C. 719, 821 S.E.2d 407 (2018), the dissent then conducted a harmless error analysis, under which a defendant bears the burden of demonstrating 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 out of which the appeal arises." N.C.G.S. § 15A-1443(a) (2019). Because "the evidence of [d]efendant's constructive possession was not exceedingly strong" and because "Stepp admitted to possession of the controlled substances," the dissenting judge concluded that "there is certainly a 'reasonable possibility' that the jury elected to convict [d]efendant on the basis of the unsupported legal theory of acting in concert to possess the controlled substances." *Glover*, 267 N.C. App. at 333, 833 S.E.2d at at 215 (Collins, J., dissenting). For this reason, the dissent would have vacated defendant's convictions and remanded the matter to the trial court for a new trial. *Id.* (Collins, J., dissenting). On 8 October 2019, defendant filed notice of appeal to this Court on the basis of the dissent.

Analysis

[1] A jury charge serves several critical purposes: "clarification of the issues, elimination of extraneous matters, and declaration and application of the law arising upon the evidence." *State v. Jackson*, 228 N.C. 656, 658, 46 S.E.2d 858, 859 (1948). As such, "a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973). In the present case, the jury was instructed that it could find defendant guilty of possessing the controlled substances in the yellow tin under the theory of constructive possession or the theory of acting in concert.

"Constructive possession of contraband material exists when there is no actual personal dominion over the material, but there is an intent and capability to maintain control and dominion over it." *State v. Brown*, 310 N.C. 563, 568, 313 S.E.2d 585, 588 (1984). "Although it is not necessary to show that an accused has exclusive possession of the premises where contraband is found, where possession of the premises

is nonexclusive, constructive possession of the contraband materials may not be inferred without other incriminating circumstances." *Id.* at 569, 313 S.E.2d at 589. As noted in both the majority and the dissenting opinions of the Court of Appeals in this matter, in order to support a jury instruction on the theory of acting in concert, mere presence at the scene of a crime—a fact undisputed in the case at bar—is insufficient; the State must also produce evidence that the defendant acted together with another who did the acts necessary to constitute the crime *pursuant to a common plan or purpose to commit the crime*. *Joyner*, 297 N.C. at 356–57, 255 S.E.2d at 395; *see also State v. Wilkerson*, 363 N.C. 382, 424, 683 S.E.2d 174, 200 (2009).

All of the judges on the panel of the lower appellate court agreed that sufficient evidence supported a jury instruction on constructive possession by defendant of the drugs in the yellow tin. In the view of the Court of Appeals majority, the evidence presented at defendant's trial also supported a conclusion that defendant did not intend to exercise control over the contents of Stepp's "hard time stash," but that he did "facilitate[ ] . . . Stepp's constructive possession by allowing her to keep her drugs in a place where they would be safe from others." *Glover*, 267 N.C. App. at 320, 833 S.E.2d at 207. Upon our careful review of the evidence presented at trial, we agree with the view of the Court of Appeals dissent that there was no evidence that defendant acted together with Stepp pursuant to any common plan or purpose regarding the controlled substances in the yellow tin; therefore, the trial court erred in giving a jury instruction on the theory of acting in concert. The evidence at trial tended to show that the yellow tin containing illegal drugs and drug paraphernalia was discovered in a dresser drawer in an area of a shared home that defendant considered his "personal area." Although this fact could indicate defendant's "capability to maintain control and dominion over" the tin, *Brown*, 310 N.C. at 568, 313 S.E.2d at 588, and thereby support the theory of constructive possession, nonetheless the location of the tin, standing alone, does not shed light on any common plan or purpose which was devised between defendant and Stepp regarding the controlled substances in the yellow tin. Likewise, while the testimonial detail that a pill was discovered in defendant's bedroom that was similar to pills found in the yellow tin could suggest that defendant had obtained the pill from the tin at issue, this circumstance would indicate, at most, defendant's intent and capability to control the drugs in the tin—again, constructive possession—instead of a common plan or purpose in which defendant acted in concert with Stepp to protect her "hard time stash." Defendant acknowledged both having used illegal drugs on the day of the search and having used such drugs with Stepp in the past.

While these admissions could potentially serve as "other incriminating circumstances" under a theory of constructive possession, *id.* at 569, 313 S.E.2d at 589, neither of them demonstrates the existence of a common plan or purpose between defendant and Stepp to possess the controlled substances in the yellow tin.

Lastly, with regard to the evidence adduced at trial, defendant denied any knowledge that the tin was in the dresser in his personal area. Consistent with defendant's unequivocal denial, Stepp testified that the yellow tin and its contents were hers alone and that she had not told defendant that she had placed the tin in the dresser drawer shortly before the search by law enforcement officers took place. This evidence does not support either of the theories of defendant's guilt presented by the State of constructive possession of the drugs by defendant or acting in concert with Stepp pursuant to a common plan or purpose. Therefore, in reviewing all of the evidence at trial and determining the jury instructions which were correctly available for the trial court to deliver to the jury here, only a jury instruction premised on the theory of constructive possession properly qualifies, because the evidence is insufficient to support a jury instruction of acting in concert. *State v. Hargett*, 255 N.C. 412, 415, 121 S.E.2d 589, 592 (1961) (holding that instructing the jury on aiding and abetting was error where the evidence at trial did not show that the defendant aided another person in committing the crime, but rather showed that the defendant "was either guilty as the perpetrator or not guilty at all"). Accordingly, we agree with the dissenting judge of the Court of Appeals on this issue of the trial court's erroneous jury instruction on defendant's criminal culpability on the theory of acting in concert. In doing so, we find plausibility in the dissent's view that the ability to conflate the theory of acting in concert and the theory of constructive possession with facts such as those presented in this case is tenable, as this confusion appears to plague the dissenting opinion of this Court.

[2] We next consider whether the trial court's error was harmless; that is, whether there is a reasonable possibility that, absent the erroneous instruction, the jury would have reached a different verdict. N.C.G.S. § 15A-1443(a); *Malachi*, 371 N.C. at 738, 821 S.E.2d at 421. In this Court's decision in *Malachi*, we emphasized that instructional errors like the one in the instant case are "exceedingly serious" and require "close scrutiny" to ensure that "there is no 'reasonable possibility' that the jury convicted the defendant on the basis of such an unsupported legal theory." 371 N.C. at 738, 821 S.E.2d at 421. Here, the heightened scrutiny referenced in *Malachi* is particularly important in light of the inherent

likelihood of potential confusion between the theories of constructive possession and possession by acting in concert. *See*, *e.g.*, *State v. Diaz*, 155 N.C. App. 307, 314, 575 S.E.2d 523, 528 (2002) ("The acting in concert theory is not generally applicable to possession offenses, as it tends to become confused with other theories of guilt."); *State v. Cotton*, 102 N.C. App. 93, 97–98, 401 S.E.2d 376, 379–80 (1991) ("An acting in concert theory is not generally applied to possession offenses, as it tends to confuse the issues."); *State v. James*, 81 N.C. App. 91, 97, 344 S.E.2d 77, 81 (1986) ("We note that the acting in concert theory has not been frequently applied to possession offenses, as it tends to become confused with other theories of guilt.").

As we discussed upon determining the erroneous nature of the employment of the instruction on acting in concert here, there was some evidence at trial that would permit a jury to find defendant guilty under a theory of constructive possession: the yellow tin was secreted in an area of the shared home that defendant considered his personal area, defendant had a pill in his bedroom that was similar to pills found in the tin, and defendant admitted to being a user of at least one of the types of controlled substances found in the tin. On the other hand, there was also the trial evidence that defendant denied any knowledge of the yellow tin or its location in the dresser in his personal area, Stepp consistently admitted that the yellow tin contained her "hard time stash," Stepp placed the tin and its illegal contents in the dresser drawer shortly before the tin's discovery, and Stepp had not told defendant of the tin's placement by her in defendant's "personal space." In *Malachi*, we observed that

> in the event that *the State presents exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support and the State's evidence is neither in dispute nor subject to serious credibility-related questions*, it is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory.

Malachi, 371 N.C. at 738, 821 S.E.2d at 421 (emphasis added). Here, the State's evidence supporting the theory of constructive possession was both "in dispute" and "subject to serious credibility-related questions" and, while certainly sufficient to warrant a jury instruction, was controverted and not "exceedingly strong." *Id.* Given this circumstance, coupled with the recognized prospect of confusion presented by proceeding upon the theory of possession by acting in concert in conjunction with the theory of constructive possession, we conclude that there is a "reasonable possibility that, had the [trial court not instructed on acting

in concert], a different result would have been reached." As a result, we also agree with the dissenting position of the lower appellate court in evaluating the extent of the trial court's error.

Conclusion

In light of our determination that the trial court committed prejudicial error in its instruction to the jury on the theory of acting in concert as a basis upon which to find defendant guilty, we reverse the decision of the Court of Appeals, vacate defendant's convictions and resulting judgments against him, and determine that defendant is entitled to a new trial.

REVERSED.

Justice NEWBY dissenting.

The evidence must be viewed in the light most favorable to the State when considering whether it was sufficient to warrant a jury instruction, much like when reviewing a motion to dismiss based on the sufficiency of the evidence. *See State v. Taylor*, 337 N.C. 597, 608, 447 S.E.2d 360, 367–68 (1994) (considering the evidence in the light most favorable to the State when reviewing whether an acting-in-concert instruction was supported by the evidence). Under a sufficiency of the evidence standard, "the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence; contradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982).

Here the majority does not consider the evidence in the light most favorable to the State but rather relies on Ms. Stepp's statements of exclusive ownership. By doing so, it singles out certain evidence for consideration rather than reviewing the totality of the evidence, including that defendant admitted to having just used the specific drugs that were later found only in the yellow tin, under the proper standard. Considering Ms. Stepp's statements in the light most favorable to the State, I agree with the Court of Appeals that there

> was sufficient evidence from which the jury could have . . . determined that [d]efendant acted in concert to aid Ms. Stepp's constructive possession of the controlled substances found in the metal tin. Specifically, [d]efendant called Ms. Stepp, who testified that she placed the metal

> tin in the dresser in [d]efendant's personal space, that the drugs therein were hers, that she intended to come back later to use them, and that she and [d]efendant had taken drugs together in the past. This testimony is evidence that Ms. Stepp possessed (constructively) the drugs in the metal tin. Further, based on Ms. Stepp's testimony along with the State's evidence, the jury could have found that [d]efendant was aware of the presence of the drugs in the metal tin: (1) he admitted to the detective to having just used methamphetamine, and the only methamphetamine found in the house was in the metal tin; and (2) he admitted to the detective to having just ingested prescription pills, and a pill found in his bedroom matched a pill found in the metal tin. And the evidence was sufficient to support findings that (1) [d]efendant facilitated Ms. Stepp's constructive possession by allowing her to keep her drugs in a place where they would be safe from others; (2) [d]efendant did not intend to exert control over the disposition of those remaining drugs, as they belonged to his friend, Ms. Stepp, and that she controlled their disposition; and (3) [d]efendant was actually present when the drugs were in Ms. Stepp's constructive possession.

State v. Glover, 267 N.C. App. 315, 319–20, 833 S.E.2d 203, 207 (2019). The jury could reasonably find from the evidence presented that a common plan or purpose existed between defendant and Ms. Stepp to possess the controlled substances in the yellow tin. When viewed in the light most favorable to the State, the evidence presented was sufficient to support the trial court's instruction; the jury resolves any contradictions and discrepancies in the evidence. Thus, the trial court properly instructed the jury on the theory of possession by acting in concert. Accordingly, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
JACK HOWARD HOLLARS

No. 324A19

Filed 18 December 2020

Constitutional Law—due process—competency to stand trial—mental illness—duty to conduct a competency hearing sua sponte

In a prosecution for various sexual offenses, substantial evidence existed creating a bona fide doubt as to defendant's competency to stand trial, and therefore the trial court's failure to conduct a competency hearing sua sponte violated defendant's due process rights. Specifically, in addition to a lengthy history of mental illness (including periods of incompetence to stand trial), a five-month gap between trial and defendant's last competency hearing, and warnings from physicians that defendant's mental health could deteriorate, defense counsel expressed concerns on the third day of trial about defendant's competency because defendant suddenly did not know what was going on and seemingly did not know who defense counsel was.

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, 266 N.C. App. 534, 833 S.E.2d 5 (2019), remanding the case for a hearing on defendant's competency based on judgments entered on 12 January 2018 by Judge William H. Coward in Superior Court, Watauga County. Heard in the Supreme Court on 31 August 2020.

Joshua H. Stein, *Attorney General*, *by Matthew W. Sawchak*, *Solicitor General*,[1] *Ryan Y. Park*, *Deputy Solicitor General*, *and Nicholas S. Brod*, *Assistant Solicitor General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Anne M. Gomez*, *Assistant Appellate Defender*, *for defendant-appellee.*

1. On 30 March 2020, we allowed a motion by Matthew W. Sawchak to withdraw as counsel for the State of North Carolina.

MORGAN, Justice.

Defendant was arrested on 10 February 2012 for allegedly sexually assaulting his stepdaughter for a period consisting of the late 1970s and early 1980s. He was brought to trial on 8 January 2018 for three counts each of second-degree sexual offense and taking indecent liberties with a child following almost six years of fluctuating determinations of defendant's competency to stand trial. At the end of the third day of the trial, defense counsel apprised the trial court of a brief conversation which the attorney had just had with defendant and, based on concerns that the exchange raised with defense counsel, he asked the trial court to inquire into defendant's competency. No inquiry of defendant was performed by the trial court at the time, the trial was recessed for the day shortly thereafter, and the trial court stated that the matter would be addressed on the next morning. During the inception of the trial proceedings on the following day and upon the trial court's inquiry to defense counsel about any more information or arguments about defendant's capacity, defense counsel replied that there were no existing concerns. The trial resumed, and upon its conclusion, the jury returned verdicts of guilty on all six charges on 12 January 2018. Defendant appealed to the Court of Appeals, arguing that the events on the third day of trial combined with defendant's lengthy history of mental illness, which included periods of incompetence to stand trial, created a duty upon the trial court to inquire sua sponte into the competency of defendant to stand trial. *See State v. Hollars*, 266 N.C. App. 534, 537–38, 833 S.E.2d 5, 7–8 (2019). The Court of Appeals held that substantial evidence existed before the trial court to create a bona fide doubt as to defendant's competency, and therefore the trial court's failure to make inquiry into defendant's competency at trial violated his due-process rights. *Id.* at 542, 833 S.E.2d at 10. The State appeals to our Court based on the dissent of a member of the Court of Appeals panel in which the dissenting judge opined that there was no bona fide doubt as to defendant's competency, and therefore defendant's due-process rights were not implicated by the trial court's lack of inquiry into the matter. *See id.* at 545, 833 S.E.2d at 11–12 (Berger, J., dissenting). We agree with the conclusion of the Court of Appeals majority that substantial evidence existed so as to create a bona fide doubt about defendant's competency. As a result, we affirm the decision of the lower appellate court which includes remanding the matter to the trial court pursuant to the instructions contained within the Court of Appeals majority opinion.

Factual and Procedural Background

In January 2012, the alleged victim in this case—a female minor—reported to the Watauga County Sheriff's Office that for a period of time spanning the late 1970s and early 1980s, when she was between twelve and fifteen years of age, defendant sexually assaulted the minor on virtually a weekly basis. Defendant was initially arrested and charged with a single count of statutory sexual offense on 10 February 2012. Subsequently, a grand jury indicted defendant on three counts of second-degree sexual offense and three counts of taking indecent liberties with a child. Following his arrest, defendant initially waived his right to court-appointed counsel at his first appearance on 23 February 2012, but the trial court nevertheless appointed counsel to defendant two months later, citing its observation that defendant was unresponsive to questioning by the trial court at defendant's probable cause hearing on 23 April 2012. Defendant's appointed counsel met with defendant while defendant was in custody in the Watauga County Jail on 1 May 2012. Defense counsel reported to the trial court three days later that defendant had presented a scattered and random thought process and had made multiple paranoid statements concerning God and the effects of exposure to chemicals on his brain during defendant's tenure in the Marine Corps. On 4 May 2012, the trial court ordered Daymark Recovery Services to complete a forensic evaluation of defendant to determine his competency to stand trial. This assessment of defendant became the first in a series of seven evaluations which are pertinent to this appeal.[2]

Dr. Hawkinson with Daymark Recovery Services completed his evaluation report on 9 May 2012, which noted that defendant appeared "psychotic and delusional" with a "limited ability to cooperate in even basic discussion of his case." Based on his observations, Dr. Hawkinson concluded that defendant was incompetent to stand trial. Following the receipt and review of the Hawkinson 5/9/2012 report, the trial court ordered that defendant be committed to the custody of Central Regional Hospital in Butner, North Carolina, or another designated facility for further evaluation and safekeeping. Once in the custody of Central Regional Hospital, another competency evaluation report was authored by Dr. Bartholomew on 9 August 2012. While the Bartholomew 8/9/2012 report agreed with the Hawkinson 5/9/2012 report that defendant was incompetent to proceed to trial, Dr. Bartholomew also noted that defendant "may

2. In order to facilitate ease of reading and for reference to each of the competency evaluations, this opinion refers to each evaluation by the healthcare provider who completed the evaluation and the date upon which the evaluation report is signed by the provider.

gain capacity if he receives mental health treatment." Upon review of the Bartholomew 8/9/2012 report, the trial court entered an order finding defendant incapable to proceed and ordered defendant to be committed to Broughton Hospital in Morganton, North Carolina.

During his time at Broughton Hospital, defendant responded well to his provider's efforts to have defendant engage in mental health treatment, medication, and vocational occupations like exercise classes and work duties. Seven months after defendant's commitment to Broughton Hospital, Dr. Bartholomew again evaluated defendant for his capacity to stand trial and detailed the results of the evaluation in a report dated 14 May 2013. The Bartholomew 5/14/2013 report concluded that, due in part to defendant's adherence to a medication regimen, defendant "demonstrated an adequate understanding of the nature of criminal legal processes" and was "able to assist in his defense in a rational and reasonable manner." Dr. Bartholomew considered defendant to be capable to proceed to trial at this juncture. On 3 September 2013, a Watauga County grand jury handed down a first set of indictments, charging defendant with four counts each of statutory sex offense and taking indecent liberties with a child; correspondingly, the trial court appointed new trial counsel to represent defendant. Superseding indictments were issued on 4 May 2015 which charged defendant with three counts each of second-degree sexual offense and taking indecent liberties with a child.

On 15 December 2014, defendant was transported from Broughton Hospital to the Watauga County Jail to discuss a plea offer with his appointed counsel. While defendant first appeared to understand his circumstances in his initial discussions with counsel upon defendant's arrival at the jail, defense counsel noted that when he met with defendant on the following day and defendant was "unable to discuss plea or trial options and insisted his millionaire sister would spend thousands" on his defense, despite the fact that defendant had no sisters with such resources. Defense counsel relayed this information to the trial court in open court on 2 March 2015, upon which the trial court granted the request of defense counsel for another competency evaluation of defendant. Pursuant to the trial court's order, Dr. Bartholomew conducted another evaluation of defendant. Dr. Bartholomew's report of 14 April 2015 again concluded that defendant was competent to proceed to trial, while explaining that defendant's confusing statements at the Watauga County Jail were likely attributable to a temporary decomposition of his mental faculties due to the change in his sleeping arrangements. However, Dr. Bartholomew predicated his determination that defendant was competent to stand trial at the time that Dr. Bartholomew signed

the Bartholomew 4/14/15 report on two caveats: first, Dr. Bartholomew advised that defendant should be housed at Broughton Hospital and transported to court each day for the duration of the trial in order to prevent a similar change in mental state as witnessed by defense counsel in December 2014; and second, Dr. Bartholomew noted that defendant's "condition may deteriorate with the stress of trial so vigilance is suggested if his case proceeds to trial."

Dr. Bartholomew testified about the predications and conclusions in his report at a competency hearing held by the trial court on 5 May 2015. At the close of the hearing, the trial court acknowledged Dr. Bartholomew's determination of defendant's competency but advised that the conditions asserted in the Bartholomew 4/14/2015 report required "the [c]ourt to give [defendant] special treatment which is not normally considered in other criminal actions." Concerned about the conditional nature of Dr. Bartholomew's determination of defendant's competency, on 27 July 2015 the trial court ordered an additional independent forensic evaluation to be completed by Dr. Bellard. Following his completion of an evaluation of defendant which was conducted pursuant to the trial court's order, Dr. Bellard issued a report on 4 November 2015 in which the examiner concluded that, while defendant experienced improved mental capacity while housed at Broughton Hospital, defendant's "difficulty relating to defense counsel" and general inability to tolerate the stress of waiting for trial rendered defendant incompetent to stand trial. Dr. Bellard also chronicled that defendant had recently had the antipsychotic medications prescribed to him by defendant's providers at Broughton Hospital cut in half and opined that defendant "could improve to a position where he was competent to stand trial if the medications were taken back" to their original levels. In accepting the report of Dr. Bellard, the trial court instructed defense counsel to prepare an order to be entered which found defendant to lack capacity to stand trial.

During his continued commitment at Broughton Hospital, defendant was evaluated by Dr. Bartholomew on two more occasions, once in December 2016 and once in August 2017. Citing the success of defendant's continued treatment, Dr. Bartholomew concluded in a report dated 8 December 2016 that defendant was capable of proceeding to trial and assisting in his own defense. Dr. Bartholomew was joined by Dr. Utterback in conducting a final evaluation of defendant in August 2017. In their joint report dated 24 August 2017, Dr. Bartholomew and Dr. Utterback advised that "given the stability of [defendant's] mental status and functioning for the last year or more at Broughton Hospital,

we believe it is reasonable to assume he will maintain this functioning in the foreseeable future and during trial." Thus, Dr. Bartholomew and Dr. Utterback concluded that defendant was capable of proceeding to trial. At a competency hearing held on 5 September 2017, the State proffered to the trial court for consideration this final report jointly generated by Dr. Bartholomew and Dr. Utterback and advised the trial court that Dr. Bartholomew was in the courtroom and available to be called as a witness if necessary. Defense counsel concurred with the State that defendant was capable of proceeding to trial at that point, adding that defense counsel's agreement was due in part to a conference with Dr. Bellard earlier on the morning of the hearing. According to defense counsel, Dr. Bellard had reported to the courtroom for the competency hearing, had engaged in dialogue with defendant prior to the hearing's commencement, and had advised defense counsel that he agreed with the determination by Dr. Bartholomew and Dr. Utterback that defendant had the capacity to proceed on 5 September 2017.

The trial court reviewed the Bartholomew and Utterback 8/24/2017 report before finding that defendant was competent to stand trial and before setting defendant's trial date for 2 October 2017. Four days before the trial was scheduled to begin, however, defense counsel filed a motion to continue the trial because a recent death in the attorney's family necessitated his presence in another state on the date of the trial. More than four months passed between the last discussion of defendant's competency to stand trial and the first day of defendant's rescheduled trial on 8 January 2018. In the meantime, defense counsel filed several pretrial motions which referenced defendant's complex and fluctuating mental health history.

The trial proceedings began with a hearing on several of defendant's pretrial motions on 8 January 2018; the State called its first witness to render testimony at the trial on the afternoon of 10 January 2018. The State's first witness was the alleged victim. She testified about the first episodes of sexual abuse that she alleged that defendant committed upon her. Defense counsel lodged an objection to this testimony, arguing that the acts to which the alleged victim was testifying fell outside of the offense date ranges of the indictments. Outside of the presence of the jury, the trial court discussed with the parties the prospect that the alleged victim's testimony could be treated as "404(b) evidence," referring to Rule 404(b) of the North Carolina Rules of Evidence which governs circumstances concerning the admissibility or inadmissibility of other crimes, wrongs, or acts committed by the defendant. N.C. R. Evid. 404(b) (2019).

Upon its completion of the discussion of the cited evidentiary rule with the parties, the trial court brought the jurors back into the courtroom and administered a Rule 404(b) instruction before allowing the State to continue with its direct examination of the victim. Just before 5:00 p.m. on the afternoon of 10 January 2018, defense counsel made another objection to the alleged victim's testimony. The trial court sustained the objection before deciding to recess the proceedings for the evening. The trial court then instructed the State and defense counsel to be prepared to discuss the Rule 404(b) evidence issue on the following morning. The trial court recessed at 5:03 p.m. before coming back on the record less than a minute later. At that time, defense counsel advised the trial court of the following:

> Your Honor, . . . I just had a brief conversation with [defendant] during which I began to have some concerns about his capacity and I would ask the Court to address him regarding that.
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> . . . .
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> . . . I've been asking him how he's doing and if he knows what's going on. And up until just now he's been able to tell me what's been going on. He just told me just a few minutes ago that he didn't know what was going on.

The trial court responded that "when we start throwing around [Rule] 404(b) and [Rule] 403, you'd have to have graduated from law school to have any inkling of what we're talking about." The trial court then asked defense counsel for further specificity as to his concerns. In response, defense counsel reiterated the following:

> I asked him if he understood what was going on. He said, no, he didn't know what she was talking about. And that has not been the way he has been responding throughout this event, either yesterday or earlier today. And in light of the history with him, I just want to make sure. I just—I feel we need to make sure. And I'm not asking for an evaluation. I would just ask for the Court to query him quickly to make sure that I'm just not—make sure I'm seeing something that is not there.

The trial court decided to address this matter as well on the following morning, surmising that the source of defendant's confusion was the previous discussion of the potential Rule 404(b) evidence. The trial court conjectured that "[w]e could take a poll around here of non-lawyers

and see if they understood [Rule 404(b)]. I doubt many of them would." The trial court stated that if it determined in the morning that defendant understood what was happening during the trial, "then I would say that the capacity situation hasn't changed any." Upon the resumption of court proceedings on the following morning on 11 January 2018, the trial court did not address defendant directly as defense counsel had requested toward the end of the previous day's trial session; instead, the trial court queried defense counsel as to whether defense counsel had "any more information or arguments" that he wanted to make concerning defendant's capacity. Defense counsel responded with the following:

> No, Your Honor. When he came in this morning he greeted me like he has other mornings. I interacted with him briefly and he interacted like he has been interacting every morning. And I've not had any questions about his capacity this morning. I just had some yesterday evening because he kind of looked at me and the look in his face was like he had no idea who I was.

The trial court once again associated defendant's expressed confusion and vacant expression which concerned defense counsel on the previous day with the discussion between the trial court and the parties regarding the Rule 404(b) evidence. The trial court stated "[y]eah, well, any time you get to—like I said, any time you get to talking about [Rule] 404(b) and [Rule] 403 everybody in the courtroom is going to look like that." The trial court then allowed the State to resume the presentation of its case-in-chief without further inquiry into defendant's capacity to proceed.

On 12 January 2018, the jury returned verdicts of guilty on three counts of taking indecent liberties with a child and three counts of second-degree sexual offense. The trial court sentenced defendant to a total of 150 years in prison: ten years for each offense of taking indecent liberties with a child and forty years for each offense of second-degree sexual offense, with the terms of incarceration to run consecutive to one another. Defendant appealed to the Court of Appeals.

A majority of the Court of Appeals panel agreed with defendant's contention, as framed in the lower appellate court's opinion, that "the trial court erred by failing to conduct *sua sponte* a competency hearing either immediately before or during the trial because substantial evidence existed before the trial court that indicated [d]efendant may have been incompetent." *Hollars*, 266 N.C. App. at 541, 833 S.E.2d at 9. The Court of Appeals majority summarized its reasons for concluding

that "the trial court was presented with substantial evidence raising a bona fide doubt as to [d]efendant's competency to stand trial" in the following manner:

> In light of [d]efendant's extensive history of mental illness, including schizophrenia, schizoaffective disorder, bipolar disorder, and mild neurocognitive disorder, his seven prior forensic evaluations with divergent findings on his competency, the five-month gap between his competency hearing and his trial, the concerns expressed by physicians and other trial judges about the potential for [d]efendant to deteriorate during trial and warning of the need for vigilance, the concerns his counsel raised to the trial court regarding his conduct and demeanor on the third day of trial, and the fact that the trial court never had an extended colloquy with [d]efendant, we conclude substantial evidence existed before the trial court that raised a bona fide doubt as to [d]efendant's competency to stand trial. Therefore, the trial court erred in failing to institute *sua sponte* a competency hearing for [d]efendant.

Id. at 542–43, 833 S.E.2d at 10–11.

With this outcome, the majority decided that the appropriate remedy here would be to "remand to the trial court for a determination of whether a meaningful retrospective hearing can be conducted on the issue of [d]efendant's competency at the time of his trial." *Id.* at 544, 833 S.E.2d at 11. As guidance to the trial court regarding the focus and the direction of the proceedings upon remand, the Court of Appeals instructed that

> if the trial court concludes that a retrospective determination is still possible, a competency hearing will be held, and if the conclusion is that the defendant was competent, no new trial will be required. If the trial court determines that a meaningful hearing is no longer possible, defendant's conviction must be reversed and a new trial may be granted when he is competent to stand trial.

Id. (quoting *State v. McRae*, 139 N.C. App. 387, 392, 533 S.E.2d 557, 561 (2000)).

The dissenting judge of the Court of Appeals panel viewed the issues of the case in the following regard:

> There was no *bona fide* doubt as to [d]efendant's competence to stand trial, and there was not substantial evidence before the trial court that [d]efendant was incompetent. Thus, the trial court did not err when it began [d]efendant's trial, and proceeded with the trial, without undertaking another competency hearing . . . .

Id. at 545, 833 S.E.2d at 11–12 (Berger, J., dissenting). Specifically, the dissenting judge opined that the record did not contain any evidence "of irrational behavior or change in demeanor by [d]efendant at trial." *Id.* at 545, 833 S.E.2d at 12 (Berger, J., dissenting). The dissenting judge considered the examiners' opinions that were contained in the evaluation reports, that the stability of defendant's mental status and functioning would be maintained in the foreseeable future and during a trial, were sufficient to indicate there was "nothing in the record that would have required the trial court to conduct another pre-trial hearing." *Id.* at 547, 833 S.E.2d at 13 (Berger, J., dissenting). As for the majority's determination that, as described in the dissenting opinion, "the trial court erred by failing to intervene *sua sponte* following an exchange between defense counsel and the trial court," *id.*, the dissenting judge disagreed by noting that "[t]he 'brief conversation' by [d]efendant and defense counsel [during trial on 10 January 2018] did not produce '*substantial evidence before the court* indicating that the accused may be mentally incompetent' " because "there was [a] very real probability that [d]efendant did not understand the intricacies of 404(b) testimony, and that he had in fact heard and understood the victim's testimony," *id.* at 550, 833 S.E.2d at 15 (Berger, J., dissenting). The dissenting judge concluded that there was no bona fide doubt as to defendant's competence, that there was not substantial evidence before the trial court that defendant was incompetent, and that the trial court did not err when it began defendant's trial and proceeded with the trial without undertaking another competency hearing. *Id.* at 551, 833 S.E.2d at 15 (Berger, J., dissenting).

The State's appeal of the decision of the Court of Appeals majority in this case brings the matter to us for consideration.

Analysis

The Due Process Clause of the Constitution of the United States shields criminal defendants who are incompetent to stand trial for charges levied against them by the State from being compelled to do so while they remain incompetent. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). In order to possess the competence necessary to stand trial, a defendant must have the "capacity to understand the nature and object

of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). While "a competency determination is necessary only when a court has reason to doubt the defendant's competence," *Godinez v. Moran*, 509 U.S. 389, 401 n.13 (1993), North Carolina criminal courts have a "constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (quoting *State v. King*, 353 N.C. 457, 467, 546 S.E.2d 575, 585 (2001)).

Substantial evidence which establishes a bona fide doubt as to a defendant's competency may be established by considering "a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial." *Drope*, 420 U.S. at 180. While this Court has determined that some evidence of mental health treatment for issues unrelated to the defendant's competency does not constitute the substantial evidence necessary to trigger the trial court's duty to hold a competency hearing, *King*, 353 N.C. at 467, 546 S.E.2d at 585, the presence of any one of the factors cited above from *Drope* has the potential to give rise to a bona fide doubt as to the defendant's competency in some circumstances. *See Drope*, 420 U.S. at 180. Regardless of the circumstances that constitute substantial evidence of a defendant's incompetence, the relevant period of time for judging a defendant's competence to stand trial is "at the time of trial." *State v. Cooper*, 286 N.C. 549, 565, 213 S.E.2d 305, 316 (1975), *overruled in part on other grounds by State v. Leonard*, 300 N.C. 223, 266 S.E.2d 631 (1980). As a result, the trial court must remain on guard over a defendant's competency; even when the defendant is deemed competent to stand trial at the commencement of the proceedings, circumstances may arise during trial "suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Drope*, 420 U.S. at 181.

The State argues that following the trial court's determination that defendant was competent to stand trial at the 5 September 2017 competency hearing, defendant presented no substantial evidence raising a bona fide doubt as to his competency. Thus, the State contends that the trial court's determination which was made four months prior to trial that defendant was competent to stand trial served to suppress any duty on the part of the trial court to conduct another competency hearing either immediately preceding the start of the trial or after the events of the trial's third day. The Court of Appeals majority disagreed with this argument, opining that "[g]iven the temporal nature of [d]efendant's

mental illness, the appropriate time to conduct a competency hearing was immediately prior to trial." *Hollars*, 266 N.C. App. at 542, 833 S.E.2d at 10. The lower appellate court found it "significant" that "[d]efendant's prior medical records disclosed numerous concerns about the potential for [d]efendant's mental stability to drastically deteriorate over a brief period of time and with the stress of trial." *Id.* Consequently, the lapse of several months between the trial court's 5 September 2017 determination of defendant's competency to stand trial and the 8 January 2018 inception of defendant's trial required the conduction of another competency hearing immediately before trial. *Id.* at 542–43, 833 S.E.2d at 10. The Court of Appeals characterized the events of the afternoon of the trial's third day and the morning of the trial's fourth day as "additional support for this conclusion" because the basis for defendant's expressed confusion which was also detected and confirmed by defense counsel operated to reinforce the need for vigilance on the part of the trial court. *Id.* at 543, 833 S.E.2d at 10–11.

Adherence to the principles espoused by the Supreme Court of the United States in its decisions rendered in *Cooper*, *Godinez*, and the progenitor case *Drope*, along with our Court's precedent established in *Badgett*, *King*, and *Cooper*, support the determinations reached by the Court of Appeals in the present case. Although the trial court was required to initiate an inquiry into the competency of defendant to stand trial only in the event that there was reason to doubt the accused's competency, there was substantial evidence existent before the trial court which indicated that defendant might be mentally incompetent to stand trial. We have already recounted the panoply of matters and circumstances which the majority of the lower appellate court properly considered in concluding that there was a sufficient amount of evidence—contrary to the dissenting judge's view—to constitute a bona fide doubt concerning defendant's competency to stand trial. Therefore, the trial court was obligated to protect the due-process rights of defendant by initiating, *sua sponte*, a competency hearing in order to ensure that defendant possessed the capacity to understand the nature and object of the proceedings against him, to consult with his counsel, and to assist in the preparation of his defense.

Even assuming, *arguendo*, that the State's contention bears some merit that there was not substantial evidence existent at the outset of the trial that raised a bona fide doubt concerning defendant's competency due to the "near-dispositive weight" which the Court of Appeals gave to "three psychiatric evaluations that found [defendant] incompetent" and that "the court's reliance on outdated evaluations caused it to overlook

more recent, probative record evidence that refuted any need to hold another competency hearing before the trial" which included "evidence from three different psychiatrists, who unanimously agreed that [defendant] was competent . . . [and a]n evaluation admitted at the [same 5 September 2017] hearing also stated that [defendant] was likely to maintain his competency throughout the trial," this depiction by the State of defendant's perceived competency to proceed at the outset of the trial is significantly eroded by the occurrences which transpired on the third day of the trial. Despite defense counsel's unequivocal concerns on the trial's third day about defendant's capacity, defense counsel's articulated basis for these concerns which centered upon defendant's representation that defendant "didn't know what was going on" after being able to tell defense counsel just prior to that juncture "what's been going on," and "in light of the history with him," the trial court refrained from conducting a competency hearing even after defense counsel's recapitulation of his concern, which was described to the trial court on the next day of trial, that during the transpiration of events on the trial's previous day, "the look in [defendant's] face was like [defendant] had no idea who [defense counsel] was." While the State and the dissenting judge below attribute defendant's apparent confusion, as did the trial court, to defendant's unfamiliarity with the intricacies of the admissibility or inadmissibility into evidence of other crimes, wrongs, or acts committed by him, nonetheless, such a potentially logical explanation for the apparent confusion of a defendant who has a documented history of mental illness and resulting multiple determinations of an incapacity to stand trial must yield to the necessity of the criminal justice system to ensure that a defendant's due-process rights are protected from a demand to stand trial at a time when the defendant is incompetent. To this end, under the facts and circumstances presented in the instant case, we hold that the trial court committed prejudicial error by failing to conduct a competency hearing for defendant in light of the existence of substantial evidence which was sufficient to raise a bona fide doubt regarding defendant's competency to stand trial.

Conclusion

Based upon the foregoing statements, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice NEWBY dissenting.

This case asks whether the trial court was presented with substantial evidence that defendant was incompetent such that it was required to hold a competency hearing during trial. Defense counsel had a history of interacting with his client and was in the best position to assess his client's competency. While initially raising a concern, defense counsel subsequently assured the trial court that his client was competent. The trial court, after personally observing defendant's behavior and the courtroom circumstances, made its independent determination. Defendant's seeming confusion during a technical and complex explanation of the rules of evidence in light of all the other circumstances does not constitute substantial evidence of incompetence. Therefore, the trial court did not err when it decided that it would proceed without a competency hearing. The majority, however, takes one isolated incident, disregards the perspective of defense counsel and the trial court, and places its review of the cold record above the perspective of those actually present. Because these circumstances do not present substantial evidence of defendant's incompetency sufficient to trigger a hearing, I respectfully dissent.

Before trial, defendant had been extensively evaluated for years. Four months before the trial was to begin, defendant was deemed competent to stand trial by three doctors who had evaluated him multiple times in the past. The doctors' competency determinations were based on several factors, including that defendant was finally taking his medication consistently. The doctors' reports contained no suggestion of defendant's need for another evaluation before trial.

Defendant's trial began on 10 January 2018 at around 9:30 a.m. Jury selection took more than half the day until the jury was released for lunch at about 12:35 p.m. At that time, defense counsel had no concerns about defendant's competence. After lunch, the trial court resumed its session around 2:00 p.m. After the jury was impaneled shortly around 3:00 p.m., the trial court gave instructions to the jury and the State and defense gave opening statements. The State then called its first witness, who was the victim. The victim started testifying about incidents of sexual abuse that preceded the dates of those charged in the indictment. Defense counsel objected to this portion of the testimony and asked to be heard outside of the jury's presence. The jury left the courtroom at 4:27 p.m. The trial court and counsel discussed the possibility that the victim's testimony concerning incidents not alleged in the indictment could be admitted as evidence under Rule 404(b) of the North Carolina

Rules of Evidence, and the jury came back into the courtroom at 4:34 p.m. The trial court then gave a limiting instruction to the jury about how Rule 404(b) evidence may be considered by the jurors, and the State continued questioning the victim. The trial court then gave another instruction before the jury was released at 5:00 p.m., and the trial court took a very brief recess. At 5:03 p.m., the following exchange occurred:

> [DEFENSE COUNSEL]: . . . I just had a brief conversation with [defendant] during which I began to have some concerns about his capacity and I would ask the Court to address him regarding that.
>
> . . . .
>
> I asked him—I've been asking him how he's doing and if he knows what's going on. And up until just now he's been able to tell me what's been going on. He just told me just a few minutes ago that he didn't know what was going on.
>
> THE COURT: Well, when we start throwing around 404(b) and 403, you'd have to have graduated from law school to have any inkling of what we're talking about. So I'm not sure what it is you—I want you to be more specific.
>
> [DEFENSE COUNSEL]: He said—I asked him—he said—I asked him if he understood what was going on. He said no, he didn't know what she was talking about. And that has not been the way he has been responding throughout this event, either yesterday or earlier today. And in light of the history with him, I just want to make sure. I just—I feel we need to make sure. And I'm not asking for an evaluation I would just ask for the Court to query him quickly to make sure that I'm just not—make sure I'm seeing something that is not there.
>
> THE COURT: Well, I tell you what, it's been a long day, and I'd rather inquire of [defendant] in the morning and give everyone a chance to rest. Give you a chance to talk to him and try to explain to him what's going on, especially with all of these rule numbers. I don't know if anybody could explain that to a non-lawyer and have them understand it.
>
> We could take a poll around here of non-lawyers and see if they understood it. I doubt many of them would. But, you know, essentially what is going on is that the victim in this case has been telling everybody what he did,

> and that's about a simple concept as you can imagine. Now, if he surely does not understand that for some reason, not that he remembers it or not, or whether he can think of some defense or something, that is not the case.
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> [DEFENSE COUNSEL]: I understand.
>
> THE COURT: But if the information coming from this woman about what he did, if he can understand that is what is happening, then I would say that the capacity situation hasn't changed any. We've got one, two—I counted them before, three, four, five, six, capacity evaluations. The latest one was August 15, 2017, and this latest one found him capable of proceeding. We'll talk about it in the morning.
>
> [DEFENSE COUNSEL]: Yes, sir.

The following day, as soon as the trial court reconvened, it noted that it must discuss and evaluate whether there was the need for "any further inquiry as to [defendant's] capacity." The trial court asked defense counsel whether he "ha[d] any more information or arguments [he] want[ed] to make as to [defendant's] capacity." Defense counsel responded as follows:

> No, Your Honor. When he came in this morning he greeted me like he has other mornings. I interacted with him briefly and he interacted like he has been interacting every morning. And I've not had any questions about his capacity this morning. I just had some yesterday evening because he kind of looked at me and the look in his face was like he had no idea who I was.

At that point, the trial court reemphasized the confusing nature of the Rule 404(b) discussion, which occurred immediately before defense counsel expressed his concern. Defense counsel reiterated that he no longer had any concerns. Thus, the trial court chose to proceed without a competency hearing.

"[A] conviction cannot stand where the defendant lacks capacity to defend himself." *State v. King*, 353 N.C. 457, 467, 546 S.E.2d 575, 585 (2001). Therefore, the "trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *Id.* (quoting *State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 581 (1977)). A trial court should consider evidence of "a defendant's

irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial." *Drope v. Missouri*, 420 U.S. 162, 180, 95 S. Ct. 896, 908 (1975).

Here the proceedings, when taken as a whole, do not show substantial evidence of defendant's incompetence. The pretrial reports concluded defendant was competent. Though defense counsel raised a concern late in the day about defendant's competency after a technical evidentiary discussion, the next morning, defense counsel's concerns completely dissipated. His repeated assurances gave the trial court no reason to believe that defendant's brief confusion the evening before would be attributable to something other than the technical explanation of Rule 404(b) evidence relating to events that occurred outside the timeframe alleged in the indictments and the long day in court. Defense counsel was in the best position to observe any issues regarding competency as he interacted with his client. Additionally, the trial court, after presiding over an entire day of trial, observing defendant, and hearing the State's questioning of the victim, was well equipped to evaluate whether its explanation of Rule 404(b) would be confusing to a listener, including defendant. The trial court is in the best position to consider and weigh the facts and circumstances and to make the appropriate determination as to whether substantial evidence of incompetence exists to require a hearing.

The majority does not appear to take issue with the premise that the trial court acted within its authority to delay any potential competency hearing until the next day. Nonetheless, the majority believes that defense counsel's brief concern and defendant's mental history warranted a competency hearing. Despite the trial court's personal observations of defendant and the circumstances, the majority prefers its review of the cold record over the trial court's actual observation of the events and conversations that occurred on the day of trial. Trial courts, however, have institutional advantages unavailable to appellate courts which place them in a better position to judge a defendant's demeanor and the events that occur during trial. In short, the trial court is certainly best equipped, having observed defendant in that moment, to determine whether a competency hearing should be held. Moreover, the trial court had the repeated assurances of defense counsel that he no longer had concerns about defendant's competency to stand trial. As previously stated, defense counsel is in the best position to assess defendant's competency given his extensive interaction with his client.

The trial court is in a better position than an appellate court to determine whether there was substantial evidence of defendant's

incompetence. The trial court's view was supported by defense counsel's assurances, who is in the best position to appreciate if his client is having difficulty understanding the proceedings. The trial court proceeded appropriately here. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
CAROLYN D. "BONNIE" SIDES

No. 400A19

Filed 18 December 2020

Constitutional Law—right to be present at criminal trial—waiver—voluntariness—suicide attempt—need for competency hearing

In a prosecution for felony embezzlement, where defendant attempted suicide before the fourth day of trial and was involuntarily committed, the trial court erred by failing to conduct a competency hearing to determine whether defendant had the mental capacity to voluntarily waive her constitutional right to be present at trial. Substantial evidence created a bona fide doubt as to defendant's competency where her medical records and recent psychiatric evaluations showed she suffered from depression, a long-term mood disorder requiring medication, and suicidal thoughts; she was assessed at a "high" risk level for suicide; and she required further treatment and immediate psychiatric stabilization after her suicide attempt.

Justice MORGAN dissenting.

Justices NEWBY and ERVIN join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 267 N.C. App. 653 (2019), finding no error after appeal from judgments entered on 16 November 2017 by Judge Beecher R. Gray in Superior Court, Cabarrus County. Heard in the Supreme Court on 31 August 2020.

Joshua H. Stein, Attorney General, by Keith Clayton, Special Deputy Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Wyatt Orsbon, Assistant Appellate Defender, for defendant-appellant.

Disability Rights North Carolina, by Susan H. Pollitt, Lisa Grafstein, and Luke Woollard, for Disability Rights North Carolina, North Carolina Psychiatric Association, and North Carolina Chapter of the National Alliance on Mental Illness, amici curiae.

DAVIS, Justice.

The defendant in this case attempted suicide one evening after her trial had recessed for the day and was thereafter involuntarily committed. The trial court declined to hold a competency hearing and determined that she had voluntarily waived her constitutional right to be present at her trial as a result of the suicide attempt. Because we hold that the trial court erred by failing to conduct a competency hearing under these circumstances, we reverse the decision of the Court of Appeals and remand for a new trial.

Factual and Procedural Background

Defendant was charged with four counts of felony embezzlement.[1] A jury trial began in Superior Court, Cabarrus County, on 6 November 2017. The State presented its case-in-chief the first three days of trial, during which time defendant was present in the courtroom. On the evening of 8 November 2017, defendant intentionally ingested 60 one-milligram Xanax tablets—thirty times her prescribed daily dose—in a suicide attempt at her home. She was found unresponsive and was taken to Carolinas HealthCare System NorthEast for treatment.

Defendant underwent medical evaluation that night by Dr. Kimberly Stover. Dr. Stover found that defendant "ha[d] been experiencing worsening depression and increased thoughts of self-harm" and sought defendant's immediate involuntary commitment, checking the box on the petition form stating that defendant was "mentally ill and dangerous to self or others or mentally ill and in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness." Dr. Stover also wrote that defendant "is not stable and for her safety will need further evaluation."

1. Prior to trial, one of the counts was dismissed by the State.

A magistrate found reasonable grounds to believe defendant required involuntary commitment and signed a commitment order, which provided for an initial period of commitment of twenty-four hours beginning on the morning of 9 November 2017. A separate evaluation was conducted later that day by a psychiatrist, Dr. Rebecca Silver, after which Dr. Silver noted that defendant "remains suicidal even today. She is not safe for treatment in the community and requires inpatient stabilization."

That morning, the trial court was informed of defendant's suicide attempt and hospitalization. The trial court told the attorneys that it would try to "salvage" the day "without committing an error that'd be reversible." Defense counsel responded that a decision to proceed without defendant could not be made "without more information." The following exchange then transpired:

> THE COURT: It might be useful to have her record for the last two years or something from the hospital if she has a record of depression and treatment and all that, but that would probably—we'd get to some point where we start to need a medical expert to interpret—
>
> [DEFENSE COUNSEL]: Yeah.
>
> THE COURT: —what all that means.

Defense counsel informed the trial court that he had "been advised that [defendant] ha[d] a number of medical conditions by her and her family" and offered to attempt to obtain more information from her doctors. The trial court asked the State whether it was "aware of any case law that would give us some guidance on whether this constitutes a voluntary absence or an involuntary [absence]." After the State responded that it had not looked into the issue, the trial court stated as follows:

> But I think we plan to be back here Monday depending on what her situation is maybe and whether this—this absence, if we find out that this would constitute a voluntary absence, we'd probably go right on through Monday if it's clear.
>
> . . . .
>
> . . . If it's questionable, that would be something else, and we don't know if she could show up here Monday or not at this point.

Defense counsel once again offered to seek additional information about her medical status and to conduct research on the issue of whether her absence should be deemed voluntary. The trial court characterized the information received up to that point—which was limited to the involuntary commitment documents—as "a bare-bones examination, clear description of findings about two sentences, and that's it." The trial court added that "[i]t takes more in depth when you get into the mental aspect, a lot more in depth." The State had prepared a draft order compelling production of certain portions of defendant's medical records to assist the trial court in determining how to proceed. Referencing that draft order, the State stated the following:

> But I'd assume, if that order were signed by the Court, that we could find out some information as to how she got there, you know, what she presented with, what, you know, past symptoms, medications that she could have been on. I think it would really open up a wealth of information that this Court could use in being well-informed to make a decision in this case.

A discussion ensued concerning the fact that the proposed order only sought information regarding defendant's condition on 8 and 9 November 2017. Defense counsel stated as follows:

> [Y]ou may want to expand the order a little bit, but I believe that what the order says is all information, complete documentation, complaint, diagnosis, treatment, prognosis, discharge and any other information that would assist the Court. I think that's rather complete, but it's the Court's order. But I think, you know, if you want to—if you want to put in including current updates to the date and time of the release or current updates through her discharge—

The trial court agreed, deciding that the order should be "comprehensive." The trial court then recessed the proceedings while the State drafted a revised order for the release of defendant's medical records and conducted research on whether the trial should continue.

When the proceedings resumed that afternoon, the State informed the trial court of its position that defendant had voluntarily waived her right to be present by choosing to ingest the excessive number of pills. Defense counsel expressed his belief that there was a need for more information regarding defendant's mental health status, noting that it was not clear whether "her intent was to end her life or to impede these proceedings." The trial court agreed to recess further trial proceedings

until the following Monday, at which time defendant would either be released from treatment or the trial court would have received the requested medical records. The trial court then stated the following:

> We don't know what her situation is going to be, but I want to take the position, unless something happens that shoots it down, that she voluntarily made herself absent from the trial and continue on Monday.

The trial court proceeded to release the jury until the following Monday and issued an order for defendant's arrest upon the expiration of her period of commitment. Later that afternoon, the trial court also entered an order for the release of defendant's medical records. The trial court mandated the production of "complete documentation of the Defendant's complaint, diagnosis, treatment, prognosis, discharge, and any other information that would assist the court in making a determination regarding how to proceed," but limited the temporal scope of the records to the "admittance date of November 8, 2017, and any days following this date for the continued treatment of [defendant]."

The proceedings resumed on 13 November 2017 at which time defendant remained in the hospital under the terms of the involuntary commitment order. The trial court informed counsel that it had received 89 pages of defendant's recent medical records over the weekend, which included reports containing the medical opinions of Dr. Silver and Dr. Stover, which both stated that defendant required further immediate inpatient psychiatric stabilization and that she remained suicidal. The records also noted that defendant had been assessed at a "high" risk level on the Columbia Suicide Severity Rating Scale. An evaluation by Dr. Silver stated, in part, that

> [s]he has been on trial for embezzlement . . . .
>
> . . . .
>
> The patient reported that the verdict for her trial was to be read out this morning, November 9. She states that last night she wrote goodbye letters to her grandchildren, and overdosed on 60 tablets of Xanax. She had stated "I'm not going to go to jail".
>
> . . . .
>
> . . . She states she continues to think about wishing she were dead reporting "I don't really have a will to live". . . .

. . . .

> . . . She denies any history of suicide attempts before last nights overdose on Xanax.

The medical records also reflected defendant's "history of a mood disorder" that she managed with daily medication but noted that she had "never been psychiatrically hospitalized." In addition, the medical records stated that defendant had been prescribed Haldol for agitation, as well as Vistaril for anxiety and Trazodone to help her sleep. She was ordered to continue her prescription of 100 milligrams of Zoloft daily.

The following exchange between the trial court and defense counsel then ensued:

> THE COURT: Up till the time that this matter occurred, [defense counsel], you have not observed anything of her that would indicate she lacked competency to proceed in this trial, would that be a fair statement?
>
> [DEFENSE COUNSEL]: That would be a fair statement.
>
> THE COURT: Okay. And then this intervention came along Wednesday?
>
> [DEFENSE COUNSEL]: Yes, sir.
>
> THE COURT: And we are where we are now—
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: —she's being further evaluated?
>
> [DEFENSE COUNSEL]: That's correct, yes.
>
> THE COURT: All right. It's my intention this morning as I stated I think Thursday to proceed with the trial under the ruling that she has voluntarily by her own actions made herself absent from the trial at this point. How it may be in the future I'm not sure, depends on her situation how it all turns out, but I'm taking the position that she has by her voluntary actions and by implication made her presence unavailable for court.

Defense counsel then stated the following:

> Your Honor, I would indicate that we did review on Thursday an involuntary commitment document indicating that the doctor put on the record that she had

> voluntarily overdosed on Xanax by taking 60 milligrams. I contend that it is somewhat of a leap for us as lay people and not doctors to consider that her actions are for the purposes of avoiding jurisdiction of the court or avoiding trial. Ms. Sides has quite a number of other factors in her life that are very pressing and from which certain personalities may find overwhelming. I would just contend, Your Honor, that this may be the straw that broke the camel's back, but I don't know that her efforts—I think her efforts were to end her life, not to end her trial.
>
> And I would contend that we don't have evidence regarding whether or not she voluntarily absented herself from the trial. We know that she attempted to absent herself from life itself, but I would contend that there is some distinction of that, that she is in custody in a medical facility, and we have not investigated whether or not she chooses or would like to be here. And so we're making a leap by saying that she voluntarily absented herself from the trial, and we'd like to note our objection to that.

Over defense counsel's objection, the trial court ruled that the trial would proceed on the basis that defendant's absence was voluntary. The trial court admitted into evidence defendant's medical records and the involuntary commitment documents, noting that it had considered those documents. The trial then resumed without defendant being present, and the jury was instructed not to consider defendant's absence in weighing the evidence or determining the issue of guilt. At the close of the State's case-in-chief, defense counsel moved to dismiss the charges against her, and the trial court denied the motion. No evidence was offered on defendant's behalf. The trial court subsequently denied defense counsel's renewed motion to dismiss. That afternoon, the jury reached a verdict finding defendant guilty of all charges.

On 16 November 2017, defendant appeared in the courtroom for sentencing. The trial court sentenced her to consecutive sentences of 60 to 84 months imprisonment for the two Class C felonies and 6 to 17 months imprisonment for the Class H felony. The trial court suspended the latter sentence and imposed 60 months supervised probation. Finally, the trial court ordered defendant to pay $364,194.43 in restitution. On 28 November 2017, defendant gave notice of appeal.

Before the Court of Appeals, defendant argued that the trial court was required to conduct a competency hearing prior to proceeding

with the trial in her absence. Relying on its prior decision in *State v. Minyard*, 231 N.C. App. 605 (2014), the majority at the Court of Appeals rejected this contention, holding that when a defendant voluntarily absents herself from trial, she waives her constitutional right to be present and is not entitled to a competency hearing. *State v. Sides*, 267 N.C. App. 653, 658 (2019). The majority concluded that defendant's overdose was a voluntary act and that no competency hearing was required under the circumstances. *Id.* at 661.[2]

In a dissenting opinion, Judge Stroud stated her belief that a defendant must be found to be competent before she can be deemed to have voluntarily absented herself from trial and that substantial evidence had existed before the trial court casting doubt on defendant's competence. *Id.* at 664 (Stroud, J., dissenting). As a result, Judge Stroud expressed her view that the trial court was required to sua sponte conduct a competency hearing in this case. *Id.* at 666. On 18 October 2019, defendant appealed as of right to this Court based upon the dissent.

Analysis

This case requires us to reconcile the following four principles based on the facts of this case: (1) a criminal defendant cannot be tried unless she is competent to stand trial; (2) a defendant has a constitutional right to be present during her entire trial; (3) a defendant may voluntarily waive her constitutional right to be present; and (4) such a waiver is only valid if the defendant is competent. Stated succinctly, in this appeal we must resolve a classic "chicken and egg" dilemma regarding how a trial court must proceed when faced with a situation where a defendant intentionally engages in conduct harmful to herself that has the effect of absenting her from trial under circumstances that raise bona fide concerns about her capacity. In such cases, the issue is whether the trial court is required to conduct a competency hearing before proceeding to determine whether the defendant made a voluntary waiver of her right to be present, or, alternatively, whether it is permissible for the trial court to forego a competency hearing and instead assume a voluntary waiver of the right to be present on the theory that the defendant's absence was the result of an intentional act.

We conclude that by essentially skipping over the issue of competency and simply assuming that defendant's suicide attempt was a

2. The Court of Appeals also rejected defendant's additional argument that the trial court had erred by amending the judgments entered against her in her absence in order to reflect corrected offense dates. *See State v. Sides*, 267 N.C. App. 653, 663 (2019). That issue, however, is not before us in this appeal.

voluntary act that constituted a waiver of her right to be present during her trial, both the majority at the Court of Appeals and the trial court "put the cart before the horse." Once the trial court had substantial evidence that defendant may have been incompetent, it should have sua sponte conducted a competency hearing to determine whether she had the capacity to voluntarily waive her right to be present during the remainder of her trial.

We first address the State's contention that defendant failed to preserve her statutory right to a competency hearing. Subsection 15A-1001(a) of the General Statutes of North Carolina states that

> [n]o person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

N.C.G.S. § 15A-1001(a) (2019).

The issue of whether a defendant has the capacity to be tried "may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court." N.C.G.S. § 15A-1002(a) (2019). Our General Statutes provide that once a question is raised as to a defendant's capacity, "the court shall hold a hearing to determine the defendant's capacity to proceed." N.C.G.S. § 15A-1002(b)(1). Defendant contends that a competency hearing was required under this statute because both defense counsel and the trial court raised the issue of defendant's competency and defense counsel objected to the trial court's ultimate decision to allow the trial to proceed.

The State, conversely, argues that defendant's statutory right to a competency hearing pursuant to N.C.G.S. § 15A-1002(b) was waived because defense counsel neither actually requested such a hearing nor properly objected to the trial court's decision to proceed without one. In support of its argument, the State cites several decisions from this Court in which we held that a defendant's statutory right to a competency hearing was not properly preserved. *See State v. Badgett*, 361 N.C. 234 (2007); *State v. King*, 353 N.C. 457 (2001); *State v. Young*, 291 N.C. 562 (1977).

However, we need not resolve the parties' dispute regarding the preservation issue. Even assuming arguendo that the State is correct that defendant failed to preserve her *statutory* right to a competency

hearing as required under our prior decisions, we hold that defendant possessed a *constitutional* due process right to such a hearing.

The United States Supreme Court has held that a defendant is competent to stand trial if he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him." *Ryan v. Gonzales*, 568 U.S. 57, 66 (2013) (cleaned up). In situations where a trial court possesses information regarding a defendant that creates "sufficient doubt of his competence to stand trial to require further inquiry on the question," it must investigate the competency issue. *Drope v. Missouri*, 420 U.S. 162, 180 (1975). This Court has likewise recognized that "[a] trial court has a constitutional duty to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent." *Young*, 291 N.C. at 568 (emphasis omitted) (citation omitted). Because questions of competency can arise for the first time during trial, "[e]ven when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Drope*, 420 U.S. at 181.

In addition, although a criminal defendant possesses a constitutional right to be present at all stages of her trial, *see Kentucky v. Stincer*, 482 U.S. 730, 745 (1987), the United States Supreme Court has also recognized the potential for a defendant in a non-capital case to waive that right.

> [W]here the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.

Taylor v. United States, 414 U.S. 17, 19 (1973) (alteration in original) (citation omitted).

The Supreme Court has made clear that in order to waive the right to be present, however, the defendant "must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away." *Id.* at 19 n.3 (citation omitted). In other words, in order to waive the right to be present, there

must be "an intentional relinquishment or abandonment" of that right. *Id.* at 19 (citation omitted). The Supreme Court has recognized that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Pate v. Robinson*, 383 U.S. 375, 384 (1966).

Here, the majority at the Court of Appeals reasoned that defendant waived her right to be present by voluntarily absenting herself from trial. *Sides*, 267 N.C. App. at 661. Specifically, the majority held that the trial court was not required to conduct a competency hearing because defendant waived her right to be present at trial by intentionally overdosing on medication, thereby resulting in her absence through her own willful conduct. *Id.* at 659–60.

We believe that the Court of Appeals erred by making that determination without first deciding whether there was substantial evidence before the trial court as to her lack of capacity to truly make such a voluntary decision. As the case law discussed above makes clear, a defendant cannot be deemed to have voluntarily waived her constitutional right to be present at her own trial unless she was mentally competent to make such a decision in the first place. Logically, competency is a necessary predicate to voluntariness. Accordingly, if there is substantial evidence suggesting that a defendant may lack the capacity to stand trial, then a sufficient inquiry into her competency is required before the trial court is able to conclude that she made a voluntary decision to waive her right to be present at the trial through her own conduct. Thus, the majority at the Court of Appeals erred by simply assuming that defendant's suicide attempt was necessarily a voluntary act.

Although the majority's analysis was flawed in this respect, the question remains whether it nevertheless ultimately reached the correct result. In order to answer that question, we must determine whether a bona fide doubt actually existed as to defendant's lack of competency that required the trial court to sua sponte conduct a competency hearing before allowing the trial to resume in her absence.

In addressing this issue, we deem it instructive to review prior decisions of this Court that address the question of whether the trial court was constitutionally required to initiate a competency hearing sua sponte. In *Young*, the defendant was convicted of first-degree murder and sentenced to death. *Young*, 291 N.C. at 565. Before trial, defense counsel raised concerns about the defendant's competency. *Id.* at 566. The trial court ordered that the defendant be committed to Dorothea Dix Hospital to undergo psychiatric examination. *Id.* at 566. The resulting

diagnostic report and psychiatric opinions identified no evidence of incompetency. *Id.* at 566–67. On appeal to this Court, the defendant contended that the trial court had erred by not holding a competency hearing, citing both his statutory and due process rights. We concluded that the defendant waived his statutory right to such a hearing as there was "no indication that the failure to hold a hearing under G.S. 15A-1002(b)(3) . . . was considered or passed upon by the trial judge." *Id.* at 567–68. We further held that defendant was not constitutionally entitled to such a hearing because where "the defendant has been committed and examined relevant to his capacity to proceed, and all evidence before the court indicates that he has that capacity, he is not denied due process by the failure of the trial judge to hold a hearing subsequent to the commitment proceedings." *Id.* at 568.

The defendant in *State v. Heptinstall*, 309 N.C. 231 (1983), was convicted of first-degree murder. Prior to trial, the trial court conducted an inquiry into his competency and reviewed evidence of his "significant history of mental illness," including a diagnosis of paranoid schizophrenia. *Heptinstall*, 309 N.C. at 233. Family members and a forensic psychiatrist testified to the defendant's bizarre behavior, but the trial court found him competent and proceeded with trial. *Id.* at 233–34. The defendant contended on appeal that the trial court should have conducted another competency hearing after his "bizarre and incoherent" testimony. *Id.* at 235.

We rejected this argument, stating that the defendant's testimony "became nonsensical and bizarre when the subject turned to matters of morality and religion" but that otherwise "[a]lmost all of his testimony during the guilt phase indicates that defendant was accurately oriented regarding his present circumstances." *Id.* at 236. We concluded that "the testimony would not have suggested to the trial court that defendant then lacked capacity to proceed. There was, therefore, no duty of the trial court on its own motion to reopen this question." *Id.* at 237.

In *King*, the defendant was convicted of first-degree murder for killing his estranged wife, and he was sentenced to death. *King*, 353 N.C. at 461. He argued on appeal that the trial court erred by not conducting a competency hearing prior to trial. *Id.* at 465. This Court held that the defendant waived his statutory right to a competency hearing and was not constitutionally entitled to such a hearing because there was not substantial evidence suggesting that he may have been incompetent. *Id.* at 466–67. We noted that the record did "not indicate that either defendant or defense counsel raised any questions about defendant's capacity to proceed at any time during defendant's trial and capital sentencing

proceeding." *Id.* at 467. Although the defendant offered some evidence of past "precautionary treatment for depression and suicidal tendencies," we concluded that this alone did not constitute substantial evidence that the defendant lacked the capacity to proceed and that, as a result, the trial court did not have a duty to sua sponte conduct a competency hearing. *Id.*

The defendant in *Badgett* was sentenced to death for first-degree murder. *Badgett*, 361 N.C. at 239. On appeal to this Court, he argued that the trial court erred by not sua sponte conducting a competency hearing in light of doubts as to his competency. *Id.* at 258. After being charged with first-degree murder, the defendant had sought counseling and was found by psychiatrists to suffer from irritability, anger management problems, and depression. *Id.* at 241–42. On appeal, the defendant attempted to rely on evidence that he had written letters to the trial court asking for a speedy trial resulting in a death sentence, impliedly asked the jury to sentence him to death, and engaged in an emotional outburst during sentencing. *Id.* at 259–60.

This Court rejected the defendant's argument that he was statutorily entitled to a competency hearing because nothing in the record indicated that questions of competency were raised at any point during trial. *Id.* at 259. With regard to the question of whether he had a constitutional right to a competency hearing, we noted that he had "interact[ed] appropriately with his attorneys during the trial. . . . conferred with them . . . . followed their advice . . . . [and] responded directly and appropriately to questioning." *Id.* at 260. Furthermore, the transcript revealed that the defendant "demonstrated a strong understanding of the proceedings against him" and treated the trial court with deference. *Id.* at 260. Moreover, although he did, in fact, have an "outburst during the state's closing arguments," he apologized afterward and "calmly and rationally" explained why he was upset. *Id.* at 260–61. Finally, we recognized that three experts testified about defendant's psychological history and none of them suggested that his mental status rendered him incompetent to stand trial. *Id.* at 261. For these reasons, we concluded that no competency hearing was required. *Id.* at 260.

While our holdings in *Young*, *Heptinstall*, *King*, and *Badgett* provide useful guidance on the basic legal principles that govern the present case, we believe several decisions of the federal courts—including two from the United States Supreme Court—are more directly relevant to our analysis. In *Drope*, on the second morning of trial for a rape charge, the defendant shot himself in the stomach in an attempt to commit suicide and was hospitalized. *Drope*, 420 U.S. at 166–67. The remainder of

the trial proceeded in his absence with the trial court ruling that his absence was voluntary in light of evidence that he had stated he would "rather be . . . dead than to go to trial for something he didn't do." *Id.* at 167. The jury found the defendant guilty, and the trial court sentenced him—after he finally appeared in court after a three-week hospital stay—to life in prison. *Id.*

The defendant argued on appeal that the trial court denied him his right to due process by failing to conduct a competency hearing in light of the circumstances surrounding his absence from trial. *Id.* at 163–64. The Supreme Court noted that the defendant "was absent for a crucial portion of his trial," which prevented the trial court from observing his behavior, *id.* at 180–81, and that "the record reveal[ed] a failure to give proper weight to the information suggesting incompetence which came to light during trial." *Id.* at 179. The defendant's wife had testified to her "belief that her husband was sick and needed psychiatric care" and that he tried to choke and kill her the night before trial. *Id.* at 166.

The Supreme Court recognized that "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required" but noted there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed." *Id.* at 180. The Supreme Court determined that it "was sufficiently likely that, in light of the evidence of [the defendant's] behavior including his suicide attempt, and there being no opportunity without his presence to evaluate that bearing in fact, the correct course was to suspend the trial until such an evaluation could be made." *Id.* at 181. The Supreme Court concluded that "when considered together with the information available prior to trial and the testimony of [the defendant's] wife at trial, the information concerning [the defendant's] suicide attempt created a sufficient doubt of his competence to stand trial to require further inquiry on the question." *Id.* at 180. The Supreme Court therefore reversed the judgment and remanded the case for a new trial. *Id.* at 183.

In *Pate*, the defendant was convicted of murdering his wife and was sentenced to life imprisonment. *Pate*, 383 U.S. at 376. At trial, defense counsel asserted the defense of insanity and contended that the defendant was incompetent to stand trial, but the trial court did not conduct a competency hearing. *Id.* The United States Supreme Court held that the defendant "was constitutionally entitled to a hearing on the issue of his competence to stand trial." *Id.* at 377. The Supreme Court cited testimony from four witnesses regarding the defendant's "history of

disturbed behavior," including instances of erratic conduct and paranoia. *Id.* at 378–79. In addition, the Supreme Court noted that the trial court had heard evidence of the defendant's prior psychiatric hospitalizations and a hospitalization resulting from an attempted suicide by gunshot to the head. *Id.* at 380–81. The Supreme Court acknowledged evidence that the defendant had exhibited "mental alertness and understanding" in his exchanges with the trial court, but it observed that even though the defendant's "demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue." *Id.* at 385–86. The Supreme Court ultimately concluded that based on the record, the defendant's "present sanity was very much in issue" during the proceedings, thereby raising a " 'bona fide doubt' as to [the] defendant's competence to stand trial" such that he was entitled to a competency hearing. *Id.* at 384–85.

The United States Court of Appeals for the Ninth Circuit addressed a similar issue in *United States v. Loyola-Dominguez*, 125 F.3d 1315 (9th Cir. 1997). In that case, the defendant attempted suicide in his jail cell the night before trial. *Id.* at 1316. The next morning, defense counsel requested that the defendant undergo a psychiatric evaluation and a competency hearing, citing some additional mental health difficulties that the defendant had experienced during his incarceration. *Id.* The trial court briefly questioned the defendant, asking him whether he would like to undergo psychiatric evaluation or continue with trial. *Id.* At one point, the trial court asked the defendant the following: "Well, do you feel—do you know what's going on? Do you know what's going on at the trial?" The defendant replied: "I don't know. I've never been here like this, so I don't know." *Id.* at 1317. The trial court then inquired as to whether the defendant felt that he was "competent to understand what's going on," and the defendant asked: "How long would it take? Because I just can't stand anymore, the way they have me there. I feel desperate." *Id.* The trial court ultimately ordered that the trial proceed without a competency hearing. *Id.*

In holding that the trial court had erred by failing to hold a competency hearing, the Ninth Circuit stated that "[w]hile we do not believe that every suicide attempt inevitably creates a doubt concerning the defendant's competency, we are persuaded that, under the circumstances of this case, such a doubt existed." *Id.* at 1318–19. The Ninth Circuit determined that the trial court's inquiry was insufficient to assess the defendant's competency, particularly "the fact that the trial court did not elicit adequate information, from either defense counsel or [the defendant], that would have dispelled the concerns that would ordinarily arise

regarding competency." *Id.* at 1319. The Ninth Circuit further explained that the defendant's responses to the trial court's questions suggested that he did not fully understand the nature and consequences of the proceedings. *Id.* Although the trial court noted that the defendant "had always seemed fine in the past," the Ninth Circuit concluded that the defendant's recent suicide attempt along with the surrounding circumstances "raised significant doubts regarding his competency to stand trial" such that a competency hearing was constitutionally required. *Id.*

Based on our thorough review of the record in the present case, we believe the trial court was presented with substantial information that cast doubt on defendant's competency. To be sure, defendant's suicide attempt itself "suggests a rather substantial degree of mental instability contemporaneous with the trial." *Drope*, 420 U.S. at 181. But her suicide attempt does not stand alone in our assessment. *See id.* In our view, the facts before the trial court—when taken as a whole—were clearly sufficient to trigger the need for a competency hearing.

On the morning of 9 November 2017, the trial court was made aware that defendant had been hospitalized after a suicide attempt and that a magistrate had determined that grounds existed to issue an order for her involuntary commitment. The trial court reviewed two psychiatric opinions regarding defendant's mental health issues. Dr. Stover, the doctor who sought defendant's immediate involuntary commitment, found that defendant "ha[d] been experiencing worsening depression and increased thoughts of self-harm" and checked the box on the form stating that defendant was "mentally ill and dangerous to self or others or mentally ill and in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness." Dr. Stover wrote that defendant "is not stable and for her safety will need further evaluation." Dr. Silver conducted another evaluation of defendant later that day and noted that defendant "remains suicidal even today. She is not safe for treatment in the community and requires inpatient stabilization."

Upon receiving this information, the trial court issued an order for the release of additional medical records—albeit only those records from 8 November 2017 onward. These records, which were reviewed by the trial court, shed additional light on defendant's mental health issues, showing that defendant had a "history of a mood disorder" that she managed with daily medication. In the meantime, defendant remained suicidal and was assessed at a "high" risk level on the Columbia Suicide Severity Rating Scale, and she told Dr. Silver that she did not "really have a will to live." As part of her inpatient treatment, she was prescribed

Haldol along with Vistaril and Trazodone. Defendant was also instructed to continue her daily dose of 100 milligrams of Zoloft.

It is clear that the trial court recognized the existence of an issue as to defendant's competency. For this reason, the trial court took the initial steps of recessing trial proceedings, conferring with counsel, and ordering the production of defendant's most recent medical records. But instead of ordering a hearing on defendant's competency, the trial court at that point abruptly ended further consideration of the issue, simply assuming—like the Court of Appeals majority—that her overdose was a voluntary action and that no further competency analysis was required. Simply put, the trial court started down the road of addressing defendant's competency but abandoned the journey midway.

In arguing that no competency hearing was required, the State points to evidence in the record suggesting that defendant's ingestion of pills was a voluntary attempt by her to avoid incarceration upon being convicted. The State supports this argument, for example, by citing a statement she made to medical providers during her hospitalization that she is "not going to go to jail."

By making this argument, however, the State is conflating the separate issues of (1) whether substantial evidence existed as to defendant's lack of competency so as to require a sua sponte competency hearing, and (2) what the ultimate result of such a competency hearing would be. But the latter issue is not before us. Rather, the sole question that we must decide is whether there was substantial evidence before the trial court to trigger the need for a sua sponte competency hearing in the first place. After hearing all of the relevant evidence as to defendant's competency at such a hearing, the trial court would then have been tasked with weighing the respective evidence—including those facts that the State highlights in its brief before this Court—and making a competency determination. Assuming defendant was found to be competent, then—and only then—would the trial court have been able to make a determination as to whether defendant's absence from the trial proceedings was the result of a voluntary act on her part.[3]

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3. In its analysis, the Court of Appeals majority relied largely on that court's prior decision in *State v. Minyard*, 231 N.C. App. 605 (2014). In *Minyard*, the Court of Appeals held, in part, that a defendant who had ingested a large quantity of intoxicating substances at the end of his trial had voluntarily waived his right to be present during the jury's deliberations. *Id.* at 626–27. To the extent the Court of Appeals' analysis on that issue is inconsistent with our holding today, that portion of *Minyard* is overruled.

We wish to emphasize that the issue of whether substantial evidence of a defendant's lack of capacity exists so as to require a sua sponte competency hearing requires a fact-intensive inquiry that will hinge on the unique circumstances presented in each case. Our holding should not be interpreted as a bright-line rule that a defendant's suicide attempt automatically triggers the need for a competency hearing in every instance. Rather, our decision is based on our consideration of all the evidence in the record when viewed in its totality.

* * *

The only remaining issue before us is to determine the appropriate remedy on remand. The two potential remedies are for the trial court to conduct either a new trial or a retrospective competency hearing.

The United States Supreme Court has recognized "the difficulty of retrospectively determining an accused's competence to stand trial." *Pate*, 383 U.S. at 387. Where a retrospective hearing would require the trial court to assess the defendant's competency "as of more than a year ago," the Supreme Court has suggested that such a hearing is not an appropriate remedy. *Dusky v. United States*, 362 U.S. 402, 403 (1960).

Here, a retrospective hearing would require an evaluation of defendant's competency more than three years ago. Because of the "inherent difficulties of such a *nunc pro tunc* determination under the most favorable circumstances," *Drope*, 420 U.S. at 183, we do not believe such an undertaking would be feasible. We conclude that defendant is entitled to a new trial—"assuming, of course, that at the time of such trial [defendant] is competent to be tried." *Id.*

Conclusion

For the reasons stated above, we reverse the decision of the Court of Appeals and remand for a new trial.

REVERSED AND REMANDED.

Justice MORGAN dissenting.

While I agree with my learned colleagues in the majority that "the sole question that we must decide is whether there was substantial evidence before the trial court to trigger the need for a *sua sponte* competency hearing," I disagree with their evaluation of defendant's mental health history as constituting a determination that "the trial court had substantial evidence that defendant may have been incompetent." I am

also in accord with the majority's approach in a case such as the current one that "the issue of whether substantial evidence of a defendant's lack of capacity exists so as to require a *sua sponte* competency hearing requires a fact-intensive inquiry that will hinge on the unique circumstances presented in each case," although I do not consider the particular features of this case to compel the need for the trial court to hold a competency hearing. The majority's tendency here to embellish aspects of defendant's mental history and capacity, plus its tendency to diminish aspects of defendant's pre-trial and trial behavior, artificially create a specter of substantial evidence which I do not perceive in this case. As a result, I dissent.

The Due Process Clause of the United States Constitution protects criminal defendants who are incompetent to stand trial for charges levied against them by the State from being compelled to stand trial while they remain incompetent. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). In order to possess the competence necessary to stand trial, a defendant must have the "capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). While "a competency determination is necessary only when a court has reason to doubt the defendant's competency," *Godinez v. Moran*, 509 U.S. 389, 401 n.13 (1993), North Carolina criminal courts have a "constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (quoting *State v. King*, 353 N.C. 457, 467, 546 S.E.2d 575, 585 (2001)). Substantial evidence which establishes a bona fide doubt as to a defendant's competency may be established by considering "a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial." *Drope*, 420 U.S. at 180. Indeed, as the majority quotes from *Drope*, a suicide attempt "suggests a rather substantial degree of mental instability contemporaneous with trial." *Id.* at 181.

The majority in the present case recounts defendant's mental health history prior to trial and delineates her unfortunate and sobering background of agitation, anxiety, and depression, and her "history of mood disorder." In its analysis, the majority sees fit to equate such circumstances as those which existed in *Drope*, in which the majority here cites the Supreme Court of the United States' emphasis on the testimony of the defendant's wife that she believed that defendant " 'was sick and needed psychiatric care' and that he tried to choke and kill her

the night before trial," as well as those in *Pate v. Robinson*, 383 U.S. 375 (1966), wherein the majority here cites the Supreme Court of the United States' emphasis on the defendant's " 'history of disturbed behavior,' including instances of erratic conduct and paranoia . . . [and] defendant's prior psychiatric hospitalizations and a hospitalization resulting from an attempted suicide by gunshot to the head," with defendant's circumstances in the case sub judice in order to substantiate the majority's conclusion here that there was a bona fide doubt about defendant's competency to stand trial so as to require the trial court to conduct a *sua sponte* competency hearing. The breadth and depth of the mental health challenges experienced by defendants in *Drope* and *Pate* were at a more extreme level than those mental health challenges experienced by defendant in the present case, although the majority stretches the magnitude of defendant's circumstances to qualify for the application of the competency hearing requirement articulated by the nation's highest court.

As my distinguished colleagues in the majority magnify the significance of defendant's mental health history to elevate it to the reaches of the *Drope* and *Pate* principles governing the existence of substantial evidence to require a trial court's *sua sponte* competency hearing to be conducted, they simultaneously bolster the perception of the presence of substantial evidence that defendant may have been incompetent by providing scant recognition of defendant's behavior that detracts from a determination of substantial evidence. The information gathered by the trial court in conjunction with defendant's apparent drug overdose showed that defendant had "never been psychiatrically hospitalized," that defendant herself denied any history of suicide attempts prior to her apparent drug overdose, and that defendant reported that she took the drugs in an effort to kill herself following the end of the third day of her trial because defendant was aware that "the verdict for her trial was to be read out this morning" and defendant had stated "I'm not going to jail." The majority's expansive reading of defendant's limited mental health history, combined with her singular suicide attempt brought on by a professed desire to avoid incarceration, does not appear to sufficiently demonstrate, in my view, defendant's inability "to understand the nature and object of the proceedings against [her], to consult with counsel, and to assist in preparing [her own] defense," which is the standard for competency as instructed by the Supreme Court in *Drope*. *Drope*, 420 U.S. at 171. Substantial evidence of a defendant's incapacity to stand trial is inadequately shown where generalized mental health issues, rather than the *Drope* delineation of factors, is shown to exist. I do not consider the standard articulated by *Drope* to have been met in the present case.

With the dearth of any information to signify that defendant was incompetent and defendant's unequivocal statement that her apparent drug overdose was a singular suicidal event to avoid the prospect of incarceration, the trial court determined that defendant's absence from trial was accomplished by her voluntary actions which constituted a waiver of defendant's constitutional right to be present at her criminal trial. The modest attention which the majority has given to these core considerations of the trial court and the Court of Appeals in those forums' respective and compatible determinations that defendant was not entitled to a competency hearing under the totality of these circumstances, while bolstering the specter of the existence of substantial evidence to require the trial court to conduct a *sua sponte* competency hearing, unfortunately decreases the standard for establishment of such substantial evidence and increases the myriad of situations in which a trial court must interrupt a criminal trial to conduct a *sua sponte* competency hearing when a defendant creates a voluntary absence from trial.

The majority mistakenly conflates defendant's *willingness* to participate in her criminal trial with her *ability* to do so. In light of this and the additional aforementioned reasons, I respectfully dissent.

Justice NEWBY and Justice ERVIN join in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
JEFF DAVID STEEN

No. 141A19

Filed 18 December 2020

1. Homicide—felony murder—jury instruction—attempted murder with a deadly weapon—hands and arms as "deadly weapons"

Under North Carolina law, an adult's hands and arms can, depending on the circumstances, qualify as "deadly weapons" for purposes of the statutory felony murder rule (N.C.G.S. § 14-17(a)). Therefore, at defendant's trial for his grandfather's murder and the attempted murder of his mother, the trial court did not err by instructing the jury that it could convict defendant of murdering his grandfather under the felony murder rule if it found—as the predicate felony under the "continuous transaction" doctrine—that defendant attempted to murder his mother using his hands and arms as deadly weapons.

2. Homicide—felony murder—jury instruction—attempted murder with a deadly weapon—prejudicial error

In a murder prosecution where the trial court instructed the jury that it could convict defendant of murdering his grandfather under the felony murder rule if it found—as the predicate felony—that defendant attempted to murder his mother (who could only recall being strangled) using either his hands and arms or a garden hoe as a deadly weapon, the trial court committed prejudicial error by including the garden hoe in its instruction. Given defendant's denials of guilt, the lack of DNA evidence linking him to the crime scene, and his mother's conflicting statements about her attacker's identity, there was a reasonable probability that, absent the instruction mentioning the garden hoe, the jury might not have convicted defendant of murdering his grandfather under a felony murder theory.

Justice NEWBY concurring in part and dissenting in part.

Justice MORGAN joins in this opinion concurring in part and dissenting in part.

Justice EARLS concurring in result only in part and dissenting in part.

Chief Justice BEASLEY joins in this opinion concurring in the result only in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 264 N.C. App. 566, 826 S.E.2d 478 (2019), finding no error in judgments entered on 1 February 2017 by Judge Nathaniel J. Poovey in Superior Court, Rowan County, based upon defendant's convictions for first-degree murder, robbery with a dangerous weapon, and attempted first-degree murder. On 11 June 2019, the Supreme Court allowed defendant's petition for discretionary review as to additional issues. Heard in the Supreme Court on 4 November 2019.

Joshua H. Stein, *Attorney General*, *by Mary Carla Babb*, *Assistant Attorney General*, *for the State-appellee.*

Glenn Gerding, *Appellate Defender*, *by Amanda S. Zimmer*, *Assistant Appellate Defender*, *for defendant-appellant.*

ERVIN, Justice.

The issues before us in this case arise from defendant's conviction for the first-degree murder of his grandfather on the basis of the felony-murder rule using the attempted murder of his mother with a deadly weapon as the predicate felony. After the conclusion of all of the evidence and the arguments of counsel, the trial court instructed the jury that it could find defendant guilty of the first-degree murder of his grandfather in the event that it found beyond a reasonable doubt that he killed his grandfather as part of a "continuous transaction" during which he also attempted to murder his mother using either his hands and arms or a garden hoe as a deadly weapon. On appeal, we have been asked to resolve the questions of whether an adult's hands and arms can ever qualify as a deadly weapon for purposes of the felony-murder provisions of N.C.G.S. § 14-17(a) (providing that a defendant can be guilty of first-degree murder on the basis of the felony-murder rule using any "other felony committed or attempted with the use of a deadly weapon" as the predicate felony) and whether the trial court's erroneous jury instruction that the jury could find that defendant attempted to murder his mother using a garden hoe as a deadly weapon prejudiced defendant's chances for a more favorable outcome at trial. *See* N.C.G.S. § 14-17(a) (2019). After careful consideration of the record in light of the applicable law, we affirm the decision of the Court of Appeals, in part; reverse the Court of Appeals' decision, in part; and remand this case to the Superior Court, Rowan County, for a new trial with respect to the issue of defendant's guilt of the murder of his grandfather.

I. Factual Background

A. Substantive Facts

On the evening of 5 November 2013, defendant repaired a ceiling fan at the home of his mother, Sandra Steen, and his grandfather, J.D. Furr. After working on the fan, defendant's mother handed defendant the bill for a loan that she had secured on his behalf; in response, defendant stated that he would "take care of it." Defendant had a history of borrowing money from his mother and grandfather, both of whom had recently told defendant that they would not lend him any more money. As of 5 November 2013, defendant owed his mother between $4,000 and $6,000, owed his grandfather approximately $500, and had a checking account balance of only $3.64.

As his mother went outside to retrieve certain items from her automobile, defendant, who had followed behind her, told her he was leaving to go to work. After defendant announced his intention to depart, defendant's mother walked to a storage shed behind the house, where she remained for approximately five to ten minutes. At trial, defendant's mother testified

that she had no memory of hearing defendant enter his own vehicle or hearing the vehicle leave the premises. While she was in the shed, defendant's mother thought that she heard raised voices. As a result, defendant's mother left the shed for the purpose of checking on her father.

As defendant's mother walked toward the house, she felt someone grab her around her neck with his or her right arm. During her trial testimony, defendant's mother stated that the arm in question felt like defendant's arm and that she had initially assumed that defendant was playing a trick upon her. However, as the grip around her neck tightened, defendant's mother thought, "[n]o[, t]his is somebody trying to kill me." As defendant's mother fought back, "trying to punch or grab whatever [she] could," her attacker placed his or her left hand over her nose and mouth, at which point everything went black. The next thing that defendant's mother remembered, according to her trial testimony, was that someone was opening her eyelid as she lay on the ground and that she saw defendant's face. At that point, defendant's mother believed that defendant was there for the purpose of helping her.

A number of neighbors testified that they did not see any unfamiliar persons or vehicles in the area that night. After working an 11:00 p.m. to 7:00 a.m. shift, defendant returned to the family home on the following morning. Upon his arrival, defendant approached his mother, whom he realized had been attacked. As a result, defendant called for emergency assistance and laid on the ground with her until paramedics arrived.

At the time that defendant's mother was discovered on the ground, she was suffering from hypothermia and extensive injuries. After being taken to the hospital, defendant's mother was diagnosed with a skull fracture, hemorrhaging of the brain, a mild traumatic brain injury, hypothermia, a cervical neck injury, a collapsed lung, multiple rib fractures, and facial trauma.

According to the paramedics who responded to defendant's call for emergency assistance, defendant's grandfather was dead at the time that they arrived. The paramedics found defendant's grandfather in a face down position near the back door, covered in blood and with a large pool of blood around his head. A garden hoe covered in defendant's grandfather's blood was recovered next to his body. According to the medical examiner, defendant's grandfather died as the result of blunt force injuries to his head and neck that could have been inflicted using the garden hoe. Defendant's grandfather's wallet, which had blood on it, was found near his body and did not contain the money that was usually kept there. Nothing else appeared to be missing from the property.

Although defendant denied any involvement in the assault upon his mother and the murder of his grandfather both in statements that he made to investigating officers and during his trial testimony, the officers who responded to the scene noticed the presence of scratches upon defendant's arm. Initially, defendant claimed that his mother had scratched him as he lay on the ground beside her while they waited for the paramedics to arrive. As the investigation continued, however, defendant gave ten different explanations concerning the manner in which he had obtained the scratches that had been observed by the investigating officers. Among other things, defendant, at different times, attributed these scratches to his cat, to an injury that he had sustained at work, and to the performance of chores.

The DNA evidence developed from items found at the scene did not connect defendant to the crime. More specifically, the record reflects that defendant's DNA was not found on his grandfather's wallet, in scrapings taken from under his mother's fingernails, or on the garden hoe.

On the day following the assault and murder, while she was still hospitalized, heavily medicated, and just beginning to recover from her traumatic brain injury, defendant's mother spoke with investigating officers. At that time, defendant's mother told the investigating officers that defendant had left the farm before she was attacked, that the perpetrator "couldn't be [defendant]" because he was taller than her assailant, and that she had been assaulted by someone wearing a ski mask. On the following day, defendant's mother told investigating officers that, "if you're thinking about [defendant as a suspect], then you're barking up the wrong tree," since she did not believe that defendant was capable of committing the assault that had occurred.

After talking with a traumatic brain injury counselor, however, defendant's mother came to the conclusion that defendant had attacked her and testified at trial that that was "when [she] was able to put into place that was [defendant]'s arm coming around [her] neck, that was [defendant] choking [her], and then it was [defendant] knocking [her] out. And then when [her] left eyelid was raised up, that was [defendant]'s face in front of [her]." In addition, defendant's mother told the jury that "[t]here was no [ski] mask" and that she "had been dreaming all kind of crazy dreams laying up there in ICU." Defendant's mother explained during her trial testimony that she had not initially wanted to believe that her son was capable of attacking her and that she had had difficulty remembering specific details about the assault as a result of the brain injury that she had sustained.

B. Procedural History

On 9 December 2013, a Rowan County grand jury returned bills of indictment charging defendant with the first-degree murder of his grandfather, the attempted first-degree murder of his mother, and robbing his grandfather with a dangerous weapon. The charges against defendant came on for trial before the trial court and a jury at the 9 January 2017 criminal session of the Superior Court, Rowan County.

At the jury instruction conference, the State requested the trial court to instruct the jury concerning four separate theories on the basis of which defendant could be convicted of first-degree murder: (1) malice, premeditation, and deliberation; (2) felony-murder based upon the predicate felony of robbery with a dangerous weapon; (3) felony-murder based upon the predicate felony of the attempted first-degree murder of defendant's mother; and (4) lying in wait. In support of this request for the delivery of the third of these instructions, the State relied upon the "continuous transaction" doctrine, under which "the [predicate] felony, in this case, which would be attempted first-degree murder occurs before, during, or soon after the murder victim's death as long as that felony, which is the attempted first-degree murder of [defendant's mother], form[s] one continuous transaction" with the actual killing. In objecting to the delivery of the State's requested instructions, defendant's trial counsel argued that the record evidence did not suffice to support defendant's conviction on the basis of either the felony-murder rule or lying in wait. After recognizing that the attempted murder of defendant's mother had to have been committed using a deadly weapon in order for it to qualify as a predicate felony for purposes of N.C.G.S. § 14-17(a), the State asserted that this "deadly weapon" requirement had been satisfied in this case given that "defendant's use of his hands, possibly feet based on the injuries that [defendant's mother] sustained, and possibly also the use of the garden tool or some other object where she believed she was hit in the back of the head with something hard would constitute a deadly weapon." In response, defendant's trial counsel argued that the record did not contain sufficient evidence to support a jury finding that the garden hoe had been used in connection with the attack upon defendant's mother in light of the fact that, even though the blood of defendant's grandfather had been found on the garden hoe, that object bore no trace of defendant's mother's DNA. In addition, defendant's trial counsel argued that the record did not contain sufficient evidence to support a determination that defendant's hands and arms had been used as a deadly weapon against defendant's mother. During closing arguments, the State asserted that "[w]e know the garden tool is

what killed [defendant's grandfather]," but did not mention the possible use of the garden hoe in the attempted murder of defendant's mother.

During its instructions to the jury, the trial court allowed that body to consider all four of the theories of defendant's guilt of first-degree murder that the State had mentioned during the jury instruction conference. In instructing the jury with respect to the issue of defendant's guilt of first-degree murder on the basis of the felony-murder rule using the attempted murder of defendant's mother as the predicate felony, the trial court stated, in pertinent part, that

> to find the defendant guilty of first-degree murder under the first-degree felony-murder rule based upon the underlying felony of attempted first-degree murder, the State must prove four things beyond a reasonable doubt:
>
> First, that the defendant committed the offense of attempted first-degree murder. . . .
>
> Second, that while committing attempted first-degree murder against [his mother], the defendant killed [his grandfather] with a deadly weapon such that it would constitute one continuous transaction.
>
> Third, that the defendant's act was a proximate cause of [his grandfather's] death. . . .
>
> And fourth, that the attempted first-degree murder was committed with the use of a deadly weapon. *The State contends and the defendant denies that the defendant used his hands and/or arms, and or a garden hoe as a deadly weapon.*
>
> A deadly weapon is a weapon which is likely to cause death or serious bodily injury. In determining whether the instrument is a deadly weapon, you should consider its nature, the manner in which it was used and the size and strength of the defendant as compared to the victim.

On 1 February 2017, the jury returned verdicts finding defendant guilty of (1) robbery with a dangerous weapon, (2) the attempted first-degree murder of his mother, and (3) the first-degree murder of his grandfather on the basis of the felony-murder rule using the attempted first-degree murder of his mother as the predicate felony. On the other hand, the jury declined to find defendant guilty of the first-degree murder of his grandfather on the basis of (1) malice, premeditation, and

deliberation; (2) the felony-murder rule using robbery with a dangerous weapon as the predicate felony; and (3) lying in wait. After accepting the jury's verdicts and arresting judgment in the case in which defendant had been convicted of the attempted murder of his mother, the trial court entered judgments sentencing defendant to a term of life imprisonment without the possibility of parole based upon his conviction for first-degree murder and to a consecutive term of 64 to 89 months imprisonment based upon his conviction for robbery with a dangerous weapon. Defendant noted an appeal from the trial court's judgments to the Court of Appeals.

C. Court of Appeals' Decision

In seeking relief from the trial court's judgments before the Court of Appeals, defendant argued that the trial court had committed prejudicial error by (1) instructing the jury that it could convict defendant of first-degree murder on the basis of the felony-murder rule using the attempted murder of his mother as the predicate felony on the grounds that the record did not contain sufficient evidence to permit the jury to find that defendant had used a garden hoe in the course of attempting to murder his mother; (2) instructing the jury that it could convict defendant of first-degree murder on the basis of the felony-murder rule using the attempted murder of his mother as the predicate felony on the grounds that hands and arms did not constitute a deadly weapon for purposes of N.C.G.S. § 14-17; and (3) excluding expert testimony concerning a medical condition that might have affected the credibility of defendant's mother's testimony that defendant had been her assailant.[1] In rejecting the second of defendant's challenges to the trial court's judgments, the Court of Appeals held that the trial court did not err by instructing the jury that defendant's hands and arms could constitute a deadly weapon for purposes of N.C.G.S. § 14-17(a). In reaching this conclusion, the Court of Appeals pointed out that it had "repeatedly held that hands, arms, and feet can constitute deadly weapons in certain circumstances 'depending upon the manner in which they were used and the relative size and condition of the parties,' " citing, among other decisions, *State v. Allen*, 193 N.C. App. 375, 378, 667 S.E.2d 295, 298 (2008), and that this Court had "held that the offense of felony child abuse could serve as the predicate felony for felony-murder where the defendant used his hands as a deadly weapon in the course of committing the abuse," *see State v. Pierce*, 346 N.C. 471, 488, S.E.2d 576, 589 (1997) (stating that,

1. As a result of the fact that the third of defendant's three challenges to the trial court's judgments was unanimously rejected by the Court of Appeals and is not before this Court, we will refrain from discussing it in any detail in this opinion.

"[w]hen a strong or mature person makes an attack by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons"). *State v. Steen*, 264 N.C. App. 566, 579, 826 S.E.2d 478, 487 (2019). The Court of Appeals further concluded that, given the differences between defendant's size and strength and that of his mother, a reasonable jury could have found that defendant used his hands and arms as deadly weapons in attempting to murder her.[2] In reaching this result, the Court of Appeals "decline[d] [d]efendant's invitation to extend the holding of [this Court in *State v. Hinton*, 361 N.C. 207, 639 S.E.2d 437 (2007),] beyond the parameters of the particular context in which it was decided," finding no evidence of any legislative intent to limit the type of weapons that would qualify as deadly weapons for purposes of N.C.G.S. § 14-17(a). *Steen*, 264 N.C. App. at 580, 826 S.E.2d at 487.

In addressing the first of defendant's challenges to the trial court's judgments, the Court of Appeals began by noting that, "although the evidence plainly established that the garden hoe was used to murder [defendant's grandfather], no evidence was presented specifically linking the garden hoe to" the attack upon defendant's mother, so that "evidence was presented in support of only one of the deadly weapon theories instructed on by the trial court — that is, the theory that [d]efendant attempted to murder Sandra with his hands and arms." *Id.* at 582, 826 S.E.2d at 489. On the other hand, acting in reliance upon this Court's decision in *State v. Malachi*, 371 N.C. 719, 821 S.E.2d 407 (2018), the Court of Appeals held that, even if "the reference to the garden hoe was unsupported by the evidence," "any error resulting from this instruction was harmless" given that the State "present[ed] exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support and the State's evidence is neither in dispute nor subject to serious credibility-related questions," quoting *Malachi*, 371 N.C. at 738, 821 S.E.2d at 421, with this evidence including defendant's mother's identification of defendant as her attacker, her extensive injuries, and the jury's "full and fair opportunity to evaluate the reliability of [defendant's mother's] testimony." *Steen*, 264 N.C. App. at 582, 826 S.E.2d at 488–89. As a result of its inability to "see how the brief reference to the garden hoe in the jury instructions could have affected the jury's determination as to the credibility of [defendant's mother]'s identification of [d]efendant

2. According to the Court of Appeals, "[d]efendant was 40 years old and [his mother] was 62 years old" at the time of the attack. In addition, the Court of Appeals noted that defendant "was 5 feet, 11 inches tall and weighed 210 pounds while [defendant's mother] was 5 feet, four inches tall and weighed 145 pounds." *State v. Steen*, 264 N.C. App. 566, 579, 826 S.E.2d 478, 487 (2019).

and, therefore, its verdict," the Court of Appeals found that defendant was not prejudiced by the trial court's erroneous reference to the use of a garden hoe in its instructions concerning the extent to which the jury was allowed to find that defendant had attempted to murder his mother using a deadly weapon. *Id.* at 583, 826 S.E.2d at 489.

In a separate, concurring opinion, Judge Berger opined that "the instruction provided by the trial court regarding the garden hoe was supported by the evidence" produced at trial and was not, for that reason, erroneous. *Steen*, 264 N.C. App. at 583, 826 S.E.2d at 489 (Berger, J., concurring). In Judge Berger's view, the fact that the record contained evidence tending to show that the blows inflicted upon defendant's mother had caused her to suffer a skull fracture and a loss of consciousness meant that the jury could "reasonably infer that [defendant's mother's] injuries were inflicted with a blunt force object" such as the garden hoe. *Id.* at 584, 826 S.E.2d at 490.

In a separate opinion in which he concurred with the Court of Appeals' decision, in part, and dissented from the Court of Appeals' decision, in part, Judge Hunter expressed the opinion that the trial court's erroneous decision to instruct the jury that it could find that defendant attempted to murder his mother with a deadly weapon on the basis of his alleged use of the garden hoe constituted prejudicial error. *Id.* (Hunter, J., concurring, in part, and dissenting, in part). Arguing in reliance upon our decision in *Malachi*, 371 N.C. at 738, 821 S.E.2d at 421, Judge Hunter noted that reviewing courts are more likely to find an error such as the one at issue here to be harmless in the event that the State presents "strong evidence of [defendant's] guilt" while stating that the State's evidence was "far from conclusive as to [d]efendant's guilt." *Id.* at 584–85, 826 S.E.2d at 490. Among other things, Judge Hunter concluded that defendant's mother's credibility was subject to serious question given that she had provided "widely conflicting" statements concerning the circumstances surrounding the attack that had been made upon her during the course of the investigation. *Id.* In addition, Judge Hunter opined that the testimony of defendant's mother identifying defendant as the perpetrator of the assault that had been committed upon her was of substantial importance to the State's case given the absence of any DNA evidence linking defendant to the attempted murder of his mother and the murder of his grandfather. *Id.* at 585, 826 S.E.2d at 490. As a result, Judge Hunter believed that defendant was entitled to a new trial with respect to the murder charge. *Id.*

Defendant noted an appeal to this Court based upon Judge Hunter's dissent. On 11 June 2020, we allowed defendant's petition seeking

discretionary review with respect to the additional issue of whether the trial court erred by allowing the jury to treat hands and arms as a deadly weapon for purposes of N.C.G.S. § 14-17.

II. Substantive Legal Analysis

A. Hands and Arms as a Deadly Weapon

[1] In seeking to persuade this Court to overturn the Court of Appeals' decision that hands and arms can be a deadly weapon for purposes of N.C.G.S. § 14-17(a), defendant asserts that "[a]llowing hands and arms to be a deadly weapon under N.C.G.S. § 14-17(a) vastly and improperly expands the circumstances which could support a conviction for felony-murder" under North Carolina law. In support of this argument, defendant points out that "not all crimes can be aggravated based on the alleged use of hands and/or arms as a deadly weapon," *citing Hinton*, 361 N.C. at 211–12, 639 S.E.2d at 440 (reasoning that "the General Assembly intended to require the State to prove that a defendant used an external dangerous weapon before conviction under the [robbery with a dangerous weapon] statute is proper"). As a result, defendant argues that, given the General Assembly's decision in 1977 to amend N.C.G.S. § 14-17(a) for the purpose of limiting the reach of the felony-murder rule so that it only encompassed certain enumerated felonies and other felonies perpetrated with the "use of a deadly weapon," the legislative intent would be "thwarted by not requiring an external dangerous weapon" as a prerequisite for a conviction under the "catch-all" provision of the statute. In addition, defendant contends that hands and arms are inherently different than an external deadly weapon on the theory that a perpetrator would not receive the same "boost of confidence" from the use of his own appendages that he would receive by carrying a firearm or some other external weapon. Finally, defendant argues that our prior decision in *Pierce* should either be overruled or limited to cases in which felonious child abuse serves as the predicate felony for purposes of the felony-murder rule.

In seeking to persuade us to uphold the Court of Appeals' decision with respect to the issue of whether hands and arms can serve as deadly weapons for purpose of the statutory version of the felony-murder rule embodied in N.C.G.S. § 14-17(a), the State begins by noting North Carolina's lengthy history of leaving the issue of whether a particular weapon qualifies as "deadly" for the jury's consideration. *See State v. Joyner*, 295 N.C. 55, 64–65, 243 S.E.2d 367, 373 (1978) (holding that an instrument's "allegedly deadly character" is a question "of fact to be determined by the jury"). In addition, the State cites decisions, such as

State v. Brunson, 180 N.C. App. 188, 636 S.E.2d 202 (2006), *aff'd per curiam*, 362 N.C. 81, 653 S.E.2d 144 (2007), for the proposition that this Court has long "recognized that under certain circumstances, hands and other body parts may be deadly weapons for purposes of proving the deadly weapon element of assault offenses perpetrated with a deadly weapon." The State argues that this Court should reject defendant's invitation to overrule *Pierce* on the grounds that it "is now well-established [law] in our appellate courts' jurisprudence," citing four subsequent cases that rely, in part, upon the reasoning utilized in *Pierce*. *See*, *e.g.*, *State v. Jones*, 353 N.C. 159, 168, 538 S.E.2d 917, 925 (2000). In the State's view, this Court's holding in *Pierce* is not limited to cases in which the predicate felony for felony-murder is child abuse; instead, the State contends that the logic of *Pierce* is applicable in any case in which the weapon "is something not inherently deadly," in which event the issue of whether a particular item constitutes a deadly weapon is a question for the jury "based upon the manner of usage and a victim's characteristics—age, size, etc.—relative to the defendant's." *See State v. Lang*, 309 N.C. 512, 525–26, 308 S.E.2d 317, 324 (1983) (holding that the trial court did not err by instructing the jury that it could find the defendant's hands or feet to be deadly weapons in a case in which two adult males kicked an adult female victim with their feet, hit her with their hands and a bat, and cut her with a knife).

The proper resolution of the issue of whether the term "deadly weapon" as contained in N.C.G.S. § 14-17(a) includes an adult defendant's hands, arms, fists, or feet when used against another adult requires us to decide an issue of statutory construction. In attempting to ascertain the meaning of a particular statutory provision, "we look first to the language of the statute itself." *Walker v. Bd. of Trs. of N.C. Loc. Gov'tal Emps. Ret. Sys.*, 348 N.C. 63, 65, 499 S.E.2d 429, 430 (1998) (quoting *Hieb v. Lowery*, 344 N.C. 403, 409, 474 S.E.2d 323, 327 (1996)). In the event that the relevant statutory language is unambiguous, the statute should be interpreted in accordance with its plain meaning. *See Lemons v. Old Hickory Council, Boy Scouts of Am., Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988). On the other hand, in the event that the relevant statutory language is ambiguous, "judicial construction must be used to ascertain the legislative will," which must be carried out "to the fullest extent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136–37 (1990). "As with any other statute, the legislative intent controls the interpretation of a criminal statute." *State v. Jones*, 358 N.C. 473, 478, 598 S.E.2d 125, 128 (2004).

"[W]hen the General Assembly fail[s] to intervene in light of a long-standing judicial practice," the principle of legislative acquiescence becomes

relevant. *Id.* at 483, 598 S.E.2d at 131 (finding that, had the General Assembly wished to change the crime of possession of cocaine from a felony to a misdemeanor, "it could have addressed the matter during the course of these many years" and that, in light of its failure to do so, "it is clear that the legislature has acquiesced in the practice of classifying the offense of possession of cocaine as a felony"). Although legislative inaction should not, standing alone, be treated as dispositive, "[t]he failure of a legislature to amend a statute which has been interpreted by a court is some evidence that the legislature approves of the court's interpretation." *Young v. Woodall*, 343 N.C. 459, 462–63, 471 S.E.2d 357, 359 (1996).

This Court and the Court of Appeals have a lengthy history of using the doctrine of legislative acquiescence in interpreting criminal statutes. In *State v. Gardner*, for example, this Court held that the crimes of breaking or entering and felonious larceny were separate offenses in light of the fact that the appellate courts in North Carolina had long treated them as distinct, 315 N.C. 444, 462, 340 S.E.2d 701, 713 (1986), on the theory that, if "punishment of both crimes in a single trial [had] not been intended by our legislature, it could have addressed the matter during the course of these many years," *id.* at 462–63, 340 S.E.2d at 713. The same logic supports the conclusion that hands, arms, feet, and other appendages can be deadly weapons for purposes of the statutory felony-murder rule embodied in N.C.G.S. § 14-17(a).

As a general proposition, a "deadly weapon" as that term is used in North Carolina jurisprudence is one that is "likely to produce death or great bodily harm under the circumstances of its use," with the issue of whether a particular weapon is or is not deadly being "one of fact to be determined by the jury" in the event that it "may or may not be likely to produce [death], according to the manner of its use, or the part of the body at which the blow is aimed." *Joyner*, 295 N.C. at 64–65, 243 S.E.2d at 373 (citations omitted). A defendant's hands, arms, feet, or other appendages may well, under certain circumstances, be "likely to produce death or great bodily harm," as this Court and the Court of Appeals have held in a number of different contexts.[3]

3. As we understand defendant's brief, he has not contended before this Court that, in the event that hands, arms, legs, and other appendages can ever serve as a deadly weapon for purposes of the statutory felony-murder rule set out in N.C.G.S. § 14-17(a), the evidence fails to support a finding that his hands and arms were deadly weapons in light of the manner in which they were used during his alleged attempt to murder his mother. For that reason, the only issue before us at this time is the extent to which, in the abstract, hands and arms can constitute a deadly weapon for purposes of North Carolina's current version of the felony-murder rule rather that whether the evidence supported a finding that his hands and arms as used at the time of his alleged assault upon his mother were deadly weapons as a matter of fact.

In *Pierce*, for example, this Court upheld a defendant's conviction for first-degree murder on the basis of the felony-murder rule using felonious child abuse as the predicate felony in a case in which the defendant caused a child's death by shaking her with his hands. 346 N.C. at 493, 488 S.E.2d at 589 (stating that, "[w]hen a strong or mature person makes an attack by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons"). Similarly, the Court of Appeals has held, in the felony-murder context, that a defendant's hands, arms, feet, and other appendages can be a deadly weapon, with the issue of whether the weapon in question was or was not actually deadly being a question of fact for the jury. *State v. Frazier*, 248 N.C. App. 252, 261, 790 S.E.2d 312, 319 (2016) (holding that the trial court did not err by allowing the jury to determine whether the "killing took place while the accused was perpetrating or attempting to perpetrate felonious child abuse with the use of a deadly weapon," which, in that instance, was his hands); *State v. Krider*, 145 N.C. App. 711, 712, 550 S.E.2d 861, 862 (2001) (upholding a defendant's conviction for first-degree murder based upon the felony-murder rule in a case in which the defendant caused the death of a child in the course of "committing felonious child abuse with the use of her hands as a deadly weapon").

In the same vein, the Court of Appeals has repeatedly held, unlike appellate courts in other states, that a defendant's hands and feet can be deadly weapons sufficient to support a defendant's conviction for assault with a deadly weapon in violation of N.C.G.S. § 14-32. *See Allen*, 193 N.C. App. at 378, 667 S.E.2d at 298 (2008) (holding that a defendant's "hands may be considered deadly weapons . . . depending upon the manner in which they were used and the relative size and condition of the parties"); *State v. Harris*, 189 N.C. App. 49, 59–60, 657 S.E.2d 701, 708–709 (2008) (holding that the issue of whether "an assailant's hands and feet are used as deadly weapons is a question of fact to be determined by the jury"); *State v. Rogers*, 153 N.C. App. 203, 211, 569 S.E.2d 657, 663 (2002) (holding that hands and fists "may be considered deadly weapons, given the manner in which they were used and the relative size and condition of the parties involved"); *State v. Hunt*, 153 N.C. App. 316, 319, 569 S.E.2d 709, 710–11 (2002) (holding that the jury "was properly allowed to determine the question of whether defendant's hands and feet constituted deadly weapons"); *State v. Grumbles*, 104 N.C. App. 766, 769, 411 S.E.2d 407, 409 (1991) (describing "this [as] a case where defendant's fists could be considered deadly weapons"); *State v. Jacobs*, 61 N.C. App. 610, 611, 301 S.E.2d 429, 430 (1983) (holding that, in a case in which a 210 pound male defendant hit a sixty-year-old female victim with his fists, "defendant's fists could have been a deadly weapon").

As a result, given the virtually uninterrupted line of appellate decisions from this Court and the Court of Appeals interpreting the reference to a "deadly weapon" in N.C.G.S. § 14-17(a) to encompass the use of a defendant's hands, arms, feet, or other appendages, so that the language used in the relevant statutory provision has an established meaning in North Carolina law, and the fact that the General Assembly has not taken any action tending to suggest that N.C.G.S. § 14-17(a) should be interpreted in a manner that differs from the interpretation deemed appropriate in this line of decisions, it would be reasonable to assume that, given the use of an expression that has an established meaning and the fact that the General Assembly has failed "to intervene in light of [this] longstanding judicial practice," *Jones*, 358 N.C. at 483, 598 S.E.2d at 131, the General Assembly intended for the language of the statutory felony-murder rule set forth in N.C.G.S. § 14-17(a) to be interpreted in the manner deemed to be appropriate by the Court of Appeals in this case.

In seeking to persuade us to reach a different result in this case, defendant argues, among other things, that our decision in *Pierce* should either be overruled or, in the alternative, that it should be limited to situations involving the abuse of small children. In support of this argument, defendant asserts that there is a categorical difference between child and adult victims, with the former being peculiarly susceptible to serious injury or death as a result of the use of hands, arms, feet, or other appendages while the latter are not. Aside from the fact that acceptance of defendant's argument would be inconsistent with the manner in which this Court has defined the expression "deadly weapon" for many years, *see, e.g.*, *Joyner*, 295 N.C. at 64–65, 243 S.E.2d at 373; *State v. Hales*, 344 N.C. 419, 426, 474 S.E.2d 328, 332 (1996); *State v. Peacock*, 313 N.C. 554, 563, 330 S.E.2d 190, 196 (1985), and the absence of any basis for the making of such a distinction in either the relevant statutory language or in the decisions, such as *Pierce*, allowing the jury to find that a deadly weapon had been used in cases in which an adult defendant used his or her hands, arms, feet, or some other appendage in the course of assaulting a smaller or weaker adult, *see Allen*, 193 N.C. App. at 378, 667 S.E.2d at 298; *Harris*, 189 N.C. App. at 59–60, 657 S.E.2d at 708–09; *Rogers*, 153 N.C. App. at 211, 569 S.E.2d at 663; *Hunt*, 153 N.C. App. at 318–19, 569 S.E.2d at 710–11; *Grumbles*, 104 N.C. App. at 770, 411 S.E.2d at 410; *Jacobs*, 61 N.C. App. at 611, 301 S.E.2d at 430, we see no reason to overrule *Pierce* or to adopt the restrictive interpretation of that decision for which defendant advocates. As a result, we decline defendant's invitation to limit the logic of *Pierce* to felony-murder cases arising from the commission of felonious child abuse using the defendant's hands, arms, legs, or another appendage as the necessary deadly weapon.

Similarly, defendant argues that the logic of our decision in *Hinton*, 361 N.C. at 207, 639 S.E.2d at 437, shows that the expression "deadly weapon" can mean different things when used in different statutory provisions and that we should adopt a felony-murder-specific interpretation of N.C.G.S. § 14-17(a) in this case. In *Hinton*, we held that the reference to "any firearms or other dangerous weapon, implement or means" as used in N.C.G.S. § 14-87(a) did not encompass the use of a defendant's hands, *id.* at 210, 639 S.E.2d at 439, with the Court having reached this result on the grounds that N.C.G.S. § 14-87 was intended to provide a "more severe punishment when the robbery is committed with the 'use or threatened use of firearms or other dangerous weapons' " than when the defendant committed common law robbery, which did not involve the use of such implements. *Id.* at 211–12, 639 S.E.2d at 440. We are not, however, persuaded that the logic upon which the Court relied in *Hinton* has any application to this case given that we have been unable to identify anything in the language in or legislative intent underlying N.C.G.S. § 14-17(a) that tends to suggest that its reference to a "deadly weapon" should be treated any differently than the way in which that expression has normally been treated in North Carolina criminal jurisprudence.

Finally, the construction of the relevant statutory language that we believe to be appropriate in this case does not create a risk that every killing perpetrated with the use of a the defendant's hands, arm, legs, or other appendages will necessarily come within the ambit of the statutory felony-murder rule set out in N.C.G.S. § 14-17(a) or otherwise thwart the General Assembly's attempt to limit the scope of the felony-murder rule by confining the availability of the felony-murder rule to unenumerated felonies committed with the use of a deadly weapon. On the contrary, under the established law in North Carolina, the extent to which hands, arms, legs, and other appendages can be deemed deadly weapons depends upon the nature and circumstances of their use, including, but not limited to, the extent to which there is a size and strength disparity between the perpetrator and his or her victim. Similarly, the fact that something more than a killing with hands, arms, legs, or other bodily appendages must be shown in order to satisfy the requirements of the felony-murder rule set out in N.C.G.S. § 14-17(a) shows that the decision that we make in this case will not have the effect of undoing the limitations upon the availability of the felony-murder rule that the General Assembly intended when it enacted the current version of the relevant statutory language, particularly given its consistency with the established definition of that term contained in our decisions and those of the Court of Appeals.

As a result, given that this Court and the Court of Appeals have held that bodily appendages such as a defendant's hands and arms can, depending upon the manner in which and the circumstances under which they are used, constitute deadly weapons in applying a wide variety of statutory provisions and given that, if the General Assembly intended to exclude hands, arms, feet, and other bodily appendages from the definition of "deadly weapon" used for purposes of N.C.G.S. § 14-17(a), it has had ample opportunity to do so without ever having acted in that manner, we hold that there is no reason for the statutory reference to a "deadly weapon" contained in N.C.G.S. § 14-17(a) to have anything other than its ordinary meaning. On the contrary, a decision excluding arms, hands, feet, and other appendages from the definition of a "deadly weapon" for purposes of the statutory felony-murder rule enumerated in N.C.G.S. § 14-17(a) would create unnecessary confusion in our State's criminal law. As a result, we affirm the Court of Appeals' decision that the trial court did not err by instructing the jury that it could find that defendant attempted to murder his mother with a deadly weapon based upon the use of his hands and arms.

B. Prejudicial Effect of the Garden Hoe Instruction

[2] In seeking to persuade us that the trial court's instruction that the jury was entitled to find that defendant attempted to murder his mother using a garden hoe as a deadly weapon constituted prejudicial error,[4] defendant begins by noting that, in order to demonstrate the prejudicial nature of the trial court's error, he needed to show the existence of a "reasonable possibility" that "a different result would have been reached at the trial" in the absence of that error. *Malachi*, 371 N.C. at 738, 821 S.E.2d at 421. Defendant contends that he made the necessary showing of prejudice given that defendant's DNA had not been found on the garden hoe, on his grandfather's wallet, or in the scrapings taken from beneath his mother's fingernails and that no blood had been found in defendant's car or on any item of his clothing.[5] In addition, defendant

4. As an aside, we note that the issue of the correctness of the Court of Appeals' determination that the trial court's instruction that the jury could find that defendant attempted to murder his mother using the garden hoe lacked sufficient evidentiary support is not before us given that the State did not seek review by this Court of the Court of Appeals' decision with respect to that issue.

5. In addition, defendant claims that an allele associated with a third party was found in fingernail scrapings taken from his mother. However, since the undisputed record evidence tended to show that the DNA analyst who testified on behalf of the State was unable to determine whether the allele came from a third party or was simply an artifact produced by the DNA amplification process and that it would have been possible for DNA

contends that, "given the various widely conflicting pre-trial statements that [his mother] gave—all but one of which flatly denied that [d]efendant was her assailant—her testimony clearly raised . . . the sort of serious credibility questions contemplated by the Supreme Court in *Malachi*" quoting *Steen*, 264 N.C. App. at 584–85, 826 S.E.2d at 490 (Hunter, J., dissenting). In defendant's view, the Court of Appeals erred by determining that the identification testimony provided by his mother constituted "exceedingly strong evidence" of his guilt given the absence of any physical evidence linking him to the commission of the crimes with which he had been charged and the existence of serious concerns about the credibility of the identification testimony provided by his mother.

The State, on the other hand, argues that the "challenged jury instruction" did not constitute prejudicial error given that "[t]he instruction as given simply stated two of the possible implements, used alone or in combination, the State was contending defendant used as a deadly weapon" and that the challenged instruction correctly asserted "that the State was contending defendant used his hands and/or arms and or a garden hoe as a deadly weapon." In addition, the State contends that, even if the trial court's reference to the garden hoe was erroneous, "the evidence at trial overwhelming[ly] established defendant used a deadly weapon in perpetrating the predicate felony," so that the jury would have reached the same conclusion in the absence of the challenged jury instruction. As support for this assertion, the State relies upon the testimony of defendant's mother and the evidence concerning the extensive injuries that she sustained during the assault that was made upon her.

In addition, the State contends that the Court of Appeals correctly applied *Malachi* to the facts of this case. According to the State, the application of the traditional harmless error test that this Court deemed to be appropriate in *Malachi* necessitates a conclusion that defendant had failed to show the existence of a reasonable possibility that the jury would have reached a different result in the absence of the delivery of the unsupported instruction relating to the garden hoe given that "the identity of the perpetrator was the most contested issue at trial" and, in the face of conflicting evidence, "the jury believed [defendant's mother] when she identified defendant as the person who attacked her." In addition, the State argued that it had elicited strong evidence of defendant's

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evidence derived from a paramedic or another similar individual to be found in the fingernail scrapings taken from defendant's mother, we do not consider this aspect of defendant's argument in our prejudice analysis.

guilt at trial, with this evidence including the fact that defendant's mother ultimately, and reluctantly, testified against him in spite of the fact that she had initially refused to believe that her own son was capable of attacking her; the inconsistent explanations that defendant gave for the scratches on his arms; and the fact that defendant had both an opportunity and a motive for attacking his mother and his grandfather.

As a result of the fact that the State does not dispute defendant's contention that he properly preserved his challenge to the trial court's instruction that the jury could consider the use of the garden hoe in determining whether defendant attempted to murder his mother with a deadly weapon,[6] we evaluate the prejudicial effect of the delivery of this instruction using our traditional harmless error standard, *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012), which requires "the defendant [to] show '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.' " *Id.* at 513, 723 S.E.2d at 331 (quoting N.C.G.S. § 15A-1443(a) (2009)). In conducting the required prejudice analysis, a reviewing court "should not find the error harmless" if it is unable to conclude "that the jury verdict would have been the same absent the error." *State v. Bunch*, 363 N.C. 841, 845, 689 S.E.2d 866, 869 (2010) (quoting *Neder v. United States*, 527 U.S. 1, 19, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999)).

In *Malachi*, we upheld the use of traditional harmless error analysis in evaluating the extent to which the defendant's case was prejudiced by the delivery of an erroneous jury instruction which allowed the jury to convict the defendant of possession of a firearm by a felon on the basis of both actual and constructive possession despite the fact that the record contained no evidence that the defendant constructively possessed the firearm in question. 371 N.C. at 721-22, 731, 821 S.E.2d

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6. We are not persuaded by the State's suggestion that the trial court's deadly weapon instruction simply listed possible choices for the identity of the deadly weapon that the jury had to find in order to convict defendant of the first-degree murder of his grandfather on the basis of the felony-murder rule using the attempted murder of defendant's mother as the predicate felony. After informing the jury that it had to find that defendant attempted to murder his mother using a deadly weapon in order to find defendant guilty of the first-degree murder of his grandfather, the trial court indicated that the State contended that the deadly weapon that defendant used in attempting to murder his mother was either his own hands and arms or the garden hoe. Taken in context, we believe that the jury could have only used the trial court's reference to the use of defendant's hands and arms or a garden hoe as a recitation of the available bases for a finding that defendant attempted to murder his mother using a deadly weapon rather than the mere statement of a non-exclusive list of possible deadly weapons.

at 410, 416. In holding that the trial court's unsupported constructive-possession instruction constituted harmless error, we stated that:

> instructional errors like the one at issue in this case are exceedingly serious and merit close scrutiny to ensure that there is no 'reasonable possibility' that the jury convicted the defendant on the basis of such an unsupported legal theory. However, in the event that the State presents exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support and the State's evidence is neither in dispute nor subject to serious credibility-related questions, it is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory.

Id. at 738, 821 S.E.2d at 421. As a result, the prejudice analysis that we are required to conduct in this case must focus upon the relative strength of the State's case in light of the strength of the countervailing evidence available to defendant, including both any substantive evidence that defendant may have elicited and any credibility-related weaknesses that may exist in the evidence tending to show defendant's guilt, with the ultimate question being whether there is a "reasonable possibility" that the outcome at trial would have been different in the event that the trial court's error had not been committed.

After carefully reviewing the record, we conclude that there is a reasonable possibility that the jury would have refrained from convicting defendant of the first-degree murder of his grandfather on the basis of the felony-murder rule using the attempted murder of his mother with a deadly weapon as the predicate felony in the absence of the trial court's erroneous instruction referring to the garden hoe as a deadly weapon. In order to avoid reaching this conclusion, we would be required to hold that the State's evidence that defendant killed his grandfather as part of a continuous transaction in which he also attempted to murder his mother using his hands and arms as a deadly weapon was so sufficiently strong that no reasonable possibility exists under which the jury would have done anything other than convict defendant of first-degree murder on the basis of that legal theory. We are unable to make such an inference given the facts contained in the present record.

As an initial matter, we note that the evidence concerning the issue of whether defendant was the actual perpetrator of the assault upon his mother and the killing of his grandfather was in sharp dispute, a fact that the jury's eventual verdict does nothing to change. Aside from the

fact that defendant consistently denied having committed the offenses with which he had been charged in his conversations with investigating officers, he maintained his innocence when he took the witness stand and testified at trial. Defendant's denials of guilt were bolstered by the fact that the record was devoid of any physical evidence tending to support the contention that he was the perpetrator of the crimes that he had been charged with committing. Finally, the conflicting nature of the statements that defendant's mother made to investigating officers concerning her ability to identify the person who had assaulted her provided an adequate basis for a reasonable jury to discount the credibility of the identification that she delivered at trial. As a result, while the record does, as the State contends, contain substantial evidence tending to show that defendant was guilty of attempting to murder his mother and killing his grandfather, including substantial evidence of his motive to commit the crimes in question and his inconsistent explanations for the scratches on his arms, we are unable to say that the State's evidence with respect to the issue of defendant's identity as the perpetrator of the murder of his grandfather was so strong that a reasonable jury could not have reached a contrary conclusion.

Even more importantly, the evidence concerning the extent to which defendant's hands and arms, as used during the alleged killing of his mother, constituted a deadly weapon was in significant dispute as well. As we noted earlier in this opinion, the trial court did not peremptorily instruct the jury that defendant's hands and arms were deadly weapons per se; instead, the trial court required the jury to make this determination based upon the nature and manner of their use and the other relevant surrounding circumstances. Although the size and strength differential between defendant and his mother was, as the Court of Appeals found, sufficient to permit a determination that defendant's hands and arms constituted a deadly weapon for purposes of this case, the differences in size and strength between defendant and his mother as revealed in the record evidence were not so stark as to preclude a reasonable jury from concluding that defendant's hands and arms were not deadly weapons. In the same vein, the nature and extent of the injuries that were inflicted upon the mother does not suffice to support a finding of harmlessness given that such a determination overlooks the necessity for the State to show a disparity in size and strength between the killer and the victim in addition to the infliction of fatal injuries and given that a contrary determination would effectively render hands and arms a deadly weapon in all instances in which death results as a result of their use. In the event that the jury decided to conclude, as we believe that it reasonably could have, that defendant's hands and arms were not used

as a deadly weapon during his alleged attempt to murder his mother, it would have been compelled to refrain from finding that defendant was guilty of the first-degree murder of his grandfather on the basis of the felony-murder rule even if it found that he was the perpetrator of that killing. As a result, we hold that the trial court's instruction concerning the use of the garden hoe as a deadly weapon during defendant's alleged attempt to murder his mother constituted prejudicial error necessitating a new trial in the case in which defendant was convicted of murdering his grandfather.[7]

III. Conclusion

Thus, for the reasons set forth above, we hold that the Court of Appeals correctly held that the trial court did not err by instructing the jury that, in light of the surrounding facts and circumstances, it could find that defendant's hands and arms constituted a deadly weapon for purposes of the felony-murder provisions of N.C.G.S. § 14-17(a). On the other hand, we also hold that there was a reasonable possibility that, had the trial court refrained from instructing the jury in such a manner as to allow it to conclude that defendant attempted to murder his mother using the garden hoe as a deadly weapon, the outcome at defendant's trial for the murder of his grandfather would have been different and that the Court of Appeals erred by reaching a contrary result. As a result, the Court of Appeals' decision is affirmed, in part, and reversed, in part, with this case being remanded to the Court of Appeals for further remand to the Superior Court, Rowan County, for a new trial in the case in which defendant was convicted of murdering his grandfather.

AFFIRMED, IN PART; REVERSED, IN PART; AND REMANDED.

Justice DAVIS did not participate in the consideration or decision of this case.

Justice NEWBY concurring in part and dissenting in part.

While I agree with the majority that defendant's hands and arms constitute deadly weapons in this case, I disagree that the instruction

7. In view of the fact that defendant has not contended that the trial court's erroneous instruction concerning the jury's ability to find that defendant's alleged use of a garden hoe in attempting to murder his mother had no bearing upon the appropriateness of defendant's conviction for the attempted murder of his mother or the robbery of his grandfather, the trial court's judgment in the robbery case and the jury's verdict in the attempted murder case remain undisturbed.

regarding the garden hoe resulted in prejudicial error. At trial the State's evidence clearly established that the garden hoe was used to murder the grandfather, but the evidence did not specifically link the garden hoe to the attack on Sandra, defendant's mother. Rather, the State's theory was that defendant used his hands and arms in an attempt to murder his mother. As stated by the Court of Appeals,

> Sandra testified that her attacker grabbed her from behind and tightly wrapped his right arm around her neck before placing his left hand over her nose and mouth. A struggle then ensued between Sandra and her attacker until she lost consciousness. The injuries Sandra sustained included a skull fracture, multiple rib fractures, and a collapsed lung. Such testimony clearly constitutes substantial evidence to support an instruction that hands and arms were used as weapons during the attack on her.

State v. Steen, 264 N.C. App. 566, 582, 826 S.E.2d 478, 489 (2019). The evidence of skull and rib fractures supports the theory that the attacker used a weapon, like the garden hoe; however, there was no specific evidence linking the garden hoe to the attack. As determined by the Court of Appeals, the evidence presented supported only one of the deadly weapon theories the trial court instructed on—hands and arms as deadly weapons—but that theory was amply supported by the evidence. *See id.* "[I]t is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory," *State v. Malachi*, 371 N.C. 719, 738, 821 S.E.2d 407, 421 (2018), even though the jury instructions included both the garden hoe and hands and arms as deadly weapons for the attempted murder charge of Sandra. As a result, the instruction given on garden hoe, even if erroneous, did not prejudice defendant.

The real issue at trial was the identity of the perpetrator, not which weapon caused which of the injuries. Sandra identified defendant as her attacker, and the jury evaluated the reliability of her testimony in light of all the evidence. When the jury found defendant guilty it found credible Sandra's identification of defendant as the attacker. Because the ultimate issue at trial concerned defendant's identity as the perpetrator, the reference to the garden hoe in the jury instructions did not influence the jury's decision to find Sandra's testimony credible. Even if the garden hoe instruction represented a different theory of the underlying crime of attempted murder, any error resulting from it was harmless because that theory was not supported by the evidence at trial. Defendant cannot show a reasonable possibility that the jury would have reached a

different result absent the erroneous instruction, and his convictions should be upheld. I respectfully concur in part and dissent in part.

Justice MORGAN joins this opinion.

Justice EARLS concurring in result only in part and dissenting in part.

To find Mr. Steen guilty of felony murder on the theory adopted by the jury, they were required to conclude that the evidence proved he attempted to murder his mother using a deadly weapon. The jury was instructed that it could find that he used either a garden hoe or his hands and arms as deadly weapons. There was no evidence presented at trial from which a jury could conclude that Mr. Steen used a garden hoe to harm his mother. *State v. Steen*, 264 N.C. App. 566, 582, 826 S.E.2d 478, 489 (2019). The majority holds today that (1) a jury can properly consider a person's hands, arms, feet, or other body parts to be deadly weapons for purposes of the felony murder statute, but (2) that the inclusion of the garden hoe instruction was not harmless error and warrants a new trial. With regard to the second holding, while I do not concur in the majority's analysis relying on our decision in *State v. Malachi*, 371 N.C. 719, 821 S.E.2d 407 (2018), I do agree that the instruction regarding the garden hoe was error warranting a new trial.

However, in its first holding the Court abdicates its role as a steward of this state's law and turns upside down the principle of stare decisis. Ignoring our own precedents and disregarding every reliable indicator of legislative intent, the majority decides to follow precedent from the Court of Appeals because, without intervention from either this Court or the General Assembly, the Court of Appeals has continued to follow its own precedent. Because I read the felony murder statute's deadly weapon requirement not to include a defendant's hands and arms, I respectfully dissent.

Subsection 14-17(a) of the General Statutes of North Carolina defines felony murder, punishable by death or life imprisonment without parole, as a murder that is "committed in the perpetration or attempted perpetration of" certain enumerated felonies or "other felony committed or attempted with the use of a deadly weapon." N.C.G.S. § 14-17(a) (2019). Our General Statutes do not define the term "deadly weapon." Rather, the definition derives from this Court's case law. A "deadly weapon" is "any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Sturdivant*, 304 N.C. 293, 301,

283 S.E.2d 719, 725 (1981). While the Court has held that other generally innocuous items may be considered deadly weapons depending on "the relative size and condition of the parties and the manner in which [they are] used," *State v. Archbell*, 139 N.C. 537, 538, 51 S.E. 801, 801 (1905), and we have held that an adult defendant's hands used against a child victim may be considered deadly weapons, *State v. Pierce*, 346 N.C. 471, 488 S.E.2d 576 (1997), we have never specifically addressed whether an adult's hands or other body part, wielded against another adult, may be considered deadly weapons for purposes of the felony murder rule.

The felony murder rule derives from English common law and was inherited by American courts. Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. 446, 458 (1985) [hereinafter Roth & Sundby, *The Felony Murder Rule*]. Since its inception in the United States, the felony murder rule remains in existence, although subject to modern limitations. 2 Wharton's Criminal Law § 147 (15th ed.). The rule originally punished defendants by requiring the imposition of the death penalty for any death that resulted during the attempted or successful perpetration of a felony. Roth & Sundby, *The Felony Murder Rule* at 450.

However, as the death penalty began to be eliminated for most felonies, revisions to felony murder statutes were made, ultimately leading to fewer crimes that constitute predicate offenses for a conviction under the felony murder rule. 2 Wharton's Criminal Law § 149. Eventually, England eliminated the felony murder rule, and jurisdictions within the United States began to place limitations on the application of the rule. *Id.* However, today, most states' felony murder rules contain the same pattern as the 1794 Pennsylvania felony murder statute, which states that "[a]ll murder . . . which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary shall be deemed murder in the first degree." 2 Wharton's Criminal Law § 147 (second alteration in original) (citation omitted).

The doctrine of felony murder includes unintended homicides that occur during the commission of a felony, the purpose of which is to protect innocent lives by deterring the commission of felonies in a dangerous or violent manner. Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide: I*, 37 Colum. L. Rev. 701, 714–15 (1937). The rationale behind the felony murder rule is that certain crimes carry a cognizable risk that death may occur from their commission. *Id.* Therefore, if death does result during such a crime, the perpetrator is responsible for the death because the death was a reasonably foreseeable consequence of the action. *Id.*

A killing is considered to have occurred during the perpetration of a felony if it occurred within the "res gestae" of the felony. *State v. Squire*, 292 N.C. 494, 512, 234 S.E.2d 563, 573 (1977) (quoting 58 A.L.R.3d 851 (originally published in 1974)). This means that the killing was close in time and distance to the felony and without a break in the chain of events from the perpetration of the felony to the time of the homicide. *See State v. Ray*, 149 N.C. App. 137, 146, 560 S.E.2d 211, 217–18 (2002). Commonly, the felony murder statute contains certain enumerated felonies in which a homicide that occurs during its perpetration would result in first-degree murder. 2 Wharton's Criminal Law § 148. Usually, these enumerated felonies involve an element of danger or violence that implies malice, and that malice may be transferred to an unintended homicide. *Id.* "Consistent with this thinking, most courts require, for the felony-murder rule to be applicable in the case of an unenumerated felony, that the felony be inherently dangerous." *Id.*

In North Carolina, prior to 1977, any inherently dangerous felony could support a conviction under the felony murder rule. *See State v. Streeton*, 231 N.C. 301, 305, 56 S.E.2d 649, 652 (1949) (discussing the previous felony murder rule, which defined felony murder as a homicide resulting from the commission or attempted commission of certain enumerated felonies or any other inherently dangerous felony). However, the General Assembly revised this state's felony murder statute in 1977 to limit the felony murder rule's application to the felonies enumerated in the statute and unenumerated felonies only when perpetrated with the use of a deadly weapon. N.C.G.S. § 14-17(a) (2019). Thus, today in North Carolina, when the felony murder rule is applied to an unenumerated felony, that felony must have been committed with the use of a deadly weapon. *See State v. Wall*, 304 N.C. 609, 614, 286 S.E.2d 68, 72 (1982) ("[T]he unambiguous language of the 1977 revision makes it clear that felonies 'committed or attempted with the use of a deadly weapon' will support a conviction of first-degree murder under the felony-murder rule.").

"In matters of statutory construction the task of the Court is to determine the legislative intent, and the intent is ascertained in the first instance 'from the plain words of the statute.' " *N.C. Sch. Bds. Ass'n v. Moore*, 359 N.C. 474, 488, 614 S.E.2d 504, 512 (2005) (quoting *Elec. Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)). "[U]ndefined words are accorded their plain meaning so long as it is reasonable to do so." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (alteration in original) (quoting *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290

(1998)). If the legislature's intent is not apparent from the plain language of the statute, the Court then considers the legislative history, meaning "the spirit of the act and what the act seeks to accomplish." *Id.* "[W]here a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *State v. Barksdale*, 181 N.C. 621, 625, 107 S.E. 505, 507 (1921).

"A deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm." *Sturdivant*, 304 N.C. at 301, 283 S.E.2d at 725. This is consistent with the definition contained in *Black's Law Dictionary*, which defines a deadly weapon as "[a]ny firearm or other device, instrument, material, or substance that, from the manner in which it is used or is intended to be used, is calculated or likely to produce death." *Deadly Weapon*, *Black's Law Dictionary* (11th ed. 2019). Neither of these definitions is consistent with defining "deadly weapon" to include a person's own hands and arms because a person's hands and arms are not an "article," "instrument," "substance," "device," or "material" as those words are used in the definitions above. The plain language of the statute, then, suggests that hands and arms are not "deadly weapons" that would lead to criminal liability for felony murder.

To the extent that the statutory language here is ambiguous, we are then required to ascertain legislative intent to determine the meaning of a statute. *Winkler v. N.C. State Bd. of Plumbing*, 374 N.C. 726, 730, 843 S.E.2d 207, 210 (2020). "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *State v. Rankin*, 371 N.C. 885, 889, 821 S.E.2d 787, 792 (2018) (quoting *State v. Langley*, 371 N.C. 389, 395, 817 S.E.2d 191, 196 (2018)).

Here, the legislative history and spirit of the act clearly demonstrate that the "deadly weapon" requirement refers to an external instrument, not a defendant's hands, feet, or other body parts. Subsection 14-17(a), our first-degree murder statute, draws a distinction between the enumerated felonies, which may always serve as a predicate felony under the felony murder rule, and "other felon[ies]," which may serve as a predicate felony only when committed or attempted with the use of a deadly weapon. N.C.G.S. § 14-17(a). As discussed previously, this distinction did not exist prior to 1977. *See Streeton*, 231 N.C. at 305, 56 S.E.2d at 652. Instead, any "other felony" could serve as a predicate for felony murder. *State v. Davis*, 305 N.C. 400, 423, 290 S.E.2d 574, 588 (1982). However,

when it added the "deadly weapon" requirement in 1977, the General Assembly rejected the longstanding practice of our courts to construe felony murder "to include at least those killings committed during the commission of 'any other felony inherently dangerous to life' as murder in the first degree." *Id.* Thus, it cannot be the case that a "deadly weapon" includes a defendant's hands, feet, or other body parts. If that were true, then a defendant would be liable for first degree murder in any case where the defendant's commission of a felony results in a death, or where the "felony [is] inherently dangerous to life." *See Streeton*, 231 N.C. at 305, 56 S.E.2d at 652. However, this is precisely the outcome that the General Assembly rejected by adding the deadly weapon requirement in 1977. *Davis*, 305 N.C. at 423, 290 S.E.2d at 588 (acknowledging that "in apparent response to holdings such as in *Streeton*," the General Assembly amended the felony murder statute "to substitute for the phrase 'or other felony' the phrase 'or other felony committed or attempted with the use of a deadly weapon' "). A proper construction of subsection 14-17(a), given the purpose and historical context of the felony murder rule, would acknowledge that this delineation suggests that the spirit of the statute seeks to limit "deadly weapons" to items external to the human body that the perpetrator of a crime brings into the fray and thereby increases the violent nature of an already dangerous crime, elevating an unenumerated felony to the level of a predicate felony for purposes of the felony murder rule. *See* N.C.G.S. § 14-17(a).

The majority does not look to "the plain language of the statute, . . . the legislative history, the spirit of the act and what the act seeks to accomplish" to ascertain legislative intent and determine the statute's meaning. *See Rankin*, 371 N.C. at 889, 821 S.E.2d at 792. Instead, the majority chooses to rely on the principle of legislative acquiescence. However, the majority's approach is contrary both to our charge "to determine the meaning that the legislature intended *upon the statute's enactment*," *see id.* (emphasis added), and to the principle that "it is this Court's ultimate duty to construe statutes," *State v. Jones*, 358 N.C. 473, 483, 598 S.E.2d 125, 131 (2004).

The cases on which the majority relies do not support its analysis. For example, the majority relies on *State v. Gardner* for the proposition that we defer to the principle of legislative acquiescence whenever our "appellate courts" have engaged in a practice undisturbed by legislative intervention. *See State v. Gardner*, 315 N.C. 444, 462, 340 S.E.2d 701, 713 (1986). However, in *Gardner*, we noted that "this Court ha[d] uniformly and frequently . . . from as early as the turn of the century" engaged in the practice being challenged, in that case treating breaking

and/or entering and larceny as distinct crimes. *Id.* When reviewing the relevant cases, the Court in *Gardner* cited to only one case from the Court of Appeals. *Id.* This is, of course, because "precedents set by the Court of Appeals are not binding on this Court." *Mazza v. Med. Mut. Ins. Co.*, 311 N.C. 621, 631, 319 S.E.2d 217, 223 (1984). Similarly, in *Jones*, on which the majority also relies, we observed that "our judiciary . . . [had] universally adhered to the practice of classifying possession of cocaine as a felony" for nearly twenty-five years in the face of multiple clarifying amendments to the relevant statute that did not seek to change the practice when relying on the principle of legislative acquiescence. *Jones*, 358 N.C. at 483–84, 598 S.E.2d at 131–32. While the majority also relies on *Young v. Woodall*, that case rejected the canon of legislative acquiescence and noted that "legislative inaction is not necessarily evidence of legislative approval, and that the inquiry must focus on the statute itself." *Young v. Woodall*, 343 N.C. 459, 463, 471 S.E.2d 357, 359–60 (1996) (citing *DiDonato v. Wortman*, 320 N.C. 423, 435, 358 S.E.2d 489, 490 (1987)).

Having decided to proceed on this thin authority, the majority cites one case from this Court in which we held that a defendant's hands could be deadly weapons where an adult brutally assaults a small child.[1] *See State v. Pierce*, 346 N.C. 471, 493, 488 S.E.2d 576, 589 (1997). The majority also cites a number of cases from the Court of Appeals; however, "precedents set by the Court of Appeals are not binding on this Court." *Mazza*, 311 N.C. at 631, 319 S.E.2d at 223. Further, the majority cites no authority for the proposition that cases from the Court of Appeals, rather than cases from this Court, are relevant to the question of legislative acquiescence on a question of statutory interpretation.

In *Pierce*, the defendant was an adult male weighing approximately 150 pounds. *Pierce*, 346 N.C. at 493, 488 S.E.2d at 589. His victim was his two-year-old niece, Tabitha. *Id.* at 479, 488 S.E.2d at 580. The defendant "admitted 'smacking' Tabitha ten times in the three weeks prior to her death, slapping Tabitha on the night she was taken to the hospital, and shaking her very hard on that night." *Id.* at 492, 488 S.E.2d at 588. Based on that and other evidence—which included evidence tending

1. The majority claims that accepting Mr. Steen's argument—that hands and arms are not deadly weapons in an assault by one adult on another—would be inconsistent with this Court's longstanding interpretation of the deadly weapon requirement. Tellingly, none of the cases cited by the majority involve the use of hands or feet. *See State v. Hales*, 344 N.C. 419, 426, 474 S.E.2d 328, 332 (1996) (fire); *State v. Peacock*, 313 N.C. 554, 563, 330 S.E.2d 190, 196 (1985) (glass vase); *State v. Joyner*, 295 N.C. 55, 64–65, 243 S.E.2d 367, 373–74 (1978) (soda bottle).

to show that he and another person shook Tabitha, beat her with their fists, beat her with a belt, beat her with a metal tray, beat her with a broken antenna, and beat her with a pair of tennis shoes, *id.*—a jury found the defendant guilty of first-degree murder by torture and by the felony murder rule, as well as felonious child abuse, *id.* at 479, 488 S.E.2d at 580. Felonious child abuse was the underlying felony for felony murder. *Id.* at 493, 488 S.E.2d at 589. Under those circumstances, we held that "[w]hen a strong or mature person makes an attack by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons." *Id.*

The situation before us today is quite different. While the assault on Sandra Steen was certainly terrible, she was not a small child. She was an able-bodied adult who actively worked on a farm. Mr. Steen was seven inches taller than her and outweighed her by sixty-five pounds. *Steen*, 264 N.C. App. at 579, 826 S.E.2d at 487. This is far different from the situation in *Pierce*, where the defendant was a 150-pound man who beat a two-year-old child to death. *Pierce*, 346 N.C. at 493, 488 S.E.2d at 589.

Of particular concern is the majority's reliance on our decision in *State v. Peacock*. There, we considered whether a defendant's conviction of robbery with a dangerous weapon could stand where the defendant had used a glass vase to strike the victim's head. *State v. Peacock*, 313 N.C. 554, 563, 330 S.E.2d 190, 196 (1985). Central to our analysis was the fact that "[t]he evidence showed that defendant [was] a large man and that [the victim], an elderly female, weighed only seventy-three pounds." *Id.* However, we have since held that, for purposes of the robbery with a dangerous weapon statute, "a defendant's hands and feet may not be considered dangerous weapons." *State v. Hinton*, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007). When determining a weapon's dangerousness for purposes of robbery with a dangerous weapon, we consider the relative size and strength of the defendant and victim. *Peacock*, 313 N.C. at 563, 330 S.E.2d at 196. Even so, it is still true that "a defendant's hands and feet may not be considered dangerous weapons" for purposes of that statute. *Hinton*, 361 N.C. at 211, 639 S.E.2d at 440. This totally belies the majority's claim that permitting hands and arms to be considered deadly weapons for purposes of the felony murder statute is necessary to maintain consistency with the manner in which this Court has defined the expression "deadly weapon" for many years.

I believe this case should be controlled by our decision in *Hinton*. There, we held that hands could not be deadly weapons for purposes of robbery with a dangerous weapon. *Hinton*, 361 N.C. at 210–12, 639 S.E.2d

at 440–41. We concluded that the statute's use of the word "means" was ambiguous[2] and applied the rule of lenity, "which requires us to strictly construe the statute." *Id.* at 211, 639 S.E.2d at 440. We then concluded that "the General Assembly intended to require the State to prove that a defendant used an external dangerous weapon before conviction under the statute is proper." *Id.* at 211–12, 639 S.E.2d at 440. Here, to the extent that the term "weapon" is ambiguous, the same analysis would lead us to the conclusion that the term requires an external instrument.

Our holding in *Hinton* is consistent with the law in most other jurisdictions. *See United States v. Rocha*, 598 F.3d 1144, 1155 (9th Cir. 2010) ("Most states have determined that body parts cannot be considered a dangerous or deadly weapon."). A majority of jurisdictions have held that body parts are not deadly weapons because to hold otherwise would erase the distinction between crimes committed with deadly weapons and without. *See, e.g.*, *Rocha*, 598 F.3d at 1157 (holding that the mere use of a body part does not constitute use of a "dangerous weapon" because the statute separately punished assault by striking, beating, or wounding, indicating congressional intent that a defendant use a weapon or some other object to perpetrate the offense); *State v. LaFleur*, 307 Conn. 115, 140, 51 A.3d 1048, 1063 (2012) ("[T]he legislature intended the term 'dangerous instrument' to mean a tool, implement or device that is external to, and separate and apart from, the perpetrator's body."); *People v. Aguilar*, 16 Cal. 4th 1023, 1026–27, 945 P.2d 1204, 1206 (1997) (holding that a deadly weapon must be an object extrinsic to the human body); *State v. Gordon*, 161 Ariz. 308, 311, 778 P.2d 1204, 1207 (1989) (holding that the trial court erred by allowing the jury to find that fists were "dangerous instruments" for purposes of enhancing felony sentences); *People v. Vollmer*, 299 N.Y. 347, 350, 87 N.E.2d 291, 293 (1949) ("When the Legislature talks of a 'dangerous weapon', it means something quite different from the bare fist of an ordinary man."); *State v. Henderson*, 356 Mo. 1072, 204 S.W.2d 774 (1947) (finding no error in a judgment because the defendant used a broomstick when assaulting his wife and not his own hands and feet); *State v. Calvin*, 209 La. 257, 266, 24 So. 2d 467, 469 (1945) (holding that there must be proof of the use of some instrumentality in order to find a defendant guilty of assault with a dangerous weapon); *Bean v. State*, 77 Okla. Crim. 73, 138 P.2d 563 (1943) (holding that the jury instruction that the defendant could be found

2. The dangerous weapon element of the statute applies to any person "having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means." *State v. Hinton*, 361 N.C. 207, 209–10, 639 S.E.2d 437, 439 (2007) (quoting N.C.G.S. § 14-87(a) (2005)).

guilty of assault with a dangerous weapon if he was found to have only used his fists was error); *Wilson v. State*, 162 Ark. 494, 496, 258 S.W. 972, 972 (1924) ("[W]here one attacks another using no other weapon than by striking with his fist, or kicking, he does not use a deadly weapon in the sense of the statute.").

In Missouri, for example, the appellate courts have directly addressed whether fists may be considered an "instrument, article or substance," and thus a "dangerous instrument" under a definition of "deadly weapon" similar to our own. *State v. Evans*, 455 S.W.3d 452, 457 (Mo. Ct. App. 2014). Rather than forecasting the potential absurdity of categorizing a defendant's hands as deadly weapons, the Missouri appellate court took a linguistic approach, considering the most natural reading of the phrase "dangerous instrument." *Id.* at 258. In *Evans*, the Missouri appellate court concluded that "a reasoned and common-sense reading of the terms 'instrument, article or substance' . . . indicate an external object or item, rather than a part of a person's body." *Id.* at 458; *see* The Oxford College Dictionary 701 (2d ed. 2007) (defining "instrument" as "a tool or implement, esp. one for delicate or scientific work"). The court further noted that the "dangerous instrument" classification "indicates the legislature's intent to impose greater punishment on those individuals who choose to use an item or weapon to commit a crime than those who do not," going on to say that "[t]his is logical when considering that likely a majority of the time, the potential for greater harm is present when persons committing crimes hold sharp, heavy, or otherwise potentially harmful objects, than if they have only their own hands at their disposal." *Evans*, 455 S.W.3d at 459. Thus, the court concluded that the defendant there, who had used only his fists to perpetrate first-degree assault with a dangerous instrument, could not be found guilty because his fists could not be an "instrument, article or substance." *Id.* at 457–61.

I find the *Evans* reasoning persuasive. In regard to North Carolina's felony murder rule, our legislature's distinction between the enumerated felonies not requiring the use of a deadly weapon and the unenumerated felonies requiring the use of a deadly weapon also indicates a purpose to more greatly punish those who decide to use an additional item or weapon in the perpetration of a felony than those who do not. Similarly, this Court ought to decline to read the phrase "deadly weapon" to include parts of the human body outside of the limited context we have previously approved and conclude that the legislature intended to limit the application of the phrase "deadly weapon" to items external to the human body.

Requiring an external implement for the felony murder statute's deadly weapon requirement is consistent with our own precedents. Consider this Court's holding in *State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1985), that a defendant need not physically use the deadly weapon to commit the felony in order to be guilty of murder under the felony murder rule, rather "possession is enough." *Id.* at 199, 337 S.E.2d at 523 ("Even under circumstances where the weapon is never used, it functions as a backup, an inanimate accomplice that can cover for the defendant if he is interrupted."). Our description in *Fields* suggests that a deadly weapon is some additional, external object that a defendant carries for use during the commission of the crime. Further, in that case we wrote:

> We hold that possession is enough, and the defendant is guilty of felony murder, even if the weapon is not *physically* used to actually commit the felony. If the defendant has brought the weapon along, he has at least a psychological use for it: it may bolster his confidence, steel his nerve, allay fears of his apprehension. Even under circumstances where the weapon is never used, it functions as a backup, an inanimate accomplice that can cover for the defendant if he is interrupted.

Id. This description of the deadly weapon requirement is inconsistent with today's holding. If, as we held in *Fields*, the General Assembly intended to include felonies where the defendant obtained a "psychological use" benefit to having a deadly weapon—where the weapon "bolster[ed] his confidence, steel[ed] his nerve, allay[ed] fears of his apprehension"—it seems highly unlikely that the General Assembly contemplated that a defendant using only his hands would receive such a benefit.

While the majority claims to uphold legislative intent through the principle of legislative acquiescence, it actually subverts the legislature's intent as evidenced by the statute's history and structure and is inconsistent with our own precedent. With today's holding, the majority undoes the General Assembly's 1977 amendment to the statute in the name of vindicating a dimly perceived legislative intent divined by the doctrine of acquiescence to the Court of Appeals precedent.

I agree with the majority's contention that we are not called upon to reconsider our holding in *Pierce*, in which we concluded that an adult defendant's hands could be considered deadly weapons for the purposes of the felony murder rule when the predicate offense is felonious child abuse.

More than a century before our holding in *Pierce*, this Court held that

> [a]n instrument, too, may be deadly or not, according to the mode of using it, or the subject on which it is used. For example, in a fight between men, the fist or foot would not, generally, be regarded as endangering life or limb. But it is manifest, that a wilful [sic] blow with the fist of a strong man, on the head of an infant, or the stamping on its chest, producing death, would import malice from the nature of the injury, likely to ensue.

State v. West, 51 N.C. 505, 509 (1859); *see also State v. Lang*, 309 N.C. 512, 525–26, 308 S.E.2d 317, 324 (1983) ("[I]f an assault were committed upon an infant of tender years or upon a person suffering an apparent disability which would make the assault likely to endanger life, the jury could . . . find that the defendant's hands or feet were used as deadly weapons."). I would take this opportunity to provide clarity about seemingly inconsistent decisions from this Court and hold that a distinction between an adult victim and a child victim is consistent with this Court's prior holding that whether a weapon may be considered deadly is a question of whether it would or would not be likely to produce deadly results. Generally, most adults are far less vulnerable than children to an attack from an adult using only the attacker's hands. Children are generally likely to be much smaller and weaker than an adult attacker, and the adult attacker's hands would, therefore, be more dangerous when used against a child than when used against an adult.

As such, I do not believe this Court ought to join the small minority of jurisdictions that allow a defendant's hands and other body parts to be considered deadly weapons when used by an adult against an adult victim. It is worth repeating that today's holding renders meaningless the statute's distinction between the enumerated felonies and others and will invariably lead to absurd results encompassing situations beyond those intended by the General Assembly.

Fortunately, the majority has wisely limited its holding here to the felony murder context. As a result, it remains the case that a defendant's body parts may not be considered deadly weapons for purposes of robbery with a dangerous weapon. *See Hinton*, 361 N.C. at 210–12, 639 S.E.2d at 440–41. A convicted defendant who has used their hands to assault another person and inflict serious bodily injury remains, after today's decision, a Class F felon, *see* N.C.G.S. § 14-32.4(a) (2019) (criminalizing assault inflicting serious bodily injury), and not a Class E

felon, *see* N.C.G.S. § 14-32(b) (2019) (criminalizing assault with a deadly weapon inflicting serious bodily injury). This is because, as the majority notes, the question is one of statutory interpretation, and each statute must be interpreted on its own (as the majority does today by refusing to following our decision in *Hinton*) to effectuate the intent of the legislature. In future cases if this issue arises, no doubt this Court will effectuate the intent of the legislature and avoid collapsing distinct offenses into one another, as we did in *Hinton*.

The majority claims that today's pronouncement, that hands and arms may be considered deadly weapons for purposes of the felony murder statute, will avoid unnecessary confusion in the state's criminal law. In reality, the majority runs away from the considered holding of our decision in *Hinton* in order to reinstate a line of decisions that was firmly rejected by the General Assembly in 1977. In so doing, the majority creates a rule that runs counter to the ordinary meaning of the term "deadly weapon," risking criminal liability for first degree murder whenever a felony results in death. I disagree that our murder statute should be so far expanded. For all of these reasons, I respectfully concur in the result only, in part, and dissent, in part.

Chief Justice BEASLEY joins in this opinion concurring in the result only in part and dissenting in part.

STATE OF NORTH CAROLINA
v.
DAVID WILLIAM WARDEN II

No. 484A19

Filed 18 December 2020

Evidence—lay witness testimony—improper vouching for credibility of child sex abuse victim—admission plain error

The trial court committed plain error in a prosecution for sexual offense with a child by an adult, child abuse by a sexual act, and indecent liberties with a child by allowing an investigator with the Department of Social Services (DSS) to improperly vouch for the credibility of the minor child victim by testifying that DSS had substantiated the allegations against defendant when there was no physical evidence of sexual abuse and the jury's verdict depended entirely on their assessment of the victim's credibility.

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, 836 S.E.2d 880 (N.C. Ct. App. 2019), reversing a judgment entered on 12 September 2018 by Judge Gregory R. Hayes in Superior Court, Rockingham County. Heard in the Supreme Court on 17 June 2020.

Joshua H. Stein, Attorney General, by Margaret A. Force, Assistant Attorney General, for the State-appellant.

Mark Montgomery for defendant-appellee.

EARLS, Justice.

In this case, we consider whether the Court of Appeals correctly held that the trial court committed plain error when it admitted improper testimony by a Department of Social Services (DSS) Child Protective Services Investigator who, after explaining that DSS will "substantiate a case" if the agency "believe[s] allegations [of sexual abuse] to be true," testified that DSS had "substantiated sexual abuse naming [defendant] as the perpetrator." The Court of Appeals held that because the DSS investigator's testimony "improperly bolstered or vouched for the victim's credibility," and because "the credibility of the complainant was the central, if not the only, issue to be decided by the jury," the trial court committed plain error requiring a new trial. *State v. Warden*, 836 S.E.2d 880, 885 (N.C. Ct. App. 2019). Judge Young dissented. While agreeing with the majority that the DSS investigator's testimony was improper, Judge Young concluded that defendant had failed to prove that, absent the improper vouching testimony, the jury likely would have reached a different result. *Warden*, 836 S.E.2d at 885 (Young, J., dissenting).

We agree with the majority of the Court of Appeals and hold today that the trial court committed plain error by allowing the State to introduce the DSS investigator's inadmissible vouching testimony. Consistent with the precedent this Court established in *State v. Towe*, 366 N.C. 56, 732 S.E.2d 564 (2012), we hold that the trial court commits a fundamental error when it allows testimony which vouches for the complainant's credibility in a case where the verdict entirely depends upon the jurors' comparative assessment of the complainant's and the defendant's credibility. Accordingly, we affirm the decision of the Court of Appeals.

Background

Defendant is the father of two children, Virginia[1] and her younger brother. Defendant separated from Virginia's mother in 2011. Around Father's Day in 2017, fifteen-year-old Virginia had a conversation with her paternal grandfather regarding their plans for the upcoming holiday. Virginia told her grandfather that she did not want to spend the holiday with defendant. Her grandfather became angry. In frustration, he shouted "It's not like he molested y'all or anything." Virginia became quiet, then told her grandfather she loved him, and hung up the phone. Later that day, Virginia told her mother that, on one occasion when she was nine and two occasions when she was twelve, defendant sexually abused her. Virginia alleged that each assault followed a similar pattern. Defendant would summon Virginia to his bedroom, force Virginia to perform oral sex on him, and then pray for forgiveness after the assault was over. During each of the assaults, Virginia's younger brother was home but not present in the bedroom. Besides Virginia and defendant, there were no other direct witnesses to any of these incidents. Virginia testified that she did not report the assaults at the time they occurred because defendant "told me not to tell anybody" and she "was terrified of my dad."

The day after she first disclosed the assaults to her mother, Virginia's mother took her to the Rockingham County Sheriff's Office to file a report. In a statement she provided on 14 June 2017, Virginia described the three incidents of sexual abuse. After an investigation, defendant was indicted on 13 October 2018 on the charges of sexual offense with a child by an adult, child abuse by a sexual act, and indecent liberties with a child.

At trial, the State called nine witnesses. In addition to Virginia, the jury heard testimony from a Detective and a Deputy Sheriff with the Rockingham County Sheriff's Office who were involved in investigating Virginia's report, Virginia's mother, Virginia's maternal grandmother, Virginia's paternal grandfather, the DSS Child Protective Services Investigator assigned to Virginia's case, and the director of a child advocacy non-profit who conducted a forensic interview of Virginia. The jury also heard testimony from Virginia's aunt, defendant's sister, who testified that when she was around the age at which Virginia was allegedly abused by defendant, defendant sexually assaulted her in a manner that shared many similarities with Virginia's account of

1. We refer to the juvenile by the pseudonym used at the Court of Appeals.

defendant's conduct. This testimony was admitted pursuant to N.C.G.S. § 8C–1, Rule 404(b) (2009). Defendant was the only witness to testify on his behalf. The jury found defendant guilty on all three charges. He was sentenced to consecutive sentences of 300 to 369 months for the sexual offense with a child by an adult, 29 to 44 months for the child abuse by a sexual act, and 19 to 32 months for the indecent liberties with a child.

Standard of Review

Because defendant failed to object to the DSS investigator's testimony at trial, we review his challenge on appeal for plain error. *State v. Hammett*, 361 N.C. 92, 98, 637 S.E.2d 518, 522 (2006). "[T]o establish plain error defendant must show that a fundamental error occurred at his trial and that the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Towe*, 366 N.C. at 62, 732 S.E.2d at 568 (quoting *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012)). A fundamental error is one "that seriously affects the fairness, integrity or public reputation of judicial proceedings." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (cleaned up). In determining whether the admission of improper testimony had a probable impact on the jury's verdict, we "examine the entire record" of the trial proceedings. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983).

Analysis

There is no disputing, and the State concedes, that the trial court erred in allowing the DSS Child Protective Services Investigator's testimony that

> part of our role is to determine whether or not we believe allegations to be true or not true. If we believe those allegations to be true, we will substantiate a case. If we believe them to be not true or we don't have enough evidence to suggest that they are true, we would un-substantiate a case. . . . We substantiated sexual abuse naming [defendant] as the perpetrator.

"In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Stancil*, 355 N.C. 266, 266–67, 559 S.E.2d 788, 789 (2002) (per curiam). This rule permits the introduction of expert testimony only when the testimony is "based on the special expertise of the expert," who "because of his [or her] expertise is in a better

position to have an opinion on the subject than is the trier of fact." *State v. Wilkerson*, 295 N.C. 559, 568–69, 247 S.E.2d 905, 911 (1978); *see also State v. McGrady*, 368 N.C. 880, 889, 787 S.E.2d 1, 9 (2016). Thus, an expert witness's "definitive diagnosis of sexual abuse" is inadmissible unless it is based upon "supporting physical evidence of the abuse." *State v. Chandler*, 364 N.C. 313, 319, 697 S.E.2d 327, 331 (2010); *see also State v. Trent*, 320 N.C. 610, 614–15, 359 S.E.2d 463, 465–66 (1987). Because there was no physical evidence that Virginia was sexually abused, it was error to permit the DSS investigator to testify that sexual abuse had *in fact* occurred. In addition, it is typically improper for a party to "s[eek] to have the witnesses vouch for the veracity of another witness."[2] *State v. Robinson*, 355 N.C. 320, 334, 561 S.E.2d 245, 255 (2002); *see also State v. Gobal*, 186 N.C. App. 308, 318, 651 S.E.2d 279, 286 (2007), *aff'd*, 362 N.C. 342, 661 S.E.2d 732 (2008) ("[O]ur Supreme Court has determined that when one witness vouch[es] for the veracity of another witness, such testimony is an opinion which is not helpful to the jury's determination of a fact in issue and is therefore excluded." (alterations in original) (cleaned up)).

The only question for this Court to address is whether defendant has met his "burden of showing that [the] error rose to the level of plain error." *State v. Melvin*, 364 N.C. 589, 594, 707 S.E.2d 629, 633 (2010). Based on our precedents, we conclude that he has. In considering this question, the Court is bound by our prior cases. This Court considered the same legal question under similar factual circumstances in *Towe*. In that case, we held that the trial court committed plain error when it allowed the State to present inadmissible vouching testimony because, in the absence of physical evidence of abuse, the case "turned on the credibility of the victim, who provided the only direct evidence against defendant." 366 N.C. at 63, 732 S.E.2d at 568. The Court reached that conclusion notwithstanding the fact that the State had also presented evidence corroborating the complainant's testimony which supported the jury's conclusion that the defendant had committed the alleged criminal acts. *Id.*

The present case shares a core, determinative similarity with *Towe*. In both this case and in *Towe*, the "victim displayed no physical symptoms diagnostic of sexual abuse," *id.* at 62, 732 S.E.2d at 568, and the

2. The ultimate analysis of the appropriateness of a witness's opinion testimony regarding the credibility of another witness differs depending on whether the witness is a lay or expert witness. *Compare* N.C.G.S. § 8C-1, Rule 701 (2019) (providing the rule that applies to lay witness testimony) *with* N.C.G.S. § 8C-1, Rule 702 (2019) (providing the rule that applies to expert witness testimony).

jury's decision to find the complainant more credible than the defendant clearly formed the basis of its ultimate verdict, *id.* at 62–64, 732 S.E.2d at 568–69. As the prosecutor emphasized at trial in this case, a guilty verdict necessarily followed from the jury's determination that Virginia was credible and defendant was not:

> What this case comes down to is whether or not you believe [Virginia]. If you believe [Virginia], there's no reasonable doubt. It really doesn't matter if you fully believe [Virginia's mother], or if you fully believe [the DSS investigator], or if you fully believe the Defendant's father. Those are extra. Those are corroborating evidence. What matters is if you believe [Virginia]. If you believe what she says, then it happened. . . . Tell her you believe her. Tell her not to be afraid. Tell her not to be ashamed. Tell her that this Defendant is guilty of exactly what he did to her.

By the prosecutor's logic, the converse was also true. If the jury determined that defendant was more credible than the complainant, then the jury would have been overwhelmingly likely to acquit. Thus, "the case against defendant revolved around the victim's credibility." *Towe*, 366 N.C. at 61, 732 S.E.2d at 567.

The State attempts to evade *Towe* by pointing to other evidence presented to the jury in this case which, it contends, independently provided a basis for the jury's decision to find defendant guilty. But the State also presented similar evidence in *Towe*, which did not detract from the Court's holding that the trial court committed plain error. To be sure, other evidence presented in this case served to corroborate the victim's testimony. However, there was no other direct evidence of the abuse.[3] In *Towe*, as in this case, the State presented testimony from close family members "describing the behavior of the victim" around the time of the alleged assaults. *Id.* at 63, 732 S.E.2d at 568. In *Towe*, as in this case, the State offered testimony from the victim's aunt, admitted under N.C.G.S. § 8C–1, Rule 404(b), "describing a similar sexual assault on her by defendant," *Id.* Therefore, under these circumstances, the impermissible vouching testimony "stilled any doubts the jury might have had

3. The dissent contends that even if there is no direct evidence of the assault, "the statement about 'substantiation' was likely superfluous." We do not agree that, in the absence of any direct evidence of an alleged assault, testimony from a professional investigator employed by a county social services agency to investigate allegations of child sexual abuse is "superfluous" to the jury's ultimate determination of the complainant's credibility and defendant's guilt.

about the victim's credibility or defendant's culpability, and thus had a probable impact on the jury's finding that defendant is guilty." *Id.* at 64, 732 S.E.2d at 569. By contrast, in cases such as *Hammett* where this Court has held that impermissible vouching testimony did not rise to the level of plain error, it was because the jury's verdict "did not rest solely on the victim's credibility." 361 N.C. at 99, 637 S.E.2d at 523. Instead, the State also presented evidence regarding the victim's physical symptoms of abuse, as well as the defendant's admission that he had previously engaged in conduct of a sexual nature with the victim. *Id.*

Although there are some factual distinctions between this case and *Towe*, these factual distinctions do not alter our legal analysis. Our necessary review of the entire record convinces us that the State presented no evidence at trial supplying an alternative basis for the jury's conclusion that defendant was guilty besides the jury's determination that the complainant was more credible than defendant. Rather, the evidence the State presented at trial was primarily aimed at persuading the jury to find the complainant's allegations more credible than defendant's denials. For example, testimony from Virginia's maternal grandmother that her behavior changed around the time of the alleged abuse, and testimony from Virginia's paternal grandfather that "all [defendant has] done his whole life is lie and try to cheat people," provided jurors with evidence suggesting that Virginia was telling the truth and defendant was lying, not evidence supporting an independent conclusion that the alleged sexual assaults did or did not occur. Similarly, while jurors were free to draw inferences from testimony alleging that defendant encouraged Virginia to shave her legs at a young age, this evidence concerned an incident that was not inherently sexual in nature, and the State did not otherwise thoroughly impeach defendant's denials that his conduct had any sexual aspect. *Cf. Hammett*, 361 N.C. at 99, 637 S.E.2d at 523. Again, this is evidence that might lead a jury to conclude that the complainant was more credible than defendant, not independent proof that the alleged assaults occurred. Similarly, Virginia's consistent testimony throughout trial and the forensic examiner's testimony that Virginia exhibited behaviors indicating past abuse may have given the jury reason to believe Virginia's allegations, but did not constitute evidence independent from the jury's assessment of the complainant's and defendant's credibility. *Id.* (holding that admission of impermissible vouching testimony was not plain error because "*in addition to* [the victim's] consistent statements and testimony that defendant had abused her sexually, the jury was able to consider properly admitted evidence that [the victim] exhibited physical signs of repeated sexual abuse") (emphasis added). Accordingly, we hold that the admission of

the DSS investigator's improper vouching testimony was, in the absence of "overwhelming evidence" directly proving defendant's guilt at trial, plain error. *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789 (per curiam).

Nothing in this decision dispossesses the jury of its authority to find a defendant guilty of sexual abuse in the absence of physical evidence, based entirely on the jurors' determination that a complainant is more credible than a defendant. Nor does our decision express any opinion about the probative value of the complainant's testimony in this case or in any case. Rather, our decision reflects, and helps preserve, the jury's fundamental "responsibility at trial" in our adversarial system to "find the ultimate facts beyond a reasonable doubt." *State v. White*, 300 N.C. 494, 503, 268 S.E.2d 481, 487 (1980) (quoting *Cty. Court of Ulster Cty., N.Y. v. Allen*, 442 U.S. 140, 156 (1979)). Of course, the State is entitled to submit to the jury any admissible evidence that it thinks will help convince jurors to believe a complainant and disbelieve a defendant. But concern for the fairness and integrity of criminal proceedings requires trial courts to exclude testimony which purports to answer an essential factual question properly reserved for the jury. When the trial court permits such testimony to be admitted, in a case where the jury's verdict is contingent upon its resolution of that essential factual question, then our precedents establish that the jury's verdict must be overturned.

Conclusion

Absent evidence supporting the jury's guilty verdict on a basis other than the jury's relative assessment of the complainant's and defendant's credibility, we do not believe that the outcome at trial would probably have been the same if the DSS investigator's inadmissible vouching testimony had been excluded. Accordingly, we hold that defendant has met his burden of showing that the trial court committed plain error. We affirm the decision of the Court of Appeals.

AFFIRMED.

Justice NEWBY dissenting.

When a defendant alleges on appeal that an error occurred at trial, but failed to properly object, that defendant must demonstrate that the outcome of the trial probably would have been different without the error. Holding that such prejudicial error occurred in this case, the majority seizes on one word uttered by one witness and decides that the State's entire case, which was supported by abundant evidence, is compromised. I respectfully dissent.

At trial, Virginia[1] testified at length that defendant, her father, forced her to perform oral sex on him multiple times. She explained that after these assaults, defendant would go to another room to pray, apologize to God, and promise never to do it again. At the time, defendant instructed Virginia not to tell anyone about what happened. Law enforcement, Virginia's mother, and two grandparents testified at trial for the State as well. Virginia's maternal grandmother testified that Virginia's behavior significantly changed around the time of the first assault. Virginia's mother and paternal grandfather testified that even though Virginia did not get along with her step-mother, she often went to work with her instead of remaining at home alone with her father.

Defendant's sister testified that multiple times when she was between the ages of seven and twelve, defendant forced her to perform various sexual acts with him. After each assault, just like with Virginia, he would express remorse and pray to God asking for forgiveness. She testified that she kept this a secret until the age of fourteen because defendant told her she would get in trouble and be taken from her mother if she brought it up. The Department of Social Services investigator testified that during her interviews Virginia's paternal grandfather, maternal grandmother, and mother's fiancé all indicated that they believed Virginia. A jury convicted defendant of sexual offense with a child by an adult, child abuse by sexual act, and indecent liberties with a child.

The majority decides that all of this evidence is not strong enough to support the guilty verdicts. It discards the verdicts because the DSS investigator also said that DSS "substantiated" Virginia's allegations.[2] The majority cites *State v. Towe*, 366 N.C. 56, 732 S.E.2d 564 (2012) to frame the question around whether the case turns on the victim's credibility. To the majority, the vouching testimony by DSS probably impacted the trial outcome because, in its view, this case turns on Virginia's credibility. It therefore holds that without the testimony that DSS substantiated Virginia's claims, the jury likely would not have believed Virginia and would have believed defendant instead.

The majority confuses evidence that is simply relevant with evidence that is essential to the outcome of the case. Of course, a witness stating that Virginia's claims were "substantiated" could enhance the credibility of her allegations. But that does not mean her allegations

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1. A pseudonym is used to protect the juvenile's identity.

2. All parties concede that this testimony was inappropriate. The question is whether it is probable that the admission of the testimony impacted the jury's finding that the defendant was guilty. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

would be unbelievable if they lacked the support of that one particular statement. Indeed, that notion is quite far from the truth in this case, where the statement about "substantiation" was likely superfluous. In context, the jury would have understood that statement simply to mean that DSS pursued the allegations, which was already obvious considering that a DSS investigator testified against defendant. Moreover, the DSS investigator explained that substantiation is for social work purposes, not trial purposes. She noted that in some cases DSS will substantiate but the government will not prosecute, or vice versa. With these careful qualifications, and the substantial additional evidence of Virginia's credibility and defendant's guilt, the majority's position that the word "substantiate" would have likely changed the outcome of the trial is hard to believe.

In addition to the explanation the jury heard about the term "substantiate," the jury heard extensive testimony from several other witnesses corroborating Virginia's consistent story—testimony of Virginia's behavior change, testimony from an expert witness regarding delayed disclosures, and testimony of defendant's demeanor during his denial of the events. Perhaps most significantly, the jury heard testimony from both Virginia and defendant's sister detailing defendant's similarly idiosyncratic behavior after each victim's sexual assaults. Defendant's modus operandi was well established.

Moreover, the majority misapplies our precedent from *Towe*. In *Towe* the challenged testimony came from an expert to whom multiple witnesses referred, likely leading the jury to place more value on that expert's testimony. 366 N.C. at 58, 732 S.E.2d at 565–66. But here no other witness emphasized the investigator's testimony, and the prosecution paid little attention to it during closing arguments. Further, unlike the victim in *Towe*, whose story was inconsistent, the victim in this case consistently recounted the traumatic events for the entire fifteen months from first disclosure until trial. Finally, unlike in *Towe*, where the defendant chose not to testify, here defendant did take the stand, allowing the jury to directly evaluate his credibility. The expert testimony in *Towe* that the victim was indeed sexually abused was pivotal to the prosecution because the State's evidence was weaker than here and the other witnesses relied on the contested expert testimony. In this case, the DSS investigator's testimony that Virginia's claims were "substantiated" was not nearly so critical. The rigorous plain error standard to which this Court has long adhered has not been met. The convictions should be upheld.

I respectfully dissent.

ELIZABETH ZANDER AND EVAN GALLOWAY
v.
ORANGE COUNTY, N.C. AND THE TOWN OF CHAPEL HILL

No. 426A18

Filed 18 December 2020

1. Class Actions—certification—impact fee ordinance—challenge to fees

The trial court did not abuse its discretion by certifying a class in an action challenging the legality of local development impact fees, which were imposed pursuant to an ordinance passed in 2008. Plaintiffs' claims were not time-barred by a provision in the enabling legislation, which required that any claim contesting the validity of the ordinance must be brought within nine months of the ordinance's effective date, because their claims included allegations that the fees themselves were illegal. Even if the time limitation constituted a bar, the repeal of the enabling legislation (after plaintiffs' suit was initiated) rendered moot any arguments to that effect.

2. Class Actions—certification—impact fee ordinance—action for refund of fees paid

The trial court did not abuse its discretion by certifying a class in an action to recover a portion of impact fees paid pursuant to an ordinance passed in 2008. Plaintiffs' claim was not time-barred by a provision in the enabling legislation stating that any claim to recover an impact fee must be brought within nine months after payment of the fee where the claim included the right to a partial refund with interest as provided by a subsequent ordinance passed in 2016. Even if the time limitation constituted a bar, the repeal of the enabling legislation (after plaintiffs' suit was initiated) rendered moot any arguments to that effect.

3. Appeal and Error—interlocutory appeal—discovery order

In an appeal from a trial court's order certifying two classes of plaintiffs whose suit challenged local development impact fees, defendants' additional appeal from an order compelling discovery of fee receipts was dismissed as interlocutory where defendants advanced no basis for appellate review.

Appeal pursuant to N.C.G.S. § 7A-27(a)(4) from an order on plaintiffs' motion allowing class certification and appointment of class counsel

entered on 3 August 2018 by Judge C. Winston Gilchrist in Superior Court, Orange County. Heard in the Supreme Court on 3 February 2020.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Robert J. King III, Daniel Smith, and Matthew B. Tynan, for plaintiffs.

Womble Bond Dickinson, by James R. Morgan, Sonny S. Haynes, and Patricia I. Heyen, for defendants.

MORGAN, Justice.

In this matter, we are asked to determine whether the Superior Court, Orange County abused its discretion in certifying two classes of plaintiffs who wish to recover impact fees assessed by defendants Orange County and the Town of Chapel Hill under a now-repealed statute which had been enacted to allow certain counties and municipalities to defray the costs for constructing public schools, among other public services. As discussed herein, we affirm the trial court's order regarding class certification. Defendants have also advanced arguments of error in a related discovery issue in the case, which we dismiss as interlocutory and not properly before this Court at this time.

Factual Background and Procedural History

Although the essence of this appeal lies in our review of the trial court's decision regarding class certification, in order to understand the origination of this case and the parties' appellate arguments, initially it is appropriate to engage in a brief review of the history of the impact fee legislation underlying plaintiffs' claims and hence the potential classes which plaintiffs seek to represent. In 1987, the North Carolina General Assembly passed "An Act Making Sundry Amendments Concerning Local Governments in Orange and Chatham Counties," authorizing Orange County to pass an ordinance providing "a system of impact fees to be paid by developers to help defray the costs to the County of constructing certain capital improvements, the need for which is created in substantial part by the new development that takes place within the County." 1987 N.C. Sess. Law 460. Among other types of capital improvements listed in the 1987 Session Law, Orange County was specifically authorized to collect impact fees for defraying the cost of public schools in the Town of Chapel Hill. The 1987 Session Law included the following provision:

> (i) Limitations on Actions.
>
> (1) Any action contesting the validity of an ordinance adopted as herein provided must be commenced

> not later than nine months after the effective date of such ordinance.
>
> (2) Any action seeking to recover an impact fee must be commenced not later than nine months after the impact fee is paid.

1987 N.C. Sess. Law 460, § 17(i).

In 1991, the General Assembly expanded Orange County's authority to permit the County to levy and collect impact fees for capital needs not only to benefit public schools in the Town of Chapel Hill, but also to defray costs of public schools throughout the entire county. 1991 N.C. Sess. Law 324, §§ 1, 2. The enabling legislation was further amended in 1993. 1993 N.C. Session Law 642, § 4(a)–(b).

Pursuant to the authority granted by the state's legislative body in these acts, to which we shall refer collectively as "the enabling legislation" for purposes of this decision, in 1993 the Orange County Board of Commissioners (the Board) adopted the "Orange County Educational Facilities Impact Fee Ordinance" and began collecting such fees from property owners seeking certificates of occupancy. The Town of Chapel Hill and the Town of Carrboro, acting on behalf of Orange County, also collected fees under the ordinance. In 2007, Orange County retained TischlerBise Inc., a company of "fiscal, economic and planning consultants" based in the state of Maryland, for assistance with a new impact fee schedule. TischlerBise prepared reports that purported to calculate the "maximum supportable impact fees" for new housing to be built in Orange County based on expected costs for land, school building construction, portable classrooms, support facilities, buses and other school vehicles, and consultant studies. Orange County adopted TischlerBise's fee values. On 11 December 2008, the Board adopted Orange County Ordinance 2008-114 (the 2008 Ordinance), which amended the Orange County Educational Facilities Impact Fee Ordinance. *See* 2008 Ordinance, §§ 30-31 to 80.[1] The 2008 Ordinance provided impact fee amounts which would become effective on the respective dates of 1 January 2009, 1 January 2010, 1 January 2011, and 1 January 2012. *Id.* § 30-33. The fee amounts prescribed by the 2008 Ordinance were determined by setting fees at varying percentages of the values in the reports produced by TischlerBise.

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1. Certified copies of the ordinances in question were provided in the supplemental record to this case, which can be viewed through the Court's electronic filing system.

On 25 September 2015, plaintiffs purchased a parcel of real property situated in the Town of Chapel Hill and consequently located in Orange County. Plaintiffs subsequently built a house on the land. The school impact fees at issue in this matter were levied against plaintiffs as authorized by the 2008 Ordinance, pursuant to which plaintiffs were assessed $11,423.00. Following an unsuccessful attempt to seek a waiver of the impact fees or an exemption from payment of the assessed impact fees, plaintiffs paid the impact fees to the Town of Chapel Hill on 4 May 2016. On 15 November 2016, the Board promulgated Orange County Ordinance 2016-034, titled "An Ordinance Amending Chapter 30, Article II - Educational Facilities Impact Fee of the Orange County Code of Ordinances" (the 2016 Ordinance), that included new fees based upon additional reports and calculations from TischlerBise. Plaintiffs would have paid a lower fee under the 2016 Ordinance's fee schedule. *See* 2016 Ordinance § 30-33. The 2016 Ordinance further provided that (1) any fees not expended within ten years "shall be refunded to the feepayer," 2016 Ordinance § 30-35(e)(1); (2) "[i]f the Schedule of Public School Impact Fees . . . is reduced . . . no refund of previously paid fees shall be made," but the "difference between the old and new fees shall be returned to the feepayer" under certain circumstances, *id.* § 30-35(e)(2); and (3) "[w]here an impact fee has been collected erroneously, or where an impact fee has been paid, and the feepayer subsequently files for and is granted an exception . . . the fee shall be returned to the feepayer," *id.* § 30-35(e)(3).

Plaintiffs commenced their putative class action by filing a class action complaint on 3 March 2017 asserting thirteen claims for relief against defendants, including, *inter alia*, claims premised upon an allegation that fees collected under the 2008 Ordinance were illegal and including claims seeking partial refunds as provided under the 2016 Ordinance. On 16 May 2017, the Board, recognizing that the General Assembly was considering the prospect of repealing the enabling legislation for the impact fees at issue and thereby revoking Orange County's impact fee authority, adopted an ordinance reinstating the fees which had been in effect from 1 January 2012 to 31 December 2016 for housing categories that had been included in the 2008 Ordinance's fee schedule. Despite this apparent attempt by Orange County to blunt any action by the General Assembly with regard to the County's powers to assess impact fees, on 20 June 2017 the General Assembly repealed the entirety of the enabling legislation, the 1987 Session Law, along with all of its amendments. *See* 2017 N.C. Session Law 36 (the Repeal Act).

In the meantime, the case at bar was proceeding through its initial discovery stage. On 16 April 2018, plaintiffs filed a "Motion to Certify Classes and Subclasses and Appoint Class Counsel" and a "Motion to Compel Discovery Responses," seeking from defendants, *inter alia*, the identities of prospective members of plaintiff's proposed classes and subclasses—other parties who had been assessed impact fees. The trial court heard arguments on both motions on 7 May 2018. Plaintiffs sought class certification only for claims against Orange County alleging that the impact fees were *ultra vire*s and that rebates were owed to the members of the classes pursuant to the 2016 Ordinance.[2] On 11 May 2018, before the trial court had issued its rulings on plaintiffs' motions, this Court issued its decision in *Quality Built Homes Inc. v. Town of Carthage*, 371 N.C. 60, 813 S.E.2d 218 (2018) (*Quality Built II*), which addressed the applicable statute of limitations for impact fee claims. In light of the new legal authority, defendants filed a "Notice of Subsequently Decided Controlling Authority," noting the *Quality Built II* decision without further reference.

On 25 May 2018, the trial court notified the parties that plaintiffs' Motion to Certify Classes and Subclasses and Appoint Class Counsel would be allowed and asked that plaintiffs prepare the order for the trial court to enter which formally allowed the motion. In satisfaction of the trial court's request, plaintiffs provided the trial court with a recommended order. The order narrowed the proposed classes in such a manner that plaintiffs only sought class certification with respect to claims against Orange County, and reduced the class claims for relief from thirteen to four claims. Defendants filed a Motion for Reconsideration on 12 June 2018. The trial court heard the motion to reconsider on 29 June 2018. On 3 August 2018, the trial court entered an order certifying a "Feepayer Class"—defined as "All persons who paid a fee in the amounts established in the 2008 Fee Ordinance during the period [of 3 March 2014 to 31 December 2016]"—and a "Refund Class"—defined as "All persons who paid a fee for a housing unit for which the corresponding fee [payable effective 1 January 2017] under the 2016 Amendment would have been less." The order provided that the Feepayer Class was certified as to the Third (fees alleged to be *ultra vires* as enforced by

2. At the hearing, defendants contended that plaintiffs' 16 April 2018 Motion to Certify Classes and Subclasses and Appoint Class Counsel did not clearly identify the specific claims for which plaintiffs sought class treatment. Defendants also argued that a proposed order submitted by plaintiffs on 7 May 2018 did not specify which claims were being certified and that any order should clarify "which class members can bring which claims." Plaintiffs' second proposed order submitted on 4 June 2018 more precisely identified the classes and claims discussed at the 7 May 2018 hearing.

the Town of Chapel Hill), Eleventh (request for declaratory judgment against both defendants that fees paid under the 2008 amendment to the Ordinance in order to obtain a certificate of occupancy were unlawful), and Thirteenth (request for attorney fees and costs to be taxed against defendants) Class Action Claims for Relief asserted in the class action complaint and that those claims would proceed only against Orange County. The order also provided that the Refund Class was certified only as to the Twelfth Class Action Claim for Relief (requested refund of fees pursuant to N.C.G.S. § 30-35(e)(2)) and that the claim would proceed only against Orange County.

Along the way, plaintiffs had served discovery requests upon defendants on 8 June 2017, which included a request for production of Orange County's fee payment receipts. The trial court allowed defendants an extension of time to respond until 14 August 2017. Orange County first responded on 18 August 2017 that the request was "overly broad and unduly burdensome." On 8 November 2017, Orange County served a supplemental response asserting a new objection based upon the perceived burdensome nature of plaintiffs' discovery requests. On 21 February 2018, Orange County produced some of the requested fee receipts. On 16 April 2018, plaintiffs filed a motion to compel production of the remainder of the requested fee receipts, on the basis that Orange County had waived its objections by failing to timely respond to the 8 June 2017 discovery requests. At the 7 May 2018 motions hearing, plaintiffs argued that Orange County had waived its objections to production of the fee receipts at issue by neglecting to seek an extension of time to serve its discovery responses or failing to request a protective order under N.C. R. Civ. P. 26(c) or 37(a)(2).

In addressing plaintiffs' Motion to Compel Discovery Responses, the trial court directed Orange County in the 3 August 2018 order to "produce all of the impact fee receipts in its possession, custody, or control for any fee paid on or after [3 June 2014], and all impact fee receipts in its possession, custody, or control, for any fee payment that would qualify the feepayer as a member of the refund class."

Defendants[3] timely filed a notice of appeal of the 3 August 2018 Order pursuant to N.C.G.S. § 7A-27 (2019) (providing that an appeal lies of right directly to the Supreme Court of a "trial court's decision

3. Although the certified claims are only against defendant Orange County and the discovery order is directed only to defendant Orange County, the appellant brief is styled as being filed on behalf of "defendants." For consistency and ease of reading, we adopt the plural phrase "defendants" and employ it throughout this opinion.

regarding class action certification under G.S. 1A-1, Rule 23"), and included in their appeal the portion of the 3 August 2018 Order that concerned plaintiffs' Motion to Compel Discovery Responses.

Analysis

I. Class certification order

Defendants' arguments regarding the trial court's class certification primarily rest upon defendants' position that there are time barriers to the claims asserted by plaintiffs. First, defendants assert that the "Feepayer Class" claims proposed by plaintiffs are barred by defendants' discernment of a "statute of repose" set forth in the enabling legislation: "Any action *contesting the validity of an ordinance* adopted as herein provided must be commenced not later than nine months after the effective date of such ordinance." 1987 N.C. Sess. Law 460, secs. 17(1)(1); 18(1)(1) (emphasis added). Defendants further contend that plaintiffs' Twelfth Class Action Claim on behalf of the proposed "Refund Class" is similarly circumscribed by the provision of the enabling legislation stating: "Any action seeking to recover an impact fee must be commenced not later than nine months after the impact fee is paid." 1987 N.C. Sess. Law 460 secs. 17(1)(2); 18(1)(2).

Although the enabling legislation which spawned this legal dispute was entirely repealed in 2017, this abolishment of the legislation occurred after plaintiffs initiated their action against defendants which prompted the trial court's order concerning class certifications and discovery rulings. Upon defendants' appeal of these components of the trial court's 3 August 2018 order to this Court, we address them with the mindfulness that our focus is limited to the trial court's treatment of the matters of class certification and discovery embodied in the subject order. We do not, in any way, address the merits of the case.

1. Standard of review

Under Rule 23 of the North Carolina Rules of Civil Procedure, a class exists "when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N.C.*, 345 N.C. 683, 697, 483 S.E.2d 422, 431 (1997) (quoting *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 280, 354 S.E.2d 459, 464 (1987)). "Other prerequisites for bringing a class action [include] that . . . the named representatives must establish that they will fairly and adequately represent the interests of all members of the class. . . ." *Id.* (citing *Crow*, 319 N.C. at 282, 354 S.E.2d at

465). "If the prerequisites for a class action are established, it is within the discretion of the trial court as to whether the matter may proceed as a class action." *Id.* (citing *Crow*, 319 N.C. at 283, 354 S.E.2d at 466). Thus, a trial court's decision whether to certify the class as proposed by plaintiffs is reviewed for an abuse of discretion; that is, " 'whether a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.' " *Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 338, 757 S.E.2d 466, 471 (2014) (quoting *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 199, 540 S.E.2d 324, 331 (2000)). In the present case, defendants argue that the trial court abused its discretion regarding the certification of classes in this lawsuit based upon defendants' view that all of plaintiffs' claims were barred by the statute of repose.

2. Application to defendants' appeal

[1] Defendants first argue that plaintiffs' claims on behalf of the Feepayer Class are time-barred by the provision in the enabling legislation which states: "Any action *contesting the validity of an ordinance* adopted as herein provided must be commenced not later than nine months after the effective date of such ordinance." 1987 N.L. Sess. Law 460, secs. 17(1)(1)–(2); 18(1)(1)–(2) (emphasis added). Defendants contend that this provision is a statute of repose. "The term 'statute of repose' is used to distinguish ordinary statutes of limitation from those that begin to run at a time unrelated to the traditional accrual of the cause of action." *Boudreau v. Baughman*, 322 N.C. 331, 339–40, 368 S.E.2d 849, 856 (1988). "Statutes of repose . . . create time limitations which are not measured from the date of injury." *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 234 n.3, 328 S.E.2d 274, 276–77 n.3 (1985). Thus, if a challenge is not brought within the period specified in a statute of repose, the would-be plaintiff "literally has *no* cause of action." *Boudreau*, 322 N.C. at 341, 368 S.E.2d at 857; *see generally Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982).

In the instant case, defendants contend that the primary claim brought by the Feepayer Class against Orange County—the Third Class Action Claim that the fees assessed are *ultra vires*—is "solely" a challenge to the *validity* of the 2008 Ordinance and therefore could only have been brought on or before 1 October 2009—within nine months of the 1 January 2009 effective date of the 2008 Ordinance. Defendants further contend that because plaintiffs' primary claim is prohibited due to its tardiness, plaintiffs' claim for declaratory judgment must fail as well. *State ex rel. Edmisten v. Tucker*, 312 N.L. 326, 338, 323 S.E.2d 294, 303 (1984) (holding that "jurisdiction under the Declaratory Judgment

Act may be invoked only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute"). Likewise, defendants assert that where the primary underlying claim is foreclosed because it is untimely, plaintiffs' claim for attorney fees and costs also is not eligible to be considered. In sum, because all of the class claims advanced on behalf of the Feepayer Class by plaintiffs fail as a matter of law, defendants contend that the trial court abused its discretion in certifying the Feepayer Class.

In their response, plaintiffs begin by emphasizing that, in order to prevail, defendants must persuade this Court that the trial court abused its discretion by certifying the Feepayer Class. Plaintiffs submit that the trial court's approach to its considerations of the class certification issues indicates a reasoned basis for the forum's conclusions where it considered extensive arguments from the parties, including seven briefs; reviewed numerous documents and items of correspondence; conducted two hearings; and then reconsidered the matter after the issuance of this Court's decision in *Quality Built II*. As to the substance of defendants' argument that the 1987 enabling legislation contained a statute of repose, plaintiffs acknowledge that plaintiffs "pleaded, argued, and believe that the 2008 Ordinance was unlawful," but "also allege that the *fees themselves were illegal* and must be repaid, with interest, to those who paid them."[4] (Emphasis added). Plaintiffs underscore the assertions in their amended complaint that plaintiffs "have personal interests in the illegality of the fees" and that "[t]he illegality of the fees predominates" over other issues; "[t]he fee amounts established by the 2008 Amendment are *ultra vires* and illegal," in reference to the Third Class Action Claim; "all fees . . . required by [d]efendants . . . are unlawful," in reference to the Eleventh Class Action Claim; and "[d]efendants acted outside the scope of their legal authority in requiring class . . . members to pay the fees specified by the 2008 Ordinance," in reference to the Thirteenth Class Action Claim.

We agree with plaintiffs that they sought damages and further relief in their amended complaint on the basis that the fees assessed to plaintiffs and other potential class members were illegal. Thus, even assuming *arguendo* that there is a statute of repose in the enabling legislation governing impact fees which would bar plaintiffs' allegations that the

4. Plaintiffs correctly note that Rule 8 of the North Carolina Rules of Civil Procedure permits pleading parties to "set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses," provided that "the pleading is not made insufficient by the insufficiency of one or more of the alternative statements." N.C. R. Civ. P. 8(e)(2).

2008 Ordinance was invalid, plaintiffs' additional averments based upon the alleged illegality of fees collected would remain unaffected. For this reason, we hold that plaintiffs' claims here are not time-barred by any asserted statute of repose in the enabling legislation.

As we observed in *Quality Built II*, a claim to recover fees illegally imposed under an unlawful municipal ordinance is in essence a claim wherein "the nature of the wrongful conduct and harm alleged . . . rests upon the . . . collection of . . . fees rather than the adoption of the impact fee ordinances." 371 N.C. at 71–72, 813 S.E.2d at 227–28 (quotation omitted). We explained that such a claim "rest[ed] upon an alleged statutory violation that resulted in the exaction of an unlawful payment which plaintiffs had an inherent right to recoup." *Id.* at 73, 813 S.E.2d at 228. Likewise, in the case before us, even if defendants are shielded from claims that the 2008 Ordinance was invalid based upon the operation of a statute of repose, any claims sounding in an assertion that there was "the exaction of an unlawful payment" from those who were required to pay the assessed impact fees are not subject to any statute of repose. Consequently, there is no prohibition against plaintiffs and other parties recognized in the trial court's certification of classes, by virtue of a statute of repose, from proceeding with their proposed claims as the recognized Feepayer Class.

Moreover, the enabling legislation itself, including the supposed statute of repose, was entirely repealed under the Repeal Act while this matter was pending, thereby rendering moot the basis of defendants' arguments. Even if the nine-month limitation period referenced in the act authorizing the imposition and collection of impact fees could have been applicable here, the asserted class claims would still be able to be pursued because the presumed statute of repose would no longer be effective to halt the claims of plaintiffs and the other class members due to the elimination of the time limitation which was arguably included in the repealed enabling legislation. N.C. Session Law 2017-36 ("Repeal Act").

Since there is no existing authority for defendants' argument that the trial court's certification of the Feepayer Class was an abuse of discretion,[5] we find no error on the part of the trial court on this issue.

5. Plaintiffs additionally note that the provisions of the 2008 Ordinance setting the amount of the fees challenged by the Feepayer Class claims were repealed by Orange County effective 1 January 2017, a date prior to the filing of this lawsuit.

3. Application to the Refund Class

[2] Defendants also contest the trial court's certification of plaintiffs' Twelfth Class Action Claim for Relief, in which plaintiffs seek a determination that the "refunds required by Orange County Code Section 30-35(e)(2) are due and payable," on behalf of the Refund Class—"All persons who paid a fee under the schedule of fees enacted in the 2008 Fee Ordinance for a housing unit for which the corresponding fee payable effective January 1, 2017 under the 2016 Amendment would have been less."

Defendants contend that the "Twelfth Class Action Claim for Relief is fundamentally a claim to recover a portion of an impact fee already paid. . . . [and] clearly falls within the type of claims contemplated by Orange County's enabling legislation," citing 987 N.C. Sess. Law 460 secs. 17(1)(2); 18(i)(2) ("Any action seeking *to recover an impact fee* must be commenced not later than nine months after the impact fee is paid." (emphasis added)). Defendants note that plaintiffs and "a substantial majority" of the proposed members in the "Refund Class" paid their impact fees more than nine months prior to the filing of the complaint and are therefore barred from recovery by the nine-month statute of repose set forth in the enabling legislation.

However, as plaintiffs argue, the remaining Refund Class claim in this case does not attempt "to recover an impact fee" as set forth in the 1987 legislative act, but instead asserts the right to partial refunds with interest as set forth by section 30-35(e)(2) of the 2016 Ordinance as promulgated by defendant Orange County itself. Further, as we observed above, the enabling legislation upon which defendants rely has been repealed. We find merit in plaintiffs' submissions on this point and, consistent with our earlier determination on the operation of a perceived time limitation barring plaintiffs' action on behalf of a certified class that such a limitation would have been eliminated due to the repeal of the enabling legislation, we do not find the commission of error on this issue by the trial court.

II. Discovery order

[3] Along with their legal arguments to this Court, plaintiffs contemporaneously filed a "Motion to Dismiss Defendants' Appeal from Discovery Order." We agree with plaintiffs' position in their motion that defendants' effort to appeal the discovery ruling of the trial court contained in its 3 August 2018 Order is, at this stage in the litigation of the case, premature and hence must be dismissed for lack of appellate jurisdiction.

Defendants have cited no basis or authority for this Court to review the trial court's order wherein the trial court has compelled discovery regarding the production of fee receipts. *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999) ("An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment."). Accordingly, we dismiss defendants' appeal regarding the discovery portion of the trial court's 3 August 2018 Order.

Conclusion

We affirm the trial court's order regarding class certification and dismiss defendants' interlocutory appeal regarding the portions of the trial court's order which pertain to discovery matters. All defenses which defendants may choose to employ at the trial level regarding plaintiffs' claims are expressly reserved.

AFFIRMED IN PART; DISMISSED IN PART.

JAMES CUMMINGS AND WIFE, CONNIE CUMMINGS	)	
	)	
v.	)	Brunswick County
	)	
ROBERT PATTON CARROLL; DHR SALES CORP. D/B/A RE/MAX COMMUNITY BROKERS; DAVID H. ROOS; MARGARET N. SINGER; BERKELEY INVESTORS, LLC; KIM BERKELEY T. DURHAM; GEORGE C. BELL; THORNLEY HOLDINGS, LLC; BROOKE ELIZABETH RUDD GAGLIE F/K/A BROOKE ELIZABETH RUDD; MARGARET RUDD & ASSOCIATES, INC.; AND JAMES C. GOODMAN	)	

No. 216A20

ORDER

Defendants Berkeley Investors, L.L.C. and George C. Bell's petition for discretionary review under N.C.G.S. § 7A-31 is allowed.

Accordingly, the new briefs of the appellants shall be filed with this Court not more than 30 days from the date of certification of this order. The remaining briefs of the parties shall be submitted to this Court within the times allowed and in the manner provided by the North Carolina Rules of Appellate Procedure.

By order of the Court in conference, this the 15th day of December 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of December 2020.

s/Amy Funderburk
AMY FUNDERBURK
Clerk of the Supreme Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	WAKE COUNTY
	)	
ROGELIO ALBINO DIAZ-TOMAS	)	

No. 54A19-3

ORDER

Defendant's petition for discretionary review as to additional issues is allowed as to issues I–V, VIII–IX, XII–XIV. Except as to the issues specified, defendant's petition for discretionary review as to additional issues is denied.

By order of this Court in Conference, this 15th day of December, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of December, 2020.

s/Amy L. Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

STATE v. PABON

[376 N.C. 527 (2020)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cabarrus County
	)	
RAFAEL ALFREDO PABON	)	

No. 467A20

ORDER

Defendant's petition for discretionary review of additional issues is denied except as to Issue II, as to which the petition is allowed.

By order of the Court in Conference, this the 15th day of December, 2020.

s/Davis, J.
For the Court

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).

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of December, 2020.

s/Amy Funderburk
AMY FUNDERBURK
Clerk of the Supreme Court

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

18 DECEMBER 2020

3A20	State v. Bryan Xavier Johnson	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent 4. Def's Motion for Extension of Time to File Reply Brief 5. Def's Motion to Deem Reply Brief Timely Filed	1. Allowed **01/07/2020** 2. Allowed **06/03/2020** 3. --- 4. Allowed **11/23/2020** 5. Allowed **11/23/2020**
7P20	State v. Marlene Johnson	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied
12P20	State v. Robert Louis Quinn	Def's PDR Under N.C.G.S. § 7A-31	Denied
17P13-4	State v. Ca'sey R. Tyler	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **10/28/2020** **Ervin, J., recused**
17P13-5	State v. Ca'sey R. Tyler	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **11/10/2020** **Ervin, J., recused**
31PA19	Eve Gyger v. Quintin Clement	Def's Motion to Waive Court Costs	Denied **10/06/2020**
35P20	State v. Kenneth Pierre	Def's PDR Under N.C.G.S. § 7A-31	Denied
42P04-11	State v. Larry McLeod Pulley	Def's Pro Se Motion for Discretionary Review	Dismissed
43P20	State v. Quintin Sinclair Wright	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Ervin, J., recuse**d
45P20	State v. Troshawn N. Williams	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

18 DECEMBER 2020

50P20	Davis & Taft Architecture, P.A. v. DDR-Shadowline, LLC, Deeds Realty Services, LLC, and Shadowline Partners, LLC	1. Def's (Shadowline Partners, LLC) PDR Under N.C.G.S. § 7A-31	1. Denied
		2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	2. Dismissed as moot
54A19-3	State v. Rogelio Albino Diaz-Tomas	1. Def's Motion for Temporary Stay	1. Allowed **04/21/2020**
		2. Def's Petition for Writ of Supersedeas	2. Allowed **06/03/2020**
		3. Def's Notice of Appeal Based Upon a Dissent	3. ---
		4. Def's PDR as to Additional Issues	4. Special Order
		5. Def's Conditional Petition for Writ of Certiorari to Review Order of the COA	5. Allowed
		6. Def's Conditional Petition for Writ of Certiorari to Review Order of District Court, Wake County	6. Allowed
		7. Def's Conditional Petition for Writ of Mandamus	7.
		8. Def's Motion to Expedite the Consideration of Defendant's Matters	8. Dismissed as moot
		9. Def's Motion to Proceed *In Forma Pauperis*	9. Allowed
		10. Def's Motion to Take Judicial Notice	10. Dismissed as moot
		11. Def's Motion for Leave to Amend Notice of Appeal	11. Allowed
		12. Def's Motion for Summary Reversal	12. Dismissed
		13. Def's Motion to Supplement Record on Appeal	13. Allowed
		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. Dismissed
		16. Def's Motion in the Alternative to Hold Certiorari and Mandamus Petitions in Abeyance	16. Allowed
		17. Def's Motion to File Memorandum of Additional Authority	17. Dismissed **07/08/2020**
		18. Def's Motion for Petition for Writ of Procedendo	18. Dismissed
		19. Def's Motion for Printing and Mailing of PDR on Additional Issues	19. Dismissed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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		20. Def's Motion for the Production of Discovery Under Seal	20. Denied
		21. Def's Motion to Amend Certificate of Service	21. Allowed
		22. Def's Motion to Amend Motion for Petition for Writ of Procedendo	22. Dismissed as moot
55P18-2	State v. James Howard Terrell, Jr.	1. Def's Pro Se Motion to Appeal Judgment of the Trial Court and Any Conditions of Post-Conviction Release	1. Dismissed **12/03/2020**
		2. Def's Pro Se Motion for Trial Court Date	2. Dismissed **12/03/2020**
56P20	William Everett Copeland IV and Catherine Ashley F. Copeland, Co-Administrators of the Estate of William Everett Copeland v. Amward Homes of N.C., Inc.; Crescent Communities, LLC; and Crescent Hillsborough, LLC	1. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed
		2. Plts' Conditional PDR Under N.C.G.S. § 7A-31	2. Allowed
63P16-2	State v. Michael Anthony York	1. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA	1. Denied
		2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	2. Allowed
69P18-4	State v. Nell Monette Baldwin	1. Def's Pro Se Motion to Consolidate the Civil Cases and Criminal Cases	1. Dismissed
		2. Def's Pro Se Motion to Proceed Without Prepaying Costs	2. Dismissed
		3. Def's Pro Se Motion to Suspend Appellate Rules to Expedite Review in the Public Interest	3. Dismissed
		4. Def's Pro Se Petition for Writ of Certiorari	4. Dismissed
		5. Def's Pro Se Motion to Add Supplemental Certificate of Service	5. Dismissed
		6. Def's Pro Se Motion to Strike the Civil Plaintiff's Response	6. Dismissed
		7. Def's Pro Se Motion to Amend the Motion for Appropriate Relief	7. Dismissed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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		8. Def's Pro Se Petition for Writ of Habeas Corpus	8. Denied **07/10/2020** **Beasley, C.J., recused;** **Morgan, J., recused**
69P98-2	State v. Spencer Edward Springs	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
70P20	Kanish, Inc. v. Kay F. Fox Taylor and Calvin Taylor	1. Plt's Motion for Temporary Stay 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/20/2020** Dissolved **12/15/2020** 2. Denied 3. Denied
77P20	State v. Christopher Tyree Johnson	Def's Pro Se Motion for Appropriate Relief Jurisdiction of Subject Matter	Dismissed
90P19-2	State v. Orlando Cooper	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas	1. Allowed **11/06/2020** 2.
95P20	State v. Carlos Espinosa and State v. Bardomiano Martinez	1. Def's (Bardomiano Martinez) Pro Se Notice of Appeal Based Upon a Constitutional Question 2. Def's (Bardomiano Martinez) Pro Se PDR Under N.C.G.S. § 7A-31 3. Def's (Bardomiano Martinez) Pro Se Petition in the Alternative for Writ of Certiorari to Review Decision of the COA 4. Def's (Carlos Espinosa) Pro Se PDR Under N.C.G.S. § 7A-31 5. Def's (Carlos Espinosa) Pro Se Motion to Proceed *In Forma Pauperis* 6. Def's (Carlos Espinosa) Pro Se Motion to Appoint Counsel	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot 4. Denied 5. Allowed 6. Dismissed as moot
97A20-2	State v. Antiwuan Tyrez Campbell	1. Def's Notice of Appeal Based Upon a Dissent 2. Def's PDR as to Additional Issues	1. --- 2. Allowed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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103P20	State v. Reginald Tremaine Wilson	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Motion to Amend PDR	1. Denied 2. Allowed
109P16-2	State v. Curtis Joel Smith	Def's Pro Se Motion for Appeal	Dismissed
113A19	Orlando Residence, LTD., Plaintiff v. Alliance Hospitality Management, LLC, Rolf A. Tweeten, Axis Hospitality, Inc., and Kenneth E. Nelson, Defendants Kenneth E. Nelson, Crossclaim Plaintiff v. Alliance Hospitality Management, LLC, Rolf A. Tweeten, and Axis Hospitality, Inc., Crossclaim Defendants	1. Def's (Kenneth E. Nelson) Pro Se Motion for Relief from Rule 31 Requirement of Certificates and Memorandum in Support Thereof 2. Def's (Kenneth E. Nelson) Pro Se Motion for Rehearing	1. Dismissed as moot **09/30/2020** 2. Denied **09/30/2020** **Morgan, J., recused**
120P20	State v. Timothy Winston Hall	Def's PDR Under N.C.G.S. § 7A-31	Denied
121P20	Kimberly Mims v. Darrell D. Parker, Sr., Lori Walker Parker	Plt's PDR Under N.C.G.S. § 7A-31	Denied
130P20	Jimmy Allen Roberts v. Daniel M. Horne, Jr., Clerk, North Carolina Court of Appeals	1. Def's Pro Se Motion for Notice of Appeal 2. Def's Pro Se Motion for Judicial Notice 3. Def's Pro Se Motion for Appointment of Counsel	1. Dismissed 2. Dismissed as moot 3. Dismissed as moot **Ervin, J., recused**
131P04-4	State v. Shan Edward Carter	Def's Pro Se Motion for an Investigation	Dismissed **Ervin, J., recused**
131P16-15	State v. Somchai Noonsab	1. Def's Pro Se Motion to Take Jurisdiction 2. Def's Pro Se Motion for Objection 3. Def's Pro Se Motion to Dismiss	1. Dismissed 2. Dismissed 3. Dismissed

		4. Def's Pro Se Petition for Writ of Mandamus	4. Dismissed
		5. Def's Pro Se Motion to Vacate Conviction - Sentence	5. Dismissed
		6. Def's Pro Se Motion for Jurisdiction to M.A.R.	6. Dismissed
		7. Def's Pro Se Motion for Jurisdiction to Certiorari	7. Dismissed
		8. Def's Pro Se Motion for Immediate Release	8. Dismissed
		9. Def's Pro Se Motion for Payment of Monetary – Declaratory Relief	9. Dismissed
		10. Def's Pro Se Motion to Expunge all Records with Prejudice	10. Dismissed
		11. Def's Pro Se Motion for Writ of Rights Jurisdiction 1	11. Dismissed
		2. Def's Pro Se Motion for Appropriate Relief Writ of Rights Jurisdiction of Subject Matters Certiorari	12. Dismissed
		13. Def's Pro Se Motion for Jurisdiction of Subject Matter	13. Dismissed
		14. Def's Pro Se Motion for Jurisdiction of Subject Matters, False Imprisonment	14. Dismissed
		15. Def's Pro Se Motion for Appropriate Relief of Jurisdiction of Subject Matter DNA Testing	15. Dismissed
		16. Def's Pro Se Motion for Jurisdiction of Chp 14-7B G.S. 14-27.7 False Imprisonment	16. Dismissed
		17. Def's Pro Se Motion to Prosecute	17. Dismissed
		18. Def's Pro Se Motion for DNA Testing	18. Dismissed
		19. Def's Pro Se Motion for Relief	19. Dismissed
		20. Def's Pro Se Motion for Immediate Release	20. Dismissed
		21. Def's Pro Se Motion for Tolling	21. Dismissed
		22. Def's Pro Se Motion for Verified Complaint	22. Dismissed
		23. Def's Pro Se Motion for Verified Complaint Re: Entrapment - Ex Post Facto Laws, False Imprisonment	23. Dismissed
		24. Def's Pro Se Motion for False Imprisonment Relief Based on Fruit of the Poisonous Tree	24. Dismissed

		25. Def's Pro Se Motion to Vacate Conviction Pursuant to Rule of Leniency - Multiplicity - Variance	25. Dismissed
		26. Def's Pro Se Motion for Immediate Release - Implied Acquittal	26. Dismissed
		27. Def's Pro Se Motion for Verified Complaint - 5th Amendment Violation	27. Dismissed
		28. Def's Pro Se Motion for Immediate Release - Mandatory Relief and Expungement of Records	28. Dismissed
		29. Def's Pro Se Motion for Double Jeopardy Analysis and Blockburger Test	29. Dismissed
		30. Def's Pro Se Motion for Appropriate Relief Based on Newly Discovered Jurisdiction	30. Dismissed
		31. Def's Pro Se Motion to Compel	31. Dismissed
		32. Def's Pro Se Motion to Compel - False Imprisonment	32. Dismissed
		33. Def's Pro Se Motion to Compel State's False Imprisonment	33. Dismissed
		34. Def's Pro Se Motion to Compel - False Imprisonment	34. Dismissed
		35. Def's Pro Se Motion for Verified Complaint - Motion to Compel	35. Dismissed
		36. Def's Pro Se Motion for Immediate Release – Monetary Relief	36. Dismissed
		37. Def's Pro Se Motion to Compel - Double Jeopardy Analysis - Blockburger Elements Test - Rule of Leniency - Duplicative, Multiplicity, Variance, Ex Post Facto Laws	37. Dismissed
		38. Def's Pro Se Motion for Remedy for Relief	38. Dismissed
		39. Def's Pro Se Motion to Compel - False Imprisonment	39. Dismissed
		40. Def's Pro Se Motion to Vacate	40. Dismissed
		41. Def's Pro Se Motion for Double Jeopardy	41. Dismissed
		42. Def's Pro Se Petition for Writ of Mandamus	42. Dismissed
		43. Def's Pro Se Petition for Writ of Mandamus	43. Dismissed

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132PA18-2	Beth Desmond v. The News and Observer Publishing Company, McClatchy Newspapers, Inc., and Mandy Locke	1. Defs' (The News and Observer Publishing Company and Mandy Locke) Petition for Rehearing 2. Plt's Petition for Rehearing	1. Denied **10/14/2020** 2. Denied **10/14/2020**
136P20	Patricia Barnard, on behalf of herself and others similarly situated v. Johnston Health Services Corporation d/b/a Johnston Health, and Accelerated Claims, Inc.	Plt's PDR Under N.C.G.S. § 7A-31	Denied
141P20	The Cherry Community Organization, a North Carolina non-profit corporation, and Stonehunt, LLC v. Stoney D. Sellars, Midtown Area Partners Holdings, LLC, and Midtown Area Partners II, LLC	Plt's (The Cherry Community Organization) PDR Under N.C.G.S. § 7A-31	Allowed
143P10-2	State v. Andre Pertiller	Def's Pro Se Motion for PDR	Denied
143P20-4	James B. Henderson v. James Vaughn	1. Petitioner's Pro Se Motion for Objection to the Amended Order 2. Petitioner's Pro Se Motion to Respond	1. Dismissed 2. Dismissed **Ervin, J., recused**
144P20	Nanny's Korner Day Care Center, Inc. v. North Carolina Department of Health and Human Services, Division of Child Development	Plt's Petition for Writ of Certiorari to Review Decision of the COA	Denied **Ervin, J., recused; Davis, J., recused**
145P20	State v. Cory Wilson	Def's PDR Under N.C.G.S. § 7A-31	Denied
154P20	State v. Monolito Finney	Def's Pro Se Motion for PDR from Full Panel of Judges	Dismissed
157P13-2	State v. Master Maurice Alston	Def's Pro Se Motion for Application of Notice and Awareness and for Release	Denied **09/29/2020**

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157P20	William Allen Cale v. Cleveland Atkinson, Jr., in his official capacity as Sheriff of Edgecombe County	1. Petitioner's Petition for Writ of Certiorari to Review Decision of the COA 2. Petitioner's Motion to Suspend Rules	1. Denied 2. Denied
163P16-3	State v. Arkeem Hakim Jordan	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Ervin, J., recused**
177P20	Dominique Ford v. North Carolina General Assembly; Cabarrus County Government; Concord Police Department; Kannapolis Police Department; Carolinas Healthcare Systems Northeast, US Food and Drug Administration; Drug Enforcement Administration; US Federal Government; and Federal Reserve System	1. Plt's Pro Se Motion for Notice of Appeal 2. Plt's Pro Se Motion for Notice of Appeal	1. Dismissed *ex mero motu* 2. Dismissed *ex mero motu*
183P19-3	State v. Coriante Pierce	1. Def's Pro Se Motion to Appeal Designation as Exceptional Case 2. Def's Pro Se Motion for Notice of Appeal of Denial of Motion to Exclude Photographs (Amended)	1. Denied 2. Denied
183P20	Michael Stacy Buchanan v. North Carolina Farm Bureau Mutual Insurance Company, Inc.	Plt's PDR Under N.C.G.S. § 7A-31	Denied
185P20	State v. Kenneth J. Fields	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied

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187P18-3	Edward Smith, Jr. v. Supt. Morris Reid, et al.	1. Petitioner's Pro Se Motion for PDR 2. Petitioner's Pro Se Motion to Appoint Counsel	1. Denied 2. Dismissed as moot **Davis, J., recused**
187P20	State v. Shanna Cheyenne Shuler	Def's PDR Under N.C.G.S. § 7A-31	Allowed
189P20	State v. Thomas Darius Jackson	Def's Petition for Writ of Certiorari to Review Order of the COA	Denied
199P20	State v. Antwan Yelverton	Def's Pro Se Motion for PDR	Dismissed **Ervin, J., recused**
204A20	James C. McGuine, Employee v. National Copier Logistics, LLC, Employer, and Travelers Insurance Company of Illinois, Carrier, and/or NCL Transportation, LLC, Employer, Non-Insured and The North Carolina Industrial Commission v. NCL Transportation, LLC, Non-Insured Employer, and Thomas E. Prince, individually	Plt's Motion to Dismiss Appeal	Denied
205P20	Shirley Valentine, Administrator of the Estate of Shanye Janise Roberts, Deceased v. Stephanie Solosko, PA-C; Nextcare Urgent Care; Nextcare, Inc.; Nextcare, Inc. d/b/a Nextcare Urgent Care; Matrix Occupational Health, Inc.; and Matrix Occupational Health, Inc. d/b/a Nextcare Urgent Care	Defs' PDR Under N.C.G.S. § 7A-31	Denied

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206P20	State v. Marques Raman Brown	1. Def's PDR Under N.C.G.S. § 7A-31 2. State's Motion to Deem Response to PDR Timely Filed	1. Denied 2. Allowed
207P20	State v. Darne Nicholas Brown	1. Def's PDR Under N.C.G.S. § 7A-31 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
209P20	State v. Jonathan Conlanges Boykin	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied
216A20	James Cummings and wife, Connie Cummings v. Robert Patton Carroll; DHR Sales Corp. d/b/a Re/Max Community Brokers; David H. Roos; Margaret N. Singer; Berkeley Investors, LLC; Kim Berkeley T. Durham; George C. Bell; Thornley Holdings, LLC; Brooke Elizabeth Rudd-Gaglie f/k/a Brooke Elizabeth Rudd; Margaret Rudd & Associates, Inc.; and James C. Goodman	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 2. Defs' (Berkeley Investors, LLC and George C. Bell) PDR Under N.C.G.S. § 7A-31 3. Defs' (Robert Patton Carroll and DHR Sales Corp d/b/a Re/Max Community Brokers) Notice of Appeal Based Upon a Dissent 4. Defs' (Berkeley Investors, LLC and George C. Bell) Motion to Stay Briefing Schedule and Set Briefing Deadlines	1. --- 2. Special Order 3. --- 4. Allowed **06/18/2020**
219P17-4	Courtney NC, LLC d/b/a Oakwood Raleigh at Brier Creek v. Monette Baldwin a/k/a Nell Monette Baldwin	1. Def's Pro Se Motion to Consolidate the Civil Cases and Criminal Cases 2. Def's Pro Se Motion to Proceed Without Prepaying Costs 3. Def's Pro Se Motion to Disqualify 4. Def's Pro Se Motion to Proceed without Paying Costs 5. Def's Pro Se Motion for the Bifurcation of Review Issues 6. Def's Pro Se Motion for Petition (Complaint) for Judicial Disciplinary Action 7. Def's Pro Se Petition for Writ of Certiorari 8. Plt's Motion for Sanctions 9. Plt's Motion to Strike and Seal Portions of Defendant's Filings	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed 8. Denied 9. Denied

		10. Def's Pro Se Motion to Strike All of Plaintiff's Responses and Motions 11. Def's Pro Se Motion for Leave to File Directly to the Honorable Supreme Court 12. Def's Pro Se Motion to Suspend the Rules 13. Def's Pro Se Motion to Amend Motion for Leave to File Directly to Add a Memorandum 14. Def's Pro Se Motion for Leave to Amend Petition for Writ of Certiorari 15. Def's Pro Se Motion to Supplement the Record 16. Def's Pro Se Motion to Suspend the Rules 17. Def's Pro Se Motion to Withdraw Exhibit Summary 18. Def's Pro Se Petition for Writ of Certiorari	10. Dismissed 11. Dismissed 12. Dismissed 13. Dismissed 14. Dismissed 15. Dismissed 16. Dismissed 17. Dismissed 18. Dismissed **Beasley, C.J., recused; Morgan, J., recused**
219P20-2	State v. Justin Marqui Caldwell	Def's Pro Se Motion for Case Review	Dismissed
222P20	State v. Kenneth Alexander Shaw	1. Def's Pro Se Motion to Dismiss Indictment 2. Def's Pro Se Motion in the Alternative for Hearing on the Motions 3. Def's Pro Se Motion to Dismiss Indictment	1. Dismissed 2. Dismissed 3. Dismissed
228P20	State v. Bradley W. Burgess	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied
233A20	State v. Johnathan Ricks	Def's Motion to Extend the Time to File Defendant's New Brief and to Deem Brief Timely Filed	Allowed **10/22/2020**

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234PA20	State v. Kelvin Alphonso Alexander	1. Def's PDR 2. Innocence Network's Motion for Leave to File Amicus Brief 3. Amicus Curiae's Motion to Admit Evan J. Ballan Pro Hac Vice 4. Amicus Curiae's Motion to Admit Kelly M. Dermody Pro Hac Vice	1. Allowed **08/12/2020** 2. Allowed **10/30/2020** 3. Allowed **10/30/2020** 4. Allowed **10/30/2020**
236P20	State v. Garry Aritis Yarborough	Def's PDR Under N.C.G.S. § 7A-31	Denied
244P20	State v. Edward Bickerton Lane, Jr.	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Alleghany County 3. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed 3. Dismissed as moot
250P17-3	State v. Justin Lee Perry	Def's Pro Se Motion for PDR	Denied **11/05/2020**
250P20	State v. Michael Shane Wells	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied
254P18-5	State v. Jimmy A. Sevilla-Briones	1. Def's Pro Se Motion for Appointment of Counsel 2. Def's Pro Se Motion for Objection/ Appeal to Prejudices 3. Def's Pro Se Motion for Petition for Full Record Review 4. Def's Pro Se Motion for Remedy 5. Def's Pro Se Motion for Clarity of Order Entry Without Relief 6. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed
254P20	State v. Nadine D. Stubbs	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/03/2020** Dissolved **12/15/2020** 2. Denied 3. Denied
255P20	State v. Edgardo Gandarilla Nunez	1. Def's PDR Prior to a Determination of the COA 2. Def's Motion to Amend PDR	1. Allowed 2. Allowed

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257P20	Mamoun Ali Mohammad Hamdan v. Nafiseh Ali Asad Freitekh	1. Petitioner's PDR Under N.C.G.S. § 7A-31 2. Respondent's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
261A18-3	North Carolina State Conference of the National Association for the Advancement of Colored People v. Tim Moore, in his official Capacity, Philip Berger, in his official capacity	1. Plt's Joint Motion for Extended Briefing Schedule 2. North Carolina Professors of Constitutional Law's (Enrique Arminjo, Joseph Blocher, John Charles Boger, Guy-Uriel Charles, Donald Corbett, Michael Kent Curtis, April G. Dawson, Walter E. Dellinger, III, Malik Edwards, Shawn E. Fields, Sarah Ludington, William P. Marshall, Gene R. Nichol, Wilson Parker, Jedediah Purdy, and Theodore M. Shaw) Motion for Leave to File Amicus Brief 3. Democracy North Carolina's Motion for Leave to File Amicus Brief 4. North Carolina Advocates for Justice's Motion for Leave to File Amicus Brief 5. North Carolina Legislative Black Caucus' Motion for Leave to File Amicus Brief 6. American Civil Liberties Union of North Carolina's Motion for Leave to File Amicus Brief 7. Governor Roy Cooper's Motion for Leave to File Amicus Brief	1. Allowed **10/21/2020** 2. Allowed **12/03/2020** 3. Allowed **12/03/2020** 4. Allowed **12/03/2020** 5. Allowed **12/03/2020** 6. Allowed **12/03/2020** 7. Allowed **12/03/2020**
263PA18-2	State v. Cedric Theodis Hobbs, Jr.	1. Def's Motion for Supplemental Briefing 2. Def's Motion for Extension of Time to File Brief 3. Social Scientists' Motion for Leave to File Amicus Brief 4. Def's Motion to Supplement the Record	1. Allowed **08/26/2020** 2. Allowed **10/07/2020** 3. Allowed **11/16/2020** 4. Allowed
264P20	State v. Terry Glenn Kluttz	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Stanly County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed

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265P20	State v. Wesley Evay Westbrook	1. Def's Notice of Appeal Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
266P20	State v. Johnny Sanders	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied
267P20	State v. William Joseph McCullen	Def's PDR Under N.C.G.S. § 7A-31	Denied
269P19	Elizabeth Luke as Guardian *ad Litem*, for Jane Doe (a minor) v. Woodlawn School, J. Robert Shirley individually and as Agent for Woodlawn School, and the Woodlawn School Board of Trustees	1. Plt's PDR Under N.C.G.S. § 7A-31 2. Defs' Motion for Substitution of Counsel	1. Denied 2. Allowed
269P20	Julie Berke v. Fidelity Brokerage Services, the Estate of Gary Ian Law, and Aman Masoomi, individually and as sole heir and Executor of the Estate of Sharon Lee Day	Def's (Aman Masoomi) PDR Under N.C.G.S. § 7A-31	Denied
277P20	State v. James Edsal Baker	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/19/2020** Dissolved **12/15/2020** 2. Denied 3. Denied
279A20	State v. Demon Hamer	Def's Motion to Amend Record on Appeal	Allowed
281P20	In the Matter of B.W.B.	Juvenile's PDR Under N.C.G.S. § 7A-31	Denied
283P20	State v. Mark Anthony Chamberlain	Def's PDR Under N.C.G.S. § 7A-31	Denied
288P20	State v. Robert Randolph Hughes	Def's PDR Under N.C.G.S. § 7A-31	Denied

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289A20	In the Matter of L.R.L.B.	Respondent-Mother's Petition for Writ of Certiorari to Review Order of District Court, Yancey County	Allowed
290PA15-3	State v. Jeffrey Tryon Collington	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **10/13/2020**
295P20	State v. Scott Edward Sasek	Def's PDR Under N.C.G.S. § 7A-31	Denied
298P18	Randall L. and Carolyn M. Henion v. County of Watauga, North Carolina, Johnny and Joan Hampton, Maymead Materials, Inc., and JW Hampton Company	1. Petitioners' PDR Under N.C.G.S. § 7A-31 2. Respondents' (Johnny and Joan Hampton, Maymead Materials, Inc., and JW Hampton Company) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
304P20	Clyde Junior Meris v. Guilford County Sheriff's Office, et al.	Plt's Pro Se Motion for Civil Action	Dismissed
305P97-9	Egbert Francis, Jr. v. State of North Carolina	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **11/12/2020**
306P18-3	Hunter F. Grodner v. Andrzej Grodner (now Andrew Grodner)	Def's Pro Se Second Motion to Disqualify Opposing Counsel and to Correct Court's Fundamental and Fatal Error	Dismissed
307P18-2	Common Cause, Dawn Baldwin Gibson, Robert E. Morrison, Cliff Moone, T. Anthony Spearman, Alida Woods, Lamar Gibson, Michael Schacter, Stella Anderson, Mark Ezzell, and Sabra Faires v. Daniel J. Forest, in his official capacity as President of the North Carolina Senate; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; and Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate	Plts' PDR Under N.C.G.S. § 7A-31	Denied

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307PA20	Marisa Mucha v. Logan Wagner	1. Def's Notice of Appeal Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 3. Counsel's Motion for Leave to Participate as Amicus Curiae 4. Amicus Curiae's Motion for Extension of Time to File Brief 5. Amicus Curiae's Motion to Waive Costs 6. Plt's Motion for Extension of Time to File Brief	1. Retained **09/23/2020** 2. Allowed **09/23/2020** 3. Dismissed as moot **11/10/2020** 4. Dismissed as moot **11/10/2020** 5. Dismissed as moot **11/10/2020** 6. Allowed **11/10/2020**
309P20	Nancy Keller, by and through her attorney-in-fact, Leslie Ann Keller v. Deerfield Episcopal Retirement Community, Inc. and Jeffrey Todd Earwood	Plt's PDR Under N.C.G.S. § 7A-31	Denied
311A20	In the Matter of the Appeal of Harris Teeter, LLC, from the Decision of the Mecklenburg County Board of Equalization and Review	1. Taxpayer's Notice of Appeal Based Upon a Dissent 2. County's Petition for Writ of Certiorari to Review Decision of the COA	1. --- 2. Denied
313P20	State v. Zaccaeus Lamont Anthony	Def's PDR Under N.C.G.S. § 7A-31	Denied
316P20	State v. Christopher C. Williams	1. Def's Pro Se Motion for Notice of Dismissal 2. Def's Pro Se Motion for Blue Ribbon Jury 3. Def's Pro Se Motion for Release of Names	1. Dismissed 2. Dismissed 3. Dismissed

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324A19	State v. Jack Howard Hollars	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues 5. Def's Motion for Extension of Time to File Response 6. Def's Motion for Appropriate Relief 7. State's Motion for Extension of Time to File Response to Motion for Appropriate Relief	1. Allowed **08/21/2019** 2. Allowed **10/04/2019** 3. --- 4. Denied **10/30/2019** 5. Allowed **09/19/2019** 6. Dismissed as moot 7. Allowed **03/16/2020**
324P20	State v. Joseph Levi Grantham	Def's PDR Under N.C.G.S. § 7A-31	Denied
326PA19	Cheryl Lloyd Humphrey Land Investment Company, LLC v. Resco Products, Inc. and Piedmont Minerals Company, Inc.	Amicus Curiae's Motion for Leave to Participate in Oral Argument	Allowed **11/30/2020**
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.	1. Plt's PDR Under N.C.G.S § 7A-31 2. Plt's Motion to Admit Stuart Edward Scott, Pro Hac Vice 3. Plt's Motion to Admit Jeremy Aaron Tor, Pro Hac Vice 4. Def's (Henry Cromartie, III, M.D.) Motion for Madeleine M. Pfefferle to Withdraw as Counsel	1. Denied 2. Dismissed as moot 3. Dismissed as moot 4. Allowed **08/21/2020**
327P20	State v. Rameen Swindell	Def's Pro Se Motion to Appeal Decision of the COA	Dismissed

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330A19-2	State v. Jesse James Tucker	1. State's Motion for Temporary Stay	1. Allowed **07/02/2020**
		2. State's Petition for Writ of Supersedeas	2. Denied **07/08/2020**
		3. Def's Motion to Dissolve Temporary Stay	3. Allowed **07/08/2020**
		4. Def's Motion to Dismiss Petition for Writ of Supersedeas	4. Dismissed as moot **07/08/2020**
		5. State's PDR Under N.C.G.S. § 7A-31	5. Denied
330P20	State v. Gurelle Demar Wyatt	Def's PDR Under N.C.G.S. § 7A-31	Denied
334PA19-2	State v. Tenedrick Strudwick	1. State's Motion for Temporary Stay	1. Allowed **10/26/2020**
		2. State's Petition for Writ of Supersedeas	2. Allowed **11/10/2020**
334P20	In the Matter of K.L., J.A. II	1. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Denied
		2. Petitioner's Motion to Amend PDR	2. Allowed
335P20	Tony Ray Simmons, Jr. v. John Lee Wiles	1. Def's Motion for Temporary Stay	1. Allowed **07/22/2020** Dissolved **12/15/2020**
		2. Def's Petition for Writ of Supersedeas	2. Denied
		3. Def's PDR Under N.C.G.S. § 7A-31	3. Denied
		4. Plt's Conditional PDR Under N.C.G.S. § 7A-31	4. Dismissed as moot
336P20	State v. Damian Maurice Gore	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
		4. Counsel's Motion to Withdraw	4. Allowed
		5. Counsel's Motion to Direct Appellate Defender to Appoint Substitute Counsel	5. Allowed

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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. Denied **10/23/2020**
		2. Def's Petition for Writ of Certiorari to Review Decision of District Court, Wake County	2. Denied **10/23/2020**
		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. Denied **10/23/2020**
		5. Def's Motion to Submit Treatises	5. Allowed **10/23/2020**
		6. Def's Motion for Temporary Stay	6. Denied **08/18/2020**
		7. Def's Petition for Writ of Supersedeas	7. Denied **10/23/2020**
		8. Def's Motion to Suspend Appellate Rules	8. Denied **10/23/2020**
		9. Def's Motion for Leave of Court to Submit Transcript and Recording	9. Denied **10/23/2020**
		10. Def's Motion to Amend Certificates of Service	10. Allowed **10/23/2020**
		11. Def's Motion to Submit Compact Disc	11. Denied **10/23/2020**
		12. Def's Motion to Substitute Motion to Suspend the Rules	12. Denied **10/23/2020**
		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. Denied **10/23/2020**
		15. Def's Motion to Submit Certified Transcript	15. Allowed **10/23/2020**
		16. Def's Motion to Proceed *In Forma Pauperis* and to Waive Incurred Costs	16. Allowed **10/23/2020**
345PA19	Crazie Overstock Promotions, LLC v. State of North Carolina, et al.	Defs' Motion to Seal State's New Brief	Allowed **10/19/2020**
347A20	In the Matter of I.J.W.	1. Guardian *ad Litem*'s Motion to Withdraw Appellee Brief	1. Allowed **10/19/2020**
		2. Guardian *ad Litem*'s Motion to File Corrected Brief	2. Allowed **10/19/2020**
		3. Guardian *ad Litem*'s Motion to Deem Corrected Brief Timely Filed	3. Allowed **10/19/2020**

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349P19	State v. Frederick Eugene Sullivan	1. Def's Pro Se Motion for Appeal 2. Def's Pro Se Motion to Appoint Counsel	1. Denied 2. Dismissed as moot
349P20-2	State v. Clorey Eugene France	Def's Pro Se Motion to Provide Documents Without Cost	Denied
351A20	In the Matter of G.D.H., J.X.W.	Respondent-Mother's Conditional Petition for Writ of Certiorari to Review Order of District Court, Wake County	Allowed **10/05/2020**
352P19-2	State v. Kenneth Russell Anthony	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas	1. Allowed **12/04/2020** 2.
354P20-2	State v. Tracy Wright Hakes	Petitioner's Pro Se Motion to Dismiss Pending Case	Dismissed
355P20	State v. Edward A. Wright	Def's Pro Se Motion to Assist in Own Defense	Dismissed
358P20	Joanne Kathleen McDowell v. Steven Clark Buchman	Plt's PDR Under N.C.G.S. § 7A-31	Denied
363A20	In the Matter of T.T.	1. Petitioner's Motion to Deem the Brief Timely Filed 2. Guardian *ad Litem*'s Motion to Deem Brief Timely Filed	1. Allowed **11/16/2020** 2. Allowed **11/16/2020**
368A20	Reynolds American Inc. v. Third Motion Equities Master Fund Ltd., et al.	Plt's Motion to Admit Gary A. Bornstein Pro Hac Vice	Allowed **10/12/2020**
369P20	State v. Maurice Jaquan Byers	Def's Pro Se Motion for Notice of Appeal	Dismissed
371A20	In the Matter of S.C.L.R.	Respondent-Mother's Petition for Writ of Certiorari to Review Order of District Court, Cleveland County	Allowed **10/19/2020**
372P20	State v. Antonio Raynal Hunter Gray	Def's PDR Under N.C.G.S. § 7A-31	Denied
374P20	State v. Michaelangelo Re	Def's PDR Under N.C.G.S. § 7A-31	Dismissed
375P20	State v. Shyheim Fitzhugh Millsaps	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied

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376A19	State v. Ervan L. Betts	Plt's Motion to Hold Remote Oral Argument in February	Allowed **12/01/2020**
378P19	State v. James Earl Satterwhite	1. Def's Pro Se Motion for PDR Under N.C.G.S. § 7A-31 2. Def's Pro Se Motion for Petition for Motion for En Banc Rehearing	1. Denied 2. Dismissed **Davis, J., recused**
386P19	State v. Gary Lynn Johnson	Def's Pro Se Motion for Notice of Appeal	Dismissed
387A20	In the Matter of J.T.C.	Respondent-Father's Motion to File Corrected Briefs	Allowed **10/27/2020**
388P20	State v. Jerry Ryan Echols	Def's PDR Under N.C.G.S. § 7A-31	Denied
389P20	State v. Gordon Hendricks, Jr.	1. Def's Pro Se Motion to Get Back into Court 2. Def's Pro Se Motion to Compel Superior Court Judge to Hold M.A.R. Hearing on Defendant 3. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Allowed
391P20	State v. Allen Maurice Morrison	Def's PDR Under N.C.G.S. § 7A-31	Denied
393P20	In the Matter of L.N.H.	1. Petitioner's PDR Under N.C.G.S. § 7A-31 2. Respondent-Mother's Conditional PDR 3. Petitioner and Guardian *ad Litem*'s Motion for Temporary Stay 4. Petitioner and Guardian *ad Litem*'s Petition for Writ of Supersedeas	1. 2. 3. Allowed **10/14/2020** 4.
395P20	State v. Michael Anthony Sheridan	1. Def's Pro Se Motion for Release to Raise Money 2. Def's Pro Se Motion for Appropriate Relief	1. Dismissed 2. Dismissed
396A19	In re J.M.	1. Respondent's Motion for Extension of Time to File Appellant Brief 2. Petitioner's Motion to Release Recording of Hearing	1. Allowed **11/06/2019** 2. Allowed **09/22/2020** **Davis, J., recused**

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396P20	State v. Norman Eugene Satterfield	Def's Pro Se Motion for Dismissal for Exoneration Under *Brady v Maryland*	Dismissed
398P20	The Broad Street Clinic Foundation v. Orin Weeks, Jr., individually and as Trustee of the Orin H. Weeks, Jr., Revocable Living Trust, Plantation Venture, LLC, Izorah, LLC, Edward Hill, LLC, Robert H., LLC, and Carteret-Craven Electric Membership Corporation	Plt's PDR Under N.C.G.S. § 7A-31	Denied
400P20	XPO Logistics, Inc. v. Bruno Sanzi	1. Plt's Petition for Writ of Certiorari to Review Order of the COA 2. Plt's Motion to Dissolve Stay	1. Denied **10/08/2020** 2. Denied **10/08/2020**
401P20	State v. William A. McClelland	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Iredell County 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
405P20	Sherly Francois Bradley v. Union County Department of Social Services	Petitioner's Pro Se Motion for Notice of Appeal	Dismissed
406P20	State v. Justin Darnell Gillespie	Def's Pro Se Motion for Sex-Offender Registry Termination	Dismissed
407P20	Archie M. Sampson v. Erik Hooks, Secretary of Department of Public Safety	Petitioner's Pro Se Motion for False Imprisonment Complaint Against Secretary of Department of Public Safety	Dismissed
409P20	Luon Nay, Employee v. Cornerstone Staffing Solutions, Employer, and Starnet Insurance Company, Carrier (Key Risk Management Services, Administrator)	1. Defs' Motion for Temporary Stay 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **09/24/2020** 2. 3.

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410P20	State v. David Lemus, Defendant, and 1st Atlantic Surety Company, Surety	1. Granville County Board of Education's PDR Under N.C.G.S. § 7A-31 2. 1st Atlantic Surety Company's Conditional PDR Under N.C.G.S. § 7A-31 3. Granville County Board of Education's Motion to Consolidate Petitions for Discretionary Review	1. Denied 2. Dismissed as moot 3. Dismissed as moot
413P20	State v. Miron Hosea Cameron	Def's Pro Se Motion for Case Review	Dismissed
414P20	State v. Jason S. Horning	Def's Pro Se Motion for Speedy Trial	Dismissed
415P19-2	State v. Scott Randall Reich	1. Def's Pro Se Motion for Notice of Intent to Appeal 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 3. Def's Pro Se Motion to Proceed *In Forma Pauperis* 4. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Allowed 4. Dismissed as moot **Davis, J., recused**
415P20	State v. Lemont Adams	Def's Pro Se Motion to Dismiss or Vacate Allegations	Dismissed
416A20	In the Matter of Z.M.T.	Respondent-Mother's Petition for Writ of Certiorari to Review Decision of District Court, Beaufort County	Allowed **11/09/2020**
417P20	Anthony B. Fairley v. North Carolina Department of Transportation	1. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question 2. Petitioner's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
418A20	In the Matter of A.P.W., A.J.W., H.K.W.	Respondent-Parent's Petition for Writ of Certiorari to Review Order of District Court, Wilkes County	Allowed
419P20	D C Custom Freight, LLC v. Tammy A. Ross & Associates, Inc.	Plt's PDR Under N.C.G.S. § 7A-31	Denied
421P20	Clarence D. Huneycutt and Doris Huneycutt v. Walter Kevin Ayers	Plaintiffs' Pro Se Motion for Notice of Appeal - Constitutional Issue	Dismissed

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425P12-2	Derrick M. Allen, Sr. v. Durham Co. District Attorney Office, State of North Carolina, et al.	1. Petitioner's Pro Se Motion for Notice of Appeal 2. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA 3. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Durham County 4. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis* 5. Petitioner's Pro Se Motion for Appointment of Counsel on Appeal	1. Dismissed *ex mero motu* 2. Dismissed 3. Dismissed 4. Allowed 5. Dismissed as moot **Ervin, J., recused**
425P20	Bilal K. Rasul v. Erik Hooks, North Carolina Department of Public Safety	Petitioner's Pro Se Motion for PDR Under N.C.G.S. § 7A-31	Denied
426A18	Elizabeth Zander and Evan Galloway v. Orange County, NC and the Town of Chapel Hill	Plts' Motion to Dismiss Appeal	Dismissed as moot
426P20	State v. Jerry Lee McDaniel	1. Def's Pro Se Motion for District Attorney to Obey Court Orders 2. Def's Pro Se Motion to Dismiss All Charges 3. Def's Pro Se Motion to Appoint Different Counsel	1. Dismissed 2. Dismissed 3. Dismissed
427P20	Carl Womack v. Merrimon Oxley	Plt's Pro Se Motion for Notice of Appeal	Dismissed **10/15/2020**
428P20	State v. Charles Edward Hickman	1. Def's Pro Se Motion for Notice of Appeal 2. Def's Pro Se Motion for PDR	1. Dismissed 2. Dismissed
429A19	In the Matter of E.B.	1. Respondent-Father's Petition for Writ of Mandamus 2. Respondent-Father's Amended Petition for Writ of Mandamus	1. Dismissed as moot **10/23/2020** 2. Denied **10/23/2020**
431P20	State v. Natividad Aguirre	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Cabarrus County	Dismissed

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434P20	Endasia Mahagony East v. United States of America, Gabriel J. Diaz	1. Petitioner's Pro Se Motion for Right to Petition Government for the Redress of Deprivation 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
435P15-4	State v. Sulyaman Alislam Wasalaam	1. Def's Pro Se Motion for Review 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed **11/13/2020** 2. Allowed **11/13/2020**
435P20	State v. Jordan Dewey Ownby	1. Def's PDR Under N.C.G.S. § 7A-31 2. Counsel's Motion to Withdraw 3. Counsel's Motion to Direct Appellate Defender to Appoint Substitute Counsel	1. Denied 2. Dismissed as moot 3. Dismissed as moot
436A19	Window World of Baton Rouge, LLC, et al. v. Window World, Inc., et al.	Plts' Motion for Leave to File Brief Under Seal	Allowed **10/15/2020**
437P20	State v. Peter Waweru Mwangi, Defendant, and 1st Atlantic Surety Company, Surety	1. Granville County Board of Education's PDR Under N.C.G.S. § 7A-31 2. Granville County Board of Education's Motion to Consolidate Petitions for Discretionary Review 3. 1st Atlantic Surety Company's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot 3. Dismissed as moot

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440P20	North Carolina Alliance for Retired Americans; Barker Fowler; Becky Johnson; Jade Jurek; Rosalyn Kociemba; Tom Kociemba; Sandra Malone; and Caren Rabinowitz, Plaintiffs v. the North Carolina State Board of Elections; and Damon Circosta, Chair of the North Carolina State Board of Elections, Defendants Philip E. Berger in his official capacity as President Pro Tempore of the North Carolina Senate; and Timothy K. Moore in his official capacity as Speaker of the North Carolina House of Representatives, Intervenor-Defendants and Republican National Committee; National Republican Senatorial Committee; National Republican Congressional Committee; Donald J. Trump for President, Inc; and North Carolina Republican Party, Intervenor-Defendants	1. Intervenor-Defendants' (Philip E. Berger and Timothy K. Moore, in their official capacities) Motion for Temporary Stay 2. Intervenor-Defendants' (Philip E. Berger and Timothy K. Moore, in their official capacities) Petition for Writ of Supersedeas 3. Intervenor-Defendants' (Republican National Committee, et al.) Motion for Temporary Stay 4. Intervenor-Defendants' (Republican National Committee, et al.) Petition for Writ of Supersedeas 5. Intervenor-Defendants' (Republican National Committee, et al.) Motion to Suspend the Rules of Appellate Procedure and Supplement the Record 6. Intervenor-Defendants' (Republican National Committee, et al.) Motion for Immediate Action on Request for Temporary Stay Pending Review of Petition for Writ of Supersedeas	1. Denied **10/23/2020** 2. Denied **10/26/2020** 3. Denied **10/23/2020** 4. Denied **10/26/2020** 5. Allowed **10/26/2020** 6. Allowed **10/23/2020** **Beasley, C.J., recused;** **Newby, J., recused;** **Davis, J., recused**
442P20	State v. James Ryan Kelliher	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31 5. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **10/23/2020** 2. 3. 4. 5.

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447P20	State v. James G. Moskos	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	Denied **10/27/2020**
451A20	In the Matter of J.L.F.	Respondent's Motion to File Corrected Record on Appeal	Allowed **11/30/2020**
454P20	Nafis Akeem-Alim Abdullah-Malik a/k/a Akeem A. Malik v. State of North Carolina	1. Defendant's Pro Se Motion for Return of Pro Se Filings 2. Defendant's Pro Se Petition for Writ of Habeas Corpus 3. Defendant's Pro Se Motion for Blank Subpoena Forms	1. Dismissed **11/06/2020** 2. Denied **11/06/2020** 3. Dismissed **11/06/2020**
454P20-2	Nafis Akeem-Alim Abdullah-Malik aka Akeem A. Malik v. State of North Carolina	1. Def's Pro Se Motion to Recall Order/ Mandate 2. Def's Pro Se Motion for Rehearing En Banc	1. Dismissed **11/25/2020** 2. Dismissed **11/25/2020**
455A18-2	John Tyler Routten v. Kelly Georgene Routten	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Dismissed as moot
455P20	State v. Michael Ray Waterfield	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/06/2020** 2. 3.
457P20	State v. Khalil Abdul Farook	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/06/2020** 2. 3.
458A20	In the Matter of L.G.G., L.G., and L.J.G.	Respondent-Father's Motion to Accept Record on Appeal as Timely Filed	Allowed. Respondent-Father's Brief will be filed within 30 days from 2 November 2020 to Retain the Original Briefing Schedule **11/16/2020**
460P19-2	Guy Unger v. Heather Unger	Plt's Petition for Writ of Certiorari to Review Decision of the COA	Denied
464P20	State v. Ronald Lee Ennis, Jr.	Def's PDR Under N.C.G.S. § 7A-31	Denied

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467A20	State v. Rafael Alfredo Pabon	1. Def's Notice of Appeal Based Upon a Dissent 2. Def's PDR as to Additional Issues	1. --- 2. Special Order
476P20	Timothy Omar Hankins, Sr. v. Sardia M. Hankins, Officers of the Court, Wake County District Court	1. Petitioner's Pro Se Motion for Emergency Petition for Review 2. Petitioner's Pro Se Petition for Writ of Mandamus	1. Denied **11/17/2020** 2. Denied **11/17/2020**
479P20	State v. Marie Elizabeth Butler	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/18/2020** 2. 3.
481P20	State v. Nathaniel D. Rice	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion for Appeal	1. Denied **11/20/2020** 2. Dismissed **11/20/2020**
482P20	Iris Pounds, Carlton Miller, Vilayuan Sayaphet-Tyler, and Rhonda Hall, on behalf of themselves and all others similarly situated v. Portfolio Recovery Associates, LLC	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Motion to Consolidate Appeals	1. Allowed **11/24/2020** 2. 3.
483P20	Shari Spector v. Portfolio Recovery Associates, LLC	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Motion to Consolidate Appeals	1. Allowed **11/24/2020** 2. 3.
484P20	Tigress McDaniel v. CMBOE, et al.	1. Plt's Pro Se Motion for Relief from Gatekeeper Order 2. Plt's Pro Se Motion to Vacate Gatekeeper Order	1. Dismissed 2. Dismissed
488P04-2	State v. Berkley Eugene Hairston	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied **11/23/2020** 2. Allowed **11/23/2020**

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490P20	State v. Islam Jabari	1. Def's Petition for Writ of Certiorari to Review Orders of the COA and Superior Court, Wake County 2. Def's Motion for Temporary Stay 3. Def's Petition for Writ of Supersedeas	1. Denied **12/01/2020** 2. Denied **12/01/2020** 3. Denied **12/01/2020**
507P20	State v. Michael Ray Waterfield	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/11/2020** 2. 3.
576P07-6	State v. Moses Leon Faison	Def's Pro Se Motion for Rehearing	Dismissed
580P05-18	In re David Lee Smith	1. Def's Pro Se Motion to Remand Case with Instructions to Liberally Construe Pro Se Petitioner's Complaint as Emergency Request to Expunge Convictions Pursuant to 2nd Chance Act 2. Def's Pro Se Emergency Petition for Writ of Mandamus 3. Def's Pro Se Motion for Independent Order for Release Pending Appeal	1. Dismissed **11/23/2020** 2. Denied **11/23/2020** 3. Denied **11/23/2020** **Ervin, J., recused**
580P05-19	In re David Lee Smith	1. Def's Pro Se Motion to Remand Court Record with Instructions for Superior Court to Docket Bond Hearing for the Week of December 7, 2020 at 10:00 a.m. 2. Def's Pro Se Motion for Wake County Sheriff's Department to Transport Appellant to Make Appearance at Hearing on Date Requested 3. Def's Pro Se Motion for Immediate Release on Written Promise Pending U.S. Supreme Court Decision on his Appeal	1. Dismissed **12/02/2020** 2. Dismissed **12/02/2020** 3. Denied **12/02/2020** **Ervin, J., recused**
592P97-2	Denver W. Blevins v. Kenneth Diggs, et al.	1. Petitioner's Pro Se Motion for PDR Under N.C.G.S. § 7A-31 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied **09/25/2020** 2. Allowed **09/25/2020**

THE COMMITTEE TO ELECT DAN FOREST, A POLITICAL COMMITTEE
v.
EMPLOYEES POLITICAL ACTION COMMITTEE (EMPAC),
A POLITICAL COMMITTEE

No. 231A18

Filed 5 February 2021

Constitutional Law—North Carolina—standing—no "injury in fact" requirement—legal right arising from statute

In a case of first impression, the Supreme Court held that, unlike the federal constitution, the North Carolina Constitution does not impose an "injury in fact" requirement for standing, and therefore a committee to elect a political candidate had standing to seek statutory damages against a political action committee for running a television advertisement that allegedly violated a "stand by your ad" law, even though the candidate won his election. The Court further clarified that where a statute (such as the "stand by your ad" law) expressly confers a cause of action to a class of persons, entitling them to sue for infringement of a legal right arising from the statute, a plaintiff has standing to bring that cause of action so long as he or she belongs to that designated class of persons.

Chief Justice NEWBY concurring in the result by separate opinion.

Appeal 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. 1 (2018), reversing an order of summary judgment entered on 15 February 2017 by Judge Allen Baddour in Superior Court, Wake County. On 5 December 2018, the Supreme Court allowed defendant's petition for discretionary review as to additional issues. Heard in the Supreme Court on 4 November 2019.

Walker Law Firm, PLLC, by David Steven Walker, II, for plaintiff.

Stevens Martin Vaughn & Tadych, by C. Amanda Martin and Michael J. Tadych, for defendant.

HUDSON, Justice.

¶ 1 At issue here is a question of first impression for our Court: whether the North Carolina Constitution limits the jurisdiction of our courts in the same manner as the standing requirements Article III imposes

on federal courts, including the requirement that the complaining party must show she has suffered "injury in fact," even where an Act of the North Carolina General Assembly expressly confers standing to sue on a party, as it did in N.C.G.S. § 163-278.39A(f) (2011) (now repealed). We hold that it does not, and we affirm the decision of the Court of Appeals.[1]

I. Factual Background and Procedural History

¶ 2 In 2012, Linda Coleman and Dan Forest were, respectively, the Democratic and Republican candidates for Lieutenant Governor of North Carolina in the general election. The Employees Political Action Committee ("EMPAC" or "defendant"), a political action committee for the State Employees Association of North Carolina (SEANC), ran television advertisements supporting Ms. Coleman. According to plaintiff's complaint, the original version of the advertisement placed by EMPAC included a photograph of an individual that was approximately one-eighth the height of the full advertisement and, at any rate, was not a full-screen picture as then required by law. Furthermore, the individual in the picture, Dana Cope, was neither the Chief Executive Officer nor the treasurer of EMPAC as required by then-existing law.

¶ 3 After discovering the ad, the Committee to Elect Dan Forest (hereinafter, "plaintiff" or "the Committee") sent a notice and letter to the North Carolina State Board of Elections and EMPAC regarding the size of the picture. The notice did not mention that the wrong individual was pictured. EMPAC subsequently removed the advertisement and replaced it with one including a full-screen picture. The full-screen picture in the second advertisement was also of Mr. Cope, and therefore also failed to comply fully with disclosure requirements.

¶ 4 Mr. Forest ultimately won the 2012 election for Lieutenant Governor. Thereafter, on 9 March 2016, his Committee filed a complaint in the Superior Court of Wake County against EMPAC, alleging violations of N.C.G.S. § 163-278.39A.

¶ 5 In 1999, the North Carolina General Assembly enacted N.C. Session Law 1999-453, codified at N.C.G.S. § 163-278.38Z *et seq.* (2011) (hereinafter, "Disclosure Statute"), as a "Stand By Your Ad" law.[2] The Disclosure Statute provided specific requirements for television and radio ads

1. We also hold that discretionary review was improvidently allowed as to the additional issue.

2. N.C.G.S. § 163-278.39A was repealed by the General Assembly effective 1 January 2014. Session Law 2013-381, § 44.1.

placed by candidate campaign committees, political action committees, and others supporting or opposing candidates. *See generally* N.C.G.S. § 163-278.39A. In pertinent part, the Disclosure Statute provided that television ads by political action committees "shall include a disclosure statement spoken by the chief executive officer or treasurer of the political action committee and containing at least the following words: 'The [name of political action committee] political action committee sponsored this ad opposing/supporting [name of candidate] for [name of office].' " *Id.* § 163-278.39A(b)(3). Furthermore, the Disclosure Statute required that, for all ads on television falling under the statute, "an unobscured, full-screen picture containing the disclosing individual, either in photographic form or through the actual appearance of the disclosing individual on camera, shall be featured throughout the duration of the disclosure statement." *Id.* § 163-278.39A(b)(6).

¶ 6 The Disclosure Statute also included a notable enforcement mechanism. In a section entitled "Legal Remedy," it created a private cause of action as follows:

> [A] candidate for an elective office who complied with the television and radio disclosure requirements throughout that candidate's entire campaign shall have a monetary remedy in a civil action against (i) an opposing candidate or candidate committee whose television or radio advertisement violates these disclosure requirements and (ii) against any political party organization, political action committee, individual, or other sponsor whose advertisements for that elective office violates these disclosure requirements[.][3]

Id. § 163-278.39A(f). The North Carolina Court of Appeals has previously characterized the cause of action created by the General Assembly in the Disclosure Statute as "unique in the world of election law." *Friends of Joe Sam Queen v. Ralph Hise for N.C. Senate*, 223 N.C. App. 395, 403 n.7 (2012).

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3. A subsection of this section provided that, as a condition precedent to bringing suit under the statute, the complaining party must file a notice with the State Board of Elections or a county board of elections (for statewide and nonstatewide candidates, respectively) "after the airing of the advertisement but no later than the first Friday after the Tuesday on which the election occurred." N.C.G.S. § 163-278.39A(f)(1). The other subsections provided a formula for calculating damages, including treble damages in certain circumstances, and shifted attorneys' fees to a party found to be in violation of the statute. *Id.* §§ 163-278.39A(f)(2), (3).

¶ 7 Plaintiff's complaint alleged two violations of the Disclosure Statute by EMPAC: (1) from 8 October through 25 October 2012, EMPAC ran a television ad that did not include "a full-screened picture containing the disclosing individual" but a much smaller one; and (2) Mr. Cope, the individual pictured in both versions of the ad, was not in fact "the Chief Executive Officer or treasurer of EMPAC."[4] The complaint included as attachments an affidavit from Mr. Forest attesting the Committee was bringing the complaint on his behalf, records of the proposed schedule for ad run times with Time Warner Cable, the invoices for the ads, and copies of the notice and letter sent to the State Board of Elections and EMPAC. Defendant filed an answer and motion to dismiss based on lack of standing, which was denied. After failing to answer discovery, plaintiff voluntarily dismissed the lawsuit on 30 June 2015 and refiled on 9 March 2016.

¶ 8 After discovery in the case proceeded, defendant filed a motion for summary judgment on 29 June 2016, arguing the Disclosure Statute violated the First Amendment as a content-based restriction on speech. After hearing the motion on 16 August 2016, the trial court entered an order on 15 February 2017 granting defendant's motion for summary judgment, stating that "plaintiff ha[d] failed to allege any forecast of damage other than speculative damage" and that "[i]n the absence of any forecast of actual demonstrable damages, the statute at issue is unconstitutional as applied."[5] Plaintiff gave timely notice of appeal to the North Carolina Court of Appeals.

¶ 9 In a split decision issued on 19 June 2018, the Court of Appeals reversed the trial court's grant of summary judgment to EMPAC. *Comm. to Elect Dan Forest v. Employees Pol. Action Comm. (EMPAC)*, 260 N.C. App. 1, 2 (2018). The majority reasoned that by "actual demonstrable damages" the trial court meant the Committee lacked standing to sue because Mr. Forest had not shown adequate "injury." Relying on deci-

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4. In order to preserve a claim under the Disclosure Statute, the Committee was required to file a Notice of Complaint with the State Board of Elections within a certain time period after the election. N.C.G.S. § 163-278.39A(f)(1) (2011). While the Forest Committee presented evidence that it had filed such a notice in a timely manner, the notice contained only the allegation of the incorrectly-sized picture, not the allegation relating to the identity of the disclosing individual. As a result, the Committee has not preserved the claim that this aspect of the Disclosure Statute was violated.

5. We note it is not clear from the trial court's wording whether by this rationale it meant that plaintiff had not suffered injury sufficient to give it standing to sue or that the damage award imposed by the statute was constitutionally excessive without a showing of "actual demonstrable damages." The parties and the Court of Appeals addressed both of these arguments on appeal, so both arguments are preserved.

sions of this Court, the majority held the Committee had standing to sue because the Disclosure Statute creates a private right of action for a candidate against a party when that party runs an ad in the candidate's election violating the Statute and "the breach of the private right, itself, constitutes an injury which provides standing to seek recourse." *Id.* at 8. The majority further held the damages awarded under the Disclosure Statute were not unconstitutionally excessive even absent a showing of actual damages and that the Disclosure Statute did not *per se* violate the First Amendment, as EMPAC had argued on appeal. *Id.* at 11–12.

¶ 10 Chief Judge McGee dissented from the majority decision of the Court of Appeals, maintaining that plaintiff had not satisfied the condition precedent required by the Disclosure Statute and also that plaintiff lacked standing to sue because it had not shown "actual harm." *Id.* at 13 (McGee, C.J., dissenting). While noting that "North Carolina courts are not constitutionally bound by the standing jurisprudence established by the United States Supreme Court[,]" the dissent also noted that North Carolina appellate courts had previously applied United States Supreme Court decisions to questions of standing and, therefore, United States Supreme Court precedent is binding on the Court of Appeals. *Id.* at 14. The dissent noted that our courts have used the language "injury in fact" to describe the standing inquiry and then cited and extensively reviewed the recent United States Supreme Court decision in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), to support the proposition that the North Carolina Constitution imposes the same "injury-in-fact" requirements of a "concrete" and "particularized" injury as the United States Constitution imposes on federal courts, including the implication that a statutory conferral of standing, without more, does not necessarily give a party sufficient interest to have standing to sue. *Comm. to Elect Dan Forest*, 260 N.C. App. at 14–16. The dissent concluded, following the reasoning in *Spokeo*, that a statutory grant of standing does not necessarily confer standing on a party under the North Carolina Constitution absent a concrete and particularized injury in fact and, because the interests vindicated by the statute were public and not private, the Committee had not suffered adequate harm to satisfy the injury requirements for standing. *Id.* at 19.

¶ 11 EMPAC appealed to this Court based on the dissent. This Court also granted EMPAC's petition for discretionary review of additional issues, which asked this Court to determine whether the Disclosure Statute was an unconstitutional restriction on EMPAC's free-speech rights and what standard should apply to that inquiry.

II. Standard of Review

¶ 12 We review the grant or denial of summary judgment *de novo*. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523 (2012). Summary judgment shall be granted "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). In ruling on a summary judgment motion, we "consider the evidence in the light most favorable to the non-movant, drawing all inferences in the non-movant's favor." *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018). "We review constitutional questions de novo." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639 (2016).

III. Analysis

¶ 13 Defendant argues plaintiff has failed to establish an "injury in fact" sufficient to have standing to sue under the North Carolina Constitution. Plaintiff argues that, unlike the United States Constitution, the North Carolina Constitution does not require a plaintiff to make an additional showing of injury where a statutory right of action is conferred by the General Assembly in order for the case to come within the power of our courts. Whether the North Carolina Constitution limits the jurisdiction of our courts in the same manner as the standing requirements Article III[6] imposes on federal courts, including the requirement that the complaining party show "injury in fact," even where an Act of the General Assembly, such as the Disclosure Statute here, expressly confers a statutory cause of action, is a question of first impression for this Court.[7] While we have held the Court of Appeals errs in relying on federal standing doctrine, and, specifically, that "[w]hile federal standing doctrine can be instructive as to general principles . . . and for comparative analysis, the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine[,]" *Goldston v. State*, 361 N.C. 26, 35 (2006), we have declined to delineate those differences. Our silence on this fundamental matter has engendered substantial confusion and disagreement in the lower courts and we end it today.

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6. U.S. Const., Art. III, sec. 2.

7. We note, as Chief Judge McGee did in dissent below, our Court of Appeals has previously decided that in some circumstances the federal standing requirements also apply to North Carolina law. *See, e.g., Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113–15 (2002); *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 390–92 (2005). This Court is not bound by those precedents.

¶ 14 North Carolina courts recognized nearly sixteen years before *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that it is the duty of the judicial branch to interpret the law, including the North Carolina Constitution. *See Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787). This duty includes the responsibility to construe the limits on the powers of the branches of government created by our Constitution. *See*, *e.g.*, *Cooper v. Berger*, 370 N.C. 392 (2018); *State ex rel. McCrory v. Berger*, 368 N.C. 633 (2016).

A. Textual Analysis

¶ 15 As ours is a written constitution, we begin with the text. *See State ex rel. Martin v. Preston*, 325 N.C. 438, 449 (1989) ("In interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere.").

> The will of the people as expressed in the Constitution is the supreme law of the land. In searching for this will or intent all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument. The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and compare it with other words and sentences with which it stands connected.

Id. at 449. In construing the document, "[w]e are guided by the basic principle of constitutional construction of giving effect to the intent of the framers." *State v. Webb*, 358 N.C. 92, 94 (2004) (cleaned up). "Constitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption. To ascertain the intent of those by whom the language was used, we must consider the conditions as they then existed and the purpose sought to be accomplished." *Id.*

¶ 16 Black's Law Dictionary defines "Standing" as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary (11th ed. 2019). The term does not appear in the North Carolina Constitution, nor does it appear in the United States Constitution.[8] Instead, federal courts have construed Article III's lim-

8. Indeed, the term "standing" is of relatively recent vintage. *See* Joseph Vining, *Legal Identity: The Coming of Age of Public Law* 55 (1978) ("The word *standing* is rather recent in the basic judicial vocabulary and does not appear to have been commonly used until the middle of our own century. No authority that I have found introduces the term with proper explanations and apologies and announces that henceforth *standing* should be used to

ited extension of federal "Judicial Power" to hear certain categories of "Cases" and "Controversies" as giving rise to the standing requirement. U.S. Const. Art. III, § 2; *See, e.g.*, *Flast v. Cohen*, 392 U.S. 83, 94–95 (1968). Thus, at least as a matter of federal law, standing, along with other justiciability doctrines, is a limitation on the exercise of judicial power.

¶ 17 Article IV of the North Carolina Constitution delineates the State's judicial power as follows:

> The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.

N.C. Const. Art. IV, § 1. As a matter of textual interpretation, we note this provision does not expressly define the term "judicial power." The provision also does not impose any express limitation on the exercise of the judicial power itself, such as the "case or controversy" requirement of the United States Constitution. To the contrary, the only limitation in the text of the provision protects the judicial power and jurisdiction of the courts from intrusion by the General Assembly except by vesting administrative agencies with judicial powers reasonably necessary to carry out their work under Article IV, Section 3. This provision was not enacted until the North Carolina Constitution of 1868, and has been readopted largely intact in subsequent versions since then.[9]

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describe who may be heard by a judge. Nor was there any sudden adoption by tacit consent. The word appears here and there, spreading very gradually with no discernible pattern. Judges and lawyers found themselves using the term and did not ask why they did so or where it came from."). One scholar's search locates the United States Supreme Court's first use of the term "standing" as an Article III limitation in *Stark v. Wickard*, 321 U.S. 288 (1944). *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 169 (1992); *see also id.* ("The explosion of judicial interest in standing as a distinct body of constitutional law is an extraordinarily recent phenomenon."). Another scholar identifies the first use of the term in this sense by a justice of that court in *Coleman v. Miller*, 307 U.S. 433, 464-68 (1939) (Frankfurter, J., concurring). *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371, 1378 (1988).

9. Although the Constitution of 1776 did not include this provision, it did provide for the appointment of judges to the "Supreme Court of Law and Equity" by the General Assembly, and the Declaration of Rights enacted at that time included the familiar

See N.C. Const. of 1868, art. IV., § 1; N.C. Const. of 1868, art. IV, § 1 (1935); N.C. Const. Art. IV, § 1 (1971).

¶ 18 This Court has previously tied another provision of our Constitution to the concept of standing: the remedy clause, an aspect of the open courts provision of Article I, Section 18, which states "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law[.]" N.C. Const. Art. I, § 18; *see Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642 (2008) (quoting N.C. Const. Art. I, § 18). A version of this provision was included in the Declaration of Rights in 1776, but the current text of the provision was not enacted until the 1868 Constitution as well. *See* N.C. Const. of 1776, Dec. of Rights, § XIII (1776); N.C. Const. of 1868, art. I, § 35. While the text of this provision does refer to "injury," the plain meaning of the provision prohibits the use of government power to *withhold* a remedy to an injured party; it does not appear on its face to limit the exercise of judicial power to any particular set of circumstances.

¶ 19 If the framers of our Constitution intended any limitation on the exercise of judicial power analogous to the standing requirements imposed by the federal constitution, it is not clear from the plain meaning of the constitutional text. Therefore, to determine what the framers meant by "judicial power" and other provisions including the remedy clause, in addition to "the text of the constitution," we must examine "the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents." *McCrory*, 368 N.C. at 639. We begin with surveying standing at common law before turning to a view of standing in federal caselaw and, finally, to our own Constitution and caselaw.

B. English Common Law History

¶ 20 English common law provides an important touchstone for determining the intent of the framers of both the federal and, in many cases, state constitutions.[10] " 'It is manifest,' said the General Assembly of North Carolina in 1715 'that the laws of England are the laws of this Government, so far as they are compatible with our way of living and trade.' " *State v. Willis*, 255 N.C. 473, 474 (1961) (quoting 17 N.C. L. Rev.

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constitutional touchstone "[t]hat the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other." N.C. Const. of 1776, Declaration of Rights, § IV (1776).

10. We are not the first state supreme court to plough the fields of English common law as it pertains to standing under state constitutions. *See, e.g.*, *Couey v. Atkins*, 357 Or. 460 (2015).

205). In 1778, in a statute that has continued unaltered since, the General Assembly of our newly constituted State adopted the common law:

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

N.C.G.S. § 4-1 (2019). "The 'common law' referred to in N.C.G.S. § 4-1 has been held to be the common law of England as of the date of the signing of the American Declaration of Independence." *Gwathmey v. State*, 342 N.C. 287, 296 (1995). While the General Assembly may in general modify or repeal the common law, "any parts of the common law which are incorporated in our Constitution may be modified only by proper constitutional amendment." *Id.* (citing *State v. Mitchell*, 202 N.C. 439 (1932)). Thus, while not necessarily dispositive, the common law background is highly relevant to discerning the meaning of the constitutional text when it was adopted.

¶ 21 When examining "standing" (as a requirement for a personal stake in litigation) under English common law, the first thing one notes is its almost complete absence. Instead, "[b]efore and at the time of the framing [of the United States Constitution], the English practice was to allow strangers to have standing in the many cases involving the ancient prerogative writs." Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 171 (1992) (hereinafter, *Standing After* Lujan). A "stranger" in this sense means "[s]omeone who is not party to a given transaction" or "[o]ne not standing toward another in some relation implied in the context," therefore, one who lacks a personal stake in the litigation. "Stranger," Black's Law Dictionary (11th ed. 2019). The prerogative writs for which courts recognized the authority of strangers to sue to enforce public rights included the writs of certiorari, prohibition, mandamus, and *quo warranto*. *See generally* Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265 (1961) (hereinafter *Standing to Secure*); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional* Requirement?, 78 Yale L.J. 816 (1969) (hereinafter, *Standing to Sue*); John L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371 (1988) (hereinafter, *Metaphor*).

¶ 22 The extraordinary writs of certiorari[11] and prohibition[12] both authorized such "stranger suits." "The English tradition of *locus standi* in prohibition and certiorari is that 'a stranger' has standing, but relief in suits by strangers is discretionary. If, however, the official's lack of 'jurisdiction' [ ] appeared on the face of the record, relief followed as [a matter] of course." Jaffe, *Standing to Secure*, 74 Harv. L. Rev. at 1274. The *locus standi* rule permitting stranger suits "has been explained on the ground that a usurpation of jurisdiction, being an encroachment upon the royal prerogative, caused such concern that it made little difference who raised the question." *Id.*

¶ 23 First, English courts strongly defended the right of strangers to bring writs of prohibition. In a notable example, clergy complained to the king of excessive grants of writs of prohibition against ecclesiastical courts. In response, according to Lord Coke, "all the judges of England, and the barons of the Exchequer, with one unanimous consent," answered the charges in a seminal document called *Articulo Cleri*. The judges stated as follows in their Third Answer to the complaints:

> Prohibitions by law are to be granted at any time to restraine a court to intermeddle with, or execute any thing, which by law they ought not to hold plea of, and they are much mistaken that maintaine the contrary . . . . And the kings courts that may award prohibitions, being informed either by the parties themselves, *or by any stranger*, that any court temporall or ecclesiasticall doth hold plea of that (whereof they have not jurisdiction) may lawfully prohibit the same, as well after judgment and execution, as before.

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11. The prerogative writ of certiorari was the antecedent of this Court's own writ of certiorari. *See* N.C. R. App. P. 21; *see also* N.C. Const. art. IV, § 12 ("the [Supreme] Court may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts."). As used by the King's Bench, however, it had a narrower function, generally reviewing the decisions of lower courts only for exceeding their jurisdiction in particular cases. Daniel R. Coquillette, *The Anglo-American Legal Heritage* 248 (1999). However, the writ was also used to regulate administrative agencies performing judicial functions. *See* Berger, *Standing to Sue*, 78 Yale L.J. at 821–22.

12. Prohibition was "[a]n extraordinary writ issued by an appellate court to prevent a lower court from exceeding its jurisdiction or to prevent a nonjudicial officer or entity from exercising a power." "Prohibition," Black's Law Dictionary (11th ed. 2019). "The writ is so ancient that forms of it are given in Glanville . . . , the first book of English law, written in the year 1189." Forrest G. Ferris & Forrest G. Ferris, Jr., *The Law of Extraordinary Legal Remedies* 414–15 (1926). Like the writs of certiorari and mandamus, it persists today. *See* N.C. R. App. P. 22.

Edward Coke, 2 *Institutes of the Laws of England* 602 (1797) (emphasis added).[13] Similarly, the writ of certiorari in English practice could be brought by strangers.[14]

¶ 24 The prerogative writ of mandamus was also extended to strangers without a personal stake. Professor Louis Jaffe has described the writ of mandamus[15] as being "invented" by Lord Coke, sitting on the King's Bench, "if not out of whole cloth then at least out of a few rags and tatters[.]" Jaffe, *Standing to Secure*, 74 Harv. L. Rev. at 1269. In *James Bagg's Case*, Lord Coke, reasoning the first assertion of jurisdiction through the writ was justified "so that no Wrong or Injury, either Publick or Private, can be done, but that it shall be reformed or punished by due Course of Law."[16] 11 Coke 93b, 98a, 77 Eng. Rep. 1271, 1278 (K.B. 1615). English cases have long held that, in matters of public right, anyone may seek the writ of mandamus to enforce the public's interest.[17] *See People*

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13. Professor Raoul Berger makes the following observation regarding this passage: "No English court, so far as I can discover, has ever rejected the authority of *Articulo Cleri* or denied that a writ of prohibition may be granted at the suit of a stranger. On the contrary, Coke was cited by the 18th century Abridgments and by English courts throughout the 19th century, and his rule remains the law in England today. Thus, at the time of the [American] Revolution, the 'courts in Westminster' afforded to a stranger a means of attack on jurisdictional excesses without requiring a showing of injury to his personal interest." Berger, *Standing to Sue*, 78 Yale L.J. at 819–20 (footnotes omitted); *see also Wadsworth v. Queen of Spain*, 17 Q.B. 171, 214 (1851) ("[W]e find it laid down in books of the highest authority that, where the court to which prohibition is to go has no jurisdiction, a prohibition may be granted upon the request of a *stranger*, as well as of the defendant himself." (citing 2 Coke 607)).

14. In *Arthur v. Commissioners of Sewers*, 88 Eng. Rep. 237 (K.B. 1725), for instance, the King's Bench distinguished between a party with a personal stake and "one who comes merely as a stranger," in determining whether the remedy of a writ of certiorari was mandatory or merely discretionary.

15. Mandamus being then, as now, "[a] writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body[.]" "Mandamus," Black's Law Dictionary (11th ed. 2019); *see Sutton v. Figgatt*, 280 N.C. 89, 93 (1971) ("The writ of mandamus is an order from a court of competent jurisdiction to a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law."); N.C. R. App. P. 22.

16. Lord Coke's rationale for the assertion of jurisdiction through mandamus is, as further discussed below, an exposition of Magna Carta that two-and-a-half centuries later would become the remedy clause in our Constitution's Declaration of Rights. *Cf.* N.C. Const. Art. I, § 18 ("every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law[.]").

17. Professor Jaffe notes "I have encountered no case before 1807 in which the standing of plaintiff is mooted, though the lists of the cases in the digest strongly suggest the possibility that the plaintiff in some of them was without a personal interest." Jaffe, *Standing to Secure*, 74 Harv. L. Rev. at 1271.

ex rel. Case v. Collins, 19 Wend. 56, 65-66 (N.Y. Sup. Ct. 1837) (collecting English cases in which party obtaining mandamus in name of king was a private person without a personal interest); *id.* at 65 ("It is at least the right, if not the duty of every citizen to interfere and see that a public offence be properly pursued and punished, and that a public grievance be remedied.").

¶ 25 The writ for *quo warranto* also contemplated suit by a stranger.[18] *See, e.g.*, *Rex v. Smith*, 100 Eng. Rep. 740 (1790) (discussing *Rex v. Brown* (1789), in which writ of *quo warranto* was granted despite "it [] not appear[ing that] the party making the application ha[d] any connection with the corporation [(a municipal government)] because "the ground on which this application is made to enforce a general Act of Parliament, which interests all the corporations of the kingdom; and therefore it is no objection that the party applying is not a member of the corporation."). *See also* Berger, *Standing to Sue*, 78 Yale L. J. at 823 (discussing same).

¶ 26 Finally, English law recognized the practice of "informers" and "relators" actions, which presaged modern "private attorney general actions."

> ["Informers" actions] went beyond making *available* procedures to control unlawful conduct, and offered financial *inducements* to strangers to prosecute such actions, provided for by a "very large" number of statutes "in which the public at large was encouraged to enforce obedience to statutes by the promise of a share of the penalty imposed for disobedience . . ." Such informers had "no interest whatever in the controversy other than that given by statute," and the pecuniary reward thus offered to strangers was little calculated to read cognate remedies narrowly.

Berger, *Standing to Sue*, 78 Yale L. J. at 825–26 (footnotes omitted).[19] A "relator" action, often for a writ of *quo warranto*, could be brought

18. "Quo Warranto," was "[a] common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed." "Quo Warranto," Black's Law Dictionary (11th ed. 2019). The writ of *quo warranto* was ultimately modified by England's Statute of Anne, 9 Anne c. 20 (1710), after which the statutory "information in nature of *quo warranto*" lied instead. *See Saunders v. Gatling*, 81 N.C. 298, 300 (1879).

19. *See also Martin v. Trout*, 199 U.S. 212, 225 (1905) ("Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence hundreds of years in England, and in this country ever since the foundation of our government.").

by the Attorney General, according to Blackstone, "at the relation of any person desiring to prosecute the same, (who is then styled the *relator*). . . ." William Blackstone, 3 *Commentaries on the Laws of England* 264. The relator need have no personal interest in the matter apart from the public interest. *See, e.g.*, *Rex v. Mayor of Hartford*, 91 Eng. Rep. 325 (1700) (*quo warranto* issued against mayor and alderman to show 'by what authority they admitted persons to be freemen of the corporation who did not inhabit in the borough. The motion was pretended to be on behalf of freemen, who by this means were encroached upon." (emphasis added)).

¶ 27 In summary, under English common law practice, which informs our interpretation of the intent of the framers of our State's constitutional text, the concept of "standing," as a personal stake, aggrievement, or injury as a prerequisite for litigation brought to vindicate public rights, was basically absent.[20] Instead, the English practice included the prerogative writs and informers and relators actions, which "took forms astonishingly similar to the 'standingless' public action or 'private attorney general' model that modern standing law is designed to thwart." Winter, *Metaphor*, 40 Stan. L. Rev. at 1396. To the extent the framers of the North Carolina Constitution were informed by the English common law which so suffused the development of law in America in crafting our constitutional text, we must conclude the use of the term "judicial power" excluded any requirement that there be "actual harm" or "injury in fact" apart from the existence of a legal right or cause of action to have standing to invoke the power of the courts in this State. This was almost certainly the intent of the original framers of the North Carolina Constitution in 1776 in establishing a "Supreme Court of Justice in Law and Equity" and recognizing a "judicial power[]" to be preserved "ever separate and distinct" from the legislative and executive powers. N.C. Const. of 1776, Declaration of Rights, § IV (1776).

¶ 28 Of course, Article IV of our Constitution which now delineates the judicial power is a product of the transformative 1868 Reconstruction convention and the most recent reorganization of our Constitution in 1971, along with the major amendments in 1935. Therefore, one may object that, whatever the meaning of the term as used by colonial lawyers raised on the English common law in 1776, that meaning no longer holds today. We therefore examine the law of standing as it evolved in America and, in particular, North Carolina to determine if that meaning still applies.

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20. *See* Jaffe, *Standing to Secure*, 74 Harv. L. Rev. at 1270; Berger, *Standing to Sue*, 78 Yale L.J. at 827, Winter, *Metaphor*, 40 Stan. L. Rev. at 1374.

C. The American Experience

¶ 29 In the century following the Revolution, the American states, including North Carolina, inherited the English common law of prerogative writs and, in general, drew a distinction between writs enforcing private rights, which required a showing of legal right or injury (i.e., the existence of a cause of action, as a matter of substantive—not constitutional—law), and those enforcing public rights, which could be brought by anyone or, at its most restrictive, a citizen or taxpayer. *See Couey*, 357 Or. at 496–98 (summarizing the caselaw of the period). Furthermore, in the late-nineteenth and early-twentieth centuries state courts, including in North Carolina, began expressing a concern with mootness, not as a constitutional but as a discretionary, prudential limitation on judicial power. *See id*. at 498–99.

¶ 30 One early case reveals the early framers' conception of the judicial powers of this Court, including the power to hear prerogative writs, relative to the English courts. In *Griffin v. Graham*, (1 Hawks) 8 N.C. 96 (1820), this Court, acting in equity, heard a complaint from the would-be heirs of a decedent who instead sought to create a trust for the establishment of a free school for indigent students. *Griffin*, 8 N.C. at 97–99. This Court held the charitable trust was valid and the court had jurisdiction to declare it so because, per the reporter's headnotes,

> though the jurisdiction of charities in England belong[ed] to the Court of Chancery, not as a Court of Equity, but as administering the prerogative of the Crown, the Court of Equity of this state hath the like jurisdiction: for, upon the revolution, the political rights and duties of the King devolved upon the people in their sovereign capacity; and they, by their representatives, have placed this power in the Courts of Equity, by the acts of Assembly of 1778, c. 5, and 1782, c. 11.

Griffin, 8 N.C. at 97. Thus, this Court necessarily recognized it inherited the same jurisdiction, including the expansive prerogative writs, now in the name of the sovereign people rather than the Crown, through the statute now codified at N.C.G.S. § 4-1, discussed above. Although the language is not couched in constitutional terms, this early decision interpreting the acts of the first session of our General Assembly is persuasive evidence of what the framers of our 1776 Constitution believed the content and limits of judicial power to be. Chief Justice Taylor, speaking for a majority of the Court, recognized, as a matter of *parens*

patriae, the authority of the Court of Chancery in England (and thus, by statutory succession, the Court of Equity in North Carolina) to hear an "information for a charitable trust" filed *ex officio* by the Attorney General "*at the relation of some informant*, where it is necessary."[21] *Id.* at 133 (emphasis added).

¶ 31 Broad access to the prerogative writs for vindication of public rights without a showing of personal interest was widely accepted in the nineteenth century. By 1875, the United States Supreme Court recognized "[t]here [wa]s . . . a decided preponderance of American authority in favor of the doctrine, that private persons may move for a [writ of] *mandamus* to enforce a public duty, not due to the government as such, without the intervention of the government law-officer." *Union Pac. R. Co. v. Hall*, 91 U.S. 343, 355 (1875) (citing many cases from several states). The Supreme Court of Illinois, in one of the cases cited therein, summarized the difference between private rights and public rights:

> The question, who shall be the relator . . . depends upon the object to be attained by the writ. Where the remedy is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced, must become the relator. . . . A stranger is not permitted officiously to interfere, and sue out a mandamus in a matter of private concern. But where the object is the enforcement of a public right, the People are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested, as a citizen, in having the laws executed, and the right in question enforced.

Pike Cnty. Comm'rs v. Illinois ex rel. Metz, 11 Ill. 202, 207–08 (1849).

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21. Although this Court did not address what, if any, interest the relator must have to invoke the court's jurisdiction, William J. Gaston, who would become a justice of this Court, was one of the trustees and is reported to have argued before the Court that North Carolina law permitted a writ of mandamus filed by a relator in the absence of a personal interest to vindicate the public's interest. 8 N.C. at 124–25 ("It is well settled, that the discretion of the trustees does not make it the less a charity: nor does it oppose the right of this Court to interfere; for, in all cases of discretionary powers, if they be abused, the Court will interfere, and by virtue of its general jurisdiction over trusts, will take the trust out of impure hands, and place it in honester. And, upon a bill in the name of the Attorney-General, (and any person, however remotely concerned, may be *relator*,) the Court will compel the trust to act, or to assign the trust.").

¶ 32 This Court followed the majority trend in recognizing the right of persons without any personal interest or injury to pursue actions to vindicate a public right throughout the nineteenth century. For instance, this Court, without any further showing or discussion of his interest, permitted a plaintiff "as a citizen and taxpayer of the state," to bring an action for mandamus against the secretary of state. *Carr v. Coke*, 116 N.C. 223, 223 (1895).

¶ 33 Another example concerns actions by private relators under section 366 of the Code of Civil Procedure of 1868, which, largely following the Statute of Anne, abolished the writ of *quo warranto* and provided a statutory action in the nature of a writ of *quo warranto* for private persons as relator to challenge the wrongful occupation of municipal offices in the name of the state, with the permission of the Attorney General. In 1892, this Court heard an action under the statute filed in the name of the state by a taxpayer and citizen of Greensboro against the appointment of a police chief, who challenged the suit on the grounds that the relator "d[id] not allege that he is entitled to the office, nor has any interest in its emoluments, and therefore is not a proper relator." *State ex rel. Foard v. Hall*, 111 N.C. 369, 369 (1892). This Court held that, under the statute, "[i]t is not necessary that the relator should have such interest." *Id.* This Court reasoned that "In many instances . . . when an office is illegally held or usurped, there is no one else who can claim a title thereto. In such cases, unless a voter or taxpayer (not a mere stranger)[22] can bring the action by leave of the attorney general, there would often be no remedy[.]" *Id.* at 370. Other cases interpreting the *quo warranto* statute show that any private person can bring an action under it and the purpose of the statute is to vindicate public, not private, rights. *See Ellison v. Raleigh*, 89 N.C. 125, 132 (1883) (holding the statute "seems to contemplate the action as one open upon the complaint of any private party[.]"); *Saunders v. Gatling*, 81 N.C. 298, 301 (1879) ("It is not merely an action to redress the grievance of a private person who claims a right to the office, but the public has an interest in the question which the legislature by these provisions of the code seems to have considered paramount to that of the private rights of the persons aggrieved[.]").

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22. Although this Court limited the class of persons who could bring the action to citizens or taxpayers as opposed to "mere strangers," this was a matter of statutory, rather than constitutional, interpretation. This Court later cited *Hall* in dismissing a complaint brought by a relator under the statute for failing to allege as a matter of substantive law under the relevant code section that he was a citizen or taxpayer of the county and thus did not show he was a "party in interest" under the Code of Civil Procedure. *State ex rel. Hines v. Vann*, 118 N.C. 3, 6 (1896) (citing N.C. Code Civ. P. of 1868, § 177).

¶ 34 These cases demonstrate that in North Carolina, as in a "decided preponderance" of states throughout the nineteenth century, *see Union Pac. R. Co.*, 91 U.S. at 355, the writ of mandamus and the successor by statute of the writ of *quo warranto* were both broadly available for the vindication of public rights common to all citizens and taxpayers, without any required showing of a personal interest. Even where such a showing was required, such as where a private right was asserted, it was treated as a matter of substantive, not constitutional law.[23]

D. Federal Standing Law and the "Case" or "Controversy" Requirement

¶ 35 Before resolving the question at hand under the North Carolina Constitution, we must examine the federal law of standing arising under the United States Constitution.[24] Federal justiciability doctrines—standing, ripeness, mootness, and the prohibition against advisory opinions—are not explicit within the constitutional text, but are the fruit of judicial interpretation of Article III's extension of the "judicial Power" to certain "Cases" or "Controversies."[25] U.S. Const. art. III, § 2;

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23. Standing is not the only modern "justiciability" doctrine not located in the North Carolina Constitution in the nineteenth century. For instance, despite the lack of statutory or common law authority, this Court at times has approved of courts in equity advising trustees as to the discharge of trusts. *See*, *e.g.*, *Simpson v. Wallace*, 83 N.C. 477, 479 (1880). In certain cases, mootness, too, was regarded, not as a matter of constitutional law, but a matter of discretion and prudence. *See State ex rel. Martin v. Sloan*, 69 N.C. 128, 128 (1873) (holding when "neither party has any interest in the case except as to cost[,]" this Court "[is] not in the habit of deciding the case."); *State v. Richmond & D.R. Co.*, 74 N.C. 287, 289 (1876) (holding the same). However, this Court expressly held that "[i]f feigned issues "—those collusively brought to test the validity of a law—" were ever valid in this State, they are abolished by the Constitution, Art. 4, § 1." *Blake v. Askew*, 76 N.C. 325, 326 (1877).

24. One might query whether this digression is necessary. As the law of standing evolved essentially and originally as a matter of federal law in the twentieth century, and our courts have on certain occasions turned to federal law to apply standing under our own laws, we believe it is. *See* Wright & Miller, 13A Fed. Prac. & Proc. Juris. § 3531.1 (3d ed. 2020) ("As academic as the history may seem, it serves vitally important purposes. Current standing law is an incredibly rich tapestry woven from all the strands that have been twisted by the wheels of time. No single approach has become finally dominant; none has gone to eternal rest. Workaday answers to many specific questions can be found in some areas, but other questions can be argued and answered only with full knowledge of the intellectual heritage."). It is particularly necessary to understand the odd federal "strands twisted" into the fabric of the law of North Carolina.

25. The political question doctrine, another justiciability doctrine, has its roots in part in Article III, but also in the "textually demonstrable constitutional commitment" of certain questions to the *other* "political departments" by other parts of the Constitution's text, *see*, *e.g.*, *Nixon v. United States*, 506 U.S. 224, 229 (1993) (holding nonjusticiable Senate's impeachment proceedings due to Article I's provision that Senate has "sole

see DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341–42 (2006) ("[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." (cleaned up)); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("Standing to sue or defend is an aspect of the case or controversy requirement."). Chief Justice Earl Warren, writing for the United States Supreme Court, articulated the complex role of the federal case or controversy requirement:

> [T]hose two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case and controversy doctrine.

Flast v. Cohen, 392 U.S. 83, 94–95 (1968). The meaning of these provisions to the framers is not described and the only evidence in the records of the Constitutional Convention is James Madison's statement that judicial power ought "to be limited to cases of a judiciary nature."[26] As we previously noted, the North Carolina Constitution lacks this provision.

¶ 36 The prohibition against advisory opinions by federal courts is, by far, "the oldest and most consistent thread in the federal law of justiciability[.]" Wright & Miller, 13A Fed. Prac. & Proc. Juris. § 3529.1 (3d ed. 2020). The rule against advisory opinions plainly originates in Article III's case or controversy requirement, as well as concerns about separa-

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Power to try all Impeachments"), and prudential considerations regarding the appropriate role of federal courts in the federal constitutional schema. *See Baker v. Carr*, 369 U.S. 186, 217 (1962).

26. *See* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. 275, 278 (2008) (quoting 2 Records of the Federal Conventions of 1787 at 430 (Max Farrand ed., rev. ed. 1966)).

tion of powers. *Clinton v. Jones*, 520 U.S. 681, 700 (1997) ("[T]he judicial power to decide cases and controversies does not include the provision of purely advisory opinions to the Executive, or permit the federal courts to resolve non justiciable questions." (footnotes omitted)). The prohibition was first recognized in the refusal of the Supreme Court to give advice to the Secretary of War and Congress on pension applications from veterans of the Revolution, in support of which the Court held " '[N]either the Legislature nor the Executive branches can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner.' " *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 n.† (1792) (an unnumbered footnote quoting the circuit court opinion below). Moreover, in a famous letter submitted in response to Secretary of State Thomas Jefferson's request for the Court to advise President Washington on certain questions about the neutral status of the United States in the French Revolutionary Wars of 1793, Chief Justice John Jay writing for the members of the Court but not *as* the Court, emphasized the separation of powers in declining to do so:

> The lines of separation drawn by the Constitution between the three departments of the government—their being in certain respects checks upon each other—and our being judges of a court of the last resort—are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to; especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments.

Letter from Chief Justice John Jay and the Associate Justices to President George Washington, August 8, 1793 (cleaned up) (available at https://founders.archives.gov/documents/Washington/05-13-02-0263). As an aspect of the prohibition against advisory opinions, the Court held it could not hear collusive suits, and that exercise of the judicial power required adverse parties. *See*, *e.g.*, *Poe v. Ullman*, 367 U.S. 497, 505 (1961); *United States v. Johnson*, 319 U.S. 302, 305 (1943).

¶ 37 In contrast to the well-established rule against advisory opinions, standing doctrine is of comparatively recent origin. *See* Winter, *Metaphor*, 40 Stan. L. Rev. at 1374 ("[A] painstaking search of the historical material demonstrates that—for the first 150 years of the Republic—the Framers, the first Congresses, and the Court were oblivious to the modern conception either that standing is a component of the constitutional

phrase 'cases or controversies' or that it is a prerequisite for seeking governmental compliance with the law."). As federal standing evolved from a requirement that a party have a cause of action to an increasingly restrictive tool curbing access to federal courts, the doctrine has been challenged by many scholars for inconsistency. *See* Gene R. Nichol, Jr., *Rethinking Standing*, 72 Cal. L. Rev. 68, 68 (1984) ("In perhaps no other area of constitutional law has scholarly commentary been so uniformly critical."). Even the Supreme Court has acknowledged this doctrinal confusion. *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of 'Art. III standing" has not been defined with complete consistency . . . .").

¶ 38 From the founding to well into the twentieth century, cases addressing the justiciability of parties to maintain a suit turned on whether the party could maintain a cause of action. *See* Sunstein, *Standing After* Lujan, 91 Mich. L. Rev. at 170. If the common law or a statute gave them a cause of action, that was all that was required for the case to come within the judicial power. *See Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 819 (1824) ("[The judicial] power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States."); Winter, *Metaphor*, 40 Stan. L. Rev. at 1395 (standing was contained in the question "whether the matter before it fit one of the recognized forms of action."). As in state courts, federal courts also recognized the right to sue to redress public harms without a showing of a particular private interest. One of the most notable early cases addressing the justiciability of a case when the party lacked a particular interest or injury was *Union Pacific Railroad v. Hall*, 91 U.S. 343 (1875), in which the Supreme Court allowed a mandamus petition brought by merchants under a general mandamus statute to compel a chartered railroad to build a railroad line. The Supreme Court recognized the merchants attempted to enforce "a duty to the public generally" and they "had no interest other than such as belonged to others." *Id.* at 354. The ultimate question—"whether a writ of *mandamus* to compel the performance of a public duty may be issued at the instance of a private relator" without a "special injury"—was answered in the affirmative. *Id.* at 354. The existence of the right to bring an action for mandamus under the statute, confirmed by the Court's examination of the widespread acceptance of public actions without particular injuries in America, settled the question; the Court raised no issue of an additional showing of a "peculiar

and special" injury being required as a matter of constitutional law. *Id.* at 355. Moreover, the existence since the first Congress of federal *qui tam* and informer's actions that permitted individuals to file suit without a personal interest support the view that Article III was not understood to impose any greater requirement for injury or a personal interest where a congressional act created a cause of action. *See* Sunstein, *Standing After* Lujan, 91 Mich. L. Rev. at 176–77.

¶ 39 Standing doctrine as a distinct constitutional requirement under Article III first arose in the middle part of the twentieth century, largely at the hands of Justices Brandeis and, later, Frankfurter, partially in response to the emergence of the administrative state and constitutional attacks on progressive federal legislative programs. *See* Sunstein, *Standing After* Lujan, 91 Mich. L. Rev. at 179; F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. 275, 276 (2008).[27] These cases primarily involved constitutional challenges to legislative enactments and government action without a common law cause of action or one arising under a statute. Importantly, in most of the cases, there was also no clear right created in the federal constitution that did not run to the public at large. *See, e.g.*, *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923) (Tenth Amendment challenge); *Ex Parte Levitt*, 302 U.S. 633, 633 (1937) (challenge alleged violation of Article I, § 6). The cases of this period, although not until later explicitly defining the inquiry in terms of "standing," were consistent with the longstanding concern only that the plaintiff show some right under common law, a statutory source, or the constitution.[28] *See, e.g.*,

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27. As several commentators have noted, in a pair of decisions, Justice Frankfurter attempted to ground the new standing requirements in the historical practice of the "courts at Westminster," even though these requirements are essentially inconsistent with the history summarized above. *See, e.g.*, Sunstein, *Standing After* Lujan, 91 Mich. L. Rev. at 172; Winter, *Metaphor*, 40 Stan. L. Rev. at 1394–95; Berger, *Standing to Sue*, 78 Yale L.J. at 816. For an empirical review of Supreme Court decisions by parts validating and criticizing the claimed impact of liberal justices, including Justices Brandeis and Frankfurter, in this early period, *see generally* Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 Stan. L. Rev. 591 (2010).

28. Although as Professor Sunstein notes the direct cause of action arising under the constitution recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), was still a long way off, Sunstein, *Standing After* Lujan, 91 Mich. L. Rev. at 180, as Professor Andrew Hessick notes, early in this period the Supreme Court recognized there was standing arising directly under the Fourteenth Amendment in *Pierce v. Society of Sisters*, 268 U.S. 510, 535–36 (1925). *See* Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. at 291, n.97. For our purposes, the relevance of *Pierce* is that the plaintiffs' standing to sue was recognized where there was a right under the constitution.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 159 (1951) (Frankfurter, J., concurring) ("Only on the ground that the organizations assert no interest protected in analogous situations at common law, by statute, or by the Constitution, therefore, can plausible challenge to their 'standing' here be made."). In the absence of such a "legal right," factual injury was insufficient. *See Tennessee Elec. Power Co. v. Tennessee Val. Authority*, 306 U.S. 118, 137–38 (1939).

¶ 40 In the most notable case of this period, *Frothingham v. Mellon*, 262 U.S. 447 (1923), the Supreme Court held a person may not sue only as a federal taxpayer who shares a grievance in common with all other federal taxpayers.[29] In *Frothingham*, the plaintiff sued as a federal taxpayer seeking to restrain the expenditure of federal funds on grants to the states through the Maternity Act of 1921 by arguing it violated the Tenth Amendment reservation of powers to the states. *Id.* at 486. The Supreme Court rejected the challenge. In holding the plaintiff's suit could not be maintained, the Court first held the plaintiff could not avail herself of the equitable powers of the federal courts because, as opposed to a taxpayer of a municipality, her "interest in the moneys of the [federal] treasury . . . is comparatively minute and indeterminable," and, therefore, obtaining an injunction as a remedy is inappropriate *Id.* at 487. The Court suggested that concerns about administrability and separation of powers informed its decision on the exercise of courts' equitable power. *Id.* at 487 ("If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned."). The Court provided a further rationale: it "ha[s] no power per se" of judicial review, but "[t]hat question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act." *Id.* at 488. Thus "[t]he party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.*

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29. The Supreme Court's first dismissal under this rationale was decided a year before in an opinion authored by Justice Brandeis. *See Fairchild v. Hughes*, 258 U.S. 126 (1922) ("Plaintiffs alleged interest [as a taxpayer] in the question submitted is not such as to afford a basis for this proceeding."). *See* Winter, *Metaphor*, 40 Stan. L. Rev. at 1376.

¶ 41 While *Frothingham* first explained the prohibition against taxpayer standing, *Ex parte Levitt*, 302 U.S. 633 (1937), announced the prohibition against citizen standing. In *Levitt*, the plaintiff sued "as a citizen and a member of the bar of [the United States Supreme] Court" challenging the appointment of Justice Hugo Black as an Associate Justice of the Supreme Court arguing that, as a sitting United States Senator, he was ineligible under Article I, § 6.[30] 302 U.S. 635–36. The Supreme Court held, citing *Frothingham* and other cases involving third-party standing, "[i]t is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." *Id.* at 636.

¶ 42 Taken together, *Frothingham* and *Levitt* establish a general prohibition against "generalized grievances"—in which the plaintiff alleges only an injury he shares in common with all other taxpayers or citizens and alleges no direct injury—to challenge the constitutionality of legislative or executive action in federal court. Some have contended *Frothingham*'s prohibition on taxpayer standing and its reasoning is "prudential"—that is, it is a product of judicial self-restraint—while others contend it is constitutional and a product of the case or controversy requirement.[31] Indeed, even one of the progenitors of modern standing, Justice Brandeis, conceived of it as a prudential, not jurisdictional limitation.[32] *See Ashwander v. Tennessee Val. Authority*, 297 U.S. 288, 346, 346–48 (1936) (Brandeis, J., concurring) (holding that "[t]he court will not pass upon the validity of a statute upon complaint of one who fails to show

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30. The clause in question provides that "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which . . . the Emoluments whereof shall have been [i]ncreased during such time." U.S. Const. art. I, § 6, cl.2. The salaries of the Supreme Court had been raised while Justice Black served as Senator.

31. Professor Jaffe, for instance, contended *Frothingham* can be reconciled with the history of 'standingless' public actions in that it "can rest on the ground that until Congress decides otherwise, there is no need for a *generally available* federal taxpayer's action." Louis L. Jaffe, *Standing to Secure Judicial Review: Private Action*s, 75 Harv. L. Rev. 255, 303 (1961).

32. Whether a standing requirement such as the prohibition against generalized grievances and attendant requirement for "direct injury" is prudential or jurisdictional may seem academic, but it is a vital distinction. If a limitation is adopted as an exercise in prudential self-restraint by the judiciary, Congress (or the legislature) may enact a statute conferring standing on persons in cases the courts would otherwise decline to hear.

that he is injured by its operation[,]" is a rule of constitutional avoidance the Supreme Court developed "for its own governance in the cases *confessedly within its jurisdiction*." (citing *Mellon*, 262 U.S. 447) (emphasis added)).

¶ 43 An important development in the law of standing happened in the middle of the twentieth century when the federal Administrative Procedure Act (APA) was enacted in 1946. In an important provision, the APA provided "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (2018). The "legal wrong" prong authorized suits based on invasion of common law interests or invasion or disregard of interests protected by a governing statute. *See* Sunstein, *Standing after* Lujan, 91 Mich. L. Rev. at 181–82; *id.* at 182, n.94 ("[T]he key point is that the APA did not require an explicit grant, but instead inferred a cause of action (standing) from the existence of an interest that the agency was entitled to consider."). The second prong, creating a statutory cause of action for persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute" served to confer standing on persons as private attorneys general. The Court had previously interpreted an analogous provision of the Communications Act of 1934 to give standing to persons "only as representatives of the public interest." *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 14 (1942).

¶ 44 Beginning in the early 1960s, the Supreme Court under Chief Justice Earl Warren, perhaps recognizing the restrictiveness of its standing decisions, applied a "pragmatic and functional strain" of standing doctrine. Wright & Miller, 13A Fed. Prac. & Proc. Juris. § 3531.1 (3d ed. 2020); *See* Sunstein, *Standing After* Lujan, 91 Mich. L. Rev. at 183–84 ; Hessick, *Standing*, *Injury in Fact*, *and Private Rights*, 93 Cornell L. Rev. at 292–93. After *Frothingham* and *Levitt*, the first Supreme Court decision to address standing again in detail was *Baker v. Carr*, 369 U.S. 186 (1962). In *Baker*, the Supreme Court held that citizens who suffered vote dilution based on malapportionment had standing to sue under the Equal Protection Clause. *See id.* at 208 ("A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution[.]"). In support of its holding, the Supreme Court articulated a rationale that has become a "refrain" if not a "shibboleth" in standing decisions, Nichol, *Rethinking Standing*, 72 Cal. L. Rev. at 71, including our own:

> A federal court cannot "pronounce any statute, either of a state or of the United States, void, because

> irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.

Baker, 369 U.S. at 205 (citation omitted) (quoting *Liverpool, N.Y. & P. Steamship Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885)).

¶ 45 Notably, the Supreme Court rested its decision not on any recent standing case, including *Frothingham* or *Levitt*, but instead on the old principle requiring an "actual controversy," or, in the *Baker* Court's term, "concrete adverseness." In *Liverpool, N.Y. & P. Steamship*, the Court noted that it would not pass upon the constitutionality of acts of Congress "as an abstract question" because "[t]hat is not the mode in which this court is accustomed or willing to consider such questions." *Liverpool, N.Y. & P. Steamship*, 113 U.S. at 39. Although it described the requirement for an "actual controvers[y]" was "jurisdictional," it reasoned that "in the exercise of that jurisdiction," it is bound by rules that are essentially functional and prudential. *See id.* (holding the court is bound by rules of constitutional avoidance as "safe guides to sound judgment" and "[i]t is the dictate of wisdom to follow them closely and carefully").

¶ 46 Besides the overarching rationale that standing is predicated on a prudential concern for sharpening legal issues, nowhere does the *Baker* opinion suggest a need for "injury in fact." To the contrary, the only injury asserted is the impairment of a constitutional right broadly shared and divorced from any "factual" harm experienced by the plaintiffs. *See* Winter, *Metaphor*, 40 Stan. L. Rev. at 1380 (describing the "voter's interest in the relative weight of his or her vote" at issue in *Baker* as "a matter that is a purely legal construct dependent on one's conceptualization of a properly weighted vote").

¶ 47 Toward the end of the Warren era, the Supreme Court again addressed standing in the context of a taxpayer suit, attempting to resolve the dispute generated by *Frothingham* about whether the prohibition against federal taxpayer standing was an absolute constitutional bar or a prudential concern. In *Flast v. Cohen*, 392 U.S. 83 (1968), the Court seemingly reversed course on *Frothingham*, and held that federal in-

come taxpayers had standing to challenge the use of federal funds to support instructional activities and materials in religious schools. *Id.* at 88. In support of this holding, Chief Justice Warren, writing for the Court, turned toward *Baker*'s functional approach rather than *Frothingham*'s concern with separation of powers:

> The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has "a personal stake in the outcome of the controversy," . . . and whether the dispute touches upon "the legal relations of parties having adverse legal interests."

Id. at 100–01 (quoting *Baker*, 369 U.S. at 205). After announcing these broad principles, the Court introduced a test to determine whether there was sufficient personal stake in a taxpayer standing suit by requiring "a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.* at 102. In the context of a taxpayer suit, the taxpayer must show the challenged statute was an exercise of Congress's power to tax and spend under Article I, § 8, and, if so, that the challenged enactment violates specific constitutional limitations on that power. In *Flast*, the Court held the expenditures were a result of the spending power and the Establishment Clause specifically limited the exercise of that power. Thus, there was standing. In contrast, the Court held, *Frothingham* lacked such a nexus.

¶ 48 The "nexus test" announced in *Flast* has been much-criticized.[33] Subsequently, the Court has essentially confined its scope to analy-

33. *See, e.g.*, *United States v. Richardson*, 418 U.S. at 182 (Powell, J., concurring) ("[I]t is impossible to see how an inquiry about the existence of 'concrete adverseness' is furthered by the application of the *Flast* test.").

sis of taxpayer standing claims under the taxing and spending power of Article I, § 8. For our purposes, *Flast* is relevant for cementing the 'pragmatic and functional strain' of *Baker*'s requirement for "concrete adverseness" and a sufficiently "personal stake in the outcome of the controversy," and also for significantly limiting the apparently broad scope of *Frothingham*'s prohibition against federal taxpayer standing in constitutional litigation.

¶ 49 While *Baker* and *Flast* involved rights arising directly under the constitution, this era also saw an expansion in standing based on rights created by statute. There was, of course, general acceptance that an express conferral of standing by Congress created a right to sue. *See McGrath*, 341 U.S. at 151–53 (Frankfurter, J., concurring). This included private attorney general actions where the plaintiff alleged no *personal* interest of their own besides the right to sue created by the statute. *See, e.g.*, *Scripps-Howard Radio*, 316 U.S. at 14 (recognizing that Congress permits litigants "standing only as representatives of the public interest."). Furthermore, the objects of statutes—that is, those regulated, as distinguished from the beneficiaries of such regulation—had standing under the APA where they had a personal interest at stake that was protected by the statute. *See* Sunstein, *Standing After* Lujan, 91 Mich. L. Rev. at 182 ("People could bring suit if they could show that 'a relevant statute' . . . granted them standing by providing that people 'adversely affected or aggrieved' were entitled to bring suit. In this way, the APA recognized that Congress had allowed people to have causes of action, and hence standing, even if their interests were not entitled to consideration by the relevant agency." (footnote omitted)). In the decade following *Flast* courts went further, concluding that the beneficiaries of regulatory programs, as well as their objects, had standing to sue to challenge government action—as well as administrative *in*action. *See id.* at 183 (citing cases from 1960 through 1975 where "courts concluded that displaced urban residents, listeners of radio stations, and users of the environment could proceed against the government to redress an agency's legally insufficient regulatory protection"). The "legal interest" test, which was exemplified by Justice Frankfurter's concurrence in *McGrath*, under which plaintiffs had standing if they suffered infringement of a right at common law, by statute, or under the constitution, *McGrath*, 341 U.S. at 151–53 (Frankfurter, J., concurring), was thus "read to allow standing for beneficiaries, who often faced statutory harm—'legal injury'—by virtue of inadequate regulatory action." Sunstein, *Standing After* Lujan, 91 Mich. L. Rev. at 184; *see Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968) (holding that "no explicit statutory provision [was] necessary to confer standing," since the private utility bringing suit was "in the class

which [the statute was] designed to protect"); Louis L. Jaffe, *Standing Again*, 84 Harv. L. Rev. 633, 633 (1972).

¶ 50 However, the Court did not stop with expanding the legal interest test. Nor did it decide that a private person could challenge any alleged violation of the public interest. Instead, in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), the Supreme Court abandoned the legal interest test, distinguishing it by reasoning that it "goes to the merits," and unanimously held for the first time that a plaintiff could challenge a government action by alleging "injury in fact." 397 U.S. at 152–53. The factual injury could, but need not be, economic. *See id.* at 152. In particular, the court recognized that "aesthetic, conservational, and recreational" interests, or even "a spiritual stake" could support standing under the "injury in fact" test. *Id.* at 154 (citations omitted); *see also* Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 Cal. L. Rev. 1915, 1921 (1986) (identifying cases in which the Supreme Court subsequently recognized these injuries, as well as other nontraditional injuries). Plainly the injury-in-fact test was intended to expand standing to new categories of plaintiffs beyond that conferred by the legal interest test. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 (1976) ("Reduction of the threshold requirement to actual injury redressable by the court represented a substantial broadening of access to the federal courts over that previously thought to be the constitutional minimum under [the APA]."). This expansion soon presented problems, however. *See* Nichol, *Rethinking Standing*, 72 Cal. L. Rev. at 75 (noting that, in some cases, injury-in-fact-test relied on injuries "that were not only intangible, but also subjective" and, in others, could not be separated from legal interests). Although *Data Processing* intended to expand standing, not restrict it, *Data Processing*'s injury-in-fact test paved the way for the restriction of standing to come. *See* Laurence H. Tribe, 1 *American Constitutional Law* 394 (3d ed. 2000) ("By decoupling standing from questions of substantive law, the *Data Processing* Court sowed the initial seeds of doubt regarding Congress' power to create standing where private rights were not infringed.").

¶ 51 The attempt to expand standing under the injury-in-fact test announced in *Data Processing* and the adoption of a pragmatic and functional approach to the question in *Baker* and *Flast* soon gave way to doctrinal change that tightened standing requirements and limited access to federal courts in the Burger era. In a series of cases addressing constitutional challenges to legislation, the Supreme Court reversed course on the pragmatic approach to standing, grounding it instead in

separation of powers—a view it had expressly rejected in the prior era. *See Flast*, 392 U.S. at 100 ("[W]hether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems.").

¶ 52 In a pair of decisions handed down the same day, the Court held there was no standing in a case alleging the failure to publish the CIA's budget violated Article I, § 9, or in a challenge to the ability of members of Congress to simultaneously serve in the Armed Forces Reserve under the incompatibility clause of Article I, § 6, cl. 2. *United States v. Richardson*, 418 U.S. 166 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974). In *Schlesinger*, the Court held a plaintiff cannot rely on citizen standing if his interest is " 'undifferentiated' from that of all other citizens." *Id.* at 217. While the Court in part defended this position in terms of *Baker*'s need for a personal stake to ensure adversary presentation, the decision primarily turned on separation-of-powers concerns, noting that since "every provision of the Constitution was meant to serve the interests of all," and permitting standing under all constitutional provisions would "ha[ve] no boundaries" and ultimately "distort the role of the Judiciary in its relationship to the Executive and the Legislature . . . ." *Id.* at 226–27, 222. Similarly, in *Richardson*, the Court held there was no citizen or taxpayer standing to challenge legislation shielding the CIA budget from public disclosure under the Statement and Account Clause, U.S. Const. art. I, sec. 9, cl. 7. *Richardson*, 418 U.S. at 175. In his concurrence, Justice Powell reasoned that "taxpayer or citizen advocacy, given its potentially broad base, is precisely the type of leverage that in a democracy ought to be employed against the branches that were intended to be responsive to public attitudes." *Id.* at 189 (Powell, J., concurring). *Richardson*, too, tightened taxpayer and citizen standing based primarily on separation-of-powers grounds. Finally, in *Valley Forge*, the Court nevertheless found no standing for a taxpayer challenging the federal government transfer of public property to a religious institution under the Establishment Clause, distinguishing it from *Flast* on the grounds that it was executive not legislative action, thus cabining the conceivably broad access to taxpayer standing under *Flast*. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982).

¶ 53 These cases reaffirm and extend the prohibition against generalized grievances, making clear that "undifferentiated" or "abstract" rights under the constitution were not sufficient to confer standing. Moreover, the Court continued to change course on its earlier expansion of standing, emphasizing that the federal law of standing was based not pri-

marily on functional concerns about the adversary presentation of the dispute, as indicated in *Baker* and *Flast*, but separation of powers, *see Allen v. Wright*, 468 U.S. 737, 752 (1984), and federalism, *see Los Angeles v. Lyons*, 461 U.S. 102, 112 (1983).

E. *Lujan* and "Injury in Fact" to Date

¶ 54 In 1992, with an opinion written by Justice Scalia, the Supreme Court dramatically altered the law of standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), when the Court held for the first time that plaintiffs had no standing to bring suit under a congressional statute authorizing suit because they lacked "injury in fact." The plaintiffs had sued under the Endangered Species Act (ESA). Section 7 of the ESA requires the Secretary of the Interior to consult with other agencies when agency projects threaten the existence of endangered plants and animals. 16 U.S.C. § 1536(a)(2) (2018). The Interior Department had originally construed that statute to apply to actions within the United States, on the high seas, or in foreign nations. *Lujan*, 504 U.S. at 558. The agency reexamined its position and ultimately issued a new regulation interpreting the statute to require consultation only for actions taken in the United States or on the high seas, not in foreign nations. *Id.* at 558–59. The plaintiffs, wildlife conservation organizations, challenged the new regulation as wrongly interpreting the statute.

¶ 55 In its decision, the Court announced the test for standing that remains the law of standing at the federal level today, that as an "irreducible constitutional minimum" standing requires three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 560–61 (citations omitted) (alterations in original). The Court applied this test and held the plaintiffs had failed to allege adequate "injury in fact." Although the parties had a "cognizable interest" in "the desire to use or observe an animal species," the particular plaintiffs (here, one or

more of the organizations' members) would not be " 'directly' affected apart from their ' "special interest" in the subject.' " *Id.* at 563 (citations omitted). The Eighth Circuit Court of Appeals below had nevertheless held there was standing based upon the ESA's "citizen-suit" provision granting "any person" a right to sue to enforce the statute. *Id.* at 571–72 (quoting 16 U.S.C. § 1540(g)). The Supreme Court rejected this rationale, however, concluding that the interest conferred by the statute was merely a "conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' ," *id.* at 573, and that it was merely a "generalized grievance," *id.* at 575. The Court summarized the generalized grievance caselaw including *Frothingham*, *Levitt*, *Richardson*, *Schlesinger*, and *Valley Forge*[34] and applied the prohibition for the first time to bar standing for a claim that arose not under the Constitution, like every generalized grievance case before, but under a statutory cause of action created by Congress. Recognizing this novel path, the Court noted that "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right," and to do so "would be discarding . . . one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of the courts. . . ." *Id.* at 576. Thus, on the basis of the Case or Controversy requirement, the Court held plaintiffs lacked standing to sue in an action to vindicate the public interest in the effective enforcement of laws even where Congress expressly conferred standing to sue.

¶ 56 Criticism of *Lujan* and the injury-in-fact requirement more broadly has been widespread. First, it has been criticized most harshly for its inconsistency with the original meaning of the case or controversy requirement of Article III and, in particular, the long history in England and the United States of public actions brought by private plaintiffs, including those authorized under a statute, as summarized above. *See generally* Sunstein, *Standing After* Lujan, 91 Mich. L. Rev. 163; Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 Duke L.J. 1141, 1151–53 (1993). Second, the injury-in-fact test, which was introduced in *Data Processing* to expand access to the courts, was, according to the critics, perversely used instead to foreclose access to the judiciary under many statutory "citizen-action" provisions. Third, critics argue that despite its occasional statements to the contrary, in turning to "injury in fact," the Court has undermined the separation of powers by invading the power of the legislature to create rights. *See* Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L.

34. Although, notably, *Flast* was not discussed.

Rev. 275 at 320—21. Most strikingly, critics argue that the rule in *Lujan* could be applied to limit even indisputably private rights of action created by statute.[35] Fifth, despite reflecting an attempt to objectify the law and separate standing analysis from a decision on the merits, the critics argue that the injury-in-fact test essentially imports assessment of the merits of the claim into the analysis *sub rosa*. Nichol, *Rethinking Standing*, 72 Cal. L. Rev. at 78. Finally, the critics argue that original concerns motivating standing doctrine—ensuring sufficient "concrete adverseness" to ensure efficient resolution of disputes—does not necessitate and is arguably impaired by the injury in fact requirement.[36]

¶ 57 In summary, the very notion of a standing requirement under Article III only arose in the twentieth century. For most of our nation's history, federal law permitted standing for private citizens in public actions even in the absence of any particularized injury requirement. For most of the twentieth century, standing existed where there was invasion of a legal right under the common law, a statute, or the Constitution. The Supreme Court long emphasized a functional and pragmatic approach to the question of standing, focused on "concrete adverseness," generally limiting this concern to constitutional questions, and significantly expanded the categories of claims that could support standing. However, that expansion was reversed, first in the context of taxpayer and citizen suits and, later with the adoption of an "injury in fact" requirement, which has been increasingly used to constrain access to federal courts even where a statute creates a right to sue. Ultimately the Court adopted a restrictive interpretation of injury-in-fact that applied its substantially tightened requirements for standing to attack the constitutionality of acts of the other branches based on taxpayer or citizen standing beyond that context to rights actually created by Congress.

F. Standing Under North Carolina Law

¶ 58 We must now determine whether our North Carolina Constitution, specifically the "judicial power" provisions of Article IV, §§ 1 and 2,

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35. *See Spokeo*, 136 S. Ct. at 1549, 194 L. Ed. 2d at 635 ("Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.").

36. Notably, the Supreme Court has largely jettisoned *Baker*'s concrete adverseness rationale. *See Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996) (noting standing doctrine "has a separation of powers component, which keeps courts within certain traditional bounds vis-à-vis the other branches, concrete adverseness or not. That is where the 'actual injury' requirement comes from").

imposes a requirement for "standing," as well as a requirement for "injury-in-fact," to bring suit under a cause of action which the General Assembly has expressly created. As an initial matter, we have held that our Constitution, unlike the federal constitution, "is in no matter a grant of power. All power which is not limited by the Constitution inheres in the people . . . ." *McIntyre v. Clarkson*, 254 N.C. 510, 515 (1961) (quoting *Lassiter v. Northampton Cty. Bd. of Elections*, 248 N.C. 102, 112 (1958)). Judicial power under the state constitution is, therefore, plenary, and "[e]xcept as expressly limited by the constitution, the inherent power of the judicial branch of government continues."[37] *Beard v. North Carolina State Bar*, 320 N.C. 126, 129 (1987); *see generally State v. Lewis*, 142 N.C. 626 (1906). While the federal constitution limits the federal "judicial Power" to certain "Cases" and "Controversies." U.S. Const. Art. III, § 2, our Constitution, in contrast, has no such case or controversy limitation to the "judicial power." Because the federal concept of standing is textually grounded in terms which are not present in the North Carolina Constitution, we see that the framers of the North Carolina Constitution did not, by their plain words, incorporate the same federal standing requirements. *See Goldston v. State*, 316 N.C. 26, 35 (2006) (holding North Carolina standing doctrine is "not coincident with federal standing doctrine"). Thus, any limitation on the judicial power in the North Carolina Constitution must inhere in the phrase "judicial power" itself.

1. Does the North Carolina Constitution Impose an "Injury-in-Fact" Requirement Under the "Judicial Power" Provision?

¶ 59 As noted, throughout the nineteenth century, the words "judicial power" in our Constitution imposed no limitation on standing. Since 1776, North Carolina law contemplated that the writ of mandamus and an action in the nature of the writ of *quo warranto* were available without any showing of a personal stake in the litigation, continuing a legacy that originated in the earliest days of the common law. Against this backdrop, we conclude that neither the framers of the 1776 Constitution, which recognized a judicial power to be kept "forever separate and distinct," nor of the 1868 Constitution, which originated our present "judicial power" in its own Article, imposed a requirement of particular injury beyond a legal right at common law, by statute, or under the constitution itself. The only case we have identified in the nineteenth century impos-

37. Other states have recognized the "plenary" nature of their judicial power under state constitutions. *See*, *e.g.*, *Couey*, 357 Or. at 502, 355 P.3d at 891; *Borrego v. Territory*, 8 N.M. 446, 495 (1896) ("judicial power . . . is thus vested in plenary terms"); *Floyd v. Quinn*, 24 R.I. 147, 149 (1902) ("[T]he vesting of the judicial power is plenary and exclusive.").

ing a standing-type justiciability doctrine as a constitutional requirement was the prohibition against collusive suits. *See Blake v. Askew*, 76 N.C. at 326 ("If they were ever valid in this State, feigned issues are abolished by the Constitution, Art. 4, § 1.").

¶ 60 Concerns about standing under North Carolina law arose in the context of suits to enjoin legislation for violating the constitution; rather than in preventing parties from getting in the courthouse door, these concerns addressed what arguments parties may lodge once there. In *St. George v. Hardie*, 147 N.C. 88 (1908), for instance, a licensed boat pilot for hire, who was licensed by a licensing board regulating pilotage on the Cape Fear River, sought to pilot a boat into the river and was denied by the defendant, the captain of the vessel, who piloted it into and out of the river himself. The plaintiff sued for the fee and the defendant, on appeal, challenged the validity of the statute authorizing the licensing board alleging that it created a monopoly in violation of the emoluments and monopolies clauses of the North Carolina Constitution by limiting the number of pilots. This Court held the defendant could not present this argument because he did not lose any right of selection of pilot as he intended to pilot his own ship. "Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has, therefore, no interest in defeating it." *Id.* at 97. Reasoning that the plaintiff was thus advancing the right of third parties, we noted that, as a principle of constitutional avoidance, we will pass upon the constitutionality of a legislative act "only in respect to those particulars, and as against those persons whose rights are thus affected[;] . . . it is only where some person attempts to resist its operation and calls in the aid of its judicial power, to pronounce it void, as to him, his property, his rights, that the objection of unconstitutionality can be presented and sustained." *Id.* at 98 (quoting *In re Wellington*, 33 Mass. (16 Pick.) 87, 96 (1834)). *St. George* might best be understood as an application of the principle of *jus tertii*, prohibiting a party from raising the rights of third parties. *See Holmes v. Godwin*, 69 N.C. 467, 470 (1873) ("*In general*, *jus tertii* cannot be set up as a defence by the defendant, unless he can in some way connect himself with the third party.").

¶ 61 We soon extended this principle to recognize that, in exercise of the equitable judicial power, a party was not entitled to injunctive relief as a matter of *substantive* law unless he would be irreparably harmed. *See Newman v. Watkins*, 208 N.C. 675, 678 (1935) ("The plaintiffs sought in a court of equity to restrain an election. It was freely conceded upon the argument that unless the statute in question is unconstitutional, the plaintiffs were not entitled to the relief sought."). This Court quoted a

treatise which itself cited *Frothingham* for the principle that "[t]he party who invokes the power (of a court to declare an act of the legislature unconstitutional) must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.* at 676–77 (quoting Willoughby, *Willoughby on the Constitution of the United States* (2d ed.) § 13, p. 20).[38] We have consistently required a showing of direct injury in injunctive suits, emphasizing that this requirement is limited to parties seeking injunctive relief declaring laws unconstitutional. *See Leonard v. Maxwell*, 216 N.C. 89, 97 (1939), ("If others have been aggrieved [by provisions for which plaintiff did not allege hurt], it suffices to say the plaintiff can speak only for himself. *In matters of constitutional challenge*, he is not his brother's keeper." (emphasis added) (citing *Newman v. Watkins*, 208 N.C. 675 (1935)); *Yarborough v. North Carolina Park Comm'n*, 196 N.C. 284, 288 (1928) ("A party who is not personally injured by a statute is not permitted to assail its validity; if he is not injured, he should not complain because another may be hurt."). In subsequent cases we have required a plaintiff to show direct injury in the two modern contexts in which injunctive relief remedied by declaring a law unconstitutional ordinarily arises—actions under the Uniform Declaratory Judgment Act and challenges to zoning ordinances. *See, e.g.*, *American Equitable Assur. Co. of N.Y. v. Gold*, 248 N.C. 288 (1958) (plaintiffs adequately alleged personal, direct injury under Uniform Declaratory Judgment Act); *Fox v. Board of Comm'rs of Durham County*, 244 N.C. 497 (1956) (no injury alleged in challenge zoning ordinance affecting county only as residents and taxpayers of county).

¶ 62 The "direct injury" required in this context could be, but is not necessarily limited to, "deprivation of a constitutionally guaranteed personal right or an invasion of his property rights." *State ex rel. Summrell*

38. This Court has also cited *Ex parte Levitt* for a near-identical proposition. *See Turner v. City of Reidsville*, 224 N.C. 42, 47 (1944) ("It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is in immediate danger of sustaining, a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." (quoting *Ex parte Levitt*, 302 U.S. 633 (1937))). Although we have cited these federal cases for this proposition in the past, it does not follow that the requirement for direct injury in injunctive suits in North Carolina is coterminous with these federal analogues. *See Goldston*, 361 N.C. at 35; *accord Nicholson v. State Ed. Assistance Authority*, 275 N.C. 439, 448 (1969) ("A taxpayer, as such, may challenge, by suit for injunction, the constitutionality of a tax levied, or proposed to be levied, upon him for an illegal or unauthorized purpose.").

v. Carolina-Virginia Racing Ass'n, 239 N.C. 591, 594 (1954); *see also Canteen Services v. Johnson, Comm'r of Revenue*, 256 N.C. 155, 166 (1962) (holding only persons "who have been injuriously affected . . . in their persons, property or constitutional rights" may challenge constitutionality of a statute). Notably, unlike in federal court, taxpayer status has long served as a basis for challenges alleging the unconstitutional or illegal disbursement of tax funds. *See Goldston v. State*, 361 N.C. at 30–31 (citing *Stratford v. City of Greensboro*, 124 N.C. 110, 111–112 (1899)). For example, we considered the standing of taxpayers to challenge the validity of a statute in *Stanley v. Department of Conservation and Development*, 284 N.C. 15 (1973). There, we held that the taxpayers were injured by a statute that exempted property from taxation, because this "increases the burden imposed upon all other taxable property." *Stanley*, 284 N.C. at 29.

¶ 63 We have not yet addressed whether the requirement of a "direct injury" or, in other words, that a person be "adversely affected" by a statute, which we have applied as a substantive requirement to entitle a plaintiff to injunctive relief, is also a constitutional requirement under the "judicial power" of Article IV, § 2 of our Constitution. This requirement is, however, founded on a longstanding concern that "[t]he courts never anticipate a question of constitutional law in advance of the necessity of deciding it." *Wood v. Braswell*, 192 N.C. 588, 589 (1926). Notably in *Wood*, Chief Justice Stacy in a concurring opinion did locate this rule, along with our avoidance of venturing advisory opinions on constitutional questions, in Article IV, § 2, reasoning that "it is only in cases calling for the exercise of judicial power that the courts may render harmless invalid acts of the Legislature." *Id.* at 590 (Stacy, C.J., concurring). The majority, however, did not go that far, implicitly reserving the question of whether this principle arises directly from the judicial power or as a prudential principle of judicial self-restraint.

¶ 64 We have since clarified that the rule requiring direct injury to challenge the constitutionality of a statute is based on the rationale "that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue." *Stanley v. Department of Conservation and Development*, 284 N.C. 15, 28 (1973). In *Stanley*, citing *Flast* approvingly for the rationale underpinning federal standing announced in *Baker*, we held

> [t]he "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens

> the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."

Id. (quoting *Flast v. Cohen*, 392 U.S. 83, 99 (1968)). As in the case "in which there is no actual antagonistic interest between the parties, or where it appears that the parties are as one in interest and desire the same relief," *Bizzell*, 248 N.C. at 295 (citations omitted), we held that "[w]henever it appears that no genuine controversy between the parties exists, the Court will dismiss the action ex mero motu." *Stanley*, 284 N.C. at 29 (citing *Bizzell*, 248 N.C. 294).

¶ 65 As we have shown, the general question of standing under the North Carolina Constitution is motivated by a pragmatic and functional concern with ensuring "concrete adverseness" that "sharpens the presentation of issues" upon which we depend, in contrast to the federal standing doctrine which is motivated by both separation-of-powers and federalism concerns. We hold, therefore, that the "concrete adverseness" rationale undergirding our standing doctrine is grounded on prudential principles of self-restraint in exercise of our power of judicial review for constitutionality, which is itself only an incident of our exercise of the judicial power to determine the law in particular cases. *See Bayard*, 1 N.C. (Mart.) at 6–7. As this rationale is directly related to the circumstances under which we assert our power and duty to declare laws unconstitutional, it applies to challenges necessitating the resolution of "constitutional questions."[39] *Stanley*, 284 N.C. at 28 (quoting *Flast*, 392 U.S. at 99). Indeed, it is *only* in this context of invoking the "judicial power" to review the constitutionality of legislative and executive acts that the direct injury requirement can be understood. It therefore does not necessarily follow that our requirement for direct injury applies to suits not arising under the constitution, but instead based on common law or statutory right.[40]

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39. This is not the only vital question of justiciability we have recognized is a matter of prudential self-restraint. In *In re Peoples*, we recognized that while "[i]n federal the mootness doctrine is grounded primarily in the 'case or controversy' requirement of Article III, Section 2 of the United States Constitution and has been labeled 'jurisdictional' by the United States Supreme Court . . . [i]n state courts [including North Carolina] the exclusion of moot questions from determination is not based on a lack of jurisdiction but rather represents a form of judicial restraint." *In re Peoples*, 296 N.C. 109, 147 (1978).

40. In the context of an action challenging the constitutionality of a legislative or executive action, we emphasize the requirement for "direct injury" or that the complaining party be "adversely affected" by the action does not incorporate the "injury-in-fact" requirement of federal law. As discussed in detail above, that test arose in 1970 in the context of an interpretation of a provision of the federal APA; whatever its merits as a

¶ 66 We have long held that a plaintiff can maintain an action for infringement of a common law interest irrespective of any "actual" injury that may occur to her. For instance, we have not dismissed trespass actions where there is no allegation of harm beyond the infringement of the legal right. *See Keziah v. Seaboard Air Line R. Co.*, 272 N.C. 299, 311 (1968) ("Any unauthorized entry on land in the actual or constructive possession of another constitutes a trespass, *irrespective of degree of force used or whether actual damages is done*." (emphasis added)); *see also Hildebrand v. Southern Bell*, 219 N.C. 402, 408 (1941) (holding landowner "is entitled to be protected as to that which is his without regard to its money value"). Indeed, "[s]uch entry entitle[s] the aggrieved party to at least nominal damages." *Keziah*, 272 N.C. at 311. Actions for breach of contract can, in some circumstances, proceed on a theory of nominal damages. *See*, *e.g.*, *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 271 (1968) (explaining that in a contract action proof of breach alone is enough to avoid judgment of nonsuit). Even in a common law action where actual injury is a necessary element of the claim, such as negligence, the proper disposition for failure to allege actual injury or damages is not dismissal for lack of standing, but dismissal for failure to state a claim upon which relief can be granted. *See*, *e.g.*, *Hansley v. Jamesville & W.R. Co.*, 115 N.C. 602, 613 (1894) ("Neither negligence without damage nor damage without negligence will constitute any cause of action.").[41] As one commentator has noted, at common law, "[l]egal injuries were conceptualized in terms of the experience of physical injury, but the former was not confused with the latter. It is only in this sense that there could be a notion of *damnum absque injuria*—that is, damage without cognizable legal injury." Winter, *Metaphor*, 40 Stan. L. Rev. at 1397.[42]

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requirement of the federal constitution, it has no connection to the text or history of our state constitutional provisions or the doctrines we have developed in accordance with them.

41. As the Court of Appeals below noted, "[i]f EMPAC had *slandered* Mr. Forest in its political ad, Mr. Forest would have had standing to seek at least nominal damages for this tort, even though he won the election." *See Comm. to Elect Dan Forest*, 260 N.C. App. at 7 (citing *Wolfe v. Montgomery Ward*, 211 N.C. 295, 296 (1937)).

42. One possible exception is the private action for common law public nuisance, but while our courts have sometimes characterized the requirement of a showing of special damages or invasion of a right not considered merged in the general public right in such an action as a requirement for "standing," *see*, *e.g.*, *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 115 (2002), dismissal for lack of subject-matter jurisdiction in such cases is based not on a constitutional requirement for standing or injury, but on the absence of any possible damages to be recovered. *See Hampton v. Pulp Co.*, 223 N.C. 535, 544 (1943) ("The real reason on which the rule denying individual

¶ 67 We have also long held that where the Legislature has created a statutory cause of action, so long as the plaintiff falls in the class of persons on which the statute confers the right, the courts will hear her claim. As we previously noted, since the nineteenth century, our Court has permitted citizens to bring citizen-suits alleging no personal injury or interest besides the statutory grant under statutory analogues to the common-law prerogative writs, such as the action in the nature of a writ *quo warranto*. *See Hall*, 111 N.C. at 371. We continue to recognize the Legislature's power to create such 'standingless' causes of action based upon purely 'public' rights. *State ex rel. Summrell v. Carolina-Virginia Racing Association*, 239 N.C. 591 (1954), authored by Justice (later, Chief Justice) William Bobbitt for the Court, is most instructive.

¶ 68 In *Summrell*, a plaintiff who was a resident of Currituck County sued "to perpetually enjoin, as a nuisance as defined by N.C.G.S. § 19-1, the defendant's maintenance and use of certain premises, buildings, fixtures and machines, for the purpose of gambling." *Id.* at 591. The defendant Racing Association was a private corporation granted a franchise as a result of an act of the General Assembly. Pursuant to that law, an election was held at which a majority of the voters participating voted in favor of a countywide Racing Commission. *Id.* To enforce its prohibition against the nuisances listed in § 19-1, the General Assembly chose to create a civil action at N.C.G.S. § 19-2, under which the plaintiff sued as relator, which provided as follows:

> "Any citizen of the county may maintain a civil action in the name of the State of North Carolina upon the relation of such . . . citizen, to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building or ground upon which said nuisance exists."

Id. at 594 (quoting N.C.G.S. § 19-2 (1965)). The action created by the General Assembly was plainly a "public action" as we discussed above—a "case[ ] in which a plaintiff, in some fashion or other, asserts the pub-

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recovery of damages [for public nuisances absent special damages or invasion of some right not considered merged in the general public right] is based—and the only one on which the policy it reflects could be justified—is that a purely public right is of such a nature that ordinarily an interference with it produces no appreciable or substantial damage."). In such cases, the absence of special damages or infringement of a right precludes establishment of the private cause of action at all, but as discussed below, a public action for abatement of public nuisance, including one maintained by any "private citizen of the county," is still available. *See* N.C.G.S. § 19-2.1 (2019).

lic's interest rather than just his own—in an attempt to challenge the actions of the government or a private party." Gene R. Nichol, Jr., *The Impossibility of* Lujan*'s Project*, 11 Duke Envtl. L. & Pol'y F. 193, 194 (2001). The plaintiff's interest, even as recognized by the statute, was no different than that of any other "citizen" of his county.[43] It certainly could not be contended to be "concrete" or "particularized." *Lujan*, 504 U.S. at 560. Nevertheless, this Court reversed the trial court's decision that it lacked "legal authority" to pass upon the action, holding that "the plaintiff's action is not grounded on general equitable principles *but on the express authority of [the statute]*, and he is entitled to injunctive relief if he can prove his allegations that the defendant is conducting and maintaining a gambling establishment." *Summrell*, 239 N.C. at 594 (emphasis added).

¶ 69 Nor was *Summrell* the last time this Court recognized the Legislature's power to create causes of action and permit a plaintiff to recover in the absence of a traditional injury. In *Bumpers v. Community Bank*, 367 N.C. 81, 88 (2013), for instance, we held the General Assembly had authority to prohibit unfair and deceptive trade practices and to create a private cause of action in favor of a class of individuals to enforce this prohibition. In order to come within the class of persons protected by the statute the plaintiff must have been "injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter," N.C.G.S. § 75-16 (2011); however, "[t]his statute is broader and covers more than traditional common law proscriptions on tortious conduct, though fraud and deceit tend to be included within its ambit." *Bumpers*, 367 N.C. at 88. Thus, North Carolina's Unfair and Deceptive Trade Practices Act expanded the injury for which a plaintiff could recover beyond the common law and the question of the plaintiff's standing was not even raised.

¶ 70 In *Addison v. Britt*, 83 N.C. App. 418 (1986), a case involving the federal Truth in Lending Act, our Court of Appeals concluded that "[o]nce a violation of an actionable portion of the [Truth in Lending Act] is established, the debtor is entitled to recover statutory damages [and

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43. It is worth noting, though not strictly necessary to our present purposes, that the constitutionality of the act authorizing the commission was implicitly at issue in the claim because, if the act was valid, the plaintiff could not prevail on his substantive nuisance claim. Thus, this Court recognized, in this instance at least, that a statutory cause of action could provide a basis for judicial review of the constitutionality of a legislative act where there was effectively no citizen standing, on the basis that the action was not grounded on equity, but statute. This bolsters our conclusion that standing is a prudential, not purely constitutional, restraint on this Court's exercise of the "judicial power."

that b]ecause the purpose of that section is to encourage private enforcement of the Act, *proof of actual damages is unnecessary*." *Id.* at 421 (emphasis added). Thus, the civil action under the Truth in Lending Act reflects a "private attorney general" action, in the sense that Congress, to promote the purposes of the Act, has empowered private individuals to sue to vindicate the public interest and to recover based on the statutory damage formula, regardless of the damages actually accumulated. Furthermore, the Act did not require "that the debtors have been misled or deceived in any way." *Id.* Thus, the Act authorized "any person [who] is liable to such [creditor failing to comply with the Act]" to recover under the Act, irrespective of actual injury resulting from infringement of the Act. *See* 15 U.S.C. § 1640(a) (1982).

¶ 71 In summary, our courts have recognized the broad authority of the legislature to create causes of action, such as "citizen-suits" and "private attorney general actions," even where personal, factual injury did not previously exist, in order to vindicate the public interest. In such cases, the relevant questions are only whether the plaintiff has shown a relevant statute confers a cause of action and whether the plaintiff satisfies the requirements to bring a claim under the statute. There is no further constitutional requirement because the issue does not implicate the concerns that motivate our standing doctrine. *See*, *e.g.*, *Stanley*, 284 N.C. at 28. The existence of the legal right is enough.

¶ 72 Having surveyed the relevant English, American, and North Carolina law of standing, we are finally in a position to determine whether, as EMPAC and the dissent below argue, the North Carolina Constitution imposes an "injury-in-fact" requirement, as under the federal constitution. While our Court of Appeals has previously come to that conclusion, which was followed by numerous panels of that court, *see*, *e.g.*, *Neuse River Foundation*, *Inc. v. Smithfield Foods*, *Inc.*, 155 N.C. App. 110, 113–15 (2002) (holding North Carolina law requires "injury in fact" for standing and applying *Lujan*), we are not bound by those decisions and conclude our Constitution does not include such a requirement.

¶ 73 First, the federal injury-in-fact requirement has no place in the text or history of our Constitution. Our Constitution includes no case-or-controversy requirement, upon which the federal injury-in-fact requirement is based. As discussed above, the "judicial power" provision of our Constitution imposes no particular requirement regarding "standing" at all. Rather, as a rule of prudential self-restraint, we have held that, in order to assure the requisite "concrete adverseness" to address "difficult constitutional questions," we have required a plaintiff to allege "direct injury" to invoke the judicial power to pass on the constitutionality of

a legislative or executive act. *See Stanley*, 284 N.C. at 28. This standing principle arises as an incident of our power and duty to determine whether executive or legislative acts violate the constitution in the resolution of actual controversies. However, where a purely statutory or common law right is at issue, this rationale is not implicated, and a showing of direct injury beyond the impairment of the common law or statutory right is not required.

¶ 74 Second, the injury-in-fact standard is inconsistent with the caselaw of this Court. To be sure, our own decisions have not always maintained these distinctions with exactitude—or avoided the doctrinal encumbrances which have attached to the "slogans and litanies" of standing decisions as barnacles to the hull. Nichol, *Rethinking Standing*, 72 Cal. L. Rev. at 71. *Dunn v. Pate*, 334 N.C. 115 (1993), provides a particularly instructive example. In that case, we held defendants seeking to avoid having a 1962 deed set aside for failure to comply with a statute in effect at the time, which required the clerk of court to make a private examination of a wife whenever she and her husband entered into a contract to ensure the conveyance was neither unreasonable nor injurious to the wife, had standing to challenge the statute as unconstitutional when the conveyance at issue apparently did not comply with the allegedly discriminatory (and since-repealed) statutory requirement. *Id.* at 117. On the way to holding the defendants in question had standing to attack the constitutionality of the private examination statute, however, we partially overruled a prior Court of Appeals decision while noting the court "correctly stated that the petitioner 'must allege she has sustained an "injury in fact" as a direct result of the statute to have standing.' " *Id.* at 119 (quoting *Murphy v. Davis*, 61 N.C. App. 597, 600, *cert. denied & appeal dismissed*, 309 N.C. 192 (1983)). The Court of Appeals decision, *Murphy*, which we had approved of in this respect had cited Article III, § 1 of the U.S. Constitution, *Baker*, and a case of this Court that itself precisely quoted the standard we discussed above in *Stanley* that was derived from *Baker* via *Flast*. However, the proposition in *Murphy* for which these sources were cited was entirely different: that "Petitioner must allege she has sustained an 'injury in fact' as a direct result of the statute to have standing to challenge the statute as violating either the federal or the North Carolina constitutions." *Murphy*, 61 N.C. App. at 600. Notably, *none* of the sources cited in *Murphy* included the language "injury in fact" and, as discussed in detail above, stand for entirely different propositions. Moreover, this Court in *Dunn* did not itself rely on the federal "injury in fact" standard—throughout the opinion we cited North Carolina caselaw and nowhere cited *Lujan* or *Data Processing*, from which that language originates. Instead, we relied upon the familiar prin-

ciple that, in a challenge to the constitutionality of a statute, a party has standing if they have been "injuriously affected . . . in their . . . property . . . ." *See Dunn*, 334 N.C. at 119 (quoting *Canteen Service*, 256 N.C. at 166). Nevertheless, the Court of Appeals and litigants have taken this apparent approval of an unsupported reference to "injury in fact" in *Dunn* and concluded we intended to incorporate federal standing requirements into North Carolina law. *See, e.g.*, *Neuse River Foundation*, 155 N.C. App. at 114 ("Standing most often turns on whether the party has alleged 'injury in fact' in light of the applicable statutes or caselaw." (citing, inter alia, *Dunn*, 334 N.C. at 119)); *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 390–92 (2005) (applying *Neuse River Foundation*'s adoption of *Lujan*'s standing requirements to hold plaintiff under UDTPA had not shown "injury in fact" to support standing). We conclude otherwise.[44]

¶ 75 The Court of Appeals' misapplication of our standing requirements in *Neuse River Foundation* was also based on our opinion in *Empire Power Co. v. North Carolina Department of Environment, Health and Natural Resources (DEHNR)*, 337 N.C. 569 (1994). This case is particularly instructive, because it demonstrates how words can assume unintended meanings in the arena of standing. *Empire Power Co.* involved a challenge brought under the North Carolina Administrative Procedure Act (NCAPA), N.C.G.S. §§ 150B-1, *et seq.* (1991), and the Air Pollution Control Act (APCA), N.C.G.S. §§ 143-215.105, *et seq.* (1993), appealing a decision of DEHNR granting an air pollution control permit to a power company to the Office of Administrative Hearings (OAH). *Empire Power Co.*, 337 N.C. at 572. The petitioner alleged DEHNR had violated its statutory duty to reduce air pollution under the APCA by giving the power company a permit without addressing comments filed by another power company. *Id.* at 572. The Court of Appeals concluded, and the power company and DEHNR both argued before this Court, that the petitioner was not an "aggrieved person" within the meaning of the NCAPA because the NCAPA cannot confer a right to an administrative hearing in the OAH and that such a right must be set forth in the organic statute at issue (there, the APCA). *Id.* at 574. This Court reversed, holding that the petitioner had shown that he was a "person aggrieved" under the NCAPA and thus "entitled to an administrative hearing to determine [his] rights, duties, or privileges." *Id.* at 588 (quoting N.C.G.S. § 150B-23(a) (1991)). We noted that, under the NCAPA, " 'Person aggrieved' means any person or group of persons of common interest directly or indirectly af-

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44. To the extent the Court of Appeals' opinion in *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110 (2002), is at odds with this opinion, we disavow it.

fected substantially in his or its person, property, or employment, by an administrative decision," *Id.* at 588 (quoting N.C.G.S. § 150B-2(6)), and held that the petitioner had established he was a "person aggrieved" because he lived downwind of the permitted station and "alleged *sufficient injury in fact to interests within the zone of those to be protected* and regulated by the statute [(the APCA)], and rules and standards promulgated thereto, the substantive and procedural requirements of which he asserts the agency violated when it issued the permit." *Id.* at 589 (emphasis added). This passing use of the phrase "injury in fact" was not in reference to any requirement of standing under the North Carolina Constitution, but whether the plaintiff had injuries to interests that fall within the zone of interests protected by the underlying statute such that the plaintiff was in the class of those "persons aggrieved" for whom the NCAPA conferred a right to an administrative decision.

2. Does the Remedy Clause of the North Carolina Constitution Impose an "Injury-in-Fact" Requirement?

¶ 76 Finally, it might nevertheless be argued that the remedy clause of the North Carolina Constitution imposes a factual injury requirement for standing. In this case, the Court of Appeals, including both the majority and the dissent below, relied on our statement in *Mangum v. Raleigh Board of Adjustment*, 362 N.C. 640 (2008), to hold the North Carolina Constitution imposes an injury in fact requirement before a plaintiff may have standing.[45] *See Comm. to Elect Dan Forest*, 260 N.C. App. at 6 ("According to our Supreme Court, '[t]he North Carolina Constitution confers standing on those who suffer harm[,]' and that one must have suffered some 'injury in fact' to have standing to sue." (citing first *Mangum*, 362 N.C. at 642; and then *Dunn*, 334 N.C. at 119); *Id.* at 13 (McGee, C.J., dissenting) (" 'As a general matter, the North Carolina Constitution confers standing on *those who suffer harm*[.]' Therefore, the North Carolina Constitution does *not* confer standing on those who

45. As an initial matter, we note that we did not impose a constitutional requirement of "injury-in-fact" in *Mangum*; rather, we held only that, where a petitioner files an action in the nature of certiorari to challenge a quasi-judicial decision under a zoning ordinance based on standing conferred under 160A-393(d)(2) (2019) (recodified at N.C.G.S. § 160D-1402(c)(2)), the petitioner must have alleged "special damages" to maintain the action and the allegations of the petitioner there were sufficient in that regard. *See Mangum*, 362 N.C. at 644; *accord* N.C.G.S. § 160D-1402(c)(2) (Supp. 2 2020) ("The following persons shall have standing to file a petition under this section: . . . Any other person who will suffer special damages as the result of the decision being appealed."). The requirement for special damages to have standing to sue in such cases arises from the requirements of the statute which creates and confers the cause of action on certain persons, not the constitution.

have not suffered harm." (emphasis in original) (citations omitted)). In *Mangum*, we stated "The North Carolina Constitution confers standing on those who suffer harm: 'All courts shall be open; [and] every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law . . . .'" *Mangum*, 362 N.C. at 642 (quoting N.C. Const. Art. I, § 18). While our statement in *Mangum* was an adequate summary of the remedy clause's effect on questions of standing—that the provision "confers standing on those who suffer harm"—it does not follow that the those who do not suffer "harm" lack "standing." In terms of logic, "harm" is a sufficient but not a necessary condition for "standing." Much recent difficulty has arisen because of our use of the term "harm." Of course, the remedy clause does not speak in terms of "harm" but "injury," and we turn to the text and history to discern its meaning.

¶ 77 Article I, section 18 of the North Carolina Constitution provides:

> All courts shall be open; *every person for an injury done him in his lands*, *goods*, *person*, *or reputation shall have remedy by due course of law*; and right and justice shall be administered without favor, denial, or delay.

N.C. Const. art. I, § 18 (emphasis added). This provision has ancient roots in English and American law. Our most contemporary treatise on the North Carolina Constitution identifies the protean origins of Article I, § 18 as a principle in Magna Carta: " '*Nulli vendemus nulli negabimus aut differemus rectum vel justitiam*.' ('To no one will we sell, to no one will we deny or delay right or justice.')" John V. Orth and Paul Martin Newby, *The North Carolina State Constitution* 65 (2d ed. 2013) (quoting Magna Carta, § 40 (1215)). The second clause of the open courts provision, commonly termed a "remedy clause," stemmed not from the text of Magna Carta, § 40 itself, but from Lord Edward Coke's influential commentaries on the provision in his *Institutes of the Laws of England*. *See* Orth and Newby, *The North Carolina State Constitution* 66 (noting that Lord Coke's commentaries pointed out that "[o]pen courts were not enough . . . ; they had to be righting wrongs and doing justice"); *see generally* David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. 1197 (1992) (describing the origin, history, and interpretation of remedy clauses). Lord Coke reasoned that, by implication, Magna Carta necessitated more than merely "open" courts: "And therefore every Subject of the Realm, for injury done to him in *bonis*, *terries*, *vel persona* [goods, lands, or person] . . . may take his remedy by the course of the Law . . . ." Orth and Newby, *The North Carolina State Constitution* 66 (quoting

Edward Coke, *Institutes of the Laws of England* (London: Society of Stationers, 1641), vol. 2, 55–56).

¶ 78 Prior to *Mangum*, we had never construed this provision to implicate standing. Rather, we have focused on whether the legislature may restrain the remedies available in certain ways. For instance, we have held the remedy clause of the open courts provision permitted the legislature to abolish punitive damages for a libeled plaintiff if a timely retraction was printed, however, we stated in dicta that abolishing compensatory damages would have violated the clause. *Osborn v. Leach*, 135 N.C. 628, 639–40 (1904). Moreover, we have held the legislature does not violate the clause by instituting a statute of repose, because the "the remedy constitutionally guaranteed must be one that is legally cognizable," and "[t]he legislature has the power to define the circumstances under which a remedy is legally cognizable and those under which it is not." *Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 444 (1983).[46]

¶ 79 How the remedy clause interacts with standing presents another question. This question turns not on what "remedy" is guaranteed, but what the term "injury" means in the phrase so as to entitle a plaintiff to a remedy. Although the provision in its present incarnation was first incorporated into the Declaration of Rights as Article I, § 35 at the 1868 Constitutional Convention, it was not discussed in the records of Convention. *See Journal of the Constitutional Convention of the State of North Carolina* (Raleigh, Joseph W. Holden, 1868). While we cannot infer the intent of the framers from this silent record, commentators have noted "the enactment of these provisions was generally motivated by concerns that the legislature, and sometimes even the courts, might block access to justice. Thus, rather than restricting legislative conferrals [of standing], if anything, they suggest a constitutional mood favorable to broad access to the courts." James W. Doggett, *"Trickle Down" Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing be Imported into State Constitutional Law?*, 108 Colum. L. Rev. 839, 878 (2008) (note) (footnotes omitted). Acknowledging this background, we nevertheless must interpret our open courts provision based on contemporaneous understandings and the common law background, which, as we have seen, continued to inform lawmakers well into the nineteenth century.

¶ 80 The concept of "injury" to which Lord Coke referred in his *Institutes* and which pervaded the common law of England and in America is en-

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46. In *Lamb*, we expressly reserved the question whether "the legislature may constitutionally abolish altogether a common law cause of action." *Id.* at 444.

tirely distinct from the concept of "injury in fact" in modern caselaw, encompassing "injuries" which did not include factual harm. For instance, in his own *Commentaries*, Blackstone recognized the writs of mandamus and prohibition, discussed in detail above, "redressed the legal injuries of 'refusal or neglect of justice' and 'encroachment of jurisdiction,' respectively." Winter, *Metaphor*, 40 Stan. L. Rev. at 1397 (quoting 3 William Blackstone, *Commentaries* *111).[47]

> The term 'injury' referred to 'any infringement of the rights of another . . . for which an action lies at law.' Legal injuries were conceptualized in terms of the experience of physical injury, but the former was not confused with the latter. It is only in this sense that there could be a notion of *damnum absque injuria* —that is, damage without cognizable legal injury.

Id. (footnotes omitted) (quoting 1 W. Jowitt, *The Dictionary of English Law* 977 (2d ed. 1977)). As Professor Hessick has noted,

> [f]actual injury (damnum) alone was not sufficient to warrant judicial intervention; rather, a person could maintain a cause of action only if he suffered a legal injury, that is, the violation of a legal right (injuria). A factual harm without a legal injury was *damnum absque injuria*, and provided no basis for relief.

Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. at 280–81 (citing 1 Theodore Sedgwick, *A Treatise on the Measure of Damages* § 32, at 28 (Arthur G. Sedgwick and Joseph H. Beale eds., 9th ed. 1920)). However, while *damnum absque injuria* (factual harm without legal injury) was insufficient at common law, *injuria sine damno* (legal injury without factual harm) sufficed. As Professor Hessick recounts, the seminal case of *Ashby v. White*, 2 Ld. Raym. 938, 92 Eng. Rep. 126, (1702) (Holt, C.J., dissenting), rev'd, 3 Salk. 17, 91 Eng. Rep. 665, would ultimately resolve this question:

> The distinction between actions on for trespass [(which did not require factual harm)] and actions on the case [(which initially did)] began to collapse in the early eighteenth century as courts became resistant to denying relief to plaintiffs whose rights had

47. As Professor Winter notes, "if Blackstone's definitions of these 'injuries' sound strange to modern ears, it is because today's jurisprudence treats 'injury-in-fact' in literalist terms. But the common law usage of the term 'injury' was plainly metaphoric." *Id.* at 1397.

> been violated but who could not demonstrate harm. In the English case *Ashby v. White*, Chief Justice Holt rejected the notion that a plaintiff could not maintain an action on the case arising from the violation of a right if he suffered no harm. He explained that "[i]f the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal." Responding to the argument that an action on the case was "not maintainable because here is no hurt or damage to the plaintiff," Chief Justice Holt argued that "surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right." Regardless of the type of action, the violation of the right was what mattered.

Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. at 281–82 (footnotes omitted).[48] The validity of Justice Holt's views in *Ashby* has been affirmed by this Court as a matter of North Carolina common law. *See, e.g.*, *Eller v. Carolina & W. Ry. Co.*, 140 N.C. 140, 142 (1905) ("Plaintiff may recover what we call nominal damages, which are really no pecuniary compensation, but which merely ascertain or fix his right or cause of action. Lord Holt has well said: 'Surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage when a man is thereby hindered of his right.' " (quoting *Ashby*, 2 Ld. Raym. at 938)).[49]

¶ 81 Therefore, the word "injury" in the remedy clause of our Constitution's open courts provision, derived from the common-law

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48. "Although Chief Justice Holt's opinion was in dissent, his judgment prevailed on appeal in the House of Lords. By the nineteenth century, both England and the United States regarded Chief Justice Holt's view as correctly stating the law." Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. at 282–83 (footnotes omitted).

49. Lord Holt's rule in *Ashby* was well-established in North Carolina by 1855, prior to the 1868 Convention. *See, e.g.*, *Bond v. Hilton*, 47 N.C. (2 Jones) 149, 150–51 (1855) (per curiam) ("Wherever there is a breach of an agreement, or the invasion of a right, the law infers some damage, and if no evidence is given of any particular amount of loss, it gives nominal damages, by way of declaring the right, upon the maxim, *ubi jus ibi remedium*." (citing *Ashby v. White*, 1st Salk. 19)).

concept of "*injuria*," means, at a minimum, the infringement of a legal right; not necessarily "injury in fact" or factual harm, derived from the contrary concept of "*damnum*." Taking the remedy clause as a whole and in the context of this history, it cannot be understood to impose a *limitation* on the power of the courts to hear a claim, under the "injury in fact" test or otherwise.[50] For the same reason, the remedy clause cannot be understood to impose a limitation on the legislature's power to create new legal rights. To the contrary, by its express terms, which provide that "every person for an injury done him . . . *shall have* remedy by due course of law," to the extent it implicates the doctrine of standing, our remedy clause should be understood as *guaranteeing* standing to sue in our courts where a legal right at common law, by statute, or arising under the North Carolina Constitution has been infringed. N.C. Const. Art. I, § 18, cl. 2 (emphasis added).

G. The Law of Standing in North Carolina Summarized

¶ 82 In summary, the "judicial power" under the North Carolina Constitution is plenary, and "[e]xcept as expressly limited by the constitution, the inherent power of the judicial branch of government continues." *Beard v. North Carolina State Bar*, 320 N.C. 126, 129 (1987). As an exercise of the judicial power entrusted in us by the people of North Carolina in our Constitution, we have the power and duty to determine the law in particular cases and, as a necessary incident of that duty, the power to conduct judicial review of executive and legislative actions for constitutionality when necessary to resolve a case. *Bayard*, 1 N.C. (Mart.) at 6–7. We have held that, in directly attacking the validity of a statute under the constitution, a party must show they suffered a "direct injury." *Summrell*, 239 N.C. at 594; *see also Stanley*, 284 N.C. at 28 (holding party must be "personally injured" to attack validity of statute). The personal or "direct injury" required in this context could be, but is not necessarily limited to, "deprivation of a constitutionally guaranteed personal right or an invasion of his property rights." *Summrell*, 239 N.C.

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50. Thirty-nine state constitutions have remedy clause provisions identical or similar to ours. *See* Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. at 1201–02 (identifying these provisions). The only state we have identified that construes the remedy clause of its open courts provision to impose a standing requirement is Texas, where our sister supreme court has held that "[u]nder the Texas Constitution, standing is implicit in the open courts provision, which contemplates access to the courts only for those litigants suffering an injury," and has applied the standing principle of federal law, including *Lujan. Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (1993); *see id.* at 445 (citing *Lujan*, 504 U.S. 555). We are not persuaded by its reasoning. *See* Doggett, "*Trickle Down" Constitutional Interpretation*, 108 Colum. L. Rev. at 878 (cautioning against adopting the Texas approach because it conflicts with the purposes underlying the adoption of open court provisions).

at 594; *see also Canteen Services*, 256 N.C. at 166 (holding only persons "who have been injuriously affected . . . in their persons, property or constitutional rights" may challenge constitutionality of a statute). The direct injury requirement applicable in cases involving constitutional challenges to the validity of government action is a rule of prudential self-restraint based on functional concern for assuring sufficient "concrete adverseness" to address "difficult constitutional questions":

> " '[t]he "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' "

Goldston, 361 N.C. at 30 (quoting *Stanley*, 284 N.C. at 28 (quoting *Flast v. Cohen*, 392 U.S. 83, 99 (1968))). When a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, however, the legal injury itself gives rise to standing. The North Carolina Constitution confers standing to sue in our courts on those who suffer the infringement of a legal right, because "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18, cl. 2. Thus, when the legislature exercises its power to create a cause of action under a statute, even where a plaintiff has no factual injury and the action is solely in the public interest, the plaintiff has standing to vindicate the legal right so long as he is in the class of persons on whom the statute confers a cause of action.[51]

H. Standing under the Disclosure Statute

¶ 83 Having followed the tortuous track through the thorny thicket of standing that brought us here, applying the law is simple. The Committee

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51. Showing a party falls within the class of persons on whom the statute confers a cause of action may require a showing of some special injury depending on the statutory terms. For instance, our zoning statutes confer standing to maintain a cause of action in the nature of certiorari appealing a quasi-judicial zoning action on certain classes of persons, including "person[s] who will suffer special damages as the result of the decision being appealed." N.C.G.S. § 160D-1402(c)(2) (Supp. 2 2020); *see Mangum*, 362 N.C. at 644. In certain cases, a cause of action may be implied from the statutory scheme. For example, to be entitled to administrative hearing under the NCAPA, a petitioner must show they are a "party aggrieved" by agency action, but where the underlying organic statute does not expressly create a right to a hearing, we have nevertheless held that those who "alleged sufficient injury in fact to interests within the zone of those to be protected and regulated by the [underlying] statute," would have a right to an administrative hearing under the NCAPA as a "person aggrieved." *Empire Power Co.*, 337 N.C. at 589.

has alleged EMPAC violated the requirements of the Disclosure Statute. Part of the Disclosure Statute creates a cause of action permitting the candidate targeted by the illegal ad to enforce the regulations by bringing suit and establishing statutory damages he can seek. This provision is one of many where our General Assembly has provided for such private enforcement. The record indicates the Committee has complied with the requirements of the Disclosure Statute.[52]

¶ 84 The Committee clearly falls under the class of persons on whom the Disclosure Statute confers a cause of action. Mr. Forest was the candidate against whom the ad below was run. He has assigned his interest in the case to his Committee. EMPAC contends that the Committee lacks standing because it cannot show "injury in fact" under *Lujan*. But, as discussed above, that is not the law of North Carolina. Under North Carolina law, the legislature may create causes of action, including "private attorney general actions" to vindicate even a purely public harm. Our requirement for a "direct injury" in cases where the plaintiff attacks the validity of a statute under the constitution does not apply here. Where the plaintiff has suffered infringement of a legal right arising under a statute that confers on a class of persons including the plaintiff a cause of action, and the plaintiff has satisfied the requirements of the statute, the plaintiff has shown standing under the North Carolina Constitution. Here, the Committee has standing based on the statutory cause of action created by the Disclosure Statute.

IV. Conclusion

¶ 85 The doctrine of standing in federal courts, including the "injury-in-fact" requirement, arises under the case-or-controversy provisions of the United States Constitution, by which exercise of the federal judicial power is limited. The North Carolina Constitution, by contrast, contains no analogous provision. Rather, in the context of standing, our "judicial power" is limited by principles of self-restraint requiring a "direct injury" when attacking the validity of a statute under the constitution. When a person alleges the infringement of a legal right directly under a cause of action at common law, a statute, or the North Carolina Constitution, however, the legal injury itself gives rise to standing. The North Carolina Constitution confers standing to sue in our courts on those who suffer the infringement of a legal right, because "every person for an injury

52. EMPAC and the dissent below argued that the Committee did not comply with the "condition precedent" of the Disclosure Statute. We disagree and hold the Committee has satisfied this condition precedent for the reasons stated in the majority opinion below.

done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18, cl. 2.

AFFIRMED IN PART; DISRECTIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.[53]

Justices BERGER and BARRINGER did not participate in the consideration or decision of this case.

Chief Justice NEWBY concurring in the result.

¶ 86 I agree with the result reached by the majority. Nonetheless, I write separately because I differ in the rationale. A system of fair elections is foundational to self-government. Our state constitution acknowledges this principle and allows the General Assembly broad authority to enact laws to protect the integrity of elections and thus encourage public trust and confidence in the election process. Under that authority, the General Assembly enacted a "stand by your ad" law in 1999, requiring political ads to contain particular information it deemed necessary to inform the public of the ad sponsor. A nonconforming ad provides inadequate information, thus harming the public generally and an affected candidate specifically. Part of that statute allowed a candidate affected by the illegal ad to enforce the regulations by bringing suit and established statutory damages he or she could seek. This provision is one of many where our General Assembly has provided for such private enforcement.

¶ 87 Misinformation harms the public, particularly when the misinformation concerns candidates for elected office. Indeed, the North Carolina Constitution recognizes the people's right to free elections, N.C. Const. art. I, § 10, which means that elections must be free from "interference," John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 56 (2d ed. 2013). The General Assembly, under its constitutional mandate to protect fair play in elections, addressed the generally recognized threat that improper advertising poses to that goal. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 371, 130 S. Ct. 876, 916, 175 L. Ed. 2d 753, 802 (2010) (explaining that "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way," and "[t]his transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages");

53. We originally granted EMPAC's petition for discretionary review on the constitutionality of the Disclosure Statute. We decline to address that issue here.

Buckley v. Valeo, 424 U.S. 1, 66–68, 96 S. Ct. 612, 657–58, 46 L. Ed. 2d 659, 714–15 (1976) (describing the various reasons the government has a significant interest in ensuring that the public is well informed on matters related to campaigning and political candidates).

¶ 88 Some states may address this problem through criminal punishment or civil penalty for intentional violations of disclosure laws. *See Friends of Joe Sam Queen v. Ralph Hise for N.C. Senate*, 223 N.C. App. 395, 403 n.7, 735 S.E.2d 229, 235 n.7 (2012) (explaining the approaches to enforcement various states have taken). The General Assembly chose a different enforcement mechanism. By allowing actions by those candidates who have been affected by unlawful ads, the General Assembly sought to meaningfully secure a vital public interest and grant a specific legal path for the injured candidate to address the wrong. *See* N.C. Const. art. I, § 18. The General Assembly perhaps recognized that it is difficult to monitor all campaign ads, that the public is harmed even by unintentional misinformation, and that the affected candidate has the greatest incentive to pursue a remedy for illegal ads.

¶ 89 Specifically, the General Assembly provided that when any entity creates a political campaign ad that violates certain disclosure requirements, the candidate affected by the unlawful ad "*shall have* a monetary remedy in a civil action against" the violator. N.C.G.S. § 163-278.39A(f) (2011) (emphasis added) (repealed 2014). The injuries to the public, to the election process, and to the individual candidate are hard to quantify: what is the monetary value of misleading information that may affect an election? The General Assembly thus provided for statutory damages. That monetary remedy is, according to the statute, equal to the amount the violating party spent to broadcast the unlawful ad. N.C.G.S. § 163-278.39A(f)(2). Only those candidates who have not violated any of the statutory provisions themselves may sue. N.C.G.S. § 163-278.39A(f). The candidate must file a notice of the complaint with the Board of Elections by the Friday following Election Tuesday. N.C.G.S. § 163-278.39A(f)(1). By the language of the statute, the General Assembly has decided that a candidate who complies with these requirements and shows a violation is entitled to statutory damages.

¶ 90 Plaintiff here has complied with all the statutory requirements. First, there is no evidence that plaintiff has violated any disclosure requirement; plaintiff has clean hands, as the General Assembly required. Next, both defendant and the Board of Elections received notice of the violation within the statutory period. Thus, sufficient evidence exists to show that plaintiff complied with any condition precedent to suing. There is

no dispute that plaintiff's complaint precisely tracks the requirements of the statute.

¶ 91 The only remaining question, then, is whether subsection 163-278.39A(f) is enforceable as written; in other words, is the statute constitutional? It is. Here the General Assembly used its longstanding constitutional authority to create causes of action like this one.

¶ 92 All political power resides in the people, N.C. Const. art. I, § 2, and the people act through the General Assembly. *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895) ("[T]he sovereign power resides with the people and is exercised by their representatives in the General Assembly."). The General Assembly therefore may presumptively take any legislative action not specifically prohibited by the North Carolina Constitution. *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961) ("[A] doctrine firmly established in the law is that a State Constitution is in no matter a grant of power. All power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it." (alteration in original) (quoting *Lassiter v. Northampton Cnty. Bd. of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958), *aff'd*, 360 U.S. 45, 54, 79 S. Ct. 985, 991, 3 L. Ed. 2d 1072, 1078 (1959))). Thus, as this Court has regularly noted, any alleged constitutional limitation on the General Assembly's power must be express and demonstrated beyond a reasonable doubt. *E.g.*, *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015).

¶ 93 In keeping with its general legislative power, the General Assembly has the authority to recognize threats to the public good, identify an injury, and provide for the appropriate remedy. A statute may create a private cause of action even if the common law would not provide that right. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) (The General Assembly is inarguably "the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter." (quoting *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956))).

¶ 94 The General Assembly may therefore create "private attorney general actions." Private attorney general actions allow nongovernmental actors to enforce laws. These actions are integral to the well-being of this State's citizens. They are often used when the harm is to the public generally and is difficult to quantify. Such a statute by its own accord

recognizes that an injury has occurred and allows a specified party to sue for recovery. *See*, *e.g.*, *Mayton v. Hiatt's Used Cars*, *Inc.*, 45 N.C. App. 206, 212, 262 S.E.2d 860, 864 (1980) (indicating that when a statute allows for a private attorney general action, it may be irrelevant whether the party bringing the suit has suffered an "actual injury"). For an action to qualify as one brought by a private attorney general, the action usually must address a right that is important to the public interest and provide for private enforcement. *See*, *e.g.*, *Stephenson v. Bartlett*, 177 N.C. App. 239, 244, 628 S.E.2d 442, 445 (2006) (explaining the traditional treatment of private attorney general actions in the context of awards of attorney's fees). These actions deter wrongdoing by incentivizing private parties to prosecute violations.

¶ 95 Indeed, the General Assembly has established a private enforcement mechanism like the one in this case in several other statutes. For example, North Carolina's Open Meetings Law, which requires certain government meetings to be open to the public, allows for such suits. It says that "[a]ny person" may bring a suit for an injunction to force the government entity to comply with the law, and "the plaintiff need not allege or prove special damage different from that suffered by the public at large." N.C.G.S. § 143-318.16A(a) (2019). The law allows the plaintiff to be awarded attorney's fees upon prevailing in such a suit. N.C.G.S. § 143-318.16B (2019).

¶ 96 Some laws go even further, mirroring the statute in this case, by providing for specified statutory damages without requiring the plaintiff to prove actual injury. *See* N.C.G.S. § 75-56(b) (2019) ("Any debt collector who fails to comply with any provision of this Article with respect to any person is liable to such person in a private action in an amount equal to the sum of (i) any actual damage sustained by such person as a result of such failure and (ii) civil penalties the court may allow, but not less than five hundred dollars ($500.00) nor greater than four thousand dollars ($4,000) for each violation."); *see also* N.C.G.S. § 75-118(a)(2) (2019) (providing that any recipient of an unsolicited facsimile may bring a suit to recover "five hundred dollars ($500.00) for the first violation, one thousand dollars ($1,000) for the second violation, and five thousand dollars ($5,000) for the third and any other violation that occurs within two years of the first violation"). The General Assembly has therefore used its constitutional authority to recognize public injuries, declare an appropriate plaintiff, and fashion a proper remedy on several occasions, including in this case.

¶ 97 Private attorney general actions with statutory damages serve to vindicate the rights of an injured public when harm is hard to quantify. The

General Assembly, within its constitutional authority, provided for such a cause of action and such damages in this case. Plaintiff has the right to sue under this statute, and neither the North Carolina Constitution nor this Court's precedent limit courts from hearing the case.

¶ 98 I respectfully concur in the result.

IN THE MATTER OF C.L.H.

No. 213A20

Filed 5 February 2021

1. Termination of Parental Rights—grounds for termination—neglect—sufficiency of findings

The trial court's findings were insufficient to support its conclusion that grounds existed to terminate respondent-father's parental rights to his child based on neglect where the sole finding—stating that the child was previously neglected due to lack of care when respondent experienced a medical issue—was not supported by the evidence. Further, the findings failed to address whether the child would be neglected in the future if returned to respondent's care.

2. Termination of Parental Rights—grounds for termination—dependency—sufficiency of findings

The trial court's findings were insufficient to support its conclusion that grounds existed to terminate respondent-father's parental rights to his child based on dependency where the sole finding related to dependency—stating that there was no proper plan of care for the child during an incident in which respondent experienced a medical issue—was not supported by the evidence. There were no findings, nor evidence presented, that respondent's health prevented him from providing proper care or supervision of the child.

3. Termination of Parental Rights—grounds for termination—willful failure to pay child support—sufficiency of findings

In a termination of parental rights case, the trial court's findings were insufficient to support termination on the grounds of willful failure to pay child support where they failed to address whether an enforceable child support order was in place within one year prior to the termination petition being filed. The termination order was

vacated and remanded for the trial court to exercise its discretion regarding the need for new evidence and to enter an order with findings and conclusions regarding the existence of a valid support order.

Justice BARRINGER dissenting.

Chief Justice NEWBY and Justice BERGER join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 22 January 2020 by Judge Christy E. Wilhelm in District Court, Cabarrus County. This matter was calendared for argument in the Supreme Court on 6 January 2021 but determined on the record and brief without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief for petitioner-appellee mother.

No brief for appellee Guardian ad Litem.

Anné C. Wright for respondent-appellant father.

EARLS, Justice.

¶ 1 Respondent appeals from the trial court's order terminating his parental rights to C.L.H. (Cash).[1] After careful review, we conclude that this case is in large part controlled by *In re K.N.*, 373 N.C. 274, 837 S.E.2d 861 (2020), necessitating that we reverse in part and vacate and remand in part.

¶ 2 Respondent is the biological father of Cash, and petitioner is Cash's biological mother. Cash was born in 2009 following a brief relationship between respondent and petitioner. Respondent and petitioner never married. On 19 August 2011, respondent and petitioner entered into a parenting agreement by which petitioner was granted primary custody of Cash, and respondent was granted visitation. Respondent and petitioner also entered into a child support consent order by which respondent agreed to pay petitioner $433 per month and fifty percent of any uninsured medical bills after the first $250 was paid by petitioner. However, neither the facts alleged in the termination petition and admit-

1. A pseudonym is used in this opinion to protect the juvenile's identity and for ease of reading. *See* N.C. R. App. P. 42(b)(1).

ted in the answer nor the trial court's factual findings indicate whether the child support consent order was in effect during the year preceding the filing of the termination petition. The last known contact between respondent and Cash was in April 2018.

¶ 3 On 1 May 2018, the trial court held a hearing after petitioner filed a motion in the cause for modification of custody and to hold respondent in contempt. Petitioner stated that she filed the motion because of concerns she had regarding events that occurred during Cash's visitation with respondent. Specifically, petitioner testified that Cash was visiting respondent on 25 February 2018 when she received a phone call claiming that she needed to pick up Cash because respondent had a medical issue. At the time, respondent was living in a camper behind his parents' home, and Cash would stay in the grandparents' home while visiting with respondent. When petitioner arrived at the grandparents' home, she found that respondent had been taken to the hospital. Petitioner testified that she went into respondent's camper to retrieve Cash's belongings and that it was "smoky" and smelled "chemically." On 13 June 2018, the trial court entered an order in which it found as fact that Cash found respondent unresponsive and sought help because respondent was "overdosing on heroin." The trial court found respondent to be unfit to provide for Cash's physical, emotional, and financial well-being and granted petitioner sole physical and legal custody of Cash. The trial court also terminated respondent's visitation with Cash.

¶ 4 On 30 January 2019, petitioner filed a petition to terminate respondent's parental rights to Cash. Petitioner alleged that grounds existed to terminate respondent's parental rights for neglect, willful failure to pay child support, dependency, and willful abandonment. N.C.G.S. § 7B-1111(a)(1), (4), (6)–(7) (2019). On 10 April 2019, respondent filed an answer in which he opposed the termination of his parental rights. On 22 January 2020, the trial court entered an order in which it determined grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1), (4), and (6). The trial court further determined that it was in Cash's best interests that respondent's parental rights be terminated. Respondent appeals.

¶ 5 Respondent argues that the trial court erred by concluding 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, 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 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, 831 S.E.2d 49, 52 (2019) (quoting *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).

¶ 6 **[1]** In this case, the trial court determined that grounds existed to terminate respondent's parental rights based on neglect, willful failure to pay child support, and dependency. N.C.G.S. § 7B-1111(a)(1), (4), and (6). We begin our analysis with consideration of whether grounds existed to terminate respondent's parental rights for neglect, pursuant to N.C.G.S. § 7B-1111(a)(1).

¶ 7 A trial court may terminate parental rights where 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 lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019).

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent.

In re D.L.W., 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984)). "When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212, 835 S.E.2d 425, 430 (2019) (citing *In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232)).[2]

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2. As we have noted in our recent opinion in *In re R.L.D.*, No. 122A20, slip op. at 5 n.3 (N.C. Dec. 11, 2020), it is not necessary in every case that a petitioner make a showing of past neglect and of a probability of future neglect to support a determination that

¶ 8 Here, Cash was not in respondent's custody at the time of the termination hearing and had not been since at least 13 June 2018, when the trial court awarded petitioner sole physical and legal custody of Cash. The last known contact between respondent and Cash was in April 2018, approximately 18 months before the termination hearing. Additionally, because this case does not arise from involvement by the Department of Social Services, no petition alleging neglect was ever filed, and Cash was never adjudicated to be a neglected juvenile.

¶ 9 The sole finding of fact potentially supporting a conclusion that respondent had previously neglected Cash was finding of fact 17(a). In finding of fact 17(a), the trial court found that

> [r]espondent was unable to care for [Cash] during the February 2018 incident, whether it was due to a drug overdose or some other medical condition, for some period of time the child was not cared for and there does not appear that there was a proper plan in place for alternative care.

Respondent argues that the portion of finding of fact 17(a) which states that Cash was not cared for during the February 2018 incident is not supported by clear, cogent, and convincing evidence. We agree. The only evidence in the record concerning Cash's care during this incident was that he stayed in his grandparents' home when visiting with respondent, that his paternal grandfather was the person who called for help with respondent's medical issue, and that petitioner was called to pick up Cash from the grandparents' home. There was no evidence presented that Cash was not cared for during this incident. Accordingly, we disregard this portion of finding of fact 17(a). *See In re J.M.J.-J.*, 374 N.C. 553, 559, 843 S.E.2d 94, 101 (2020) (disregarding adjudicatory findings of fact not supported by clear, cogent, and convincing evidence).

¶ 10 We further note that the trial court's findings of fact, even if supported, shed little light on how this incident, and the alleged absence of care, impacted Cash. *See In re K.L.T.*, 374 N.C. 826, 831, 845 S.E.2d 28, 34 (2020) ("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.' " (citation omitted)). Further, assuming arguendo that the incident and alleged lack

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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). Such a determination is also permissible in the event that there is a showing of current neglect as defined in N.C.G.S. § 7B-101(15).

of care constituted prior neglect, the trial court did not find that there would be a likelihood of future neglect should Cash be returned to respondent's care, nor do the trial court's sparse findings of fact support such a conclusion. *See In re K.N.*, 373 N.C. at 282, 837 S.E.2d at 867 (stating that in light of the juvenile's prior adjudication of neglect and his resulting removal from the home, "we must evaluate whether there are sufficient findings of fact in the termination order to support the trial court's ultimate conclusion that there is a likelihood of future neglect by respondent"). Therefore, we hold the trial court erred by concluding that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) to terminate respondent's parental rights.

¶ 11 **[2]** We next consider whether the trial court properly concluded that grounds existed to terminate respondent's parental rights for dependency, pursuant to 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). 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). To adjudicate the ground of dependency, 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 K.R.C.*, 374 N.C. 849, 859, 845 S.E.2d 56, 63 (2020) (citation omitted).

¶ 12 Here, the sole express finding of fact made by the trial court regarding this statutory ground was that "the ground of dependency exists in that there was no proper plan for care of the minor child." Arguably, the trial court's finding of fact 17(a) concerning the February 2018 incident and the lack of an alternative plan of care for Cash was also related to this statutory ground. However, the trial court made no finding of fact, and there was no evidence presented, that at the time of the termina-

tion hearing respondent suffered from any condition which rendered him incapable of providing proper care or supervision to Cash. The only evidence presented that possibly supported a conclusion that respondent was incapable of parenting Cash was the incident in February 2018, which occurred over 18 months prior to the termination hearing. *See In re Z.D.*, 258 N.C. App. 441, 452, 812 S.E.2d 668, 676 (2018) (holding that the evidence was insufficient to support termination of respondent's parental rights based on dependency where "[r]espondent's mental health and parenting abilities pertain[ed] more to the historic facts of the case that occurred at least a year prior to the hearing, and the order contain[ed] no specific findings regarding [r]espondent's condition, mental health, and alleged incapability at the time of the hearing"). Accordingly, we hold that the trial court erred by concluding that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(6) to terminate respondent's parental rights.

¶ 13 **[3]** Finally, we consider the trial court's conclusion that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(4) to terminate respondent's parental rights for his willful failure to pay for the child's care without justification. A trial court may terminate a parent's parental rights pursuant to this statutory ground when

> [o]ne parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement.

N.C.G.S. § 7B-1111(a)(4). We agree with the Court of Appeals that, when seeking to terminate parental rights pursuant to this statutory ground, "petitioner must prove the existence of a support order that was enforceable during the year before the termination petition was filed." *In re I.R.L.*, 263 N.C. App. 481, 485, 823 S.E.2d 902, 905 (2019) (quoting *In re Roberson*, 97 N.C. App. 277, 281, 387 S.E.2d 668, 670 (1990)). When the trial court fails to make findings of fact "indicating that a child support order existed or that [the parent] failed to pay support 'as required by' the child support order," its findings are insufficient to support the conclusion that grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(4). *Id.* at 486, 823 S.E.2d at 906.

¶ 14 In *In re I.R.L.*, the Court of Appeals concluded that the trial court's findings were insufficient to support a conclusion that the father's

parental rights were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(4). *Id.* The Court of Appeals noted that

> while both parties testified that a child support order was entered in December 2014 ordering [the] father to pay $50.00 per month in child support, the trial court's termination order [was] devoid of any findings indicating that a child support order existed or that [the f]ather failed to pay support "as required by" the child support order.

Id. Here, the trial court made no findings of fact that a child support order existed in the year prior to the filing of the petition to terminate respondent's parental rights. Consequently, we conclude that the trial court's findings of fact are insufficient to support the termination of respondent's parental rights based on N.C.G.S. § 7B-1111(a)(4).

¶ 15 The dissent, urging affirmance of the trial court's decision, attempts to distinguish *In re I.R.L.* by pointing out that the trial court's order in that case was "devoid of any findings indicating that a child support order existed or that [the respondent] failed to pay support 'as required by' the child support order." *In re I.R.L.*, 263 N.C. App. at 486, 823 S.E.2d at 906. However, as discussed above, the trial court's order in the instant case is similarly deficient. The dissent also points to the fact that "the only evidence [in *In re I.R.L.*] supporting the existence of a child support order was the testimony of both parties." However, the source of the evidence, as opposed to its existence in the record, does not affect our decision on this issue. When reviewing an order terminating parental rights, our task as an appellate court is "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Z.A.M.*, 374 N.C. at 94, 839 S.E.2d at 797 (quoting *In re C.B.C.*, 373 N.C. at 19, 832 S.E.2d at 695). Just as in this case, the trial court in *In re I.R.L.* failed to find as a fact that a child support order existed, and that the respondent had violated it, despite the existence of evidence in the record that would have supported such a finding. *In re I.R.L.*, 263 N.C. App. at 486, 823 S.E.2d at 906. The source of that evidence, so long as it is clear, cogent, and convincing, is not relevant to our analysis. There is no material distinction between this case and *In re I.R.L.*

¶ 16 We note that here there appears to be evidence in the record which might support a conclusion that grounds existed to terminate respondent's parental rights pursuant to this statutory ground. First, petitioner alleged in the termination petition, and respondent admitted in his an-

swer, that the parties had entered into a child support consent order.[3] Neither the allegation nor the admission, however, establish that the support order was in effect during the year prior to the filing of the termination petition. *See* N.C.G.S. § 7B-1111(a)(4) (permitting termination of parental rights if a parent has failed to pay support as required by a decree or custody agreement "for a period of one year or more next preceding the filing of the petition or motion"). Second, petitioner testified that there was a child support order in place at the time of the termination hearing.

¶ 17 Also on this ground, the trial court found as fact, and respondent does not dispute, that respondent "paid no support, whether child support or other monetary support for the benefit of the minor child since September 2015." Respondent does, however, argue that the trial court failed to make any findings of fact regarding whether his failure to pay support was willful, and, thus, the trial court's conclusion on this issue was not supported by its factual findings. It is not necessary to resolve this argument because we have determined that the trial court failed to make factual findings that respondent failed to pay for the care, support, and education of the juvenile within the year prior to the filing of the termination petition "as required by the decree or custody agreement." *See* N.C.G.S. § 7B-1111(a)(4). We note, however, that the existence of the child support order in effect at the relevant time, if it had been included in the factual findings, would support a conclusion that respondent had the ability to pay some portion of the cost of care for the juvenile. *In re J.D.S.*, 170 N.C. App. 244, 257, 612 S.E.2d 350, 358 (quoting *In re Roberson*, 97 N.C. App. 277, 281, 387 S.E.2d 668, 670 (1990)), *cert. denied*, 360 N.C. 64, 623 S.E.2d 584 (2005) ("In a termination action pursuant to this ground, petitioner must prove the existence of a support order that was enforceable during the year before the termination petition was filed. . . . Because a proper decree for child support will be based on the supporting parent's ability to pay as well as the child's needs, . . . there is no requirement that petitioner independently prove or that the termination order find as fact respondent's ability to pay support during the relevant statutory time period." (alterations in original)). Where, as in this matter, the "trial court's adjudicatory findings were insufficient to support its conclusion that termination of the parent's rights was warranted, but the record contained additional evidence that could have

3. The admitted allegation reads: "Within the same Cabarrus County file, the Petitioner and Respondent entered into a child support consent order wherein the Respondent agreed to pay the Plaintiff the sum of $433 per month and fifty percent (50%) of any uninsured medical bills after the first $250 is paid by the Petitioner."

potentially supported a conclusion that termination was appropriate," we "vacate[ ] the trial court's termination order and remand[ ] the case for further proceedings, including the entry of a new order containing findings of fact and conclusions of law addressing the issue of whether [the] ground for termination existed." *In re K.N.*, 373 N.C. at 284, 837 S.E.2d at 869.[4]

¶ 18 The dissent, urging the opposite result, argues that the trial court's findings of fact 11 and 17(c) were supported by the record and support the trial court's conclusion to terminate respondent-father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(4). However, neither those nor any of the other findings of the trial court establish the existence of a child support order at the relevant time. In arguing that the record evidence supports the result below, it appears that the dissent is conflating the record with the *factual findings* of the trial court. However, it is our role to review the trial court's factual findings to determine whether they support the trial court's conclusions of law. *See*, *e.g.*, *In re E.H.P.*, 372 N.C. at 392, 831 S.E.2d at 52. As the Court of Appeals has stated, "[i]t is the role of the trial court and not [the appellate court] to make findings of fact regarding the evidence." *In re F.G.J.*, 200 N.C. App. 681, 693, 684 S.E.2d 745, 754 (2009); *see also In re K.N.*, 373 N.C. at 283, 837 S.E.2d at 868 (rejecting argument of petitioner that evidence in the record supported affirmance of trial court's ultimate conclusions and instead looking to "the trial court's actual findings").

¶ 19 This principle has long been followed by our courts. As Justice Exum explained forty years ago:

> 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

4. The dissent incorrectly suggests that on the question of whether a remand is necessary for factual findings, this case is controlled by *In re A.U.D.*, 373 N.C. 3, 10–11, 832 S.E.2d 698, 702–03 (2019). In that case, we declined to remand to the trial court for written findings on specific factors that the trial court must consider during the best interests phase of the proceeding. *In re A.U.D.*, 373 N.C. 3, 11, 832 S.E.2d 698, 703 (2019). Critically, N.C.G.S. § 7B-1110(a) does not require written findings as to each factor. *Id.* at 10, 832 S.E.2d at 703. Because the trial transcript demonstrated that the trial court had carefully considered each factor, satisfying the statutory requirement, we concluded that remand for written findings on each factor "would be an elevation of form over substance." *Id.* at 11, 832 S.E.2d at 703. In any case, even were we to adopt the dissent's view that written findings are never required for uncontested facts, the uncontested evidence in this case does not establish that a child support order was in place during the relevant time period—namely, the year preceding the filing of the termination petition. *See* N.C.G.S. § 7B-1111(a)(4).

> 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."

Coble v. Coble, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980) (quoting *Montgomery v. Montgomery*, 32 N.C. App. 154, 158, 231 S.E.2d 26, 29 (1977) and citing *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967)). In deciding whether a trial court's award of alimony followed the requirements of applicable statutes, this Court explained:

> The requirement of special fact-finding did not begin with implementation of our present Rules of Civil Procedure. In *Martin v. Martin*, 263 N.C. 86, 138 S.E. 2d 801 (1964) (per curiam), this Court reviewed a trial court order which directed alimony *pendente lite* and child support payments. The trial court made only limited findings of [fact] about the defendant's financial circumstances. The hearing had been on affidavits and defendant submitted his own uncontradicted affidavit indicating his dire financial situation. However, no findings of fact concerning the matters in the affidavit were made. This Court stated, in remanding to the trial court:
>
> If the facts set out in defendant's affidavit are true, the payments required of defendant are clearly excessive, unrealistic and beyond the limits of judicial discretion. *The court made no specific findings with respect to the matters set out in the affidavit, and it does not appear whether they were considered.* 263 N.C. at 87–88, 138 S.E. 2d at 802 (emphasis added).

Quick v. Quick, 305 N.C. 446, 452–53, 290 S.E.2d 653, 658 (1982). In the termination of parental rights context, this has long been the rule as well. *See, e.g.*, *In re T.P.*, 197 N.C. App. 723, 730, 678 S.E.2d 781, 787 (2009) ("We have little doubt after studying the record that there existed evidence from which the trial court could have made findings and conclusions to support its orders for termination of parental rights.

Unfortunately, the skeletal orders in the record are inadequate to allow for meaningful appellate review."); *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009) ("Although there may be evidence in the record to support a finding that Respondent acted inconsistently with his custodial rights, it is not the duty of this Court to issue findings of fact."). The dissent's position would have us make factual findings for the trial court on a fundamental and material fact, which is not how we have applied the standard of review in these cases. As we did recently in *In re K.N.*, and *In re N.D.A.*, we are compelled to remand for further factual findings on this ground. *See In re K.N.*, 373 N.C. at 284, 837 S.E.2d at 868; *In re N.D.A.*, 373 N.C. 71, 84, 833 S.E.2d, 768, 777 (2019).

¶ 20 In summary, the portions of the trial court's order concluding that respondent's parental rights were subject to termination under N.C.G.S. § 7B-1111(a)(1) and (6) are reversed. The portion of the trial court's order adjudicating grounds for termination under N.C.G.S. § 7B-1111(a)(4) is vacated and remanded for further proceedings not inconsistent with this opinion, including the entry of a new order containing findings of fact and conclusions of law addressing whether there was a child support order in place that was enforceable during the year before the termination petition was filed and the issue of whether respondent willfully failed to pay support for Cash without justification. 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, 837 S.E.2d at 869.

REVERSED IN PART; VACATED AND REMANDED IN PART.

Justice BARRINGER dissenting.

¶ 21 Based on a review of the record, respondent-father did not preserve for appeal the issue of whether petitioner-mother proved the existence of a child support order to terminate respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(4). Moreover, even if respondent-father had preserved the issue for appeal, the trial court's findings are sufficient to support the conclusion that grounds for termination existed pursuant to N.C.G.S. § 7B-1111(a)(4).

¶ 22 N.C.G.S. § 7B-1111(a)(4) states:

> (a) The court may terminate the parental rights upon a finding of one or more of the following:
>
> . . . .

> (4) One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement.

¶ 23 Here, respondent-father admitted that a child support order existed. Specifically, respondent-father admitted to the following allegation in his answer to petitioner-mother's petition for termination:

> Within [Cabarrus County File Number: 11-CVD-961], the Petitioner and Respondent entered into a child support consent order wherein the Respondent agreed to pay the Plaintiff the sum of $433 per month and fifty percent (50%) of any uninsured medical bills after the first $250 is paid by the Petitioner.

¶ 24 Respondent-father never moved to amend his answer or otherwise present to the trial court any reason to disregard this admitted allegation. *See* N.C. R. App. P. 10(a)(1). It is well-established law in this state that an admission in an answer binds the answering party and renders the fact uncontested. *See Harris v. Pembaur*, 84 N.C. App. 666, 670 (1987) ("Facts alleged in the complaint and admitted in the answer are conclusively established by the admission." (citing *Champion v. Waller*, 268 N.C. 426 (1966))).

¶ 25 *In re I.R.L.*, 263 N.C. App. 481 (2019)[1] is incorrectly relied upon by respondent-father and the majority. On the contrary, the controlling precedent established by this Court is found in *In re A.U.D.*, 373 N.C. 3, 10–11 (2019), where this Court held that "a remand by this Court to the trial court for written findings on these uncontested issues—a disposition for which our dissenting colleague appears to be advocating—would be an elevation of form over substance and would serve only to delay the final resolution of this matter for the children." Affirming the trial court's termination of parental rights in this case does not involve improperly finding facts that a child support order exists, as the major-

1. While the majority relies on this decision from the Court of Appeals, it is worth noting that decisions from the Court of Appeals are only persuasive, not binding authority on this Court in cases not previously adopted.

ity contends. Here, the fact of the existence of a child support order is uncontested by respondent-father's admission in his answer to petitioner-mother's allegation in her petition for termination.[2] To remand this case and direct the trial court to make findings of fact on a fact already uncontested by both parties is "an elevation of form over substance." *Id.*

¶ 26 Moreover, *In re I.R.L.* is distinguishable from the instant case. In that case, the "trial court's termination order [was] devoid of any findings indicating that a child support order existed or that [the f]ather failed to pay support 'as required by' the child support order," and the only evidence supporting the existence of a child support order was the testimony of both parties. *Id.* at 486.

¶ 27 In this case, the trial court determined that "[t]he Respondent-father paid no support, whether child support or other monetary support for the benefit of the minor child since September 2015, over four years next preceding the filing of this [termination]." Respondent-father did not challenge finding of fact 11 in the trial court's termination order. Unchallenged findings of fact are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019). Therefore, finding of fact 11 is binding on this Court.

¶ 28 Finding of fact 11 is also supported by sufficient evidence. Respondent-father admitted that "Petitioner[-mother] and Respondent [-father] entered into a child support consent order wherein the Respondent[-father] agreed to pay the [Petitioner-mother] the sum of $433 per month." The uncontroverted evidence showed that there was a child-support order in place for Cash, the biological child of petitioner-mother and respondent-father, and that the last payment respondent-father made was in September 2015.

¶ 29 The record additionally supports the trial court's finding of fact 17(c) that respondent-father willfully failed to pay child support. Respondent-father testified that he intentionally withheld financial support from Cash. Respondent-father testified that he was employed. When asked about his financial assistance after the 25 February 2018 incident and the loss of his visitation rights, respondent-father responded as follows:

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2. Moreover, a review of the record indicates that the parties apparently considered the issue of whether there was a child support order to be settled. Petitioner-mother, in her testimony during direct examination responded that there was a child support order in place for the minor child. On cross examination of the petitioner-mother, the respondent-father's attorney did not question her regarding her testimony regarding the child support order. On direct examination, the respondent-father testified that he paid money in accordance with "the legal agreement we had."

"I'm not going to give the money when I'm not even allowed to spend time with my son." Also, respondent-father did not give any justification for his failure to pay child support after the 25 February 2018 incident and admitted he was currently employed as a subcontractor and had worked as a contractor for most of his life. On this record, there is sufficient evidence to find that respondent-father had willfully and without justification failed to pay child support for four years.

¶ 30 Respondent-father argues that finding of fact 17(c) should be treated as a conclusion of law and raises that the trial court used the same language in its third conclusion of law. The majority seems to implicitly adopt this argument. However, a finding that an act is willful is determined by the trier of fact whether it be a jury or the trial court. *In re K.N.K.*, 374 N.C. 50, 53 (2020) ("The willfulness of a parent's actions is a question of fact for the trial court."); *see also Brandon v. Brandon*, 132 N.C. App. 646, 651 (1999) ("Where the trial court sits as the finder of fact, 'and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inference shall be drawn is for the trial [court].' " (alteration in original)). Plainly, the determination of whether a parent is acting willfully is a finding of fact and not a conclusion of law. *In re J.S.*, 374 N.C. 811, 818 (2020). Finding of fact 17(c) is therefore properly classified as a finding of fact in the trial court's termination order.

¶ 31 In conclusion, respondent-father's admission in his answer to petitioner-mother's allegation that he had entered into a consent child support order makes its existence an uncontested fact. Additionally, the trial court's findings of fact 11 and 17(c) were supported by sufficient evidence in the record and support the trial court's conclusion to terminate respondent-father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(4) for willfully failing to pay child support without justification.

¶ 32 For these reasons, the decision of the trial court should be upheld on the ground for termination pursuant to N.C.G.S. § 7B-1111(a)(4).[3] Accordingly, I respectfully dissent.

Chief Justice NEWBY and Justice BERGER join in this dissenting opinion.

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3. Since I would affirm the trial court's termination pursuant to N.C.G.S § 7B-1111(a)(4) and only one termination ground is required under N.C.G.S. § 7B-1111(a), it is unnecessary to reach the remaining grounds found by the trial court.

IN RE J.E.B.

[376 N.C. 629, 2021-NCSC-2]

IN THE MATTER OF J.E.B., II

No. 99A20

Filed 5 February 2021

1. Termination of Parental Rights—guardian ad litem participation in hearing—appointed counsel's duties—N.C.G.S. § 7B-1101.1(d)

Respondent mother received a fundamentally fair hearing in a termination of parental rights case even though her guardian ad litem cross-examined witnesses and made arguments to the court (which was at the express direction of, or in apparent coordination with, respondent's appointed counsel). There was no violation of N.C.G.S. § 7B-1101.1(d) where counsel's actions representing respondent throughout the proceeding did not demonstrate an abdication of his responsibilities and where the clear statutory language required only that the parent's counsel and guardian ad litem not be the same person and did not constitute a prohibition against the guardian ad litem from assisting counsel as he did here.

2. Termination of Parental Rights—appointed counsel—assistance from guardian ad litem—ineffective assistance of counsel claim

In a termination of parental rights case where the guardian ad litem participated in the hearing by questioning some witnesses and making arguments to the trial court, respondent's claim that she received ineffective assistance of counsel because her appointed counsel was not sufficiently involved with the proceeding was rejected because the record reflected that counsel was engaged throughout and utilized the assistance of the guardian ad litem to better serve respondent. Respondent's additional claim that the guardian ad litem was unprepared to assist her counsel was not supported by the record.

Justice MORGAN dissenting.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order terminating respondent's parental rights entered on 21 October 2019 by Judge John K. Greenlee in District Court, Gaston County. Heard in the Supreme Court on 11 January 2021.

IN RE J.E.B.

[376 N.C. 629, 2021-NCSC-2]

Elizabeth Myrick Boone for petitioner-appellee Gaston County Department of Health and Human Services.

Brian C. Bernhardt for appellee Guardian ad Litem.

Garron T. Michael for respondent-appellant mother.

EARLS, Justice.

¶ 1 Respondent-mother appeals from an order entered by Judge John K. Greenlee in District Court, Gaston County, on 21 October 2019 terminating her parental rights in J.E.B., II (Jason).[1] Respondent argues that she was denied a fundamentally fair termination proceeding because her guardian ad litem conducted examinations of some witnesses and, at one point, presented legal arguments on respondent's behalf. In respondent's view, these actions violated N.C.G.S. § 7B-1101.1, which establishes the right of a parent to appointed counsel and, in certain circumstances, to a guardian ad litem in a termination of parental rights proceeding. It further provides that "[t]he parent's counsel shall not be appointed to serve as the guardian ad litem and the guardian ad litem shall not act as the parent's attorney." N.C.G.S. § 7B-1101.1(d) (2019). Because the trial court properly appointed respondent a guardian ad litem and an attorney, both of whom carried out appropriate roles in this matter, we conclude the statute was not violated and we affirm the trial court's order.

I. Background

¶ 2 Jason was placed in the temporary nonsecure custody of the Gaston County Department of Health and Human Services, Division of Social Services (DSS) on 22 November 2017 following a forensic interview during which Jason disclosed that he had been sexually abused by his father's roommate and physically abused by his father. Prior to that point, both respondent and Jason's father had been involved with DSS as a result of concerns of substance abuse and domestic violence.

¶ 3 On 27 March 2018, the trial court entered an adjudication order placing Jason in the legal custody of DSS. The termination order indicates that, at a disposition hearing on 24 April 2018, the trial court ordered respondent to complete a case plan with the following components:

a) Refrain from using/abusing all illegal/mind altering substances;

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

b) Complete an updated Mental Health and Substance Abuse Assessment;

c) Follow any recommendations from the Mental Health and Substance Abuse Assessments;

d) Submit to drug screens as requested;

e) Complete parenting classes;

f) Obtain and maintain safe, appropriate, and stable housing;

g) Obtain a Psychological Assessment;

h) Attend visitations with the juvenile, demonstrate effective parenting skills and display appropriate communication skills in presence of the juvenile;

i) Sign all consents necessary;

j) Refrain from any criminal activity.

The trial court subsequently found that Respondent failed to enter into a case plan, despite being ordered to do so by the court. The trial court changed Jason's primary permanent plan from reunification to adoption in an order filed 9 November 2018, following a hearing on 16 October 2018. Respondent was ultimately served with a termination petition alleging that Jason was a neglected juvenile, that respondent had willfully left Jason in foster care for more than twelve months without making reasonable progress to correct the circumstances that led to his removal from the home, and that respondent was incapable of properly caring for Jason.

¶ 4 At the beginning of the termination proceeding, respondent's appointed attorney, Mr. Kakassy, unsuccessfully attempted to withdraw on the basis of noncooperation, indicating that he had been unable to communicate with respondent and that she did not wish him to continue representing her. The court denied Mr. Kakassy's request to withdraw. In doing so, the court stated the following:

> All right. [Respondent,] Mr. Kakassy has been on your underlying case for some period of time, was appointed on this in June. He is very familiar with your case and your situation. You have a Guardian Ad Litem that's been appointed, Mr. Hargett. Both are fully capable, professional attorneys to assist you in this and are fully capable of doing that. So, any motion to have a new attorney appointed or release Mr. Kakassy is denied.

Later, Mr. Kakassy again protested that he would have difficulty proceeding and the trial court stated that Mr. Hargett, respondent's guardian ad litem, was "welcome to ask questions and examine [respondent]" and stated that the group—Mr. Kakassy, Mr. Hargett, and respondent—could determine among themselves what strategy to use to present evidence.

¶ 5 During the proceeding, Mr. Kakassy and Mr. Hargett worked together to represent respondent. At various points, Mr. Hargett cross-examined witnesses, including respondent. At various points, Mr. Kakassy objected on respondent's behalf. At the end of the adjudication stage of the proceeding, Mr. Kakassy requested that DSS dismiss the dependency ground for termination of respondent's parental rights and Mr. Hargett argued on respondent's behalf regarding the remaining two grounds. During the best interests phase of the proceeding, Mr. Kakassy conducted the direct examination of respondent's only witness.

¶ 6 In an order entered on 21 October 2019, the trial court determined that grounds existed to terminate respondent's parental rights with respect to Jason. Respondent filed the instant appeal and argued that Mr. Hargett's actions violated a statutory mandate that a parent's guardian ad litem "shall not act as the parent's attorney." *See* N.C.G.S. § 7B-1101.1(d). Respondent also asserts in the alternative that, if we do not reverse the termination order on that basis, she received ineffective assistance of counsel. On a motion filed by DSS, respondent's original appeal was dismissed by order of this Court on 7 May 2020. We allowed respondent's petition for a writ of certiorari by order on the same date.

II. Standard of Review

¶ 7 Generally, when this Court reviews a trial court's order terminating parental rights, we review "to determine whether the trial court made sufficient factual findings to support its ultimate findings of fact and conclusions of law, regardless of how they are classified in the order." *In re Z.A.M.*, 374 N.C. 88, 97, 839 S.E.2d 792, 798 (2020). Factual findings are sufficient if they "are supported by clear, cogent and convincing evidence" in the record. *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984). Here, respondent raises a question of statutory interpretation, which we review de novo. *Town of Pinebluff v. Moore Cnty.*, 374 N.C. 254, 255–56, 839 S.E.2d 833, 834 (2020) (citing *Applewood Props., LLC v. New S. Props., LLC*, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013)).

III. Analysis

¶ 8 Respondent raises two arguments on appeal. First, she argues that she was denied a fundamentally fair termination proceeding because

her appointed guardian ad litem acted as her attorney. In the alternative, she argues that her appointed counsel provided ineffective assistance. We address each argument in turn.

A. Guardian ad litem

¶ 9 **[1]** In a hearing to determine the termination of parental rights, "[t]he parent 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). In certain circumstances, the parent may also be appointed a guardian ad litem. N.C.G.S. § 7B-1101.1(b)–(c). If a guardian ad litem is appointed for the parent, "[t]he parent's counsel shall not be appointed to serve as the guardian ad litem and the guardian ad litem shall not act as the parent's attorney." N.C.G.S. § 7B-1101.1(d). Respondent urges us to interpret subsection (d) to mean that a guardian ad litem shall not perform the functions of an attorney, so that the statute is violated where a guardian ad litem conducts examinations or performs similar acts. DSS, on the other hand, argues that the statute merely precludes one person from being appointed both as a parent's counsel and as a parent's guardian ad litem.

¶ 10 A parent whose rights are considered in a termination of parental rights proceeding must be provided "with fundamentally fair procedures" consistent with the Due Process Clause of the Fourteenth Amendment. *In re Murphy*, 105 N.C. App. 651, 653, 414 S.E.2d 396, 397 (quoting *Santosky v. Kramer*, 455 U.S. 745, 754, 102 S. Ct. 1388, 1395 (1982)), *aff'd per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992). Respondent argues that the trial court violated the statute and rendered the proceeding fundamentally unfair by "permitting [her guardian ad litem] to act in the role of [her] parent attorney throughout the termination proceeding." As a result, we must consider whether the actions of respondent's guardian ad litem amounted to acting as the parent's attorney within the meaning of the statute.

¶ 11 "The goal of statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment." *State v. Rankin*, 371 N.C. 885, 889, 821 S.E.2d 787, 792 (2018). When the meaning is clear from the statute's plain language, we "give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Winkler v. N.C. State Bd. of Plumbing*, 374 N.C. 726, 730, 843 S.E.2d 207, 210 (2020) (citation omitted). However, when the language is ambiguous, we must ascertain the General Assembly's intent. *Id.* "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *Rankin*, 371 N.C. at

889, 821 S.E.2d at 792 (citation omitted). When we are determining legislative intent, "the words and phrases of a statute must be interpreted contextually, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 215, 388 S.E.2d 134, 140 (1990).

¶ 12 Here, the statute's text is not ambiguous because the text bears only one meaning. *See Winkler*, 374 N.C. at 732, 843 S.E.2d at 212 (describing an ambiguous statute as one "equally susceptible of multiple interpretations"); *State v. Conley*, 374 N.C. 209, 214, 839 S.E.2d 805, 808 (2020) (concluding that a statute's language is ambiguous because it "could reasonably be construed" in two ways). The statute provides that "[t]he parent's counsel shall not be appointed to serve as the guardian ad litem and the guardian ad litem shall not act as the parent's attorney." N.C.G.S. § 7B-1101.1(d). In its preceding subsections, the statute establishes a parent's right to counsel and provides for the appointment of a guardian ad litem in certain circumstances. N.C.G.S. § 7B-1101.1(a)–(c). It is clear to us, reading the language in context, that the statutory mandate of subsection 7B-1101.1(d) that "[t]he parent's counsel shall not be appointed" as the guardian ad litem and that "the guardian ad litem shall not act" as the parent's attorney requires that the parent's counsel and the parent's guardian ad litem not be the same person so that the respondent parent receives the benefit of both.[2] It does not, as respondent suggests, prevent a guardian ad litem from conducting cross-examinations or presenting an argument directly to the trial court.

¶ 13 In urging the opposite result, respondent focuses, as does the dissent, on the phrase "act as the parent's attorney" to the exclusion of the rest of the statute. "However, this Court does not read segments of a statute in isolation." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188, 594 S.E.2d 1, 20 (2004). We similarly do not read portions of a sentence in isolation. The statute's statement that the guardian ad litem "shall not act" as the parent's attorney has the same function in the statute as the similar phrase, appearing in the same sentence, that the parent's attorney "shall not be appointed" as the guardian ad litem. The two parts of

2. While there is no need to resort to the history of the statute to interpret its meaning here, it is worth noting that this provision was adopted in 2005 after concerns were expressed about potential conflicts of interest if the same person were to serve simultaneously in both roles for a parent. *See In re K.L.S.*, 635 S.E.2d 536, 2006 N.C. App. LEXIS 2128, at *12 (2006) (unpublished) (stating that effect of N.C.G.S. § 7B-1101.1 (2005) was to prevent the trial court from appointing the same person as both a parent's attorney and guardian ad litem). The history of its enactment further supports our understanding of the statute's plain meaning.

the sentence mirror each other to fulfill the statute's dual purposes—ensuring a parent's right to counsel and providing those in need with a guardian ad litem. The provision of a guardian ad litem does not satisfy the statute's mandate of the parent's right to counsel just as the provision of counsel does not satisfy the statute's mandate for a guardian ad litem when a parent requires one. If the General Assembly had intended a different meaning it would have used different language. For example, the General Assembly could have, but did not, prohibit a guardian ad litem from "furnishing the services of a lawyer or lawyers" on behalf of a parent in a termination of parental rights proceeding. *See* N.C.G.S. § 84-4 (prohibiting persons not licensed as attorneys from holding themselves out as competent to "furnish[ ] the services of a lawyer or lawyers" and prohibiting such persons from "perform[ing] for or furnish[ing] to another legal services"). Instead, the General Assembly stated that the guardian ad litem "shall not act as the parent's attorney" in the same sentence that it stated that the parent's attorney "shall not be appointed to serve as the guardian ad litem." N.C.G.S. § 7B-1101.1(d).

¶ 14 In the instant case, the proceedings did not violate the statute. A thorough review of the record reveals that respondent's counsel maintained control of the respondent's case, actively made strategic decisions regarding how best to protect respondent's interests, and served as respondent's counsel throughout the proceeding. For example, Mr. Kakassy, respondent's appointed attorney, began the proceeding by informing the trial court that respondent did not want him to represent her and that she preferred a different appointed attorney. The trial court denied his request to withdraw, further demonstrating that all present recognized that Mr. Kakassy was respondent's attorney and that Mr. Kakassy was acting in that capacity throughout the proceeding. At appropriate times, Mr. Kakassy objected on respondent's behalf. After DSS closed its case-in-chief regarding the existence of grounds for termination, it was Mr. Kakassy who informed the trial court that respondent had no further witnesses for that portion of the proceeding. When the time came for legal arguments on the existence of grounds for termination, Mr. Kakassy directed the argument, first securing the dismissal of one ground for termination and informing the trial court that Mr. Hargett would present an argument on the remaining two grounds. During the best interests phase of the proceeding, Mr. Kakassy controlled the presentation of evidence for respondent and conducted the direct examination of respondent's only witness. When Mr. Hargett examined witnesses or otherwise performed trial functions, the transcript reveals that he did so either at the express direction of or in apparent coordination with Mr. Kakassy. Where, as here, respondent's

appointed attorney did not functionally abdicate his responsibilities, leaving the guardian ad litem to "act as the parent's attorney" in the absence of the parent's actual legal counsel, there is no violation of N.C.G.S. § 7B-1101.1(d).

B. Ineffective assistance of counsel

¶ 15 **[2]** Respondent briefly argues, in the alternative, that she was denied effective assistance of counsel because Mr. Kakassy was not sufficiently involved in the proceeding. For the same reasons that we have rejected respondent's argument pursuant to N.C.G.S. § 7B-1101.1(d), we also reject this argument. The record reflects that, far from being uninvolved, Mr. Kakassy was engaged throughout the proceeding and utilized the assistance of Mr. Hargett, who is also an attorney, to better serve respondent. While respondent also claims that Mr. Hargett was unprepared to assist Mr. Kakassy, her claim is unsupported by the record.

IV. Conclusion

¶ 16 The parent in a termination of parental rights proceeding has a right to counsel. N.C.G.S. § 7B-1101.1(a). When that parent also qualifies for representation by a guardian ad litem, the parent must be able to receive the benefit of both counsel and the guardian ad litem. To this end, the statute makes clear that the same person may not serve in both roles. N.C.G.S. § 7B-1101.1(d). However, where a parent has been afforded both an attorney and a guardian ad litem, the statute is not violated where, as here, the parent's counsel acts as the parent's attorney and the guardian ad litem assists counsel in the presentation of the case to ensure that the parent is effectively represented. Respondent has not shown that the proceeding below was fundamentally unfair. Accordingly, we affirm the trial court's order terminating respondent's parental rights in Jason.

AFFIRMED.

Justice MORGAN dissenting.

¶ 17 I respectfully disagree with my distinguished colleagues of the majority upon their arrival at the unfortunate conclusion in this case which manifests their startling willingness to forsake the most fundamental tenet of statutory construction: assigning to words their plain and simple meaning. I sharply disagree with the majority's stunning departure from this bedrock of statutory interpretation which is exacerbated by the circuitous approach employed by my fellow justices to justify this deviation. In construing the clear words of the statutory provision at issue in

a direct and appropriate manner, I would conclude that the trial court erred in its interpretation of subsection 7B-1101.1(d) of the General Statutes of North Carolina—the statutory provision at issue in the present case—which constituted a violation of the statute, causing sufficient prejudice to respondent-mother so as to warrant the vacation of the trial court's order and a remand to the trial court for a new termination of parental rights hearing.

¶ 18 The first sentence of N.C.G.S. § 7B-1101.1(d) reads as follows: "The parent's counsel shall not be appointed to serve as the guardian ad litem and the guardian ad litem shall not act as the parent's attorney." N.C.G.S. § 7B-1101.1(d) (2019). In understanding a court's proper role in the accurate interpretation of our Legislature's statutory enactments, this Court stated in its decision in *Brown v. Flowe* that

> [t]o determine legislative intent, a court must analyze the statute as a whole, considering the chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish. First among these considerations, however, is the plain meaning of the words chosen by the legislature; if they are clear and unambiguous within the context of the statute, they are to be given their plain and ordinary meanings. The Court's analysis therefore properly begins with the words themselves.

349 N.C. 520, 522, 507 S.E.2d 894, 895–96 (1998) (citations omitted).

¶ 19 "When 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." *Lemons v. Old Hickory Council*, *Boy Scouts of Am.*, *Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988).

¶ 20 In applying the general standards of accurate statutory construction which are specified in *Brown* to the entirety of N.C.G.S. § 7B-1101.1, it is apparent that the intent of the Legislature was to afford a parent whose parental rights were subject to termination with the right to an attorney, with the opportunity for the trial court's appointment of a guardian ad litem for a parent who is deemed to be incompetent, with the fees of these two separate persons to be borne by the Office of Indigent Defense Services upon a determination by the court that the parent is indigent. *See* N.C.G.S. § 7B-1101.1(a)–(f). The objectives of N.C.G.S. § 7B-1101.1 involve the provision of persons to the parent to separately represent the parent's legal interests and the parent's special individualized interests,

with a permeating spirit of the fullness of the protection of the rights of a mother or a father whose parental rights to a child or to children are in peril of being terminated.

¶ 21 Consistent with this identification and analysis of its companion subsections, N.C.G.S. § 7B-1101.1(d) is indicative of the accomplishment of the same objectives and representative of the same spirit when considering the Legislature's selection of the particular words "[t]he parent's counsel shall not be appointed to serve as the guardian ad litem and the guardian ad litem shall not act as the parent's attorney." N.C.G.S. § 7B-1101.1(d). Just as with the other provisions of N.C.G.S. § 7B-1101.1, in analyzing the statute as a whole as mandated by our decision in *Brown*, subsection (d) evinces an expectation in its plain and simple language that the parent's counsel will represent the parent's legal interests, the parent's guardian ad litem will represent the parent's special individualized interests, and such a demarcation of authority and responsibility is clear for the two separate persons from the Legislature's clear and direct language.

¶ 22 It is obvious to me in the instant case that respondent-mother's counsel Mr. Kakassy was not appointed to serve as her guardian ad litem; consequently, there is compliance with N.C.G.S. § 7B-1101.1(d) by the trial court. It is also obvious to me in the instant case—as it is to the Court members in the majority as well—that respondent-mother's guardian ad litem, Mr. Hargett, acted as her attorney; consequently, in my view, there is a violation of N.C.G.S. § 7B-1101.1(d) by the trial court. During the termination of parental rights hearing, the record shows that respondent-mother's guardian ad litem conducted five of the six examinations of witnesses on behalf of respondent-mother and made legal arguments to the trial court in his capacity as a licensed attorney. The majority opinion itself acknowledges that (1) "[a]t various points, Mr. Hargett cross-examined witnesses, including respondent" and (2) "Mr. Hargett argued on respondent's behalf regarding the remaining two grounds [for termination of parental rights]."

¶ 23 Unequivocally, the examination of witnesses and the rendition of legal arguments on the record in a court of general jurisdiction in the State of North Carolina constitutes the actions of an attorney. In the present case, since the guardian ad litem for respondent-mother, at a minimum, performed these acts attributable to an attorney in the course of a termination of parental rights hearing, I would conclude that the trial court violated the mandate of N.C.G.S. § 7B-1101.1(d) that "the guardian ad litem shall not act as the parent's attorney." In applying the well-established principles of statutory construction generally articulated in *Brown* and

specifically addressed in *Lemons* with regard to clear and unambiguous language, the analysis of N.C.G.S. § 7B-1101.1 as a whole, the chosen words of the Legislature throughout N.C.G.S. § 7B-1101.1 including subsection (d), the spirit of the statute, and the objectives that N.C.G.S. § 7B-1101.1 seeks to accomplish, I am compelled to dissent from the majority's view as to its interpretation of N.C.G.S. § 7B-1101.1(d) with respect to the application of this statutory provision in the present case and the conclusion ultimately reached by the majority to affirm the trial court's order which terminated respondent-mother's parental rights.

¶ 24 I agree with the majority that the text of N.C.G.S. § 7B-1101.1(d) "is not ambiguous because the text bears only one meaning." I also concur with the majority that this statutory provision "requires that the parent's counsel and the parent's guardian ad litem not be the same person so that the respondent parent receives the benefit of both." However, the majority's correct identification of these important premises becomes eroded by the majority's faulty assumptions and approaches which are built upon these premises.

¶ 25 At the outset of its opinion, the majority summarized its conclusion that "the statute was not violated and we affirm the trial court's order" because "the trial court properly appointed respondent a guardian ad litem and an attorney, both of whom carried out appropriate roles in this matter." The majority erroneously presumes that the trial court's appointment of one person as the parent's counsel and another person as the parent's guardian ad litem comports with N.C.G.S. § 7B-1101.1(d), so long as the counsel is performing legal responsibilities and the guardian ad litem is performing the responsibilities of the guardian ad litem. I concede that each person was performing his assigned statutory responsibilities; however, the guardian ad litem was acting as the parent's attorney *in addition to* performing his responsibilities as the guardian ad litem, and as stated by the majority, the statutory language of N.C.G.S. § 7B-1101.1(d) "is not ambiguous because the text bears only one meaning," to wit: the guardian ad litem shall not act as the parent's attorney. In an effort to blunt the effect of the plain and simple meaning of the statute's express prohibition against the guardian ad litem's ability to act as the parent's attorney, the majority discerns "that respondent's counsel maintained control of the respondent's case, actively made strategic decisions regarding how best to protect respondent's interests, and served as respondent's counsel throughout the proceeding." Even assuming *arguendo* that this depiction is true, the trial court's allowance of the guardian ad litem to become a second attorney for the parent in the performance of legal responsibilities during the hearing, despite the

ongoing status of respondent-mother's appointed counsel as the parent's attorney of record, contravenes the provision of N.C.G.S. § 7B-1101.1(d) that "the guardian ad litem shall not act as the parent's attorney." "It is well established that the word 'shall' is generally imperative or mandatory when used in our statutes." *Morningstar Marinas/Eaton Ferry, LLC v. Warren Cnty.*, 368 N.C. 360, 365, 777 S.E.2d 733, 737 (2015) (extraneity omitted).

¶ 26 The majority compounds its inconsistent statutory construction of the first sentence of N.C.G.S. § 7B-1101.1(d) in its endeavor to validate the guardian ad litem's sanctioned ability to engage in, as the majority states, "conducting cross-examinations or presenting an argument directly to the trial court" by equating the first phrase of the sentence that "[t]he parent's counsel shall not be appointed to serve as the guardian ad litem" with the second phrase of the sentence that "the guardian ad litem shall not act as the parent's attorney." The majority opines that "[t]he two parts of the sentence mirror each other to fulfill the statute's dual purposes—ensuring a parent's right to counsel and providing those in need with a guardian ad litem." While this statutory construction of the first sentence of N.C.G.S. § 7B-1101.1(d) represents another glimmer of the majority's occasional remembrances and applications in this case of the principles of statutory construction which this Court has espoused in *Brown*, *Lemons*, and *Morningstar Marinas*, nonetheless the repeated inconsistencies of the majority's statutory construction remain which cause it to reiterate that the guardian ad litem here was allowed to conduct cross-examinations and present arguments directly to the trial court, despite the "mirror" images of the two phrases in the first sentence of N.C.G.S. § 7B-1101.1(d) that include the proscription that "the guardian ad litem shall not act as the parent's attorney."

¶ 27 A final approach which the majority has employed to authenticate its concept of statutory construction in the present case is the introduction of inappropriate, extraneous verbiage and considerations which obfuscate the plain and simple meaning of the statutory provision at issue. For example, the majority concludes that "the statute is not violated where, as here, the parent's counsel acts as the parent's attorney and the guardian ad litem assists counsel in the presentation of the case to ensure that the parent is effectively represented." This recapitulation of N.C.G.S. § 7B-1101.1(d) by the majority more resembles a convenient recast of the clear and direct words of the statutory provision's first sentence, "[t]he parent's counsel shall not be appointed to serve as the guardian ad litem and the guardian ad litem shall not act as the parent's attorney." "It is a well-settled principle of statutory construction that where a statute

is intelligible without any additional words, no additional words may be supplied." *State v. Camp*, 286 N.C. 148, 151, 209 S.E.2d 754, 756 (1974). Similarly, the majority adeptly repositions the standard set by the unadulterated directness of the statutory language at issue by restating it as follows: "[w]here, as here, respondent's appointed attorney did not functionally abdicate his responsibilities, leaving the guardian ad litem to 'act as the parent's attorney' in the absence of the parent's actual legal counsel, there is no violation of N.C.G.S. § 7B-1101.1(d)." "When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388–89 (1978).

¶ 28 In conclusion, the trial court's statement on the record of the hearing to both respondent-mother's appointed counsel, Mr. Kakassy, and respondent-mother's appointed guardian ad litem, Mr. Hargett, that "y'all are both kind of acting as counsel for [respondent-mother] today" was a patently obvious recognition by the trial court that Mr. Hargett, albeit serving as the parent's guardian ad litem, was being allowed by the trial court to act as counsel for the parent. In this regard, the trial court violated N.C.G.S. § 7B-1101.1(d) by permitting the guardian ad litem to act as the parent's attorney. Due to my conclusion that the trial court's error was sufficiently prejudicial to respondent-mother so as to warrant the vacation of the trial court's order terminating respondent-mother's parental rights and a remand to the trial court for a new termination of parental rights hearing, I would not reach respondent-mother's alternative argument that her appointed attorney rendered ineffective assistance of counsel. In my view, respondent-mother's ability to present her position in the termination hearing was unduly compromised by the trial court's contravention of N.C.G.S. § 7B-1101.1(d), which included the appointed guardian ad litem's inability to fully focus upon his responsibilities as contemplated by the plain and simple words of the statute because of the trial court's express authorization for the guardian ad litem to act as the parent's attorney.

¶ 29 In light of the reasons which I have cited and discussed, I respectfully dissent.

IN RE J.T.C.

[376 N.C. 642, 2021-NCSC-3]

IN THE MATTER OF J.T.C.

No. 387A20

Filed 5 February 2021

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 847 S.E.2d 452 (N.C. Ct. App. 2020), affirming an order entered on 4 September 2018 by Judge John M. Britt in District Court, Nash County. Heard in the Supreme Court on 13 January 2021.

Mark L. Hayes for petitioner-appellee mother.

Leslie Rawls for respondent-appellant father.

PER CURIAM.

AFFIRMED.

IN RE S.F.D.

[376 N.C. 643, 2021-NCSC-4]

IN THE MATTER OF S.F.D.

No. 80A20

Filed 5 February 2021

Termination of Parental Rights—no-merit brief—neglect—lifetime incarceration of father

In a termination of parental rights case where respondent-father was incarcerated for life without the possibility of parole for murder and for shooting a child, counsel for respondent filed a no-merit brief pursuant to Appellate Rule 3.1(e) which conceded that counsel could find no meritorious argument to challenge termination on the ground of neglect or the conclusion that termination was in the best interests of the child. After an independent review of the entire record, the Supreme Court affirmed the trial court's termination of respondent's parental rights.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 25 November 2019 by Judge Ward D. Scott in District Court, Buncombe County. This matter was calendared for argument in the Supreme Court on 6 January 2021 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 Buncombe County Department of Social Services.

Michael N. Tousey for appellee Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, by J. Lee Gilliam, Assistant Parent Defender, for respondent-appellant father.

BARRINGER, Justice.

¶ 1 Respondent-father of the minor child S.F.D. appeals from the trial court's 25 November 2019 order terminating the parental rights of respondent-father to S.F.D. (Sophia).[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

1. The pseudonym "Sophia" is used throughout this opinion to protect the identity of the juvenile and for ease of reading.

respondent-father's appeal are meritless. Accordingly, we affirm the trial court's order.

¶ 2 In January 2016, the Buncombe County Department of Social Services (DSS) received a report of a domestic violence incident between Sophia's mother (mother), and the putative father of one of Sophia's half-siblings. The family was found in need of services, and the mother entered into a Family Services Agreement. Sophia was in the care of respondent-father at that time but returned to her mother's care in May 2016, following respondent-father's incarceration.

¶ 3 On 8 August 2016, DSS received a report of a domestic violence incident between the mother and her girlfriend. The mother entered into a safety plan that required her girlfriend to have no contact with the minor children. On 23 August 2016, DSS received another report of a domestic violence incident between the mother and her girlfriend. The mother admitted that her oldest child and Sophia witnessed the argument and subsequently saw the mother sustain injuries.

¶ 4 On 25 August 2016, DSS received a third report of domestic violence between the mother and her girlfriend. The mother admitted Sophia was in the home when her girlfriend hit her and made threats against her life. The mother also admitted to violating the safety plan. DSS immediately requested an emergency Child and Family Team Meeting, and the mother agreed to place her minor children in safety resource placements. Sophia was placed with the maternal grandmother. Respondent-father was in jail on pending charges of first-degree murder, attempted first-degree murder, intentional child abuse causing serious bodily injury, and murder of an unborn child for allegedly shooting his pregnant girlfriend and her toddler.

¶ 5 DSS filed a juvenile petition on 27 September 2016, alleging Sophia to be a neglected juvenile. At the adjudication hearing on 15 February 2017, the mother and respondent-father stipulated that the allegations in the juvenile petition were true and correct and that, based on that stipulation, the trial court could conclude as a matter of law that Sophia was a neglected juvenile. The trial court adjudicated Sophia to be a neglected juvenile and placed Sophia into the custody of DSS, with continued placement with Sophia's maternal grandmother. The trial court adopted DSS's recommendations that respondent-father complete a Comprehensive Clinical Assessment (CCA) and engage in mental health group therapy at the Buncombe County Detention Center but did not adopt DSS's recommendation to continue visitation and ordered no contact between respondent-father and Sophia.

¶ 6 At the permanency-planning hearing on 29 March 2017, the trial court ordered that the permanent plan be a primary plan of reunification and a secondary plan of guardianship or custody with a relative or approved custodian. The trial court changed the secondary plan to adoption and left the primary plan as reunification at the 21 September 2017 permanency-planning hearing. At the 7 November 2018 permanency-planning hearing, the trial court changed the permanent plan to a primary plan of adoption and secondary plans of guardianship and reunification.

¶ 7 On 9 January 2019, DSS filed a petition to terminate respondent-father's parental rights on the grounds of neglect, willfully leaving Sophia in foster care for more than twelve months without a showing of reasonable progress to correct the conditions that led to Sophia's removal, willful failure to pay a reasonable portion of Sophia's care for the preceding six months, and attempted murder of another child residing in the home. *See* N.C.G.S. § 7B-1111(a)(1), (2), (3), (8) (2019). The petition also sought to terminate the mother's parental rights on the grounds of neglect, willfully leaving Sophia in foster care for more than twelve months without a showing of reasonable progress to correct the conditions that led to Sophia's removal, and willful failure to pay a reasonable portion of Sophia's care for the preceding six months. *See* N.C.G.S. § 7B-1111(a)(1), (2), (3) (2019). On 9 April 2019, the mother relinquished her parental rights to Sophia.

¶ 8 Before the hearing on the termination petition, respondent-father had been convicted of offenses arising from the murder of his pregnant girlfriend and the shooting of her toddler-aged child in the face. Respondent-father had been sentenced to incarceration for life without the possibility of parole. The mother did not revoke her relinquishment of her parental rights to Sophia. As the time to revoke had expired before the hearing, the mother was no longer a party to the matter.

¶ 9 Following a hearing on 17 September 2019, the trial court entered an order on 25 November 2019 concluding that three grounds existed to terminate respondent-father's parental rights: neglect, willfully leaving Sophia in foster care for more than twelve months without showing reasonable progress, and attempted murder of another child residing in the home. *See* N.C.G.S. § 7B-1111(a)(1), (2), (8). The trial court also determined it was in Sophia's best interests to terminate his parental rights. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent-father gave notice of appeal to this Court pursuant to N.C.G.S. § 7B-1001(a1)(1).

¶ 10 Respondent-father's counsel has filed a no-merit brief pursuant to Rule 3.1(e) of the Rules of Appellate Procedure. In the brief, counsel identified two issues arguably supporting an appeal related to the grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(2) and (8) but explained that any argument regarding the ground of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) would be wholly without merit. Acknowledging that "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 (2019), counsel stated that "even if successful," arguments pertaining to N.C.G.S. § 7B-1111(a)(2) and (8) "would not alter the ultimate result." Counsel further explained that counsel could not make a meritorious argument of error as to the trial court's conclusion regarding the termination of respondent-father's parental rights being in the best interests of Sophia. Counsel advised respondent-father of his right to file pro se written arguments with this Court and provided him with the documents necessary to do so. Respondent-father has not submitted written arguments to this Court.

¶ 11 We carefully and independently review 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 (2019). Having undertaken this review, we are satisfied that the trial court's 25 November 2019 order is supported by clear, cogent, and convincing evidence and based on proper legal grounds in determining that grounds exist pursuant to N.C.G.S. § 7B-1111(a)(1) to terminate respondent-father's parental rights and that termination is in the best interests of Sophia. Accordingly, we affirm the trial court's order terminating respondent-father's parental rights.

AFFIRMED.

IN RE S.R.F.

[376 N.C. 647, 2021-NCSC-5]

IN THE MATTER OF S.R.F.

No. 214A20

Filed 5 February 2021

Termination of Parental Rights—grounds for termination—neglect—findings of fact

A trial court's uncontested findings of fact supported its conclusion that grounds existed to terminate respondent-mother's parental rights to her child based on neglect, where the findings not only demonstrated respondent's failure to adequately address the domestic violence and substance abuse issues that contributed to the child being adjudicated neglected and dependent but also indicated a likelihood of future neglect based on respondent's noncompliance with her case plan. Although portions of certain findings were unsupported by the evidence with regard to specific aspects of the case plan, any errors were harmless in light of the remaining supported findings.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 12 February 2020 by Chief Judge Thomas M. Brittain in District Court, Transylvania County. This matter was calendared in the Supreme Court on 6 January 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Mary Ann J. Hollocker for petitioner-appellee Transylvania County Department of Social Services.

Susan H. Boyles for appellee Guardian ad Litem.

Robert W. Ewing for respondent-appellant mother.

MORGAN, Justice.

¶ 1 Respondent-mother appeals from the trial court's order terminating her parental rights to "Sarah,"[1] a minor child born in September 2014. Although the trial court also terminated the parental rights of Sarah's father, he is not a party to this appeal. Because we conclude that the

1. We use this pseudonym to protect the juvenile's privacy and for ease of reading.

trial court properly adjudicated the existence of grounds to terminate respondent-mother's parental rights based on her neglect of Sarah, we affirm.

Factual Background and Procedural History

¶ 2 On 28 March 2018, Transylvania County Department of Social Services (DSS) obtained nonsecure custody of Sarah and filed a juvenile petition alleging that she was neglected and dependent. The trial court held an adjudicatory hearing on 30 May 2018 at which the parties stipulated to the following facts:

> 12. On or about October 17, 2017, [DSS] received a Child Protective Services report that [Sarah] had been exposed to a physical altercation between [respondent-mother] and a man named Casey.
>
> 13. [Sarah] was in the presence of the domestic violence incident when Casey hit, smacked, and choked [respondent-mother].
>
> 14. On or about October 18, 2017, [DSS] received a Child Protective Services report alleging [respondent-mother] was using meth and leaving [Sarah] with who[m]ever and drugs are being sold out of the home where the child lives.
>
> 15. . . . Law enforcement went to the home and found methamphetamine. [Respondent-mother] was charged with Felony Possession [of] Methamphetamine. Charges are currently pending. [Sarah] was at the home during the raid.
>
> 16. On or about October 19, 2017, [respondent-mother] made [a] plan for [Sarah] to reside with her grandmother . . . and then later changed the plan to her father, David . . . . David and [his wife] are unable to continue to provide care for [Sarah] at this time.
>
> 17. On or about October 21, 2017, [a DSS] Social Worker . . . met with [respondent-mother] in Transylvania County jail and [respondent-mother] agreed to [a] safety assessment. . . .
>
> . . . .

22. [Respondent-mother] did not contact the social worker upon release from jail. [She] has not completed a substance abuse assessment. [She] has not complied with drug screen requests from the Department.

. . . .

24. On or about March 5, 2018, [respondent-mother] was charged with Felony Breaking and/or Entering and Felony Larceny after Breaking/Entering for stealing items from her grandmother's home. Charges are currently pending.

25. [Respondent-mother] admitted to the social worker that drugs were sold out of the home where the juvenile was residing.

26. [Respondent-mother] admitted to the social worker that she has an addiction problem and was using methamphetamine.

. . . .

29. . . . [Respondent-mother] was incarcerated at the time of the petition.

30. [Sarah] has been exposed to an injurious environment while in her mother's care. The juvenile has been exposed to domestic violence and substance abuse.

31. [Respondent-mother's] substance abuse has impeded her ability to provide appropriate care and supervision of the juvenile.

Based on these stipulated facts, the trial court entered an order on 12 June 2018 adjudicating Sarah to be a neglected and dependent juvenile.

¶ 3 The trial court held a dispositional hearing on 13 June 2018 and subsequently entered a "Disposition Order" on 2 August 2018. As a result of the hearing and the order, the trial court granted custody and placement authority over Sarah to DSS and specifically sanctioned Sarah's transfer from kinship care into a foster placement recommended by DSS. The trial court provided one hour of supervised visitation per week with Sarah to respondent-mother and ordered respondent-mother to contact DSS in order to establish a case plan and to "follow any and all parts" thereof. Respondent-mother signed her DSS case plan on 14 June 2018.

¶ 4 After a permanency planning hearing on 14 November 2018, the trial court established a primary permanent plan for Sarah of reunification, with a secondary plan of adoption and termination of parental rights. However, the trial court discontinued respondent-mother's visitation with Sarah due to respondent-mother's repeated failure to attend scheduled visits and the resulting distress caused to Sarah. The trial court offered the prospect of future visitation if respondent-mother would "reengage."

¶ 5 Following a hearing on 15 May 2019, the trial court changed Sarah's primary permanent plan to termination of parental rights and adoption. The trial court found that respondent-mother was incarcerated and had not "made any attempts to work on her [case] plan" since the previous hearing.

¶ 6 DSS filed a motion to terminate the parental rights of both respondents to Sarah on 15 July 2019. After a series of continuances, the trial court held a hearing on the motion to terminate parental rights on 15 January 2020 and entered an order terminating respondents' parental rights on 12 February 2020.

¶ 7 The trial court adjudicated the existence of two statutory grounds for terminating respondent-mother's parental rights: (1) respondent-mother's neglect of Sarah under N.C.G.S. § 7B-1111(a)(1) (2019), and (2) respondent-mother's willful failure to make reasonable progress to correct the conditions leading to Sarah's removal from the home in March 2018 under N.C.G.S. § 7B-1111(a)(2) (2019). The trial court then considered the dispositional factors in N.C.G.S. § 7B-1110(a) (2019) and concluded that it was in Sarah's best interests to terminate respondent-mother's parental rights. Respondent-mother gave timely notice of appeal from the termination of parental rights order.

¶ 8 In her appeal to this Court, respondent-mother challenges both of the grounds for termination of her parental rights which were adjudicated by the trial court.[2] She contends the court's adjudications are unsupported by its findings of fact and based on findings not supported by the evidence. Respondent-mother does not separately contest the trial

2. In an "abundance of caution," respondent-mother also challenges the trial court's adjudications of dependency under N.C.G.S. § 7B-1111(a)(6) (2019) and willful abandonment under N.C.G.S. § 7B-1111(a)(7) (2019), insofar as the trial court relied on these additional grounds. Although the trial court made findings that include language found in N.C.G.S. § 7B-1111(a)(6) and (7), the termination of parental rights order makes no reference to either of these provisions. The trial court relied only upon N.C.G.S. § 7B-1111(a)(1) and (2) as its grounds for terminating respondent-mother's parental rights.

court's determination of Sarah's best interests at the dispositional stage of the proceeding under N.C.G.S. § 7B-1110(a). We thus limit our review to the court's adjudicatory findings and conclusions.

Adjudication

¶ 9 Under this Court's well-established standard of review,

> [w]e review a district court's adjudication under N.C.G.S. § 7B-1111(a) to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. Unchallenged findings of fact are deemed supported by competent evidence and are binding on appeal. Moreover, we review only those findings needed to sustain the trial court's adjudication.
>
> The issue of whether a trial court's findings of fact support its conclusions of law is reviewed de novo. However, an adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order. Therefore, if this Court upholds the trial court's order in which it concludes that a particular ground for termination exists, then we need not review any remaining grounds.

In re J.S., 374 N.C. 811, 814–15, 845 S.E.2d 66, 70–71 (2020) (extraneity omitted).

¶ 10 In the instant case, the trial court adjudicated grounds to terminate respondent-mother's parental rights for neglecting Sarah under N.C.G.S. § 7B-1111(a)(1). A juvenile is deemed "neglected" if the child is denied "proper care, supervision, or discipline" by the child's parent or caretaker, if the juvenile "lives in an environment injurious to the juvenile's welfare[,]" or if the juvenile "has been abandoned[.]" N.C.G.S. § 7B-101(15) (2019).

¶ 11 When termination of parental rights is based on neglect, "if the child has been separated from the parent for a long period of time, there must be a showing of . . . a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984))[3]. "When

3. As we have more recently determined in our opinion rendered in *In re R.L.D.*, No. 122A20, 2020 N.C. LEXIS 1043, 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

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).

¶ 12 Respondent-mother challenges several of the trial court's findings of fact on the basis that they are unsupported by the evidence introduced at the termination hearing. She first claims that the evidence does not support Finding of Fact 14(6), which states that the trial court's initial Disposition Order entered on 2 August 2018 required her and respondent-father to "[o]btain a domestic violence assessment and follow any recommended treatment[.]"

¶ 13 We agree with respondent-mother that the Disposition Order did not contain an express directive to address the issue of domestic violence, even though exposure to domestic violence in respondent-mother's home was one of the reasons for Sarah's adjudication as a neglected juvenile on 13 June 2018. However, in light of the uncontested portions of Findings of Fact 16 and 17, which state that respondent-mother signed a case plan with DSS on 14 June 2018 and that her DSS case plan required her "to engage in domestic violence treatment which she has failed to do," we conclude that the trial court's erroneous finding about the terms of the Disposition Order on this subject and respondent-mother's failure to comply in this area constitute harmless error. As respondent-mother does not contest Findings of Fact 16 and 17, they are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Since the Disposition Order required respondent-mother to "follow any and all parts" of her DSS case plan, the error that she identifies in Finding of Fact 14(6) is unavailing to her appeal. *See generally In re M.C.*, 374 N.C. 882, 887, 844 S.E.2d 564, 568 (2020) (concluding that "the erroneous finding is not necessary to support the trial court's legal determination that grounds existed for the termination of respondent's parental rights").

¶ 14 Respondent-mother next objects to those portions of Finding of Fact 17 which state that she was ordered to obtain "a comprehensive clinical assessment which she never completed" and that she failed to "engage in substance abuse treatment . . . by not having the assessment." Respondent-mother claims that there is no evidence in the record that she was required to have a "comprehensive clinical assessment" (CCA).

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parent's parental rights to 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.

She further contends that the record shows that she submitted to a mental health and substance abuse assessment as ordered by the trial court.

¶ 15 While we again agree with respondent-mother that the findings of fact that she has identified and challenged are erroneous, we also again conclude that these errors are harmless in light of the trial court's related findings and supporting evidence. While the record contains no evidence that respondent-mother was ordered to obtain a CCA,[4] the trial court did order, however, that respondent-mother was required to

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4. North Carolina law does not define or establish uniform protocols for a CCA. A manual published by the North Carolina Department of Health and Human Services provides the following description:

> The CCA is a face-to-face evaluation and must include the following elements:
>
> - A description of the presenting problems, including source of distress, precipitating events, and associated problems or symptoms;
> - A chronological general health and behavioral history (including both mental health and substance abuse) of the individual's symptoms, treatment, and treatment response;
> - Current medications (for both physical and psychiatric treatment);
> - A review of biological, psychological, familial, social, developmental, and environmental dimensions to identify strengths, needs, and risks in each area;
> - Evidence of beneficiary and legally responsible person's (if applicable) participation in the assessment;
> - Analysis and interpretation of the assessment information with an appropriate case formulation;
> - Diagnoses from the DSM-5 [or any subsequent editions], including mental health, substance use disorders, and/or intellectual/developmental disabilities, as well as physical health conditions and functional impairment; and
> - Recommendations for additional assessments, services, support, or treatment based on the results of the CCA.

N.C. Dep't of Health & Hum. Servs. Div. of Mental Health, Dev. Disabilities, and Subs. Abuse Servs., APSM45-2, Records Mgmt. & Doc. Manual for Providers of Publicly-Funded Mental Health, Intell. or Dev. Disabilities & Subs. Use Servs. & Local Mgmt. Entities-Managed Care Orgs., ch. 3-2 (Dec. 1, 2016).

enter into a case plan with DSS that included the following components: "obtain a mental health and substance abuse assessment [and] follow all recommendations of the assessment[.]" Whatever specific distinctions may exist between a CCA and a "mental health and substance abuse assessment," they are irrelevant given respondent-mother's lack of progress in addressing the causes of Sarah's 12 June 2018 adjudication as a neglected juvenile.

¶ 16 The evidence at the termination of parental rights hearing showed that respondent-mother obtained a mental health assessment and substance abuse assessment at Meridian on 14 June 2018 but failed to comply with the recommended treatment. Respondent-mother had an updated substance abuse assessment on 11 December 2019[5] while she was living in Forsyth County following her release from prison in October 2019, but she again failed to follow the assessor's treatment recommendations. The assessor had recommended, based on respondent-mother's self-report that respondent-mother had been sober since her arrest for possession of methamphetamine and other drugs on 28 April 2019, that respondent-mother attend "a relapse prevention program at Daymark" and "twelve-step meetings and Celebrate Recovery" due to the high rate of relapse associated with methamphetamine use. However, respondent-mother declined to do so. Accordingly, although we disregard the improper finding by the trial court that respondent-mother failed to obtain a substance abuse assessment, we fully credit the trial court's proper finding that respondent-mother failed to engage in the recommended treatment as required by her case plan. *See In re S.D.*, 374 N.C. 67, 83, 839 S.E.2d 315, 328 (2020).

¶ 17 Respondent-mother also challenges the following segment of Finding of Fact 27:

> 27. As of the date of this hearing, due to the respondent parents' *continued substance abuse and domestic violence* [emphasis added], failure to work on their case plan and obtain treatment, and failure to work toward reunification with the child, there is a substantial likelihood of further neglect if child was placed in the custody of said respondents.

Respondent-mother objects to the trial court's determination that she continued to engage in substance abuse and domestic violence at the

5. DSS Social Worker Jodi Hopkins testified that mental health and substance abuse assessments are considered valid for a period of one year.

time of the termination hearing. Respondent-mother specifically argues that "the finding that [she] continued to engage in substance abuse and domestic violence is a conclusion of law and should be treated as such" for purposes of appellate review. *See generally State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008) ("Findings of fact which are essentially conclusions of law will be treated as such on appeal." (extraneity omitted)). She then submits that the trial court's conclusion about her continued substance abuse and domestic violence was "not supported by any findings of fact" in the order terminating respondent-mother's parental rights.

¶ 18 We hold that the trial court's determination that respondents continued to engage in substance abuse and domestic violence is properly designated as a finding of fact rather than as a conclusion of law. In the event that the trial court had used the words "substance abuse" and "domestic violence" as legal terms of art in its order to clearly articulate a legal ruling, then respondent-mother's characterization of these terms might be more persuasive. *See generally Sparks*, 362 N.C. at 185, 657 S.E.2d at 658 ("In distinguishing between findings of fact and conclusions of law, as a general rule, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." (extraneity omitted)). However, in the context in which the trial court's observation is rendered, we construe the trial court's determination that respondent parents engaged in "continued substance abuse and domestic violence" to mean that they still acted in such a manner at the time of the termination hearing. We do recognize, however, that the trial court's ending determination in Finding of Fact 27 that this conduct of respondent parents creates "a substantial likelihood of further neglect if child was placed in the custody of said respondents" is in the nature of a conclusion of law. *See In re J.O.D.*, 374 N.C. 797, 807, 844 S.E.2d 570, 578 (2020).

¶ 19 Notwithstanding this Court's disagreement with respondent-mother's disputed classification of the trial court's determination, we find insufficient evidentiary support for the portion of Finding of Fact 27 that she was participating in "continued substance abuse and domestic violence" at the time of the termination of parental rights hearing on 15 January 2020. DSS presented evidence that respondent-mother had multiple drug-related arrests and periods of incarceration during the course of the underlying juvenile case. DSS Social Worker Hopkins also testified that respondent-mother was on probation and awaiting trial on felony drug charges at the time of the termination hearing. However, respondent-mother's three most recent drug screens had been negative for

the presence of controlled substances; for in Finding of Fact 17, the trial court acknowledged that respondent-mother "did submit to some [drug screens,] and the most recent ones were negative." Similarly, although DSS adduced evidence of respondent-mother's involvement in a single domestic violence incident at her boyfriend's residence in August 2018 after Sarah had entered nonsecure custody, the agency did not present evidence of any subsequent episodes of domestic violence. As a result, we disregard the portion of Finding of Fact 27 concerning "continued substance abuse and domestic violence." *See In re J.M.J.-J.*, 374 N.C. 553, 559, 843 S.E.2d 94, 101 (2020).

¶ 20 Having addressed each of respondent-mother's objections to the trial court's challenged findings of fact, we now consider her claim that the court's findings as a whole do not support its conclusion of law in support of its adjudication of neglect under N.C.G.S. § 7B-1111(a)(1), to wit:

> 4. The respondent parents have neglected the minor child [Sarah]. Due to the respondent parents' substance abuse and improper care and supervision of the child, the child was adjudicated to be a neglected and dependent juvenile by order entered in this matter following hearing on May 30, 2018. Despite the movant having referred the parents to services aimed at remedying the issues that lead [sic] to the child being placed out of the home of the respondents, including referrals to various agencies to help address substance abuse issues and improvement of parenting skills, said respondents failed to meaningfully engage in their case plan. The respondent parents' unwillingness to document an ability to provide a safe and appropriate home for the minor child, together with the failure to address their substance abuse issues and domestic violence issues, and failure to meaningfully engage in their case plan[,] demonstrate there is a reasonable likelihood that neglect [of] the child would reoccur in the future if the child was placed in the custody of said respondents, and said facts constitute a ground to terminate the respondent parents' parental rights to the minor child pursuant to N.C.[G.S.] § 7B-1111(a)(1).

¶ 21 While she does not deny her prior neglect of Sarah, respondent-mother contends that the trial court erred in concluding that Sarah

was likely to experience further neglect if the child were returned to respondent-mother's custody. *See generally In re J.O.D.*, 374 N.C. at 807, 844 S.E.2d at 578 (explaining that the "determination that neglect is likely to reoccur if [the juvenile] was returned to [the parent's] care is more properly classified as a conclusion of law"). We must determine therefore whether the trial court's valid findings of fact demonstrate a likelihood of future neglect by respondent-mother at the time of the termination of parental rights hearing. *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167.

¶ 22 The trial court's supported findings of fact indicate that respondent-mother has a Child Protective Services history dating back to 2014 which denotes repeated reports of improper supervision and care, substance abuse, and domestic violence. The findings also detail the circumstances that led DSS to assume nonsecure custody of Sarah in March 2018 and resulted in the child's adjudication as a neglected and dependent juvenile in June 2018. Specifically, the findings describe Sarah's "expos[ure] to domestic violence and substance abuse" in respondent-mother's care, as well as respondent-mother's incarceration on criminal charges, lack of stable employment or housing, and self-professed addiction to methamphetamine.

¶ 23 As summarized in Conclusion of Law 4, the trial court's findings of fact further reflect respondent-mother's failure to "meaningfully address[]" the issues of substance abuse and domestic violence which led to Sarah's status as a neglected and dependent juvenile. These findings recognize that respondent-mother obtained no domestic violence or substance abuse treatment, except for a brief period of substance abuse treatment while she was incarcerated in 2019. More generally, said findings illustrate respondent-mother's failure to "meaningfully engage" in any of the requirements of her court-ordered DSS case plan, which also included the completion of parenting classes and the attainment of stable housing and employment. The findings also catalog respondent-mother's failure to visit or contact Sarah after 21 August 2018 and respondent-mother's dereliction to provide any financial support for Sarah while the child was in DSS custody.

¶ 24 Other findings—specifically Finding of Fact 17—demonstrate the trial court's consideration of the evidence of changed circumstances which are favorable to respondent-mother. Finding of Fact 17 credits respondent-mother with obtaining some substance abuse treatment while in prison. The evidence at the termination hearing showed that she re-

ceived approximately four weeks of "MRT classes"[6] while incarcerated for a probation violation. However, respondent-mother did not complete the MRT program following her release from confinement on 8 October 2019 and did not obtain any additional substance abuse treatment at the time of the termination hearing. Finding of Fact 17 also favorably acknowledged respondent-mother's negative drug screens.

¶ 25 "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)). Here, the trial court's findings of fact demonstrate an extended period of respondent-mother's failure to comply with the DSS case plan which she signed on 14 June 2018, with particular emphasis upon respondent-mother's failure to comply with the conditions of her case plan directly related to the issues of domestic violence and substance abuse. *See In re C.J.*, 373 N.C. 260, 263, 837 S.E.2d 859, 861 (2020); *In re M.A.W.*, 370 N.C. at 154–55, 804 S.E.2d at 517–18. The findings also emphasize respondent-mother's complete lack of involvement with Sarah since 21 August 2018. *See In re D.L.A.D.*, No. 123A20, 2020 WL 6815091, at *5 (N.C. Nov. 20, 2020) ("An extended period in which a parent does not attempt to visit the child could show ['a future propensity to be inattentive to the child.']"); *In re A.S.T.*, No. 18A20, 2020 WL 6815097, at *6 (N.C. Nov. 20, 2020) (relying in part on the respondent-father's failure to attempt to contact the child in affirming trial court's conclusion of a probability of future neglect). Respondent-mother's few weeks of attending a prison-based substance abuse program, followed by a brief period of apparent sobriety leading up to the termination of parental rights hearing, is insufficient to negate the trial court's determination that respondent-mother was likely to subject Sarah to further neglect if the child were returned to the custody of respondent-mother. *See In re O.W.D.A.*, No. 397A19, 2020 WL 6815126, at *6 (N.C. Nov. 20, 2020) ("[A]lthough respondent-father may have made some minimal progress during his most recent incarceration, . . . these eleventh-hour efforts did not outweigh the evidence of his persistent failures to make improvements while not incarcerated . . . ."); *In re A.S.T.*, No. 18A20, 2020 WL 6815097, at *6 (affirming adjudication under N.C.G.S. § 7B-1111(a)(1) where "[r]espondent has failed to appreciably address his substance abuse issues . . . and has only shown an extended abstinence from cocaine use

6. Moral Reconation Therapy (MRT) is "a cognitive behavioral program conducted in a group setting, designed to reduce criminal thinking and reinforce positive behaviors and habits." Jamie Markham, *A Visit to the Burke CRV Center*, North Carolina Criminal Law (May 23, 2019, 4:07 PM), https://nccriminallaw.sog.unc.edu/a-visit-to-the-burke-crv-center/.

while incarcerated"). Accordingly, we hold that the trial court properly concluded that grounds existed to terminate respondent-mother's parental rights to Sarah for neglect pursuant to N.C.G.S. § 7B-1111(a)(1).

¶ 26 Having upheld the trial court adjudication of neglect under N.C.G.S. § 7B-1111(a)(1), we need not review its additional adjudication of willful failure to make reasonable progress under N.C.G.S. § 7B-1111(a)(2). *In re J.S.*, 374 N.C. at 815, 845 S.E.2d at 71.

Conclusion

¶ 27 Although respondent-mother has identified some harmless inaccuracies in the trial court's adjudicatory findings of fact, the trial court's remaining findings of fact support its conclusions of law that grounds exist to terminate respondent-mother's parental rights for her neglect of the juvenile Sarah under N.C.G.S. § 7B-1111(a)(1). Because respondent-mother does not separately challenge the trial court's determination that terminating respondent-mother's parental rights to Sarah is in the best interests of the juvenile, we affirm the termination of parental rights order.

AFFIRMED.

IN RE C.B.C.B.

[376 N.C. 660 (2021)]

IN THE MATTER OF C.B.C.B.	)	From Catawba County

No. 521A20

ORDER

Respondent-appellant mother has two closely related cases pending at the appellate level: *In re C.B.C.B.*, No. 521A20, No. 19 JT 261, pending at this Court; and *In re C.B.C.B.*, No. COA21-11, No. 19 JA 261, pending at the Court of Appeals. This Court hereby allows respondent-appellant mother's petition for discretionary review prior to a decision by the N.C. Court of Appeals. On its own motion, this Court hereby consolidates *In re C.B.C.B.*, No. COA21-11, No. 19 JA 261 with *In re C.B.C.B.*, No. 521A20, No. 19 JT 261. In accordance with this consolidation, any party may move to amend the record filed with this Court.

This Court hereby allows respondent-appellant mother's motion for an extension of time to file her brief to the extent that respondent-appellant mother's brief will be due thirty (30) days from the entry of this order. The remainder of the briefing schedule will proceed according to Rules 13 and 28 of the N.C. Rules of Appellate Procedure. Respondent-appellant mother's motion to suspend the rules for expedited review is hereby dismissed as moot.

By order of the Court in Conference, this 27 day of January, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27 day of January, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
~~Assistant~~ Clerk

I. BEVERLY LAKE, JOHN B. LEWIS, JR., EVERETTE M. LATTA, PORTER L. McATEER, ELIZABETH S. McATEER, ROBERT C. HANES, BLAIR J. CARPENTER, MARILYN L. FUTRELLE, FRANKLIN E. DAVIS, THE ESTATE OF JAMES D. WILSON, THE ESTATE OF BENJAMIN E. FOUNTAIN, JR., FAYE IRIS Y. FISHER, STEVE FRED BLANTON, HERBERT W. COOPER, ROBERT C. HAYES, JR., STEPHEN B. JONES, MARCELLUS BUCHANAN, DAVID B. BARNES, BARBARA J. CURRIE, CONNIE SAVELL, ROBERT B. KAISER, JOAN ATWELL, ALICE P. NOBLES, BRUCE B. JARVIS, ROXANNA J. EVANS, JEAN C. NARRON, AND ALL OTHERS SIMILARLY SITUATED	)	
	)	Gaston County
v.	)	
STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, A CORPORATION, FORMERLY KNOWN AS THE NORTH CAROLINA TEACHERS AND STATE EMPLOYEES' COMPREHENSIVE MAJOR MEDICAL PLAN, TEACHERS AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION, BOARD OF TRUSTEES OF THE TEACHERS AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE, JANET COWELL, IN HER OFFICIAL CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA, AND THE STATE OF NORTH CAROLINA	)	

No. 436PA13-4

DISCLOSURE PURSUANT TO CANON 3D OF THE CODE OF JUDICIAL CONDUCT

This case arises from a challenge brought by a class of over 222,000 individuals consisting, as described in the class certification order entered by Judge Edwin G. Wilson, Jr., in the Superior Court, Gaston County, on 11 October 2016, of (1) "[a]ll members (or their Estates or personal representatives if they have deceased since July 1, 2009) of the N.C. Teachers' and State Employees' Retirement System ("TSERS") who retired before January 1, 1988; (2) TSERS members (or their Estates or

personal representatives if they have deceased since July 1, 2009) who retired on or after January 1, 1988, who were hired before October 1, 2006 and have 5 or more years of contributory services with the State and (3) surviving spouses (or their personal representatives if they have deceased since July 1, 2009) of (i) deceased retired employees, provided the death of the former plan member occurred prior to October 1, 1986; and (ii) deceased teachers, State employees, and members of the General Assembly who are receiving a survivor's alternate benefit under any of the State-supported retirement programs, provided the death of the former plan member occurred prior to October 1, 1986," to legislation enacted by the General Assembly requiring class members to pay a premium to order to obtain coverage under what plaintiffs describe in their complaint as the Regular State Health Plan. This case is currently before the Court on discretionary review of a decision of the Court of Appeals reversing an order entered by the trial court on 19 May 2017 granting partial summary judgment in favor of plaintiffs on the grounds that the State had breached its contract with the members of the plaintiff class and requiring the State, among other things, to (1) provide premium-free coverage under certain provisions of the State Health Plan to members of the plaintiff class and to (2) reimburse members of the plaintiff class for premiums that they had paid in order to obtain such coverage prior to the entry of the trial court's order. *Lake v. State Health Plan*, 264 N.C. App. 174, 825 S.E.2d 645 (2019). In light of the number of individuals potentially affected by the outcome of the present appeal and the amount of money that is potentially at issue in this case, the justices of the Supreme Court of North Carolina have, prior to consideration of this case on the merits, elected to provide the parties and their counsel with the following information:

1. According to Canon 3C(1)(d)(i) of the North Carolina Code of Judicial Conduct, "[a] judge should disqualify himself/herself in a proceeding in which the judge's impartiality could reasonably be questioned," including a case in which "[t]he judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person," "[i]s a party to the proceeding . . . ." In addition, Canon 3D, which addresses "remittal of disqualification," provides that "a judge potentially disqualified by the terms of Canon 3C may, instead of withdrawing from the proceeding, disclose on the record the basis of the judge's potential disqualification" and that, "[i]f, based on such disclosure, the parties and lawyers, on behalf of their clients and independently of the judge's participation, all agree that the judge's basis for potential disqualification is immaterial or insubstantial, the judge is no longer disqualified, and may participate in the proceeding," with any

such agreement" to be "signed by all lawyers" and to be "incorporated in the record of the proceeding."

2. Pursuant to Canon 3D of the North Carolina Code of Judicial Conduct, the members of the Court, after making reasonable inquiry, hereby disclose the following information pertaining to members of their families who are within the third degree of kinship by blood or marriage and either are or may be members of the plaintiff class and who do not live in their immediate households:

a. Chief Justice Newby's mother is a retired teacher who taught in the Randolph and Guilford County public school systems and at Guilford Technical Community College.

b. Justice Ervin's deceased paternal grandfather served as a member of this Court and as a special judge of the Superior Court, his deceased father retired from a position as a Superior Court Judge, his mother taught in the Burke County public school system and at the western North Carolina School of the Deaf, and his brother-in-law is a retired special agent with the State Bureau of Investigation.

c. Justice Morgan's deceased maternal grandmother retired from her position as a teacher in the New Bern public schools.

d. Justice Berger's mother-in-law is a retired teacher who taught in the Forsyth County public school system and his wife's deceased maternal grandmother retired after teaching in the Yadkin and Durham County public school systems.

e. Justice Barringer's mother is a retired lunchroom cashier formerly employed by the Shelby City and Cleveland County public schools and her maternal aunt is a retired teaching assistant and bus driver formerly employed by the Shelby City Schools.

None of the family members identified in Paragraph No. 2 are serving as class representatives in this case.

3. Although the justices believe that they have, after reasonable inquiry, identified all of the members of their families within the third degree of kinship who are or may be members of the plaintiff class, they are unable to state definitively that other members of their families within the third degree of kinship are not also members of the plaintiff class.

4. The Court is mindful of its constitutional responsibilities as the judicial tribunal of last resort in North Carolina. *See* N.C. Const. art. VI (vesting the Supreme Court of North Carolina with appellate jurisdiction

and supervisory authority over all of the state courts in North Carolina). Pursuant to Canon 3D, the justices identified in Paragraph No. 2 are disqualified from participating in the consideration and decision of this case based upon one or more of the family relationships set forth above unless the parties and their lawyers file a written agreement stipulating that each justice's basis for disqualification is immaterial or insubstantial. In view of the fact that a minimum of four justices is necessary to constitute a "quorum for the transaction of the business of the court," N.C.G.S. § 7A-10(a) (2019), the parties to this proceeding will be denied an opportunity to be heard for lack of a quorum in the absence of further action by the parties or the Court.

5. According to the Rule of Necessity, "actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question properly presented to such a court." *Boyce v. Cooper*, 357 N.C. 655, 655, 588 S.E.2d 887, 888 (2003) (quoting *United States v. Will*, 449 U.S. 200, 214, 66 L. Ed. 2d 392, 405–06 (1980)); *see also Bacon v. Lee*, 353 N.C. 696, 717–18, 549 S.E.2d 840, 854–55 (2001) (holding that the Governor of North Carolina is permitted to consider a clemency petition submitted by a death-sentenced individual despite his prior service as Attorney General); *Long v. Watts*, 183 N.C. 99, 102, 110 S.E. 765, 767 (1922) (holding that the Court was required to hear a case challenging the application of a statewide income tax upon judicial salaries despite the potential impact of the resulting decision upon the members of the Court).

6. Prior to addressing whether the Rule of Necessity should be invoked in this proceeding and in order to give the parties a full and fair opportunity to be heard concerning the manner in which the Court should proceed in this case, the Court invites counsel on behalf of the parties to submit to the Court no later than 1 February 2021 either written objections to the participation of the justices identified herein or written consent of the parties and their counsel to the participation of the justices in the consideration and decision of this case on the grounds that the potential basis or bases for disqualification disclosed under Canon 3D is or are immaterial or insubstantial.

By order of the Court in conference, this the 26th day of January 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 26th day of January 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk

M.C. Hackney
~~Assistant~~ Clerk, Supreme Court of
North Carolina

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

5 FEBRUARY 2021

1P21	State v. Rasheed Anthony	Def's Pro Se Motion for Verified Complaint - Motion to Compel	Dismissed **01/27/2021**
6P05-2	Jose Luis Garza v. State of North Carolina, NCDPS, Director Todd E. Ishee, Pender Correctional Institution, Superintendent, Bryan Wells	1. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COA03-1330; COAP20-220) 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis* 3. Petitioner's Pro Se Motion to Appoint Counsel	1. Denied **12/29/2020** 2. Allowed **12/29/2020** 3. Dismissed as moot **12/29/2020**
6P21	State v. Aijalon Derice Dove	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-143) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
13P21	State v. Wallace Bradsher	1. Def's Motion for Temporary Stay (COA19-365) 2. Def's Petition for Writ of Supersedeas	1. Allowed **01/11/2021** 2. **Berger, J., recused**
15P21	State v. Jasper R. Marshall, III	Def's Pro Se Motion for Verified Complaint	Denied **01/25/2021**
16PA20	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. North Carolina Coalition for Charter Schools' Motion for Leave to File Amicus Brief (COA18-688) 2. Pinnacle Classical Academy's Motion for Leave to File an Amicus Brief	1. Allowed **01/26/2021** 2. Allowed **01/26/2021** **Berger, J., recused**
22A21	Jerry Mace, Sr. & Mace Grading Co., Inc. v. Scott T. Utley, II, Jody Bell, Energy Partners, LLC & Energy Partners of NC, LLC, Utley Enterprises, LLC d/b/a Energy Partners of Mebane	1. Defs' Notice of Appeal Based Upon a Dissent (COA19-726) 2. Defs' PDR as to Additional Issues 3. Plts' Pro Se Motion for Extension of Time to File Response	1. --- 2. 3. Denied **01/26/2021**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

5 FEBRUARY 2021

23A21	State v. Darrell Tristan Anderson	1. Def's Motion for Temporary Stay (COA19-841) 2. Def's Petition for Writ of Supersedeas	1. Allowed **01/19/2021** 2.
27A21	State v. Michael Devon Tripp	1. State's Motion for Temporary Stay (COA18-1286) 2. State's Petition for Writ of Supersedeas	1. Allowed **01/20/2021** 2.
28A21	State v. Deshandra Vachelle Cobb	1. State's Motion for Temporary Stay (COA19-681) 2. State's Petition for Writ of Supersedeas	1. Allowed **01/19/2021** 2.
29A20	Stacy Griffin, Employee v. Absolute Fire Control, Employer, Everest National Ins. Co. & Gallagher Bassett Servs., Carrier	1. Defs' Notice of Appeal Based Upon a Dissent (COA19-461) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Conditional PDR Under N.C.G.S. § 7A-31 4. Defs' Petition for Writ of Certiorari to Review Decision of the COA 5. Defs' Motion for Daniel J. Burke to Withdraw as Counsel of Record	1. — 2. Allowed **04/29/2020** 3. Allowed **04/29/2020** 4. 5. Allowed **12/29/2020**
30A21	State v. Robert Wayne Delau	1. State's Motion for Temporary Stay (COA19-1030) 2. State's Petition for Writ of Supersedeas	1. Allowed **01/20/2021** 2.
35P21	In the Matter of A.J.L.H., C.A.L.W., M.J.L.H.	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA20-267) 2. Petitioner's Motion for Temporary Stay 3. Petitioner's Petition for Writ of Supersedeas 4. Respondent's Motion to Dissolve Temporary Stay (Emergency) 5. Respondent's Motion for Sanctions 6. Respondent's Motion for Sanctions	1. 2. Allowed **01/21/2021** 3. 4. Denied **02/01/2021** 5. 6.
38P21	Samantha Lee Gordon v. Joshua Bridges	Def's Pro Se Motion to Dismiss Case in North Carolina	Dismissed **01/25/2021**
40A98-2	State v. William Christopher Goode	Def's Pro Se Motion to Compel	Dismissed

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46P21	State v. Terry Lynn Best	1. Def's Pro Se Motion to Dismiss Case 2. Def's Pro Se Motion to Schedule Hearing	1. Dismissed **02/01/2021** 2. Dismissed **02/01/2021**
53P20	In the Matter of the Appeal of Lowe's Home Centers, LLC, from the Valuation and Taxation of Certain Real Property by Union County for Tax Year 2017	1. Union County's PDR Under N.C.G.S. § 7A-31 (COA19-125) 2. North Carolina Association of County Commissioners and Eleven Individual Counties' Motion for Leave to File Amicus Brief in Support of PDR	1. Denied 2. Dismissed
66P20	State v. Thurman Levone Burns	Def's Pro Se Motion for Writ of Rights (COAP19-324)	Dismissed
94PA13-4	State v. George Victor Stokes	Def's Pro Se Motion for Preparation of Opinion and Appellant Brief	Dismissed **01/07/2021**
104P20-2	State v. Reggie Joe Beal	Def's PDR Under N.C.G.S. § 7A-31 (COA19-469-2)	Denied **Ervin, J., recused**
105P20	State v. Matthew Joseph Taylor	Def's PDR Under N.C.G.S. § 7A-31 (COA19-593)	Denied
157P20	William Allen Cale v. Cleveland Atkinson, Jr., in his official capacity as Sheriff of Edgecombe County	Petitioner's Motion to Seal Document (COA19-296)	Denied **12/30/2020**
162P20	State v. Benson Moore	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Rockingham County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Ervin, J., recused** **Berger, J., recused**
174P20	Dirk Andrew Lammert, Jr. v. Brittany Gayle Morris	Def's Pro Se Motion for Remote Hearing	Dismissed

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183P19-4	State v. Coriante Pierce	Def's Pro Se Petition for Writ of Habeas Corpus (COAP19-265)	Denied **01/08/2021**
186P17-5	State v. Lenwood Lee Paige	1. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA06-3) 2. Def's Pro Se Petition for Writ of Habeas Corpus 3. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied **12/17/2020** 2. Denied **12/17/2020** 3. Allowed **12/17/2020** **Hudson, J., recused**
187PA20	State v. Shanna Cheyenne Shuler	1. Def's PDR Under N.C.G.S. § 7A-31 (COA19-967) 2. Def's Motion to Amend Record on Appeal	1. Allowed **12/15/2020** 2. Allowed **01/12/2021**
193A20	In the Matter of R.D.M., Z.A.M., J.M.B., and J.J.B.	Respondent-Father's Petition for Writ of Certiorari to Review Decision of District Court, Wake County	Allowed **12/30/2020**
197PA20-2	State v. Jeremy Johnson	1. Def's Motion for Temporary Stay (COA19-529; 19-529-2) 2. Def's Petition for Writ of Supersedeas	1. Allowed **01/20/2021** 2. **Berger, J., recused**
203P20	Jerry McSwain, Employee v. Industrial Commercial Sales & Service, LLC, Employer, AIG/ Chartis Claims, Inc., Carrier	1. Plt's Motion to Admit Gayla S.L. McSwain Pro Hac Vice (COA19-740) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Denied 3. Dismissed as moot
237P20	State v. Anthony Leon Hargett	Def's PDR Under N.C.G.S. § 7A-31 (COA19-718)	Denied **Berger, J., recused**

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241P20	Maria Hontzas Poulos v. John Emanuel Poulos, AJ Properties of Fayetteville, LLC, Bear One Investments, LLC, Bear Plus One, LLC, Bear Six Investments, LLC, Cumberland Research Associates, LLC, Fayetteville Endoscopy, LLC, Fayetteville Gastroenterology Associates, PA, Icarian Partners, LLC, JBV Rental Property, LLC, Jeem, LLC, JEP Investments, LLC, JZJ, LLC, KPC Commercial, LLC, Lumberton Square II, LLC, Meej, LLC, Meej II, LLC, PK Properties of Fayetteville, LLC, Village Ambulatory Surgery Associates, Inc., Ocie F. Murray, Jr., as Trustee of the John E. Poulos Family Trust, John Emanuel Poulos, as Trustee of the Koula Poulos Revocable Trust	Def's PDR Under N.C.G.S. § 7A-31 (COA19-340)	Denied
242P07-4	State v. Yilien Osnarque	Def's Pro Se Motion for PDR (COAP20-262)	Dismissed **Ervin, J., recused**
282P20	Karen Bauman v. Pasquotank County ABC Board	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-613) 2. Plt's Motion to Deem PDR Timely Filed 3. Plt's Petition for Writ of Certiorari to Review Decision of the COA 4. Def's Motion to Dismiss Petition for Writ of Certiorari 5. Def's Motion to Dismiss PDR	1. --- 2. Denied 3. Denied 4. Dismissed as moot 5. Allowed **Berger, J., recused**

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290P20	Chad Poovey and Angela Poovey, Plaintiffs v. Vista North Carolina Limited Partnership and APC Towers, LLC, Defendants v. 130 of Chatham, LLC, et al., Nominal Defendants	Plts' PDR Under N.C.G.S. § 7A-31 (COA19-302)	Denied
293P20	State v. Aaron Rashaun Byers	Def's PDR Under N.C.G.S. § 7A-31 (COA18-863)	Denied
298P20	State v. Travis Lashaun Watson	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1254)	Denied **Berger, J., recused**
301P20	State v. Mark Allen Hartgrove	Def's Pro Se Motion for Dismissal (COA19-647)	Dismissed
302P20	State v. Larry Gene Kearney II	Def's PDR Under N.C.G.S. § 7A-31 (COA19-585)	Denied
306P10-2	State v. Anthony Patterson, Jr.	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Durham County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel 4. Def's Pro Se Motion for Leave to File Supplemental Brief	1. Dismissed 2. Allowed 3. Dismissed as moot 4. Dismissed as moot
311A20	In re Harris Teeter, LLC	Mecklenburg County's Motion to Continue Oral Argument	Allowed **02/02/2021**
312P18-2	State v. Aaron Lee Gordon	1. State's Motion for Temporary Stay (COA17-1077; 17-1077-2) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/02/2020** 2. Allowed 3. Allowed
317P20	State v. LeRon Kelly Owens	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-1008)	Denied

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338P20	Andrea R. Wallace v. Keith M. Maxwell, MD; Southeastern Sports Medicine, PLLC; Southeastern Sports Medicine, PLLC d/b/a Hendersonville Sports Medicine and Rehabilitation; and Southeastern Sports Physician Services, PLLC	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-291) 2. Plt's Motion to Amend PDR	1. Denied 2. Allowed **Berger, J., recused**
339A18-2	The New Hanover County Board of Education v. Josh Stein, in his capacity as Attorney General of the State of North Carolina and North Carolina Coastal Federation and Sound Rivers, Inc., Intervenors	1. Attorney General's Motion for Temporary Stay (COA17-1374; 17-1374-2) 2. Attorney General's Petition for Writ of Supersedeas 3. Intervenors' Petition for Writ of Supersedeas 4. Intervenors' Notice of Appeal Based Upon a Dissent 5. Intervenors' PDR as to Additional Issues 6. Attorney General's Notice of Appeal Based Upon a Dissent 7. Attorney General's PDR as to Additional Issues	1. Allowed **12/31/2020** 2. 3. 4. 5. 6. 7. **Berger, J., recused**
350P20	Dacat, Inc., and Viet Group Investments, LLC v. Jones Legacy Transportation, LLC, and Victor A. Jones	Plts' PDR Under N.C.G.S. § 7A-31 (COA19-588)	Denied
359P19	State v. Ivan Jonathan Prudente-Anorve	Def's PDR Under N.C.G.S. § 7A-31 (COA18-827)	Denied **Berger, J., recused**

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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 (COA19-730) 2. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal 4. Plt's Pro Se Motion for Extension of Time to File Response to Motion to Dismiss 5. Plt's Pro Se Motion for Extension of Time to File Response to Motion to Dismiss 6. Plt's Pro Se Motion for Court Acceptance of Documents Under Seal	1. --- 2. Denied 3. Allowed 4. Allowed **08/28/2020** 5. Allowed **09/22/2020** 6. Allowed **09/22/2020** **Ervin, J., recused**
364P19	In the Matter of Custodial Law Enforcement Recording Sought by City of Greensboro	1. Petitioner's Notice of Appeal Based Upon a Constitutional Question (COA18-992) 2. Petitioner's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31 3. Appellee's (Greensboro Police Officers) Motion to Dismiss Appeal 4. Amicus Curiaes' Conditional Motion for Leave to File Amicus Brief	1. Retained 2. Allowed 3. Denied 4. Allowed **Berger, J., recused**
379PA18-2	State v. Van Buren Killette, Sr.	1. Def's Petition for Writ of Mandamus 2. Def's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31 (COA18-26-2)	1. Denied 2. Allowed **Berger, J., recused**
381P20	State v. Archie Lynn McNeill	1. Def's Motion for Temporary Stay (COA19-1081) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/03/2020** Dissolved **02/03/2021** 2. Denied 3. Denied
383A19	Delia Newman, *et ux* v. Heather Stepp, *et ux*	Def's Petition for Rehearing	Denied **01/26/2021**

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390P20	State v. Thomas John Clark	1. Def's PDR Under N.C.G.S. § 7A-31 (COA19-446) 2. State's Motion to Dismiss Appeal	1. Denied 2. Dismissed as moot
392P20	In re E.P.-L.M.	1. Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA19-803) 2. Petitioner's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
396A19	In re J.M.	Respondent's Petition for Rehearing	Denied **Berger, J., recused** **Barringer, J., recused**
402P17-2	Thelma Bonner Booth, Widow and Administratrix of the Estate of Henry Hunter Booth, Jr., Deceased-Employee v. Hackney Acquisition Company, f/k/a Hackney & Sons, Inc., f/k/a Hackney & Sons (East), f/k/a J.A. Hackney & Sons, Employer, North Carolina Insurance Guaranty Association on behalf of American Mutual Liability Insurance, Carrier, and on behalf of the Home Insurance Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA19-602)	Denied
407P20-2	Archie M. Sampson v. Erik Hooks, Secretary of Department of Public Safety	1. Petitioner's Pro Se Motion for Administrative Remedy 2. Petitioner's Pro Se Motion for Administrative Remedy	1. Dismissed 2. Dismissed

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409P20	Luon Nay, Employee v. Cornerstone Staffing Solutions, Employer, and Starnet Insurance Company, Carrier (Key Risk Management Services, Administrator)	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/24/2020** 2. Allowed 3. Allowed **Berger, J., recused**
424P14-3	John S. Stritzinger v. Bank of America	1. Plt's Pro Se Motion for Petition to Reinstate Appeal 2. Plt's Pro Se Motion for Petition to Add Parties 3. Plt's Pro Se Motion to Appoint Counsel 4. Plt's Pro Se Motion to Reinstate NC Supreme Court Action	1. Dismissed 2. Dismissed 3. Dismissed as moot 4. Dismissed
433P20	State v. Glenn Warren Mayo, Jr.	Def's Pro Se Motion for Reconsideration of Motion for Appropriate Relief	Dismissed
436PA13-4	Lake, et al. v. State Health Plan For Teachers and State Employees, et al.	Disclosure Pursuant to Canon 3D of the Code of Judicial Conduct	Special Order **01/26/2021**
438P09-3	Darron Jermaine Jones v. Dean Locklear	Petitioner's Pro Se Motion for Notice of Appeal (COA08-1582)	Dismissed **12/17/2020**
438P09-4	Darron Jermaine Jones v. Dean Locklear	1. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wayne County (COA08-1582) 2. Petitioner's Pro Se Motion to Appoint Counsel	1. Denied **12/21/2020** 2. Dismissed as moot **12/21/2020**
441P19	Richard Owen Shirey v. Stacie B. Shirey	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1011)	Denied **Berger, J., recused**
448P20	Christy Rucker v. Anthony Culler and Renee Culler	Defs' Pro Se PDR Under N.C.G.S. § 7A-31 (COAP19-861)	Denied
469P20	State v. Regina M. Schmidt	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1159)	Denied
472P20	State v. Torrance D. Crouell, Sr.	Def's Pro Se Motion to Compel	Dismissed

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474P20	State v. Pierre Jamar Walker	1. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COAP20-536) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as moot
477A20	State of North Carolina *ex rel.* Utilities Commission, Appellee v. Virginia Electric and Power Company d/b/a Dominion Energy North Carolina, Appellant Attorney General Joshua H. Stein, Cross-Appellant	Attorney General's Motion to Dismiss Cross-Appeal	Allowed **01/15/2021**
485PA19	State v. Cashaun K. Harvin	Def's Motion to Withdraw Request to Withdraw and to Set Due Date for Defendant's Brief (COA18-1240)	Allowed; Defendant's brief due 30 days from the date of this Order **02/03/2021**
488P19	State v. David Ocampo	Def's PDR Under N.C.G.S. § 7A-31 (COA19-20)	Denied **Berger, J., recused**
491P20	Ca'sey Rafael Tyler v. Scotland Correctional Institution	1. Petitioner's Pro Se Motion for PDR (COAP20-553) 2. Petitioner's Pro Se Petition for Writ of Habeas Corpus 3. Petitioner's Pro Se Motion for PDR	1. Dismissed 2. Denied 3. Dismissed
497P20	State v. Edward Lamont Womble	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Moore County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
498P20	Dominique McFarrin Ford v. Freedom Mortgage Corporation	Plt's Pro Se Motion for Notice of Appeal	Dismissed

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505P20	State v. Rayquan Jamal Borum	1. State's PDR Under N.C.G.S. § 7A-31 (COA19-1022) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31 3. State's Motion for Temporary Stay 4. State's Petition for Writ of Supersedeas	1. 2. 3. Allowed **01/27/2021** 4.
508A20	In the Matter of G.J.A.	Respondent-Mother's Motion to Withdraw Appeal	Allowed **01/14/2021**
509P20	Christy Joy NC Partners LLC d/b/a Cortland Whitehall, Nickolas Blake Wilson, Jane Doe, and John Doe v. Tigress McDaniel and Disabled Minor Child	1. Def's Pro Se Motion for Expedited Discovery 2. Def's Pro Se Motion for Stay of Proceedings 3. Def's Pro Se Motion for Recusal of Paulina Havelka 4. Def's Pro Se Motion for Notice of Appeal	1. Dismissed **12/17/2020** 2. Dismissed **12/17/2020** 3. Dismissed **12/17/2020** 4. Dismissed **12/17/2020**
510P20	State v. Johnny M. Cook	1. Def's Pro Se Motion for Notice of Default 2. Def's Pro Se Motion for Notice of Default	1. Dismissed **01/27/2021** 2. Dismissed **01/27/2021**
516P20	State v. Samuel Dewayne Gragg	Def's Pro Se Motion for Release from Avery County Jail	Dismissed **12/22/2020**
517P20	State v. Kevin Renard Joyner	Def's Pro Se Motion to Reduce Bail	Dismissed **12/21/2020**
521A20	In the Matter of C.B.C.B.	1. Respondent-Mother's PDR Under N.C.G.S. § 7A-31 Prior to a Determination by the COA 2. Respondent-Mother's Motion to Suspend the Rules to Allow Expedited Review 3. Respondent-Mother's Motion for Extension of Time to File Brief 4. Respondent-Mother's Motion to Amend the Filed Record	1. Special Order **01/27/2021** 2. Special Order **01/27/2021** 3. Special Order **01/27/2021** 4. Allowed
527P20	State v. Joshua Christian Bullock	1. State's Motion for Temporary Stay (COA20-187) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/23/2020** 2. 3.

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531P20-1	State v. Connell Dixon Hawkins, Chadley Tyrone Norris, and James Alexander Ray	1. Def's (James Alexander Ray) Pro Se Motion for PDR Under N.C.G.S. § 7A-31 (COA20-881) 2. Def's (James Alexander Ray) Pro Se Motion for PDR Under N.C.G.S. § 7A-31	1. Dismissed **01/15/2021** 2. Dismissed **01/15/2021**
531P20-2	State v. Connell Dixon Hawkins, Chadley Tyrone Norris, and James Alexander Ray	Def's (James Alexander Ray) Pro Se Motion for Conditional Acceptance for Value	Dismissed **02/02/2021**
533A20	State v. Lewie P. Robinson	1. State's Motion for Temporary Stay (COA19-474) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **12/31/2020** 2. Allowed **01/21/2021** 3. --- **Berger, J., recused**
534A20	In the Matter of S.M.	1. Respondent-Mother's Motion for Extension of Time to File Brief 2. Respondent-Mother's Motion to Withdraw and to Allow Parent Defender to Appoint Substitute Counsel	1. Allowed **01/25/2021** 2. Allowed **02/01/2021**
535A20	State v. Ciera Yvette Woods	1. Def's Motion for Temporary Stay (COA19-985) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/31/2020** 2. 3. 4. **Berger, J., recused**
536P00-11	Terrance L. James v. State of North Carolina	Petitioner's Pro Se Motion for Emergency Application for Writ of Mandamus and Order of Res Judicata	Dismissed **12/29/2020** **Ervin, J., recused**
536P00-12	Terrance L. James v. N.C. Department of Public Safety, et al.	1. Petitioner's Pro Se Motion for Emergency Writ of Prohibition 2. Petitioner's Pro Se Motion to Proceed Without Fees Emergency	1. Dismissed **01/11/2021** 2. Allowed **01/11/2021** **Ervin, J., recused**

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536P20	State v. Siddhanth Sharma	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA19-591) 2. Def's Pro Se Motion for Extension of Time to File PDR 3. Def's Pro Se Second Motion for Extension of Time to File PDR	1. Dismissed *ex mero motu* 2. Denied 3. Denied **Berger, J., recused**
548A04-3	State v. Vincent Lamont Harris	1. State's Motion for Temporary Stay (COA18-952) 2. State's Petition for Writ of Supersedeas	1. Allowed **01/15/2021** 2.

CHISUM v. CAMPAGNA

[376 N.C. 680, 2021-NCSC-7]

DENNIS D. CHISUM, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF JUDGES ROAD INDUSTRIAL PARK, LLC, CAROLINA COAST HOLDINGS, LLC, AND PARKWAY BUSINESS PARK, LLC

v.

ROCCO J. CAMPAGNA, RICHARD J. CAMPAGNA, JUDGES ROAD INDUSTRIAL PARK, LLC, CAROLINA COAST HOLDINGS, LLC, AND PARKWAY BUSINESS PARK, LLC

No. 406A19

Filed 12 March 2021

1. Statutes of Limitation and Repose—declaratory judgment claims—based on breach of contract—limitations period—date of notice of breach

In a legal dispute concerning plaintiff's membership status in the parties' three limited liability companies (LLCs), the three-year limitations period applicable to plaintiff's declaratory judgment claims (based on breach of contract) began to run at the time he became aware or should have become aware of defendants' breach of the LLC operating agreements. Therefore, rather than dismissing the claims as time-barred, the trial court properly submitted to the jury the issue of when plaintiff had notice of defendants' breach where the record showed it was a triable issue of fact.

2. Damages and Remedies—constructive fraud—breach of fiduciary duty—proof of nominal damages—sufficient

In a legal dispute concerning plaintiff's membership status in the parties' three limited liability companies (LLCs), the trial court properly entered judgment in plaintiff's favor on his claims for breach of fiduciary duty and constructive fraud, which included an award of punitive damages, even though plaintiff presented no evidence that he suffered actual damages as a result of defendants' conduct. Under North Carolina law, a showing of nominal damages is sufficient to support claims for breach of fiduciary duty and constructive fraud.

3. Fraud—constructive—breach of fiduciary duty—jury verdicts—not fatally inconsistent—consideration of different time periods

In a legal dispute concerning plaintiff's membership status in the parties' three limited liability companies (LLCs), the trial court did not err by allowing the jury to find one of the defendants liable for constructive fraud but not liable for breach of fiduciary duty. Although elements of the two claims overlap (namely, a breach of

a relationship of trust and confidence), different statutes of limitations apply to each claim, and therefore the jury—evaluating defendant's conduct over two different periods of time—could find that defendant's actions satisfied those elements within the ten-year limitations period for constructive fraud but not within the three-year limitations period for breach of fiduciary duty.

4. Fraud—constructive—jury instruction—no reference to rebuttable presumption

In a legal dispute concerning plaintiff's membership status in the parties' three limited liability companies (LLCs), the trial court did not err by declining to give defendants' requested jury instruction that a finding that defendants had acted openly, fairly, and honestly in their dealings with the LLCs would defeat plaintiff's constructive fraud claim. The requested instruction did not accurately state the applicable law because it did not explain that, even if evidence of defendants' open, fair, and honest conduct sufficed to rebut the presumption of constructive fraud, plaintiff could still be entitled to recovery if the jury found proof of actual fraud.

5. Damages and Remedies—compensatory damages—identical awards against individual defendants—no fatal ambiguity in verdict

After a complex business trial against two defendants where the jury awarded compensatory damages to a limited liability company against each defendant on a derivative claim for constructive fraud, the trial court did not abuse its discretion in declining to amend the judgment because the verdict was not fatally ambiguous as to damages. Defendants were not held to be jointly and severally liable, and therefore could be found to each be independently liable, and although plaintiff's counsel told the jury during closing arguments that the trial court would prevent a double recovery, which defendants argued could have made the jury think its award would be split in half between the two defendants, juries are presumed to follow trial courts' instructions. In this case, both the instructions and the verdict sheet were clear and did not contain confusing language regarding the effect of any damage award.

6. Corporations—judicial dissolution—appointment of receiver—sufficiency of evidence and findings—notice and opportunity to be heard

In a legal dispute concerning plaintiff's membership status in the parties' three limited liability companies (LLCs), the trial court

did not err in ordering that two of the LLCs be judicially dissolved and a receiver appointed to oversee the process without first giving defendants the opportunity to buy plaintiff's membership interests. The record evidence and the court's findings of fact supported dissolution under clause (i) of N.C.G.S. § 57D-6-02(2) (allowing judicial dissolution where it is not practicable to conduct an LLC's business); the allegations in plaintiff's complaint, the evidence at trial, and the court's statement during jury deliberations that it would likely order dissolution gave defendants sufficient notice that judicial dissolution was an issue; and the trial afforded defendants ample opportunity to be heard on the issue.

7. Statutes of Limitation and Repose—declaratory judgment claims—based on breach of contract—applicable limitations period—triable issue of fact

In a legal dispute concerning plaintiff's membership status in the parties' three limited liability companies (LLCs), the three-year limitations period for breach of contract claims applied to plaintiff's declaratory judgment claims regarding one of the LLCs, where plaintiff based those claims on a theory that defendants breached the LLC operating agreement by diluting his membership interest and assuming total control of the LLC. On appeal, the trial court's order directing a verdict in defendants' favor on these claims was reversed and remanded because a triable issue of fact existed regarding the date the limitations period began to run (the date when plaintiff knew or should have known about defendants' alleged breach).

8. Appeal and Error—preservation of issues—waiver of appellate review—complex business case—distribution of punitive damages award

In a legal dispute concerning plaintiff's membership status in the parties' three limited liability companies (LLCs), plaintiff waived appellate review of his argument that any distributions defendants receive following the LLCs' judicial dissolution should be calculated by excluding the punitive damages the LLCs received from defendants in the case, where plaintiff neither objected to the trial court's jury instructions nor proposed alternative instructions on how to distribute a punitive damages award to the LLCs.

9. Corporations—individual claims—breach of fiduciary duty—constructive fraud—showing of injury

In a legal dispute concerning plaintiff's membership status in the parties' three limited liability companies (LLCs), the trial court

properly dismissed plaintiff's individual claims for breach of fiduciary duty and constructive fraud where, although plaintiff alleged facts describing the specific steps defendants took to deprive him of his ownership interests in the LLCs, plaintiff failed to show he suffered a legally cognizable injury as a result of defendants' conduct.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an opinion and final judgment entered on 11 October 2018 and an order and opinion on post-trial motions entered on 25 April 2019 by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases, in Superior Court, New Hanover County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 12 October 2020.

Sigmon Law, PLLC, by Mark R. Sigmon, and Whitfield Bryson & Mason, LLP, by Daniel K. Bryson, Matthew E. Lee, and Jeremy R. Williams, for plaintiff-appellee/appellant.

Reiss & Nutt, PLLC, by W. Cory Reiss, and Shipman & Wright, LLP, by James T. Moore and Gary K. Shipman, for defendants-appellants/appellees.

ERVIN, Justice.

¶ 1 In this appeal from the Business Court, we address a number of issues arising from a dispute between plaintiff Dennis Chisum and defendants Rocco Campagna and Richard Campagna concerning their respective membership interests in three related limited liability companies. For the reasons set out below, we affirm the trial court's judgment and orders, in part, and reverse this judgment and those orders and remand, in part.

I. Factual Background

A. Substantive Facts

1. Formation of Limited Liability Companies

¶ 2 Beginning in the 1990s, The Camp Group–an entity which was equally owned by Richard Campagna and Rocco Campagna–formed three limited liability companies–Judges Road Industrial Park, LLC; Carolina Coast Holdings, LLC; and Parkway Business Park, LLC–for the purpose of developing commercial real estate in Wilmington. Although Mr. Chisum was a founding member of Judges Road and Carolina Coast, he

did not become a member of Parkway until 16 October 2007. The members of each LLC entered into company-specific operating agreements which specified (1) the initial capital contributions that each member was required to make; (2) the membership interests of each owner, which were set forth in documents referred to as Schedule 1s[1]; (3) the managers of each LLC; and (4) the rules concerning "capital calls" for the LLCs, which governed requests for additional capital contributions from members over and above the members' initial contributions.

¶ 3 The operating agreements specified that member contributions were measured in "capital units," with each $1,000.00 in contributed capital constituting a single capital unit. The operating agreements further provided that members might be required to make additional capital contributions "ratably in accordance with such Members' then existing Membership Interest within the time period approved by the Majority in Interest of the Members" if, in the case of Judges Road and Carolina Coast, a capital call was requested by the managers and approved by "a Majority in Interest of the Members" or if, in the case of Parkway, a capital call was requested by a majority of the members. In the event that any member failed to make the payment required by a capital call, the managers could "elect to allow the remaining Members . . . to contribute to the Company, pro rata by Membership Interest, such Additional Capital Contribution." If one or more of the other members elected to proceed in that fashion, that member would be credited with additional capital units and would obtain a proportionate increase in his or her ownership interest that would be offset by a decrease in the noncontributing members' ownership interests.

¶ 4 The operating agreements further provided that any member's membership interest could be transferred by "sale, assignment, gift, pledge, exchange or other disposition" "after the Membership Interest has been offered to the Company and to the Members," with the seller being required to give "thirty . . . days written notice of his intention to sell or otherwise transfer all or any portion of his interest in the Company." In addition, the operating agreements included provisions governing the voluntary transfer of membership interests. Between 2007 and 2012, the Campagnas directed a number of capital calls for the three LLCs.

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1. The Camp Group transferred its interest in the LLCs to the Campagnas individually in 2007.

2. Dilution of Mr. Chisum's Interest in Judges Road

¶ 5 At the time of its formation in 1996, Mr. Chisum owned a 35% interest in Judges Road, with The Camp Group having served as the manager of Judges Road from its formation until 2007, when Richard Campagna was designated to fulfill the role. By 2010, Mr. Chisum's membership interest in Judge's Road had been reduced to 18.884%. On 25 June 2012, James MacDonald, the attorney for all three LLCs, mailed a letter to Mr. Chisum notifying him that there had been a $100,000.00 capital call for Judges Road and that a meeting had been scheduled for 2 July 2012 in order to amend the Judges Road operating agreement. In addition, the letter stated, in relevant part, that:

> [b]ased on the information provided by the accountant[,] [Richard Campagna] and [Rocco Campagna] have been advised by the accountant that your interest has been diluted to the point that you have no remaining equity in the Company. If you do not participate in this capital call, you will no longer be deemed a member and your interest will be considered diluted in full.

¶ 6 The 2 July 2012 meeting occurred in Mr. Chisum's absence. At the meeting, the Campagnas voted to fully dilute Mr. Chisum's membership interest based upon his failure to make the contribution required by the capital call. According to the meeting minutes, Mr. Chisum's "membership interest would be exhausted and extinguished if future capital calls were not timely made." The Campagnas, however, took control of the LLC at the conclusion of the 2 July 2012 meeting and failed to either include Mr. Chisum in the making of future operational decisions or correspond with him any further for the purpose of apprising him of his membership status. In addition, the Campagnas failed to amend the Judges Road operating agreement to reflect that Mr. Chisum's membership interest had been extinguished.

¶ 7 On 27 August 2012, the Campagnas paid the entire $100,000.00 capital call that had been made for Judges Road, with this amount being inclusive of Mr. Chisum's portion. In spite of the fact that the Campagnas believed that they each held a 50% ownership interest in Judges Road from and after the date of the 2 July 2012 meeting, Mr. Chisum continued to receive K-1s relating to Judges Road through the 2013 tax year, with Mr. Chisum's 2012 K-1 for Judges Road showing that he held an 18.884% ownership interest in the company and with his 2013 K-1 for Judges Road reflecting that, while he held an 18.884% interest in that company

at the beginning of the year, he held no interest whatsoever by its end. The 2013 K-1 for Judges Road that Mr. Chisum received indicated that it was his "[f]inal" Judges Road K-1.

3. Dilution of Mr. Chisum's Interest in Parkway

¶ 8 Parkway was formed in 1998 by The Camp Group and Caporaletti Development, LLC, with Anthony Caporaletti and Katrina Caporaletti serving as the company managers. In 2004, Caporaletti Development resigned from Parkway and sold its membership interest to Carolina Coast, with the Campagnas having become Parkway's managers at that time. Mr. Chisum joined Parkway in 2007 and held an 8.34% membership interest in the company.

¶ 9 After the 2 July 2012 Judges Road meeting, the Campagnas took control of Parkway as well. On 27 August 2013, Parkway mailed Mr. Chisum's 2012 Parkway K-1 to him; this K-1 showed that, at the end of 2012, Mr. Chisum held an 8.34% membership interest in the company. At some point in 2014, Parkway sent Mr. Chisum his 2013 K-1 by means of a letter dated 7 April 2014. The 2013 Parkway K-1 stated that, while Mr. Chisum held an 8.34% ownership interest at the beginning of the year, he had no interest in the company at the end of 2013, with his 2013 K-1 being marked as Mr. Chisum's "[f]inal" Parkway K-1.

4. Dilution of Mr. Chisum's Interest in Carolina Coast

¶ 10 At the time of its formation in 2000, Mr. Chisum had a 33.333% membership interest in Carolina Coast. Although Mr. Chisum and the Campagnas each served as managers at the time that the company was organized, the Carolina Coast operating agreement was changed in 2007 to provide for a single manager, a role that Richard Campagna was designated to fill. By 2010, Mr. Chisum's membership interest in Carolina Coast had been reduced to 16.667%.

¶ 11 A Carolina Coast membership meeting was held on 4 October 2010, at which Mr. Chisum was told that he needed to repay a loan that he and his wife, Blanche Chisum, had obtained and that had been secured by the LLCs. In response, Mr. Chisum argued that the repayment of the loan was not his sole responsibility and that he lacked sufficient funds to repay the loan. In spite of Mr. Chisum's objections, the Campagnas assessed a capital call in the amount of $63,500.00 against Mr. Chisum, gave Mr. Chisum one week to make the required capital contribution, and warned Mr. Chisum that, in the event that he failed to make the required contribution, his interest in Carolina Coast would be diluted.

After Mr. Chisum failed to make the required payment, the Campagnas paid off the loan on 27 October 2010.

¶ 12 After the 4 October 2010 meeting, the Campagnas acted as if Mr. Chisum's membership interest in Carolina Coast had been extinguished in full. In 2011, Mr. Chisum received his 2010 K-1, which was marked as his "[f]inal" K-1 relating to Carolina Coast and which stated that Mr. Chisum's membership interest in that company had been reduced to zero. Although Mr. Chisum believed that his 2010 Carolina Coast K-1 was in error and that he continued to have an ownership interest in Carolina Coast, Mr. Chisum never received another K-1 from Carolina Coast after 2011.

B. Procedural History

¶ 13 Mr. Chisum did not take any action to ascertain the status of his membership interest in any of the LLCs until he initiated this action in 2016. In March 2016, Mr. Chisum went to a storage facility owned by Judges Road for the purpose of accessing his complimentary owner's unit. At that time, he was approached by the facility's property manager, who told Mr. Chisum that he could no longer use the storage unit given that Judges Road had sold the facility to a third-party buyer. Upon receiving this information, Mr. Chisum searched the relevant tax records and discovered the existence of a deed transferring the Judges Road storage facility to a new owner on 1 February 2016 for a payment of $5.75 million.

1. Original Complaint and Related Proceedings

¶ 14 On 19 July 2016, Mr. Chisum filed a verified complaint against the Campagnas, Judges Road, Parkway, and Carolina Coast in which he asserted claims for (1) conversion, on the theory that the Campagnas had wrongfully converted his ownership interests in the three LLCs to their own use while intentionally concealing their wrongful conduct from him; (2) unfair and deceptive trade practices, on the theory that the Campagnas had converted Mr. Chisum's ownership interests in the LLCs to their own use by making fraudulent capital calls for the purpose of fully diluting his ownership interests; (3) unjust enrichment; (4) a declaration that Mr. Chisum continued to own interests in each of the three LLCs; and (5) a claim seeking judicial dissolution of the LLCs. Based upon these claims for relief, Mr. Chisum sought an award of compensatory and punitive damages and the dissolution and liquidation of all three LLCs pursuant to N.C.G.S. § 57D-6-02.

¶ 15 On the same day that he filed his complaint, Mr. Chisum sought and obtained the entry of a temporary restraining order against the

Campagnas that prevented them from taking any further action that would have the effect of diminishing the LLCs' assets. On 3 August 2016, however, Judge Phyllis M. Gorham entered an order denying Mr. Chisum's request for the issuance of a preliminary injunction and dissolving the temporary restraining order. On 19 August 2016, the Chief Justice designated this case a complex business case. On 19 September 2016, the Campagnas filed an answer to Mr. Chisum's complaint in which they denied the material allegations of the complaint; asserted a number of affirmative defenses, including the expiration of the applicable statutes of limitation, laches, estoppel, waiver, and unclean hands; and sought the dismissal of Mr. Chisum's complaint for failure to state a claim for which relief could be granted pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6).

2. Amended Complaint and Related Proceedings

¶ 16 On 8 February 2017, Mr. Chisum filed an amended complaint in which he reasserted the claims that he had alleged against the Campagnas in his original complaint and added derivative claims against the Campagnas on behalf of Judges Road, Parkway, and Carolina Coast. In addition, the amended complaint asserted claims against Mr. MacDonald; the MacDonald Law Firm, PLLC; Milton Hardison, who served as the accountant for all three LLCs; and Hardison & Chamberlain, CPAs, PA. Finally, the amended complaint asserted (1) derivative and individual claims for breach of fiduciary duty and constructive fraud against the Campagnas; (2) derivative and individual claims for breach of fiduciary duty, constructive fraud, and professional negligence or legal malpractice against Mr. MacDonald and the MacDonald Law Firm; (3) derivative and individual claims for breach of fiduciary duty, constructive fraud, and professional negligence against Mr. Hardison and Hardison & Chamberlain; (4) derivative and individual claims for civil conspiracy against the Campagnas, Mr. MacDonald, the MacDonald Law Firm, Mr. Hardison, and Hardison & Chamberlain; (5) individual claims for conversion and fraud in the inducement against the Campagnas; (6) individual claims for failure to pay distributions, unjust enrichment, and declaratory judgment against the Campagnas and the three LLCs; (7) individual claims for unfair and deceptive trade practices against the Campagnas, Mr. MacDonald, the MacDonald Law Firm, Mr. Hardison, and Hardison & Chamberlain; and (8) an individual claim for judicial dissolution against the LLCs pursuant to N.C.G.S. § 57D-6-02. As a result, based upon these claims, Mr. Chisum (1) derivatively and individually sought to recover punitive damages from the Campagnas, Mr. MacDonald, the MacDonald Law Firm, Mr. Hardison, and Hardison & Chamberlain; (2) individually

sought to pierce the corporate veil in order to hold the Campagnas personally liable "for the debts and obligations of the [three] LLCs, as alleged"; and (3) derivatively and individually sought to recover actual, compensatory, and consequential damages from all of the defendants, jointly and severally.

¶ 17 In March of 2017, each of the defendants filed answers to the amended complaint and moved to dismiss it. By 7 July 2017, each of the derivative and individual claims against Mr. MacDonald, the MacDonald Law Firm, Mr. Hardison, and Hardison & Chamberlain had been voluntarily dismissed, so that the only remaining claims were the individual and derivative claims that Mr. Chisum had asserted against the Campagnas and the LLCs.

3. Pre-Trial Rulings by the Trial Court

a. 20 July 2017 Order on Cross-Motions for Summary Judgment

¶ 18 On 8 February 2017, Mr. Chisum sought partial summary judgment in his favor with respect to the declaratory judgment claim that he had individually asserted against the Campagnas and Judges Road concerning his status as an owner or member of Judges Road. In response, defendants moved for summary judgment in their favor with respect to this claim on the grounds that it was barred by the applicable statute of limitations. On 20 July 2017, the trial court entered an order concluding that Mr. Chisum's declaratory judgment claims were not subject to any statute of limitations given that the amended complaint "allege[d] an actual controversy between [Mr. Chisum] and Rocco and Richard [Campagna] over their respective rights and obligations as members of Judges Road, irrespective of the claim for conversion"; that the trial court "[could] not find, and [d]efendants [did] not reference[ ], any North Carolina authority citing to a specific statute of limitations for a declaratory judgment claim"; and that the timeliness of a declaratory action was more appropriately challenged through the assertion of a defense of laches, which defendants had failed to raise in response to Mr. Chisum's declaratory judgment claim. As a result, the trial court denied defendants' summary judgment motion. In addition, after granting Mr. Chisum's summary judgment motion, in part, and determining that the Judges Road operating agreement "would not permit a member's interest to be diluted to zero, or extinguished entirely, by the failure to contribute capital in response to a capital call," the trial court denied the remainder of Mr. Chisum's summary judgment motion.

b. 7 November 2017 Order on the Campagnas' Motion to Dismiss

¶ 19 On 14 March 2017, defendants filed a motion seeking the dismissal of Mr. Chisum's claims for breach of fiduciary duty, constructive fraud, fraud in the inducement, unjust enrichment, and unfair and deceptive trade practices for failure to state a claim for which relief could be granted pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) and seeking the dismissal of the fraud in the inducement claim for lack of particularity pursuant to N.C.G.S. § 1A-1, Rule 9(b). On 7 November 2017, the trial court entered an order granting defendants' motion to dismiss the derivative claims for breach of fiduciary duty and constructive fraud to the extent that they rested upon allegations that defendants had engaged in making "sham" capital calls, improperly attempted to amend the operating agreements, and "[g]enerally attempt[ed] to freeze Mr. Chisum out of the LLCs" while denying defendants' dismissal motions directed to those same claims to the extent that they rested upon allegations that the Campagnas had improperly funneled money and misappropriated corporate opportunities to and from themselves and the LLCs and had sold assets belonging to the LLCs while diverting the proceeds of the relevant transactions to themselves and other entities. Finally, the trial court dismissed Mr. Chisum's individual claims for breach of fiduciary duty, constructive fraud, fraud in the inducement, unjust enrichment, and unfair and deceptive trade practices.

c. 2 March 2018 Order on Cross-Motions for Summary Judgment

¶ 20 On 15 May 2017, Mr. Chisum filed a motion seeking partial summary judgment in his favor with respect to his claim for a declaration concerning his status as an owner or member of Parkway and Carolina Coast. On 28 July 2017, Mr. Chisum filed a motion seeking partial summary judgment in his favor with respect to his individual claim against Richard Campagna for constructive fraud and his request for the entry of a declaratory judgment against each of the defendants concerning both his status as a member in each of the LLCs and the amount of his membership interest in each of the LLCs. On 2 August 2017, defendants filed a motion seeking the entry of summary judgment in their favor with respect to each of the remaining claims asserted in the amended complaint.

¶ 21 On 2 March 2018, the trial court entered an order determining that the Parkway and Carolina Coast operating agreements did not permit a member's interest to be extinguished for failure to contribute capital

in response to a capital call. On the other hand, the trial court declined to enter summary judgment in Mr. Chisum's favor with respect to the issue of whether Mr. Chisum continued to own an interest in Parkway or Carolina Coast. Finally, the trial court dismissed Mr. Chisum's conversion claim while denying the remainder of defendants' summary judgment motion.

d. 27 July 2018 Order Vacating Prior Declaratory Judgment Order

¶ 22 On 27 July 2018, the trial court, acting on its own motion, entered an order vacating its prior order determining that the Parkway and Carolina Coast operating agreements did not permit the extinguishment of membership interests based upon a member's failure to comply with a capital call. In making this determination, the trial court stated that, "[u]pon further consideration," "statutes of limitations are appropriately applied to declaratory judgment claims, and . . . laches also may apply under appropriate facts." Based upon that logic, the trial court determined that the three-year statute of limitations for breach of contract actions applied to Mr. Chisum's declaratory judgment claims and that it lacked the authority to decide the declaratory judgment claims on the grounds that the record reflected the existence of a jury question concerning the extent to which these claims were barred by the applicable statute of limitations.

4. Trial

¶ 23 This case came on for trial before the trial court and a jury beginning on 6 August 2018. During the course of the trial, the trial court struck defendants' laches defense as a sanction for discovery violations. On 13 August 2018, the trial court directed a verdict in favor of defendants with respect to all of Mr. Chisum's claims relating to Carolina Coast on statute of limitations grounds and summarized its decision by stating that:

> no reasonable juror could conclude from the evidence that has been presented that Mr. Chisum . . . would not reasonably have known that the Campagnas were in breach of the operating agreement and considered him ousted as an LLC member any later than July—the—prior to the July date in 2013. That would be the three-year mark. . . .
>
> [A]gain, no reasonable juror could conclude that [Mr. Chisum] would not have known that there was

> a potential breach of his rights under the LLC under the operating agreement as of no later than October of 2011.

On the other hand, at the close of all of the evidence, the trial court denied the defendants' motion for a directed verdict with respect to all of the other remaining claims and submitted those claims for the jury's consideration after rejecting defendants' request that the trial court instruct the jury with respect to Mr. Chisum's constructive fraud claim that defendants would have rebutted any presumption of fraud arising from a breach of fiduciary duty by showing that they acted openly, fairly, and honestly in their dealings with the LLCs and Mr. Chisum.

¶ 24 On 15 August 2018, the jury returned the following verdict:

> 1. Did Dennis Chisum file this lawsuit within three years of the date that he knew, or reasonably should have known, that the Campagnas no longer considered Dennis Chisum to be a member of Parkway and were excluding him from his membership rights in Parkway?
>
>   Yes.
>
> 2. Was Parkway damaged by a failure of Richard Campagna to discharge his fiduciary duties as manager of the company?
>
>   Yes.
>
> 3. Did Richard Campagna take advantage of a position of trust and confidence to bring about the transfer of money and real property from Parkway to himself or his other companies, including the Camp Group, LLC?
>
>   Yes.
>
> 4. What amount, if any, is Parkway entitled to recover from Richard Campagna as damages?
>
> $128,757.00
>
> 5. Was Parkway damaged by a failure of Rocco Campagna to discharge his fiduciary duties as manager of the company?
>
>   No.

6. Did Rocco Campagna take advantage of a position of trust and confidence to bring about the transfer of money and real property from Parkway to himself or his other companies, including the Camp Group, LLC?

   Yes.

7. What amount, if any, is Parkway entitled to recover from Rocco Campagna as damages?

   $128,757.00

8. Did Dennis Chisum file this lawsuit within three years of the date that he knew, or reasonably should have known, that the Campagnas no longer considered Dennis Chisum to be a member of Judges Road and were excluding him from his membership rights in Judges Road?

   Yes.

9. Was Judges Road damaged by a failure of Richard Campagna to discharge his fiduciary duties as manager of the company?

   Yes.

10. Did Richard Campagna take advantage of a position of trust and confidence to bring about the transfer of money from Judges Road to himself or his other companies, including the Camp Group, LLC?

    Yes.

11. What amount, if any, is Judges Road entitled to recover from Richard Campagna as damages?

    $1.00

12. Was Judges Road damaged by a failure of Rocco Campagna to discharge his fiduciary duties as manager of the company?

    No.

13. Did Rocco Campagna take advantage of a position of trust and confidence to bring about the

transfer of money from Judges Road to himself or his other companies, including the Camp Group, LLC?

Yes.

14. What amount, if any, is Judges Road entitled to recover from Rocco Campagna as damages?

$1.00

15. Did Richard Campagna and Rocco Campagna conspire to divert money and property from Parkway to the Camp Group, LLC?

No.

16. Did Richard Campagna and Rocco Campagna conspire to divert money and property from Judges Road to the Camp Group, LLC?

Yes.

17. What amount of unpaid distributions is Dennis Chisum entitled to receive from Parkway?

$10,695.00

18. What amount of unpaid distributions is Dennis Chisum entitled to receive from Judges Road?

$3,927.00

Later that day, the trial court instructed the jury with respect to the amount of punitive damages, if any, that Mr. Chisum was entitled to recover.

¶ 25 On 16 August 2018, the trial court informed the parties that it was "highly likely" that it would order dissolution of Judges Road and Parkway. On the same day, the jury returned a verdict determining that:

19. Is Richard Campagna liable to Parkway for punitive damages?

Yes.

20. What amount of punitive damages, if any, does the jury in its discretion award against Richard Campagna to Parkway?

$150,000.00

21. Is Richard Campagna liable to Judges Road for punitive damages?

    Yes.

22. What amount of punitive damages, if any, does the jury in its discretion award against Richard Campagna to Judges Road?

    $350,000.00

23. Is Rocco Campagna liable to Parkway for punitive damages?

    No.

24. What amount of punitive damages, if any, does the jury in its discretion award against Rocco Campagna to Parkway?

    N/A

25. Is Rocco Campagna liable to Judges Road for punitive damages?

    Yes.

26. What amount of punitive damages, if any, does the jury in its discretion award against Rocco Campagna to Judges Road?

    $250,000.00

¶ 26 On 11 October 2018, the trial court entered a final judgment which required the Campagnas to pay the compensatory and punitive damages amounts determined to be appropriate by the jury while reflecting the following additional determinations:

> IT IS FURTHER ORDERED, in the Court's discretion, that judgment is entered for [Mr. Chisum] as to [Mr. Chisum]'s claims for declaratory judgment with regard to Parkway and Judges Road. The Court declares that [Mr. Chisum] remains a member of Parkway, with a current percentage of ownership in the company of 8.34%. The Court declares that [Mr. Chisum] remains a member of Judges Road, with a current percentage of ownership in the company of 18.884%.

> IT IS FURTHER ORDERED that, in the Court's discretion, judgment is entered for [Mr. Chisum] against Defendants on [Mr. Chisum]'s claims for judicial dissolution of Parkway and Judges Road pursuant to [N.C.G.S.] § 57D-6-02(2)(i).[2] The evidence at the trial established that it is not practicable for [Mr. Chisum] and the Campagnas to conduct the business of Parkway and Judges Road in conformance with the operating agreements. Parkway, once it is reinstated, and Judges Road are hereby dissolved.
>
> IT IS FURTHER ORDERED that, in the Court's discretion, pursuant to [N.C.G.S] §§ 1-502(2) and 57D-6-04, in order to carry the judgment into effect, the Court in its discretion shall appoint a receiver for Parkway and for Judges Road under the authority and subject to the duties as set forth in the separately entered orders of this date.

On the same date, the trial court entered orders appointing George M. Oliver to serve as the receiver for Parkway and Judges Road.

5. Post-Trial Motions

¶ 27 On 22 October 2018, defendants filed a number of post-trial motions. First, defendants filed a motion seeking the entry of judgment in their favor notwithstanding the verdict pursuant to N.C.G.S. § 1A-1, Rule 50(b), on the grounds that (1) Mr. Chisum's claims for declaratory judgment were barred by the statute of limitations, a fact that deprived him of the standing needed to maintain the derivative claims, or, in the alternative, that judgment should be entered in defendants' favor with respect to the derivative claims for breach of fiduciary duty and constructive fraud on the grounds that Mr. Chisum had failed to prove the actual damages that were necessary to support those claims; (2) concerning the verdict in favor of Judges Road regarding the derivative claims that had been asserted against Rocco Campagna, it was legally inconsistent for the jury to have found Rocco Campagna liable for constructive fraud without also finding him liable for breach of fiduciary duty; (3) with respect to the derivative claims for constructive fraud, the evidence elicited at trial

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2. Subsection 57D-6-02(2) provides that "[t]he superior court may dissolve an LLC in a proceeding brought by . . . [a] member, if it is established that (i) it is not practicable to conduct the LLC's business in conformance with the operating agreement and this Chapter or (ii) liquidation of the LLC is necessary to protect the rights and interests of the member." N.C.G.S. § 57D-6-02(2) (2019).

demonstrated that the Campagnas had acted in an open, fair, and honest manner, with this fact sufficing to rebut the presumption that they were liable for constructive fraud; and (4) the punitive damages awards in favor of Judges Road and Parkway cannot be predicated upon the underlying claims for liability or, in the alternative, that the punitive damages claim by Judges Road cannot stand in light of the jury's determination that Judges Road had not suffered any actual damages of the type necessary to support a claim for breach of fiduciary duty or constructive fraud.

¶ 28 In an alternative motion for a new trial, defendants contended that a new trial was necessary because (1) the jury had been erroneously instructed that the statute of limitations applicable to Mr. Chisum's declaratory judgment claims did not begin to run until Mr. Chisum had been put on notice of the existence of these claims; (2) the derivative claims for breach of fiduciary duty and constructive fraud required proof of actual, rather than merely nominal, damages; (3) with respect to the breach of fiduciary duty and constructive fraud claims involving Judges Road, the jury had failed to find the existence of actual damages; (4) the jury returned legally inconsistent verdicts given that it had found Rocco Campagna liable for constructive fraud while refraining from finding him liable for breach of fiduciary duty; and (5) the trial court erred by failing to instruct the jury that a finding that the Campagnas had acted openly, fairly, and honestly sufficed to rebut the presumption of constructive fraud. In an alternative motion to alter or amend the judgment pursuant to N.C.G.S. § 1A-1, Rules 59(a) and (e), defendants argued that (1) the total amount of punitive damages awarded to Judges Road should be reduced to the maximum statutory cap of $250,000.00 pursuant to N.C.G.S. § 1D-25(b) and that it was unclear as to whether the jury had intended to return identical damage awards against Richard Campagna and Rocco Campagna or whether the jury believed that the trial court would divide a single award of $128,757.00 between those two defendants; (2) the judgment concerning the dissolution of the LLCs and the appointment of a receiver should be altered or amended based upon a contention that the record did not contain sufficient evidence to justify the adoption of dissolution as a remedy, that the trial court had failed to afford the Campagnas a hearing with respect to dissolution-related issues as required by statute, and that the appointment of a receiver was "unnecessary and unwarranted"; (3) they should have been given the option of purchasing Mr. Chisum's remaining membership interests in the LLCs pursuant to N.C.G.S. § 57D-6-03(d); and (4) the required hearing was not held prior to the trial court's appointment of a receiver. In addition, defendants filed a motion for relief from the trial court's orders

appointing a receiver and for the trial court to direct that the LLCs pay the receiver-related fees and expenses specified in the trial court's orders appointing receivers for Judges Road and Parkway and a motion seeking the entry of a stay of the trial court's final judgment and of the orders appointing receivers for Judges Road and Parkway pending disposition of their other post-trial motions.

¶ 29 Similarly, Mr. Chisum filed a series of post-trial motions on 22 October 2018 in which he sought (1) the entry of judgment notwithstanding the verdict with respect to the declaratory judgment claim relating to his ownership interest in Carolina Coast or, in the alternative, a new trial or an alteration or amendment of the judgment relating to that claim; (2) a new trial concerning the other claims that Mr. Chisum had asserted related to Carolina Coast; (3) an amendment to the judgment cancelling the deeds that transferred the property to The Camp Group; and (4) an amendment to the judgment to bar the Campagnas from receiving distributions that included any of the punitive damages amounts that they had been ordered to pay to Parkway or Judges Road.

¶ 30 On 5 December 2018, the trial court stayed the execution of the final judgment and its orders appointing a receiver for Judges Road and Parkway while directing the Campagnas to post bond in the amount of $600,000.00, an action that the Campagnas took on or about 5 February 2019. On 6 February 2019, the trial court entered an order divesting the receiver who had been appointed to operate and dissolve Parkway and Judges Road of his authority to act in that capacity pending the resolution of the post-trial motions. On 25 April 2019, the trial court entered an order addressing the parties' post-trial motions. In its order, the trial court amended its judgment by reducing the amount of punitive damages awarded to Judges Road against Richard Campagna to the statutorily-prescribed sum of $145,825.00 and reduced the amount of punitive damages awarded to Judges Road against Rocco Campagna to the statutorily-prescribed amount of $104,175.00 while denying the remainder of the parties' post-trial motions. Defendants noted an appeal to this Court from the trial court's final judgment and post-trial orders while Mr. Chisum noted a cross-appeal to this Court from the trial court's final judgment and certain preliminary and post-trial orders.

II. Substantive Legal Analysis

A. Standard of Review

¶ 31 This Court reviews a trial court's legal determinations, including its decisions to grant or deny motions to dismiss for failure to state a claim for which relief can be granted, *see Sykes v. Health Network Sols., Inc.*,

372 N.C. 326, 332 (2019), and the correctness of the trial court's instructions to the jury, *see Chappell v. N.C. Dep't of Transp.*, 374 N.C. 273, 281 (2020), using a de novo standard of review. The issue before a reviewing court in determining whether a motion for a directed verdict or judgment notwithstanding the verdict should have been allowed or denied focuses upon "whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322 (1991) (citation omitted). In view of the fact that trial court decisions to dissolve an LLC pursuant to N.C.G.S. § 57D-6-02 and to appoint a receiver pursuant to N.C.G.S. § 57D-6-04 (stating that a trial court "*may* appoint . . . a receiver . . . if dissolution is decreed by the court to wind up the LLC" (emphasis added)), are discretionary in nature, we review such determinations using an abuse of discretion standard of review. *See Campbell v. Church*, 298 N.C. 476, 483 (1979) (stating that "the use of 'may' generally connotes permissive or discretionary action and does not mandate or compel a particular act"); *Mitchell*, *Brewer*, *Richardson*, *Adams*, *Burge & Boughman*, *PLLC v. Brewer*, 209 N.C. App. 369, 392 (2011) (stating that "the issuance of . . . an order of [judicial] dissolution is within the trial court's discretion"). In the same vein, "[t]he trial judge has the discretionary power to set aside a verdict when, in his opinion, it would work injustice to let it stand"; "if no question of law or legal inference is involved in the motion, his action in so doing is not subject to review on appeal in the absence of a clear abuse of discretion." *Piazza v. Kirkbride*, 372 N.C. 137, 143 (2019) (quoting *Selph v. Selph*, 267 N.C. 635, 637 (1966)). A ruling committed to the trial court's discretion will not be overturned for an abuse of discretion in the absence of "a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 370 N.C. 235, 241 (2017) (quoting *In re Foreclosure of Lucks*, 369 N.C. 222, 228 (2016)).

B. Defendants' Appeal

1. Accrual of the Statute of Limitations

¶ 32 **[1]** As an initial matter, defendants contend that, as far as Mr. Chisum's declaratory judgment claims are concerned, the trial court erred by submitting to the jury the issue of when Mr. Chisum had notice of the Campagnas' breach of the operating agreements for Judges Road and Parkway. According to defendants, the trial court erred by submitting the issue of the date upon which Mr. Chisum had notice of the Campagnas' alleged breaches of the operating agreements to the jury on the grounds that the applicable statute of limitations began running at the moment

of the breach regardless of the extent to which the injured party had notice that the breach had occurred. In defendants' view, the undisputed record evidence tended to show that any breaches of the operating agreements for Judges Road and Parkway that the Campagnas might have committed occurred outside of the three-year limitations period applicable to breach of contract-based declaratory judgment claims. In support of this contention, defendants direct our attention to Mr. Chisum's testimony that the Campagnas took control of Judges Road and Parkway in 2012 and sold Parkway's assets in January 2013 in violation of the applicable operating agreements and to Richard Campagna's testimony that, after he and Rocco Campagna had made a capital contribution to Judges Road in August 2012 following Mr. Chisum's refusal to do so, the Campagnas assumed total ownership and control over both Judges Road and Parkway. In addition, defendants point to evidence that, as of 1 January 2013, Mr. Chisum had ceased making decisions for either LLC and was no longer receiving benefits as a member of either Judges Road or Parkway. As a result, defendants contend that Mr. Chisum's declaratory judgment claims involving Judges Road and Parkway were time-barred at the time that he filed his initial complaint in this case in July 2016.

¶ 33 In seeking to persuade us to reject defendants' contention, Mr. Chisum contends that established North Carolina law requires the existence of notice before the limitations period associated with a breach of contract claim begins to accrue and that an analysis of the record evidence demonstrates the existence of triable issues of fact with respect to the date upon which he had notice of the Campagnas' breaches of the Judges Road and Parkway operating agreements. Mr. Chisum claims that he cannot be said to have been on actual or constructive notice that a breach of the Judges Road and Parkway operating agreements had occurred given that the Campagnas had never amended the Schedule 1s associated with either entity to reflect the extinguishment of his ownership interests in light of Mr. MacDonald's testimony that the Schedule 1s provided the "definitive" statement of a member's interest in the LLCs and the fact that he had informed Mr. Chisum that he was a member to the extent shown on the Schedule 1s within three years of Mr. Chisum filing the complaint in this lawsuit. In addition, Mr. Chisum asserts that the Campagnas continued to send him K-1s showing that he was a member of Judges Road and Parkway, "including [documents transmitted] within 3 years of when he filed the lawsuit." In the event that notice of breach is required before the applicable statute of limitations began to run, Mr. Chisum points out that "[defendants] do not argue that the evidence was insufficient in that event."

¶ 34 As a general proposition, "a statute of limitations should not begin running against [a] plaintiff until [the] plaintiff has knowledge that a wrong has been inflicted upon him." *Black v. Littlejohn*, 312 N.C. 626, 639 (1985). On the other hand, "as soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run." *Pembee Mfg. Corp. v. Cape Fear Constr. Co., Inc.*, 313 N.C. 488, 493 (1985). The Court recognized the validity of this principle in the breach of contract context in *Christenbury Eye Center, P.A. v. Medflow, Inc.*, 370 N.C. 1 (2017), in which the parties had entered into an agreement requiring the defendants to provide the plaintiff with software improvements and the defendants failed to make a required royalty payment on 20 October 2000; failed to make another payment at any subsequent time; failed to provide written reports; and made prohibited sales—all of which were actions constituting a breach pursuant to the agreement. *Id.* at 3. Although the defendants remained in breach of the contract for the next decade, plaintiff did not file suit until 22 September 2014. *Id.* In affirming the trial court's decision to dismiss the plaintiff's breach of contract claim on the grounds that it was time-barred, we noted that "North Carolina law has long recognized the principle that a party must timely bring an action *upon discovery* of an injury to avoid dismissal of the claim" and held that "[s]tatutes of limitations require the pursuit of claims to occur within a certain period *after discovery*." *Id.* at 2 (emphases added). As a result, given that the plaintiff "had notice of its injury as early as 20 November 1999," when the defendants did not submit their first monthly report, "and certainly by 20 October 2000, when [the] defendants failed to pay the first $500 minimum royalty payment," we held that, "[b]ecause [the] plaintiff had notice of its injury yet failed to assert its rights, all of [the] plaintiff's claims are time barred." *Id.* at 6–7.

¶ 35 We recognized the same principle in *Parsons v. Gunter*, 266 N.C. 731 (1966), in which the parties had agreed to jointly develop, patent, and sell cotton card drive machines and to divide any resulting profits. *Id.* at 731. After the machines became successful, the defendant independently formed a separate corporation to market the machines, began realizing large profits, and patented the machinery. *Id.* at 731–32. When the plaintiff demanded an accounting in May 1960, the defendant responded by saying that "there was not enough room for both of us in selling these card drives." *Id.* at 733. Over three years later, the plaintiff brought a breach of contract action against the defendant in reliance upon the parties' earlier agreement. *Id.* In upholding the trial court's determination that the plaintiff's action was time-barred, we noted that the plaintiff had filed suit "[m]ore than three years . . . after [the]

plaintiff *was put on notice of* [the defendant's] disavowal of any obligation to [the] plaintiff and the institution of this action." *Id.* at 734 (emphasis added).

¶ 36 Admittedly, a number of our prior decisions have been somewhat opaque in addressing the issue that is before us in this case. *See, e.g.*, *Pearce v. N.C. State Hwy. Patrol Voluntary Pledge Comm.*, 310 N.C. 445 (1984); *Penley v. Penley*, 314 N.C. 1 (1985). However, the entire principle upon which defendants' argument hinges, which is that the statute of limitations begins to run against a plaintiff who has no way of knowing that the underlying breach has occurred, runs afoul of both our recent decisions, such as *Christenbury*, and basic notions of fairness. The evidence contained in the present record demonstrates that, even though the operating agreements specified the manner in which "all notices, demands and requests" were required to be given, Mr. MacDonald was unable to recall whether the 25 June 2012 letter that he sent to Mr. Chisum concerning Judges Road complied with the terms of the operating agreements, while Mr. Chisum testified that he never received the letter in question. In addition, even though Mr. Chisum's 2013 Parkway K-1 was dated 7 April 2014, Mr. Chisum testified that he did not receive it until October 2014 and that he first became aware that the Campagnas had attempted to extinguish his ownership interests in the LLCs in March 2016, when he unsuccessfully attempted to access his complimentary Judges Road storage unit. As a result, we affirm the trial court's determination that the statute of limitations applicable to the declaratory judgment claims that Mr. Chisum asserted against defendants began running at the time that he became aware or should have become aware of the Campagnas' breaches of the operating agreements and that the record contained sufficient evidence that Mr. Chisum's declaratory judgment claims relating to Judges Road and Parkway were not time-barred to support the submission of the statute of limitations issue to the jury.

2. Necessity for Proof of Actual Damages

¶ 37 **[2]** Secondly, defendants argue that the trial court erred by failing to direct a verdict or enter judgment notwithstanding the verdict in their favor with respect to the derivative claims for breach of fiduciary duty and constructive fraud relating to Judges Road. In support of this contention, defendants contend that the record contained no evidence that Judges Road had suffered actual damages, a deficiency that defendants believe to be fatal to Mr. Chisum's chances for success with respect to the relevant claims. In defendants' view, nominal damages, standing alone, are insufficient to support claims for constructive fraud and breach of fiduciary duty, with Mr. Chisum having failed to elicit any evi-

dence that Judges Road had sustained any actual damages as a result of the Campagnas' conduct.

¶ 38 In response, Mr. Chisum begins by arguing that defendants did not properly preserve this contention for purposes of appellate review by failing to raise it at trial and invited any error that the trial court might have committed by requesting the trial court to instruct the jury with respect to the breach of fiduciary duty and constructive fraud claims in such a manner as to permit the jury to find in Mr. Chisum's favor based upon an award of nothing more than nominal damages. In addition, Mr. Chisum contends that he did, in fact, offer evidence tending to show that Judges Road had sustained actual damages as the result of the Campagnas' conduct, including evidence which demonstrated that the Campagnas had made loans to themselves from the LLCs, sold essentially all of Judges Road's assets without either informing or obtaining consent from Mr. Chisum, and paid themselves large "management fees" from the LLCs despite their admission that they were "not supposed to get such fees." Finally, Mr. Chisum asserts that North Carolina law allows the assertion of breach of fiduciary duty and constructive fraud claims based upon nothing more than an award of nominal damages.

¶ 39 Although this Court has not previously addressed the issue of whether a plaintiff is required to prove actual damages in support of breach of fiduciary duty and constructive fraud claims, the Court of Appeals has addressed this issue on a number of occasions. In *Sloop v. London*, 27 N.C. App. 516 (1975), the plaintiffs sought to recover damages for wrongful foreclosure in reliance upon a breach of fiduciary duty theory. *Id.* at 518. After the trial court directed a verdict in favor of the defendants on the grounds that the record was devoid of any evidence tending to show that a wrongful foreclosure had occurred or that the plaintiffs were entitled to recover actual damages from the defendants, the Court of Appeals reversed the trial court's decision on the grounds that, "regardless of proof of any actual damages, [the] plaintiffs would be entitled to at least nominal damages should the jury find there was a wrongful foreclosure." *Id.* (citing *Bowen v. Fid. Bank*, 209 N.C. 140 (1936); 5 Strong, N.C. Index 2d, Mortgages and Deeds of Trust, § 39, pp. 594–95).

¶ 40 Similarly, in *Mace v. Pyatt*, 203 N.C. App. 245 (2010), the plaintiff asserted claims for trespass, conversion, forgery, fraud, and damage to personal property; prevailed upon all of those claims before a jury; and was awarded compensatory and punitive damages. *Id.* at 250. On appeal, the defendant argued that, given the absence of evidence concerning the amount of compensatory damages that the plaintiff was entitled to recover, the jury should not have been allowed to consider whether

either compensatory or punitive damages should be awarded. *Id.* at 253. Although the Court of Appeals vacated the jury's award on the grounds that the compensatory damages issue should not have been submitted to the jury, *id.* at 254–55, it recognized that the record contained evidence tending to show that the plaintiff had suffered nominal damages and upheld the jury's punitive damages award for that reason, *id.* at 255–57, stating that:

> [i]t is well established that merely nominal damages may support a substantial award of punitive damages. Once a cause of action is established, [a] plaintiff is entitled to recover, as a matter of law, nominal damages, which in turn support an award of punitive damages. Nominal damages need only be *recoverable* to support a punitive damages award, and a finding of nominal damages by the jury is not required where [a] plaintiff has sufficiently proven the elements of her cause of action.

Id. at 255 (cleaned up). As a result of its determination that the plaintiff was entitled to recover nominal damages, the Court of Appeals concluded that the jury's punitive damages award should be upheld. *Id.* at 256–57.

¶ 41 The plaintiff in *Bogovich v. Embassy Club of Sedgefield, Inc.*, 211 N.C. App. 1 (2011), asserted claims for breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices against multiple defendants, including a husband and wife. *Id.* at 2. After the trial court granted summary judgment in favor of the plaintiff with respect to her constructive fraud and unfair and deceptive trade practices claims, the jury found for the plaintiff with respect to her claim for breach of fiduciary duty and awarded her $12,165.00 in compensatory damages against the couple, $510,000.00 in punitive damages against the husband, and $1.00 in punitive damages against the wife. *Id.* at 7. On appeal, the defendants challenged the trial court's decision to grant summary judgment in favor of the plaintiff with respect to her constructive fraud claim on the grounds that the plaintiff had failed to establish the amount of compensatory damages to which she was entitled. *Id.* at 11. In rejecting the defendants' argument, the Court of Appeals concluded that "the undisputed evidence established the existence of all of the elements required for a finding of liability for constructive fraud" and that, "[a]ccording to well-established law, once a cause of action [has been] established, [the] plaintiff is entitled to recover, as a matter of law, nominal damages." *Id.* at 12 (second alteration in original).

¶ 42 In *Collier v. Bryant*, 216 N.C. App. 419 (2011), the plaintiffs asserted claims for actual and constructive fraud. However, the trial court granted summary judgment in favor of the defendant with respect to those claims. *Id.* at 423. On appeal, the plaintiffs contended that the record reflected the existence of genuine issues of material fact relating to the damages issue, *id.* at 430, while the defendants asserted that the plaintiffs were not entitled to recover punitive damages on the grounds that the plaintiffs could not prove the elements of their underlying substantive claims, *id.* at 434. In rejecting the defendants' argument, the Court of Appeals held that punitive damages are "incidental damages to a cause of action" and "can be awarded if either actual or constructive fraud is shown." *Id.* In other words, the Court of Appeals held that, even though "nominal damages must be recoverable" in order to support a punitive damages award, "there is no requirement that nominal damages actually be recovered." *Id.*

¶ 43 Similarly, the plaintiff in *Harris v. Testar, Inc.*, 243 N.C. App. 33 (2015), asserted a wrongful termination claim while the defendants counterclaimed for fraud and breach of fiduciary duty. *Id.* at 36. The trial court granted summary judgment in favor of the defendants, who were awarded $1.00 in nominal damages. *Id.* at 36–37. On appeal, the plaintiff challenged the trial court's decision to grant summary judgment in favor of the defendants with respect to the breach of fiduciary duty counterclaim. *Id.* at 37. The Court of Appeals, however, concluded that the plaintiff had breached a fiduciary duty to the defendants and allowed the trial court's ruling to stand despite the fact that nothing more than nominal damages had been awarded to the defendants. *Id.* at 38–39.

¶ 44 As a result of our belief that the Court of Appeals decisions discussed above were correctly decided, we adopt the reasoning of the Court of Appeals and hold that potential liability for nominal damages is sufficient to establish the validity of claims for breach of fiduciary duty and constructive fraud and can support an award of punitive damages. Aside from the fact that nothing in the prior decisions of this Court indicates that proof of actual injury is necessary in order to support a claim for breach of fiduciary duty or constructive fraud, we see no basis for treating the incurrence of nominal damages as a second-class legal citizen in this context, particularly given that such damages do reflect the existence of a legal harm and the fact that the policy of North Carolina law is to discourage breaches of fiduciary duty and acts of constructive fraud. As a result, we affirm the trial court's decision to enter judgment in Mr. Chisum's favor with respect to the claims for breach of fiduciary

duty and constructive fraud relating to Judges Road, including its award of punitive damages.

3. Inconsistent Verdicts

¶ 45 **[3]** Thirdly, defendants contend that the trial court erred by allowing the jury to find Rocco Campagna liable for constructive fraud given that it failed to find him liable for breach of fiduciary duty. According to defendants, given that the existence of a breach of fiduciary duty is an element of a constructive fraud claim, the jury could not rationally have found Rocco Campagna liable for constructive fraud once it failed to find that he had breached a fiduciary duty. In other words, defendants claim that, having found that Rocco Campagna was not liable for breach of fiduciary duty, it was precluded from finding him liable on a constructive fraud theory.

¶ 46 Mr. Chisum, on the other hand, contends that the trial court correctly determined that the jury's verdicts were not fatally inconsistent given that the jury was instructed to evaluate Rocco Campagna's conduct over two different periods of time in determining whether he should be held liable for breach of fiduciary duty and constructive fraud, with a ten-year period of time being applicable to the constructive fraud claim and a three-year period of time being applicable to the breach of fiduciary duty claim. In addition, Mr. Chisum asserts that defendants have failed to cite any authority in support of their argument that the jury's verdicts with respect to the relevant claims are fatally inconsistent.

¶ 47 The Court of Appeals has explicitly held that, "[a]lthough the elements of [constructive fraud and breach of fiduciary duty] overlap, each is a separate claim under North Carolina law." *White v. Consol. Plan., Inc.*, 166 N.C. App. 283, 293 (2004) (citing *Governor's Club, Inc. v. Governors Club Ltd. P'ship*, 152 N.C. App. 240, 249 (2002), *aff'd per curiam*, 357 N.C. 46 (2003)). This Court has implicitly endorsed the logic inherent in the Court of Appeals' treatment of this question, having allowed plaintiffs to assert claims for both breach of fiduciary duty and constructive fraud in the same case. *See, e.g.*, *Orlando Residence, Ltd. v. All. Hosp. Mgmt., LLC*, 375 N.C. 140 (2020) (involving separate claims for breach of fiduciary duty and constructive fraud).

¶ 48 A successful claim for breach of fiduciary duty requires proof that "(1) the defendants owed the plaintiff a fiduciary duty; (2) the defendant breached that fiduciary duty; and (3) the breach of fiduciary duty was a proximate cause of injury to the plaintiff." *Sykes*, 372 N.C. at 339. A successful claim for constructive fraud requires proof of facts and circumstances "(1) which created the relation of trust and confidence [between

the parties], and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Terry v. Terry*, 302 N.C. 77, 83 (1981) (second alteration in original) (quoting *Rhodes v. Jones*, 232 N.C. 547, 548–49 (1950)). Although the statute of limitations applicable to breach of fiduciary duty claims is three years, N.C.G.S. § 1-52(1) (2019), the limitations period applicable to constructive fraud claims is ten years, N.C.G.S. § 1-56(a) (2019).

¶ 49 In rejecting defendants' challenge to the consistency of the jury's verdicts with respect to these claims, the trial court pointed out that:

> [t]he jury was permitted to consider Rocco's conduct for the 10 years preceding January 6, 2017, in deciding whether he had committed constructive fraud, but for only 3 years preceding January 6, 2017, for the claim of breach of fiduciary duty. [Mr. Chisum] presented detailed, voluminous evidence regarding Judges Road financial transactions from 2010 through 2017. The jury could have concluded that Rocco engaged in acts in breach of the trust and confidence he owed Judges Road for which he should be held liable that occurred prior to, but not after, January 6, 2014.

After carefully reviewing the record, we agree with the trial court that the jury's verdicts with respect to the breach of fiduciary duty and constructive fraud claims are not fundamentally inconsistent in light of the differing statutes of limitation applicable to those claims. Simply put, the jury's determination that Rocco Campagna engaged in tortious conduct prior to 2014 has no bearing upon the issue of whether he engaged in tortious conduct between 2014 and 2017. As a result, we affirm the trial court's determination that the jury did not act in an impermissibly inconsistent manner when it found Rocco Campagna liable for constructive fraud while declining to find him liable for breach of fiduciary duty.

4. Instruction Concerning Open, Fair, and Honest Conduct

¶ 50 **[4]** Next, defendants contend that the trial court erred by declining to instruct the jury concerning the effect of evidence tending to show that they acted openly, fairly, and honestly in their dealings with Judges Road and Parkway upon the viability of Mr. Chisum's constructive fraud claim. Defendants assert that, if the trial court had delivered the requested instruction, the jury would have found that the presumption of constructive fraud had been rebutted, so that Mr. Chisum would have been required to prove actual fraud and would not have been able to

do so. In defendants' view, the record contained evidence tending to show that both Mr. Chisum and the LLCs sought and relied upon independent advice in connection with their dealings with the Campagnas, with this evidence being sufficient to support the delivery of the requested instruction. In addition, defendants contend that the trial court erroneously informed the jury that the principal issue that it was required to consider in addressing this claim was whether the Campagnas had been open, fair, and honest in their dealings with Mr. Chisum rather than in their dealings with the LLC, so that the trial court's instructions shifted their fiduciary obligations "away from the party to whom the fiduciary duty is actually owed" to a third person.

¶ 51 In response, Mr. Chisum argues that the trial court had correctly recognized that defendants had failed to elicit evidence tending to show that Mr. Chisum or the LLCs relied upon independent advice in the course of Mr. Chisum's dealings with the Campagnas and the LLCs. In addition, Mr. Chisum points to the presence of evidence tending to show that the Campagnas had exclusive control over the LLCs and relied upon the LLCs' lawyer and accountant to do their bidding, while ignoring the advice provided by the Companies' attorney that Mr. Chisum remained a member of the LLCs to the extent shown on the Schedule 1s, with these facts serving to defeat defendants' assertion that they had acted in an open, fair, and honest manner. Mr. Chisum also asserts that the trial court's focus upon whether the Campagnas had acted openly, fairly, and honestly in their dealings with him as an individual was proper given that the underlying issue at trial was the propriety of the elimination of Mr. Chisum's individual interests in the LLCs. Finally, Mr. Chisum contends that defendants cannot show prejudice from the trial court's failure to deliver the requested instruction.

¶ 52 "It is a well-established principle in this jurisdiction that in reviewing jury instructions for error, they must be considered and reviewed in their entirety." *Desmond v. News & Observer Publ'g Co.*, 375 N.C. 21, 66 (2020), *reh'g denied*, 848 S.E.2d 486 (N.C. 2020) (quoting *Murrow v. Daniels*, 321 N.C. 494, 497 (1988)). In evaluating the validity of a party's challenge to the trial court's failure to deliver a particular jury instruction, "we consider whether the instruction requested is correct as a statement of law and, if so, whether the requested instruction is supported by the evidence." *Minor v. Minor*, 366 N.C. 526, 531 (2013).

¶ 53 In *Forbis v. Neal*, 361 N.C. 519 (2007), the plaintiff brought an action on behalf of the estates of her two aunts against the aunts' nephew based upon certain transactions in which the nephew had engaged in reliance upon his authority as the aunts' attorney in fact. *Id.* at 521. After

the trial court granted summary judgment in the nephew's favor, *id.* at 523, this Court held, in connection with the plaintiff's constructive fraud claim, that, "[w]hen, as here, the superior party obtains a possible benefit through the alleged abuse of the confidential or fiduciary relationship, the aggrieved party is entitled to a presumption that constructive fraud occurred," *id.* at 529 (citation omitted), with this presumption arising "not so much because the fiduciary has committed a fraud, but because he may have done so," *id.* (cleaned up). After noting that the nephew was entitled to rebut the presumption of fraud "by showing, for example, that the confidence reposed in him was not abused," *id.* (cleaned up), we noted that the nephew had failed to make a sufficient showing to successfully rebut the presumption, *id.* at 530. We have also held that, once rebutted, the presumption of fraud "evaporates, and the accusing party must shoulder the burden of producing actual evidence of fraud." *Watts v. Cumberland Cnty. Hosp. Sys., Inc.*, 317 N.C. 110, 116 (1986).

¶ 54 Although the jury instruction that the Campagnas requested the trial court to deliver is couched in the language of the pattern jury instructions, that fact is not determinative of the issue that we are required to resolve in this case. *Desmond*, 375 N.C. at 70 (concluding that the pattern jury instructions did not accurately state the applicable law). The instruction that the Campagnas requested the trial court to deliver with respect to Judges Road—which is identical to the instruction that they requested relating to Parkway—did not include the burden-shifting language that is found in our decisions with respect to this issue. Instead, the ultimate import of the instruction that defendants requested the trial court to deliver to the jury in this case stated that, if the jury found that the Campagnas had acted openly, fairly, and honestly in their dealings with him, Mr. Chisum would be completely barred from obtaining a recovery on the basis of his constructive fraud claim. In view of the fact that the requested instruction did not inform the jury that, if the Campagnas had managed to rebut the presumption of fraud, Mr. Chisum would still be entitled to a recovery in the event that the jury found that actual fraud had occurred, it did not accurately state the applicable law. As a result, the trial court did not err by failing to instruct the jury concerning the manner in which it should consider evidence tending to show that the Campagnas acted in an open, fair, and honest manner in accordance with defendants' requested instruction.

5. Identical Compensatory Damage Awards

¶ 55 **[5]** Next, defendants argue that the jury's decision to award $128,757.00 in compensatory damages to Parkway against each of the Campagnas created an impermissible ambiguity in the jury's verdict. In support of

this contention, defendants note that Mr. Chisum's trial counsel suggested in his closing argument to the jury that the jury could award the same amount of compensatory damages against each defendant with the assurance that the trial court would ensure that no double recovery occurred. In light of this statement, defendants contend that a reviewing court cannot be certain whether the jury intended to award identical amounts to Parkway against each defendant or if it believed that the trial court would split a single award of $128,757.00 in favor of Parkway between Richard Campagna and Rocco Campagna. Although defendants acknowledge that they failed to lodge a contemporaneous objection to this portion of Mr. Chisum's jury argument, they contend that this omission has no bearing upon the proper resolution of their challenge to the compensatory damages award relating to Parkway because the resulting ambiguity did not become apparent until the jury had rendered its verdict.

¶ 56 In response, Mr. Chisum notes that defendants did not object to the statements that his trial counsel made during his closing argument and have not challenged the trial court's determination that the record contained sufficient evidence to support a total compensatory damage award in favor of Parkway in the amount of $257,514.00. In light of that set of circumstances, Mr. Chisum argues that the trial court did not abuse its discretion by refusing to disturb the jury's compensatory damages verdict.

¶ 57 A verdict "should be certain and import a definite meaning free from ambiguity," *Gibson v. Cent. Mfrs. Mut. Ins. Co.*, 232 N.C. 712, 716 (1950), with an uncertain or ambiguous verdict being insufficient to support the entry of a judgment, *id.* at 715. As a general proposition, reviewing courts presume that the jury has followed the trial court's instructions. *See Smith v. Perdue*, 258 N.C. 686, 690 (1963). For that reason, we have held jury verdicts to be fatally ambiguous in the event that the verdict sheet or the underlying instructions were vague, making it unclear precisely what the jury intended by its verdict. *See State v. Lyons*, 330 N.C. 298, 309 (1991); *State v. McLamb*, 313 N.C. 572, 577 (1985). However, defendants' argument does not focus upon any alleged deficiency in the trial court's instructions and rests, instead, upon a statement made by Mr. Chisum's trial counsel during closing arguments.

¶ 58 As a result of the fact that this Court has never had an opportunity to directly address the validity of identical compensatory damage verdicts returned against different defendants, defendants have directed our attention to *City of Richmond, Virginia v. Madison Management Group*,

Inc., 918 F.2d 438 (4th Cir. 1990), and *ClearOne Communications, Inc. v. Biamp Systems*, 653 F.3d 1163 (10th Cir. 2011), in which defendants contend that similar verdicts were held to be impermissibly ambiguous. The decisions upon which defendants rely are, however, distinguishable from this case given that the defendants in those cases were treated as being jointly and severally liable, making it unclear whether the juries intended to apportion total damages between the defendants or to require the defendants to pay the same damage amount jointly and severally. *See City of Richmond*, 918 F.2d at 460–61; *ClearOne*, 653 F.3d at 1179. In view of the fact that the Campagnas have not been held to be jointly and severally liable in this case, the rationale upon which the decisions relied upon by defendants is based has no application in this case.

¶ 59 A careful review of the record shows that the jury was clearly instructed to award the damages that Parkway sustained as a proximate result of the fact that both Richard Campagna and Rocco Campagna took "advantage of a position of trust and confidence to bring about the transfer of money and real property from Parkway to himself or his other companies." At trial, Mr. Chisum elicited evidence tending to show "lost profits, loans and transfers of funds by the Campagnas to themselves, and losses associated with the sales of Parkway's assets." According to the trial court, the combined compensatory damages award to Parkway was "well within the range of compensatory damages sought for Parkway." Moreover, the verdict sheet and the trial court's instructions in this case did not contain any language that could reasonably have been expected to confuse the jury as to the effect of any damage award that it intended to make, so we have no basis for believing that the jury failed to act in accordance with the trial court's instructions regardless of any statements that might have been made by Mr. Chisum's trial counsel during the closing arguments to the jury. As a result, we hold that the trial court did not abuse its discretion by refraining from deciding that the jury's compensatory damages verdict with respect to Parkway was impermissibly ambiguous.

6. Judicial Dissolution and Appointment of Receiver

¶ 60 **[6]** Finally, defendants argue that the trial court erred by judicially dissolving Judges Road and Parkway and appointing a receiver to handle the operation and dissolution of the two LLCs. As an initial matter, defendants contend that the trial court failed to make findings of fact and conclusions of law in support of its determination that the dissolution of Judges Road and Parkway was necessary. In addition, defendants claim, in reliance upon testimony from Mr. Chisum that he continued to consider the Campagnas to be his "good friends," that their working

relationship with one another was "good," and that they all "got along very well," that the record did not support the trial court's decision to dissolve the two LLCs. Moreover, defendants assert that they were deprived of their statutory right to purchase Mr. Chisum's interests in lieu of dissolution. Similarly, defendants contend that they were statutorily entitled to notice and an opportunity to be heard prior to the entry of an order judicially dissolving Judges Road and Parkway, with the trial itself being insufficient to serve as the required hearing given that the issue of whether the LLCs should be judicially dissolved was not at issue between the parties during the trial. In the same vein, defendants assert that, given Mr. Chisum's failure to seek judicial dissolution of Judges Road and Parkway pursuant to clause (i) of N.C.G.S. § 57D-6-02(2) in his amended complaint, they had not received notice concerning the exact nature of the judicial dissolution claim that Mr. Chisum was asserting as required by N.C.G.S. § 1A-1, Rule 8. Finally, defendants argue that the trial court failed to provide them with notice and an opportunity to be heard before appointing a receiver as required by N.C.G.S. § 57D-6-04.

¶ 61 Mr. Chisum has responded to defendants' arguments by asserting that the trial court did make sufficient findings to support the entry of an order of judicial dissolution and that there was ample support in the record evidence for such a decision. In addition, Mr. Chisum claims that the Campagnas were not entitled to purchase his interests in Judges Road and Parkway in lieu of judicial dissolution given that such a "buy-out" opportunity is only available when judicial dissolution is ordered pursuant to clause (ii) of the applicable statute while the trial court predicated its decision to judicially dissolve Judges Road and Parkway upon clause (i). Finally, Mr. Chisum contends that the trial and related proceedings provided defendants with ample notice and an opportunity to be heard with respect to both the judicial dissolution of Judges Road and Parkway and the appointment of a receiver.

¶ 62 According to N.C.G.S. § 57D-6-02(2),

> [t]he superior court may dissolve an LLC in a proceeding brought by . . . [a] member, if it is established that (i) it is not practicable to conduct the LLC's business in conformance with the operating agreement and this Chapter or (ii) liquidation of the LLC is necessary to protect the rights and interests of the member.

N.C.G.S. § 57D-6-02(2) (2019). The rights available to the members of a judicially dissolved LLC vary depending upon the basis upon which the trial court decides that judicial dissolution should be required. In

the event that a trial court determines that an LLC should be judicially dissolved pursuant to clause (ii), "the court will not order dissolution if after the court's decision the LLC or one or more other members elect to purchase the ownership interest of the complaining member at its fair value in accordance with any procedures the court may provide." N.C.G.S. § 57D-6-03(d) (2019). Similarly, trial courts have the authority to appoint a receiver for an LLC on the condition that "the court shall hold a hearing on the subject after delivering notice, or causing the party who brought the dissolution to deliver notice, of the hearing to all parties and any other interested persons designated by the court." N.C.G.S. § 57D-6-04(a) (2019).

¶ 63 In his amended complaint, Mr. Chisum alleged, in pertinent part, that:

> 160. Defendants [Rocco] Campagna and [Richard] Campagna unilaterally determined that Dennis Chisum was no longer an owner or member of the Chisum/Campagna LLCs and began operating the companies in their own best interests, to the detriment of Dennis Chisum's interests.
>
> 161. Upon information and belief, [Rocco] Campagna and [Richard] Campagna have directed distributions to themselves without notifying Dennis Chisum or distributing money to him in accordance with his ownership interest.
>
> 162. Based on the Campagnas' conduct as set forth herein, liquidation of each of the Chisum/Campagna LLCs is necessary to protect the rights and interests of Dennis Chisum.
>
> 163. In accordance with N.C.G.S. §§ 57D-6-02 and 57D-6-02, [Mr. Chisum] requests that this Court dissolve and liquidate each of the Chisum/Campagna LLCs and distribute the proceeds in accordance with their respective ownership interests.

A careful examination of these allegations compels the conclusion that Mr. Chisum sought the judicial dissolution of Judges Road and Parkway pursuant to both clauses of N.C.G.S. § 57D-6-02(2) by virtue of the fact that these factual allegations would support a determination that it was no longer practicable to operate the LLCs in accordance with the existing operating agreements and that judicial dissolution was necessary

to protect Mr. Chisum's interests, so that defendants had ample notice that the trial court was entitled to dissolve the two LLCs on the basis of either prong of the relevant statutory provision.

¶ 64 In deciding that Judges Road and Parkway should be judicially dissolved, the trial court found as fact that:

> a. The Campagnas and [Mr. Chisum] had no direct contact or communications with one another from approximately October of 2010, when [Mr. Chisum] walked out of the [Carolina Coast] members meeting, and the filing of this lawsuit in July 2016.
>
> b. The Campagnas treated [Mr.] Chisum as if his membership interests in Parkway and Judges Road had been extinguished beginning in July 2012, but never communicated to [Mr. Chisum] that they considered his memberships terminated. Richard Campagna admitted [Mr. Chisum] did not fail to meet a capital call or take any specific action which would have terminated [Mr. Chisum's] membership in Parkway.
>
> c. The Campagnas filed documents with the Secretary of State of North Carolina representing that Parkway was dissolved without notifying [Mr. Chisum], seeking his consent, or making any distribution to [Mr. Chisum].
>
> d. The Campagnas ceased providing [Mr. Chisum] with required report and financial information regarding Parkway and Judges Road.
>
> e. [Mr. Chisum]'s wife, Blanche, testified that she attempted to visit the Campagnas' offices sometime in 2012–2013 to get information regarding the LLCs, but that Richard ordered her to leave the premises in a threatening manner.

In addition, in denying defendants' post-trial motions relating to the judicial dissolution of Judges Road and Parkway, the trial court stated that:

> [i]n addition to this evidence, the Court also has had opportunity to observe the parties during the course of this litigation and at trial. The level of acrimony and

> distrust between the Campagnas and [Mr. Chisum] is extraordinary. Following this lengthy and highly contentious lawsuit, the Court is convinced that these parties could not ever again be associated with one another in a jointly owned business, let alone conduct the business of Parkway and Judges Road.

As a result, the trial court's factual findings and the evidence received at trial provide ample support for a determination that "it is not practicable to conduct the LLC[s'] business in conformance with the operating agreement and this Chapter." N.C.G.S. § 57D-6-02(2). As a result, we hold that the trial court properly ordered the judicial dissolution of Judges Road and Parkway pursuant to clause (i) of N.C.G.S. § 57D-6-02(2) without giving the Campagnas the opportunity to purchase Mr. Chisum's interests given that they were not entitled to do so. *See* N.C.G.S. § 57D-6-03(d).

¶ 65 In addition, we hold that defendants had an ample opportunity to be heard with respect to the issue of whether Judges Road and Parkway should be judicially dissolved. In view of the allegations of the amended complaint, the interrelationship of the other issues that were before the trial court in this case, and the extent to which evidence relevant to the judicial dissolution was received during the course of the trial, we have no hesitation in concluding that the extent to which Judges Road and Parkway should be judicially dissolved and whether a receiver should be appointed to oversee the operation and dissolution of those companies were issues before the court at trial. At trial, the trial court heard extensive evidence concerning the level of animosity between the parties and the likelihood that they would ever be able to work together as required by the operating agreements. In addition, the trial court informed the parties while the jury was deliberating that "it's likely I will order dissolution here. I mean, highly likely, given the circumstances of the existing Judges Road" and that it typically "appoint[s] a receiver" in such circumstances. As a result, for all of these reasons, we hold that the trial court did not err when it ordered that Judges Road and Parkway be judicially dissolved and that a receiver be appointed to oversee the operation and dissolution of those LLCs.

C. Mr. Chisum's Appeal

1. Timeliness of Carolina Coast-Related Claims

¶ 66 **[7]** In seeking relief from the trial court's judgments and orders before this Court, Mr. Chisum begins by arguing that the trial court erred by determining that his claims relating to Carolina Coast were barred

by the applicable statute of limitations. More specifically, Mr. Chisum contends that statutes of limitation do not apply to actions for a declaratory judgment given that nothing is required to support the maintenance of such actions except the existence of an actual controversy between the parties, with the only time-related bar applicable to declaratory judgment actions being the equitable doctrine of laches. In addition, Mr. Chisum asserts that, in the event that this Court concludes that declaratory judgment claims are subject to any statute of limitation, such actions should be governed by the ten-year limitations period for actions sounding in constructive fraud rather than the three-year limitations period for actions sounding in breach of contract given that his declaratory judgment claims rest upon the constructive fraud claim asserted in his amended complaint.

¶ 67 In addition, Mr. Chisum asserts that his claims involving Carolina Coast should be deemed to have been timely filed even if the applicable statute of limitations is the three-year period governing breach of contract actions, with this result being the appropriate one given that the Campagnas never amended Carolina Coast's Schedule 1. At an absolute minimum, Mr. Chisum argues that the record reveals the existence of triable issues of fact relating to whether the operating agreement had been breached and whether or upon what date Mr. Chisum learned of any such breach that were sufficient to preclude the trial court from directing a verdict in defendants' favor with respect to his Carolina Coast-related claims. Finally, Mr. Chisum requests that, in the event that his claims relating to Carolina Coast are remanded to the Superior Court, New Hanover County, for a new trial, the trial court be directed to instruct the jury concerning the doctrine of equitable estoppel given the existence of evidence tending to show that the Campagnas acted in such a manner as to induce him to refrain from taking action to protect his interests prior to the filing of the initial complaint.

¶ 68 In response, defendants assert that the applicable statute of limitations is the three-year period applicable to a breach of contract claim, with the relevant limitations period having begun to run at the time of breach regardless of the extent, if any, to which Mr. Chisum had notice that a breach had actually occurred. In addition, defendants argue that the Campagnas did not act in a secretive manner in taking control of Carolina Coast and that Mr. Chisum had ample notice of their alleged breaches of contract more than three years prior to the filing of the original complaint.

¶ 69 This Court has "long recognized that a party must initiate an action within a certain statutorily prescribed period after discovering its injury

to avoid dismissal of a claim," *Christenbury Eye Ctr., P.A.*, 370 N.C. at 5, and that statutes of limitation exist to "afford security against stale demands, not to deprive anyone of his just rights by lapse of time," *id.* at 5–6 (quoting *Shearin v. Lloyd*, 246 N.C. 363, 371 (1957), *superseded by statute*, N.C.G.S. § 1-15(b) (1971), *on other grounds as recognized in Black v. Littlejohn*, 312 N.C. 626, 630–31 (1985)). Although the General Assembly has not enacted a specific statute of limitations applicable to declaratory judgment claims, this Court has applied statutes of limitation to declaratory judgment claims in a number of earlier cases.

¶ 70 In *Penley v. Penley*, 314 N.C. 1 (1985), for example, a husband filed an action against his wife for the purpose of seeking a declaration that he was entitled to a 48% ownership interest in a fast-food business. *Id.* at 4. The plaintiff alleged that, in exchange for his full-time assistance in operating the business during a time when the defendant was ill, she had agreed to organize the business as a joint enterprise with equally divided returns. *Id.* at 5. The plaintiff further alleged that, in 1977, the parties orally formed a corporation in which each party would own a 48% interest while their son owned the remaining 4%. *Id.* Both parties served as officers and directors of the corporation from late 1977 through 9 April 1979, at which point the defendant abandoned the plaintiff. *Id.* After a brief reconciliation, the defendant abandoned the plaintiff for a second time on 31 December 1979 and, from that point on, denied that the plaintiff possessed any rights in the business and wrongfully converted the proceeds of the business to her own use. *Id.* On 11 August 1981, the plaintiff filed a complaint seeking a declaration that he was entitled to a 48% interest in the corporation, a claim that the jury upheld at trial. *Id.* at 4. On appeal, this Court concluded that "the three-year contract limitations period provided in [N.C.G.S. §] 1-52(1) is the applicable statute of limitations," *id.* at 19, and determined that "the breach occurred and the right to institute an action commenced, at the earliest, when [the] defendant broke her promise or took action inconsistent with the promise she made to [the plaintiff]," *id.* at 20. As a result, we held that, since the breach of contract occurred when the defendant initially failed to perform in accordance with the contract by abandoning the plaintiff in April 1979, the plaintiff's declaratory judgment claim was not barred by the applicable three-year limitations period. *Id.* at 19–21.

¶ 71 In *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170 (2003), we considered issues arising from the General Assembly's decision to enact legislation authorizing Orange County to enact a civil rights ordinance. *Id.* at 174–75. Acting in reliance upon this legislation, as amended, the Orange County Board of Commissioners adopted an

anti-discrimination ordinance that was to be enforced by the Orange County Human Relations Commission. *Id.* at 176. In response to a civil action filed by the plaintiff alleging that the defendant had discriminated against her on the basis of her age and sex, forced her to resign, and retaliated against her for filing a complaint, the defendant asserted a counterclaim in which it sought a declaration that the enabling legislation and the underlying ordinance violated the North Carolina Constitution. *Id.* at 176–77. On appeal from a trial court decision that the defendant's claim was not time-barred and that the enabling legislation violated the North Carolina Constitution, this Court concluded that the defendant's declaratory judgment action was not barred by the statute of limitations given that the defendant had not been harmed by the enactment of the enabling legislation or the adoption of the underlying ordinance until enforcement action had been taken against it, a set of circumstances that had occurred "well within any limitations period triggered by the suits and proceedings brought against it." *Id.* at 179–81.

¶ 72 In *Quality Built Homes Inc. v. Town of Carthage*, 369 N.C. 15 (2016), the plaintiffs brought a declaratory judgment action for the purpose of obtaining a determination concerning whether the Town had the authority to enact and enforce an ordinance regulating the collection of water and sewer impact fees that were intended to facilitate the provision of service to future customers. *Id.* at 16. On appeal from a trial court order granting summary judgment in favor of the Town, this Court held that the Town lacked the statutory authority to impose and collect fees relating to service to be provided in the future and remanded the case to the Court of Appeals for a determination concerning whether the plaintiffs' claims were barred by the applicable statute of limitations. *Id.* at 20. In the course of deciding a subsequent appeal, we identified the applicable limitations period by focusing upon the nature of the underlying substantive claim to which the request for a declaratory judgment related and concluded that certain of the plaintiffs' claims were time-barred by the three-year statute of limitations applicable to claims arising under state or federal statutes. *Quality Built Homes Inc. v. Town of Carthage*, 371 N.C. 60, 73 (2018) (*Quality Built Homes II*).

¶ 73 Finally, in *North Carolina Farm Bureau Mutual Insurance Company v. Hull*, 370 N.C. 486 (2018), we reversed a decision of the Court of Appeals for the reasons stated in a dissenting opinion which would have held that a declaratory judgment action in a subrogation-related action had been timely filed within the three-year limitation period applicable to breach of contract actions. *See N.C. Farm Bureau Mut. Ins. Co. v. Hull*, 251 N.C. App. 429, 435 (2016) (Tyson, J., concur-

ring in part and dissenting in part). In *Hull*, as in *Penley*, *Williams*, and *Quality Built Homes*, we affirmed the applicability of statutes of limitations to declaratory judgment actions, with the appliable statute of limitations being the one associated with the substantive claim that most closely approximates the basis for the relevant request for a declaration. *See Penley*, 314 N.C. at 20–21 (applying the three-year statute of limitations applicable to actions for breach of contract given that the case in question revolved around an alleged breach of contract); *Quality Built Homes II*, 371 N.C. at 72–73 (applying the three-year statute of limitations applicable to claims based upon a "liability created by statute" given that the plaintiffs sought a declaration concerning the extent to which the Town's decision to assess certain fees relating to future service rested upon sufficient statutory authority); *Hull*, 370 N.C. at 486 (endorsing the conclusion set out in the dissenting opinion at the Court of Appeals that the three-year statute of limitations applicable to breach of contract actions governed an action seeking a declaration concerning the extent of a parties' subrogation rights under a policy of insurance). In the event that we believed that statutes of limitation did not apply to declaratory judgment actions, we would not have made any of these decisions. Moreover, we do not believe that the General Assembly intended to exempt declaratory judgment actions from the reach of any statute of limitations whatsoever given that such a decision might have the effect of thwarting the enforcement of the limitation of actions provisions that pervade the General Statutes of North Carolina by allowing plaintiffs to recast otherwise time-barred claims as declaratory judgment actions. As a result, we hold that declaratory judgment actions are subject to the applicable statute of limitations, which is the one that governs the substantive right that is most closely associated with the declaration that is being sought.

¶ 74 Although Mr. Chisum has, in fact, asserted a constructive fraud claim in connection with defendants' actions in interfering with his interest in Carolina Coast, he lacks the ability to assert that claim unless he is able to establish his status as a member of that LLC. The extent to which Mr. Chisum is a member of Carolina Coast hinges, in turn, upon the contents of the operating agreement associated with that entity, which is, of course, a contract. As a result, given that the validity of Mr. Chisum's claims relating to Carolina Coast ultimately hinges upon the validity of his claim that defendants breached the operating agreement by diluting his membership interest in the LLC and assuming total control of its operations, we hold that the three-year statute of limitations applicable to contract claims governs the declaratory judgment claims at issue in this case.

¶ 75 Finally, consistent with our earlier decision that a claim for breach of contract accrues when the plaintiff knew or should have known that the contract had been breached, we hold that the trial court erred by directing a verdict in favor of defendants with respect to Mr. Chisum's Carolina Coast-related claims. Although the record does, to be sure, contain ample evidence tending to show that Mr. Chisum knew or should have known of the Campagnas' breach of the operating agreement more than three years prior to the filing of the initial complaint, including the fact that Mr. Chisum's 2010 K-1 had been marked "[f]inal," we believe that the record also contains evidence that would have permitted a reasonable jury to return a verdict in Mr. Chisum's favor with respect to this issue, including, but not limited to, the fact that the record contains evidence tending to show that an individual's membership status relating to Coastal Carolina is reflected in the contents of the Schedule 1 applicable to that LLC, and the fact that the Schedule 1 relating to Carolina Coast was never amended to show that Mr. Chisum's membership status had been fully diluted and the fact that Mr. Chisum was allowed to use his complimentary storage unit at Judges Road until February 2016. Thus, the trial court erred by directing a verdict in defendants' favor with respect to Mr. Chisum's Carolina Coast-related claims.

¶ 76 As a result, given our determination that the record reveals the existence of a triable issue of fact relating to the extent to which Mr. Chisum knew or reasonably should have known that defendants had breached the Carolina Coast operating agreement more than three years prior to the filing of the initial complaint, we reverse the trial court's decision to direct a verdict in defendants' favor with respect to this issue and remand this case to the Superior Court, New Hanover County, for a new trial with respect to the issue of whether Mr. Chisum's Carolina Coast-related claims are barred by the applicable statute of limitations. On remand, Mr. Chisum is free to attempt to persuade the trial court to deliver an equitable estoppel instruction to the jury if he wishes to do so. In the event that the jury determines on remand that Mr. Chisum's initial complaint had been filed within three years after he knew or reasonably should have known that defendants had breached the Carolina Coast operating agreement and in the event that Mr. Chisum establishes on remand that he remains a member of Carolina Coast, he is also entitled to assert his breach of fiduciary duty and constructive fraud claims against defendants, subject to his ability to show that those claims are not otherwise time-barred and have substantive merit.

2. Punitive Damages Awards

¶ 77 **[8]** Secondly, Mr. Chisum argues that, since the Campagnas own a majority of the interests in Judges Road and Parkway, they are otherwise entitled to receive pro rata distributions that include monies associated with punitive damages awards that they are required to pay to Judges Road and Parkway at the time that the LLCs are judicially dissolved. In Mr. Chisum's view, this Court should not countenance what he believes to be an inequitable result, particularly given that such a result would thwart North Carolina's policy of "punish[ing] a defendant for egregiously wrongful acts and . . . deter[ring] the defendant and others from committing similar wrongful acts," quoting N.C.G.S. § 1D-1 (2019). In addition, Mr. Chisum asserts that the principles underlying North Carolina's policy precluding tortfeasors from being enriched as a result of their own wrongs in the wrongful death context should provide guidance to the Court in resolving this issue as well and directs our attention to four decisions from other jurisdictions that, in his opinion, hold that punitive damages awarded in corporate derivative actions should not be included in disbursements that are ultimately made for the benefit of wrongdoers. Finally, Mr. Chisum contends that, since he is not requesting that the jury's verdict be altered, the necessary relief can be afforded by simply amending the existing judgment to reflect that any distribution that is eventually made to the Campagnas following the judicial dissolution of Judges Road and Parkway should be calculated by excluding the effect of the punitive damages awards that they are otherwise required to pay to the LLCs.

¶ 78 In seeking to persuade us to refrain from adopting this proposal, defendants note that Mr. Chisum has failed to cite any binding or persuasive authority that fully supports his argument. In defendants' view, the jury was adequately informed that any punitive damages awards that it elected to order would be paid to the LLCs and that the Campagnas owned interests in Judges Road and Parkway at the time that the jury rendered its verdict with respect to the punitive damages issue. Finally, defendants assert that Mr. Chisum's analogy to the wrongful death claims is a faulty one given that in such cases, unlike the situation at issue in this case, the actual wrongdoer is a real party in interest in the underlying litigation.

¶ 79 According to well-established North Carolina law, a party is not entitled to advance an argument for the first time on appeal. *See Higgins v. Simmons*, 324 N.C. 100, 103 (1989). Instead, a party seeking to advance a legal claim on appeal "must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the

ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1). In addition, "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection." N.C. R. App. P. 10(a)(2).

¶ 80 A careful examination of the record demonstrates that Mr. Chisum has failed to properly preserve this issue for purposes of appellate review. Although Mr. Chisum asserted at the jury instruction conference that, pursuant to the trial court's instructions, "[w]e're punishing [defendants]," only "for 80% of the dollars to go right back [to them]," he failed to propose any instructions that would preclude what he now claims to be an inequitable outcome and asked the trial court to instruct the jury to simply decide how much in punitive damages should be awarded to each LLC without requesting that the jury attempt to specify the way in which any punitive damages award made in favor of Judges Road and Parkway should ultimately be distributed to the LLCs' owners. After defendants' trial counsel argued that

> if [the jury] were to award punitive damages, it is specifically damages that have to be reasonably related—they have to be exactly related to the injury that was—for which the jury compensated them. That injury would be to the LLC. So to divorce the punitive damages from the injury to the LLC that they're required to base the punitive damages on wouldn't make much sense[,]

the trial court determined that "the issue of who gets to participate in [the] punitive damage award can be sorted out with the final judgment." Following the jury instruction conference, the trial court instructed the jury to decide the amount, if any, of punitive damages that Richard Campagna and Rocco Campagna should be required to pay to Judges Road and Parkway in punitive damages, with any punitive damages award being limited to an amount which "bear[s] a rational relationship to the sum reasonably needed to punish" the two Campagnas.

¶ 81 After having allowed the jury to deliberate and reach its verdict with respect to the punitive damages issue on the basis of instructions to which he did not object, Mr. Chisum waived the right to seek to have the allocation of the jury's punitive damages award recalibrated at a later time. In essence, Mr. Chisum acquiesced in a jury instruction

that provided that any punitive damages award that the jury elected to make would be paid to Judges Road and Parkway. Having done so, Mr. Chisum has no right to complain in the event that the trial court elected to enter judgment based upon the jury's verdict as it was returned. As a result, we decline to disturb the trial court's refusal to alter or amend the judgment so as to ensure that the Campagnas did not benefit from the jury's decision to award punitive damages in favor of Judges Road and Parkway.

3. Individual Claims for Fiduciary Duty and Constructive Fraud

¶ 82 **[9]** Finally, Mr. Chisum argues that the trial court erred by dismissing his individual claims for breach of fiduciary duty and constructive fraud on the grounds that the assertion of these claims was authorized by this Court's decision in *Barger v. McCoy Hillard & Parks*, 346 N.C. 650 (1997), given that he suffered an injury that was separate and distinct from that suffered by Judges Road or Parkway. As a result, Mr. Chisum contends that he should have been permitted to pursue his individual claims in addition to the derivative claims that he asserted on behalf of the LLCs.

¶ 83 In response, defendants contend that members of an LLC do not owe a fiduciary duty to other members and that Mr. Chisum failed to allege and prove that he had suffered an injury as the result of defendants' conduct that was separate and distinct from any injury sustained by the LLCs. Thus, defendants urge the Court to determine that Mr. Chisum's attempt to assert individual claims for breach of fiduciary duty and constructive fraud in this case must necessarily fail.

¶ 84 The long-standing rule in this jurisdiction is that "shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock." *Barger*, 346 N.C. at 658. On the other hand, however, this Court has recognized exceptions to the general rule "(1) where there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder, and (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders." *Id.* For that reason:

> a shareholder may maintain an individual action against a third party for an injury that directly affects the shareholder, even if the corporation also has a cause of action arising from the same wrong, if the shareholder can show that the wrongdoer owed him a special duty or that the injury suffered by the shareholder is separate and distinct from the injury

> sustained by the other shareholders or the corporation itself.

Id. at 658–59; *see also*, *e.g.*, *Corwin v. British Am. Tobacco PLLC*, 371 N.C. 605, 613 (2018) (stating that "the second *Barger* exception[ ] focuses on whether the stockholder suffered a harm that is distinct from the harm suffered *by the corporation*"); *Green v. Freeman*, 367 N.C. 136, 142 (2013) (applying the *Barger* exceptions).

¶ 85 Prior to addressing the issue of whether Mr. Chisum satisfied the requirements for the assertion of an individual claim delineated in *Barger*, however, we must first determine whether he satisfied the requirements for the assertion of an individual breach of fiduciary duty or constructive fraud claim at all. As we have already noted, in order to successfully assert a claim for breach of fiduciary duty, "a plaintiff must show that: (1) the defendant owed the plaintiff a fiduciary duty; (2) the defendant breached that fiduciary duty; and (3) the breach of fiduciary duty was a proximate cause of injury to the plaintiff." *Sykes*, 372 N.C. at 339. Similarly, the assertion of a successful constructive fraud claim requires a plaintiff to show that he or she suffered an injury proximately caused by a defendant's decision to take advantage of a position of trust. *See Terry*, 302 N.C. at 83.

¶ 86 A careful review of the record developed before the trial court satisfies us that Mr. Chisum's breach of fiduciary duty and constructive fraud claims fail because of his failure to demonstrate that he sustained a legally cognizable injury. In attempting to demonstrate the existence of the requisite injury, Mr. Chisum claims that the Campagnas attempted to "freeze [him] out of the LLCs," conducted "sham capital calls," acted as if he was no longer a member of the LLCs, and treated him in a manner that was inconsistent with his status as a member of Judges Road and Parkway. Instead of showing the existence of a legally cognizable injury, the facts upon which Mr. Chisum relies simply describe the specific steps that the Campagnas took to deprive Mr. Chisum of his ownership interests in Judges Road and Parkway and do not show the sort of injury that is necessary to support claims for breach of fiduciary duty and constructive fraud. As a result, since Mr. Chisum has failed to establish that he suffered a legally cognizable injury as the result of the Campagnas' conduct, we need not determine whether any injury that Mr. Chisum might have suffered was separate and apart from any injury suffered by Judges Road and Parkway. For that reason, we affirm the trial court's decision to dismiss Mr. Chisum's individual claims for breach of fiduciary duty and constructive fraud.

III. Conclusion

¶ 87 Thus, for the reasons set forth above, we hold that none of defendants' challenges to the trial court's judgment and related orders have merit and that, with the exception of his challenge to the trial court's decision to direct a verdict in favor of defendants with respect to his Carolina Coast-related claims, the same is true of Mr. Chisum's challenges to the trial court's judgment and related orders. As a result, the trial court's judgments and related orders are affirmed, in part, and reversed, in part, and this case is remanded to the Superior Court, New Hanover County, for further proceedings not inconsistent with this opinion, including the holding of a new trial with respect to the claims relating to Carolina Coast that were asserted in Mr. Chisum's amended complaint.

AFFIRMED, IN PART, AND REVERSED AND REMANDED, IN PART.

Justices BERGER and BARRINGER did not participate in the consideration or decision of this case.

GAY v. SABER HEALTHCARE GRP., L.L.C.

[376 N.C. 726, 2021-NCSC-8]

PAMELA GAY, EXECUTRIX OF THE ESTATE OF JOAN R. FRANKLIN
v.
SABER HEALTHCARE GROUP, L.L.C., AND AUTUMN CORPORATION,
D/B/A AUTUMN CARE OF RAEFORD

No. 190A20

Filed 12 March 2021

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 842 S.E.2d 635 (N.C. Ct. App. 2020), affirming an order denying defendants' motion to compel arbitration and stay proceedings entered on 11 June 2019 by Judge Mary Ann Tally in Superior Court, Hoke County. Heard in the Supreme Court on 17 February 2021.

Rachel A. Fuerst and Rebecca J. Britton for plaintiff-appellee.

Bradley K. Overcash and Daniel E. Peterson for defendant-appellants.

Narendra K. Ghosh for North Carolina Advocates for Justice, amicus curiae.

PER CURIAM.

AFFIRMED.

GRIFFIN v. ABSOLUTE FIRE CONTROL, INC.

[376 N.C. 727, 2021-NCSC-9]

STACY GRIFFIN, EMPLOYEE
v.
ABSOLUTE FIRE CONTROL, INC., EMPLOYER, AND EVEREST NATIONAL INS. CO. & GALLAGHER BASSETT SERVS., CARRIER

No. 29A20

Filed 12 March 2021

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 269 N.C. App. 193 (2020), affirming in part and reversing and remanding in part an opinion and award filed on 25 January 2019 by the North Carolina Industrial Commission. On 29 April 2020, the Supreme Court allowed plaintiff's petition for discretionary review and defendants' conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 16 February 2021.

Sellers, Ayers, Dortch & Lyons, PA, by Christian R. Ayers and John F. Ayers III, for plaintiff-appellee.

Brotherton Ford Berry & Weaver, PLLC, by Demetrius Worley, for defendant-appellants.

Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson; and Erwin Byrd for North Carolina Advocates for Justice, amicus curiae.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Linda Stephens; and Teague Campbell Dennis & Gorham, LLP, by Bruce Hamilton, for North Carolina Association of Defense Attorneys, North Carolina Association of Self-Insurers, North Carolina Chamber Legal Institute, North Carolina Retail Merchants Association, North Carolina Home Builders Association, North Carolina Automobile Dealers Association, North Carolina Restaurant and Lodging Association, National Federation of Independent Business, Employers Coalition of North Carolina, North Carolina Farm Bureau Federation, American Property Casualty Insurance Association Insurance Federation of North Carolina, and National Association of Mutual Insurance Companies, amici curiae.

IN RE ELDRIDGE

[376 N.C. 728, 2021-NCSC-10]

PER CURIAM.

AFFIRMED.

¶ 1 Plaintiff's petition for discretionary review is dismissed as improvidently allowed. Defendants' conditional petition for discretionary review is dismissed as improvidently allowed. Defendants' petition for writ of certiorari is dismissed as moot.

Justice BERGER did not participate in the consideration or decision of this case.

IN THE MATTER OF DAVIN ELDRIDGE

No. 478A19

Filed 12 March 2021

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 268 N.C. App. 491, 836 S.E.2d 859 (2019), affirming an order finding defendant guilty of criminal contempt entered on 11 January 2019 by Judge William H. Coward in Superior Court, Macon County. Heard in the Supreme Court on 16 February 2021.

Joshua H. Stein, Attorney General, by Teresa L. Townsend, Special Deputy Attorney General, for the State-appellee.

McKinney Law Firm, P.A., by Zeyland G. McKinney, Jr., for defendant-appellant.

PER CURIAM.

AFFIRMED.

IN RE N.P.

[376 N.C. 729, 2021-NCSC-11]

IN THE MATTER OF N.P.

No. 280A19

Filed 12 March 2021

Termination of Parental Rights—subject matter jurisdiction—non-resident parents—residence of the child

The trial court had subject matter jurisdiction in a termination of parental rights case because—even though the parents were not and had not been residents of North Carolina—jurisdiction depends on the residence of the child, not the parents. Since the child was born in North Carolina and had lived her entire life in this state, she was a resident of North Carolina.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 30 April 2019 by Judge J.H. Corpening, II in District Court, New Hanover County. Heard in the Supreme Court on 13 January 2021.

Karen F. Richards for petitioner-appellee New Hanover County Department of Social Services.

Michelle FormyDuval Lynch for appellee Guardian ad Litem.

Peter Wood for respondent-appellant.

MORGAN, Justice.

¶ 1 In this appeal from a termination of parental rights order, this Court is asked to determine whether the trial court had subject matter jurisdiction in the proceeding. Respondent-mother bases her argument contesting the trial court's authority on her assertions that (1) neither she, her daughter "Nancy," nor Nancy's father were residents of North Carolina and (2) any temporary emergency jurisdiction which the trial court may have obtained in the matter had expired prior to the filing of the termination of parental rights petition.[1] After careful review of the unusual circumstances presented by this case, we conclude that the trial court here properly exercised subject matter jurisdiction concerning Nancy under the plain language of our state's Juvenile Code. Accordingly, we affirm

1. We employ a pseudonym for the child for ease of reading and to protect the identity of the juvenile.

the trial court's order terminating respondent-mother's parental rights to Nancy.

I. Factual Background and Procedural History

¶ 2 In July 2017, respondent-mother, then seventeen years of age, was pregnant and living with her boyfriend and his family in Norfolk, Virginia. During the early portion of the month, while visiting Onslow County, North Carolina, respondent-mother went to see a doctor for prenatal care and was determined to be at risk for an immediate miscarriage. Respondent-mother was in labor as she was transported by helicopter to New Hanover Regional Medical Center in Wilmington, North Carolina. On 4 July 2017, Nancy was born twenty-three weeks prematurely, weighing one pound and four ounces, suffering from a hole in her heart, and needing a feeding tube to eat. As a result, Nancy required care from a variety of medical professionals, including a neurologist, an ophthalmologist, a cardiologist, and a pulmonologist. Respondent-mother remained at the hospital with Nancy after the child's birth. Respondent-mother's boyfriend, who was Nancy's father, returned home to Virginia after Nancy's birth, but joined respondent-mother and Nancy at the hospital for a temporary period beginning on 22 September 2017.[2] When Nancy's father and respondent-mother did not follow the proper feeding schedule for Nancy and had trouble providing proper care for the infant even with the help of hospital staff, the Onslow County Department of Social Services was contacted. Since the hospital where Nancy was receiving care was located in New Hanover County, the juvenile matter was transferred to the New Hanover County Department of Social Services (DSS) on 29 September 2017. As a result of the interrelated issues regarding Nancy's health and care, DSS took Nancy into its custody on 3 October 2017. On 3 October 2017, DSS filed a petition, which alleged that Nancy was neglected and dependent. Following an adjudication hearing in December 2017, the trial court adjudicated Nancy to be both neglected and dependent.

¶ 3 At a nonsecure custody hearing held on 11 October 2017, the trial court concluded that it "ha[d] emergency jurisdiction over the subject matter and the parties to this action and authority to enter this Order." When Nancy was discharged from the hospital on 12 October 2017, DSS placed her in foster care in New Hanover County. On 9 November 2017, Nancy's father and respondent-mother entered into a case plan with

2. Initially, Nancy's father was not listed on her birth certificate, but he added his name to the birth certificate after the filing of the petition to terminate his and respondent-mother's parental rights. The parental rights of Nancy's father to the juvenile were also terminated, but he is not a party to this appeal.

DSS, agreeing to complete parenting classes, to complete psychological evaluations and follow any recommendations, and to maintain stable housing and employment. After the agreement was reached, both parents moved back to Norfolk, Virginia, where they continued to reside at the time of the filing of the termination of parental rights petition with the family of Nancy's father.

¶ 4 On 22 October 2018, DSS filed a petition to terminate the parental rights to Nancy of both respondent-mother and Nancy's father. After a hearing on 1 April 2019, the trial court found that grounds existed to terminate the parental rights of both parents on the bases of neglect, failure to make "reasonable progress . . . in correcting those conditions which led to the removal of the juvenile," and willful abandonment. N.C.G.S. § 7B-1111(1), (2), (7) (2019). To support these grounds, among other findings of fact which are not challenged by respondent-mother on appeal, the trial court found that respondent-mother (1) did not engage in parenting classes, (2) delayed her psychological evaluation, (3) did not complete recommended therapy, (4) did not verify her housing or income during the course of the proceeding, (5) missed or rescheduled numerous visits with Nancy, and (6) did not provide emotional or financial support for Nancy. The trial court additionally determined that it was in the best interests of Nancy to terminate the parental rights of both parents. The trial court entered the order of termination on 30 April 2019. Respondent-mother gave written notice of appeal to this Court on 2 May 2019.

II. Analysis

1. Standard of Review

¶ 5 "The existence of subject matter jurisdiction is a matter of law and cannot be conferred upon a court by consent." *In re K.J.L.*, 363 N.C. 343, 345–46 (2009) (extraneity omitted). "[A] court's lack of subject matter jurisdiction is not waivable and can be raised at any time," *id.* at 346, including for the first time upon appeal, *In re H.L.A.D.*, 184 N.C. App. 381, 385 (2007), *aff'd per curiam*, 362 N.C. 170 (2008). We review questions of law de novo. *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, 370 N.C. 553, 556 (2018).

2. Pertinent Law

¶ 6 Absent subject matter jurisdiction a court has no power to act and any resulting judgment is void. *In re T.R.P.*, 360 N.C. 588, 590 (2006). "When the record shows a lack of [subject matter] jurisdiction in the lower court, the appropriate action on the part of the appellate court is

to . . . vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176 (1981).

¶ 7 "In matters arising under the Juvenile Code, the court's subject matter jurisdiction is established by statute." *In re K.J.L.*, 363 N.C. at 345. The Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) is an overarching jurisdictional scheme intended to "[a]void jurisdictional competition and conflict with courts of other States in matters of child custody." N.C.G.S. § 50A-101 cmt. (2019); *see also In re L.T.*, 374 N.C. 567, 569 (2020) ("The trial court must comply with the UCCJEA in order to have subject matter jurisdiction over juvenile abuse, neglect, and dependency cases and termination of parental rights cases.").

> The UCCJEA applies to proceedings in which child custody is at issue, including those involving juvenile abuse, neglect, dependency and termination of parental rights; and a trial court must comply with its provisions to obtain jurisdiction in such cases. *See* N.C.G.S. §§ 50A-102(4), -201(a)–(b) (2017). Generally, North Carolina courts have jurisdiction to make a child custody determination if North Carolina is the home state of the child. N.C.G.S. § 50A-201(a)(1). " 'Home state' means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C.G.S. § 50A-102(7) (2017).

In re S.E., 373 N.C. 360, 364 (2020).

¶ 8 More specifically, in termination of parental rights matters, the North Carolina General Statutes provide:

> *The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion.* The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. *Provided, that before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody*

> *determination under the provisions of G.S. 50A-201*, 50A-203, or 50A-204. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. *Provided, that before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201* or G.S. 50A-203, without regard to G.S. 50A-204 *and that process was served on the nonresident parent pursuant to G.S. 7B-1106.*

N.C.G.S. § 7B-1101 (2019) (emphasis added). Section 50A-201 of the General Statutes of North Carolina sets forth in four subparagraphs when "a court of this State has jurisdiction to make an initial child-custody determination." N.C.G.S. § 50A-201(a)(1) (2019). Section 50A-204 addresses when a court of this State has temporary emergency jurisdiction. N.C.G.S. § 50A-204 (2019). As pertinent to this appeal, subparagraph (a)(1) of N.C.G.S. § 50A-201 states:

> (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State[.]

N.C.G.S. § 50A-201(a)(1). Once a court has made a child-custody determination under the provisions of section 50A-201, that court has exclusive, continuing jurisdiction over the determination until:

> (1) A court of this State determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or
>
> (2) A court of this State or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State.

N.C.G.S. § 50A-202 (2019).[3]

3. Respondent-mother does not make a specific argument under section 50A-202.

3. Application

¶ 9 Respondent-mother's sole argument on appeal is that the trial court lacked subject matter jurisdiction in this matter, although this position is premised on a series of related and overlapping contentions. First, while she acknowledges the appropriate exercise of the trial court's temporary emergency jurisdiction in the days just after Nancy's birth, respondent-mother asserts that "at some point after DSS took custody, that jurisdiction expired." Respondent-mother also contends that she and Nancy's father were residents of Norfolk, Virginia when Nancy was born and at least until some point after the date of the filing of the petition to terminate their parental rights to Nancy. Respondent-mother submits that the exercise of subject matter jurisdiction by the trial court here was improper under the terms of the UCCJEA. Respondent-mother also notes her own youth at the time of Nancy's birth.

¶ 10 Further, respondent-mother represents that the exercise of jurisdiction by the trial court in New Hanover County created

> an uphill battle complying with the case plan. She had no transportation and could not easily make it back and forth between her home state and the state with custody of Nancy for visits. She had trouble lining up services in Virginia when that state did not administer the case plan. Keeping her child in a state where she did not reside presented logistical and legal barriers that would not have existed if the parents and Nancy lived in the same state.

Respondent-mother goes on to contend that "[t]here are compelling public policy issues for not allowing a state that acquires temporary emergency jurisdiction to keep custody of a child indefinitely. At some point the child should be allowed to return to the state where the parents live." Finally, respondent-mother maintains that Nancy's case should have been transferred to Virginia, citing N.C.G.S. § 7B-903(a)(6) for the proposition that the trial court could have ordered DSS to "return the juvenile to the responsible authorities in the juvenile's home state." N.C.G.S. § 7B-903(a)(6) (2019).

¶ 11 Assuming, *arguendo*, that the existence of a temporary emergency regarding Nancy's welfare had expired at some point after the juvenile's birth and before the filing of the petition to terminate parental rights to Nancy, such a circumstance is of no consequence in light of the facts and procedures in the present case. We are not required to determine with exactness the juncture at which the temporary emergency regarding

the child's well-being may have ended because the record reveals that, regardless of any temporary emergency jurisdiction exercised during the initial period of Nancy's life or during the time leading up to her adjudication as a dependent and neglected juvenile, the trial court had exclusive, original jurisdiction over all petitions and motions concerning termination of parental rights to Nancy pursuant to N.C.G.S. § 7B-1101 and in conformance with the UCCJEA. Section 7B-1101 properly focuses the question of subject matter jurisdiction on the custody, location, or residence of the subject *child* in a termination of parental rights proceeding rather than on the residential state of the *parents*. *See*, *e.g.*, *In re T.H.T.*, 362 N.C. 446, 450 (2008) (affirming that the *child's* best interests constitute "the 'polar star' of the North Carolina Juvenile Code"); *see also In re Montgomery*, 311 N.C. 101, 109 (1984). Respondent-mother incorrectly construes the applicable law regarding jurisdiction to be dictated by the residential location of the child's *parents*, instead of the residential location of the *child* along with other factors consistent with the child's residential location which impact the child's best interests.

¶ 12 Likewise, section 7B-1101 states, *inter alia*, that a trial

> court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights *to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services* . . . in the district at the time of filing of the petition or motion. . . . Provided, that before exercising jurisdiction . . . , *the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201* . . . .

N.C.G.S. § 7B-1101 (emphasis added). Similarly, section 50A-201 provides that "a court of this State has jurisdiction to make an initial child-custody determination only if . . . [t]his State is the *home state of the child* on the date of the commencement of the proceeding," N.C.G.S. § 50A-201(a)(1) (emphasis added), and " '[h]ome state' means the state *in which a child lived with* a parent or a *person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding*," N.C.G.S. § 50A-102(7) (2019) (emphasis added).

¶ 13 In the case at bar, the trial court made a finding of fact that Nancy "has lived in this state for her entire life. The Courts of the State of North Carolina have home state jurisdiction over the child and at least one par-

ent is a resident of this State."[4] Nancy was born in North Carolina and lived with foster parents in the state for the six months immediately before the filing of the termination of parental rights petition on 22 October 2018. For the entirety of her life, which was nearly sixteen months at that time, Nancy lived in North Carolina. These facts indicate that the trial court's determination that North Carolina was the home state for Nancy was supported by, and fully consistent with, both the UCCJEA and N.C.G.S. § 50A-201(a)(1).

¶ 14 With further regard to the operation of N.C.G.S. § 7B-1101, as noted above, Nancy was born in New Hanover County, North Carolina, had resided for her entire life in New Hanover County at the time of the filing of the petition to terminate respondent-mother's parental rights and was in the legal custody of DSS in New Hanover County at the time of the filing of the petition to terminate respondent-mother's parental rights. Thus, every requirement for exclusive, original jurisdiction under N.C.G.S. § 7B-1101 was satisfied: (1) Nancy "reside[d] in, [was] found in, or [was] in the legal or actual custody of a county department of social services . . . at the time of filing of the petition or motion;" (2) North Carolina was the home state for Nancy pursuant to N.C.G.S. § 50A-201(a)(1); and (3) "process was served on [respondent-mother] pursuant to G.S. 7B-1106."[5] N.C.G.S. § 7B-1101. This proper exercise of jurisdiction by the trial court is buttressed by the lack of any motion made by any party to the proceedings concerning Nancy to end the tribunal's authority based upon the expiration or termination of the temporary emergency, or to transfer the tribunal's authority to an appropriate legal forum in the parents' residential state of Virginia. As a result, North Carolina's ongoing jurisdiction was exclusive and appropriate. Accordingly, Nancy was a juvenile over whom our state's courts could properly exercise subject matter jurisdiction in connection with a petition of termination of parental rights under our state's Juvenile Code.

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4. Although a trial court making specific findings of fact related to its jurisdiction under N.C.G.S. § 50A-201(a)(1) "would be the better practice," this Court has affirmed that the statute "states only that certain circumstances must exist, not that the court specifically make findings to that effect." *In re T.J.D.W.*, 182 N.C. App. 394, 397, *aff'd per curiam*, 362 N.C. 84 (2007). Although respondent-mother was a resident of Virginia when the termination of parental rights petition was filed on 22 October 2018, the record on appeal indicates that she relocated to North Carolina between that date and 3 December 2018 when the notice of hearing in the termination proceeding was filed, at which point her address was in Rocky Point, N.C. Likewise, both of the amended notices of hearing on the termination of parental rights petition, filed on 18 February 2019 and 25 March 2019, designate respondent-mother's address as being located in Rocky Point, N.C.

5. Respondent-mother has never disputed the fact "that process was served on [her] pursuant to G.S. 7B-1106." N.C.G.S. § 7B-1101.

¶ 15 In response to respondent-mother's representation that the transfer of her case plan to Virginia pursuant to N.C.G.S. § 7B-903(a)(6) would have improved her opportunity to successfully complete it, we note that the statute is inapposite here and hence the transfer option was unavailable. The statute provides, in abuse, neglect, and dependency proceedings, that

> [t]he following alternatives for disposition shall be available to any court exercising jurisdiction, and the court may combine any of the applicable alternatives when the court finds the disposition to be in the best interests of the juvenile:
>
> . . .
>
> (6) Place the juvenile in the custody of the department of social services *in the county of the juvenile's residence*. In the case of a juvenile who has legal residence outside the State, the court *may place the juvenile in the physical custody of the department of social services in the county where the juvenile is found so that agency may return the juvenile to the responsible authorities in the juvenile's home state.*

N.C.G.S. § 7B-903(a)(6) (emphasis added). As already discussed, at all times during this matter, Nancy was found in New Hanover County, North Carolina and North Carolina was her home state. Therefore, N.C.G.S. § 7B-903(a)(6) was not available to be invoked in the instant case by the trial court.

¶ 16 As to respondent-mother's reference to her own youth at the time of Nancy's birth, N.C.G.S. § 7B-1101 specifically states that "[t]he court shall have jurisdiction to terminate the parental rights of any parent *irrespective of the age of the parent*." N.C.G.S. § 7B-1101 (emphasis added). Respondent-mother cites no legal authority to the contrary and makes no actual argument on this point. Also, we must decline respondent-mother's invitation to engage in public policy considerations here in light of the unambiguous and specific language chosen by the General Assembly in drafting and enacting the Juvenile Code of this state. Given the clarity of the statutes which pertain to subject matter jurisdiction as they apply to the present case, any such public policy concerns raised here should be directed to the state's legislative branch for contemplation. *See*, *e.g.*, *State v. Whittle Commc'ns*, 328 N.C. 456, 470 (1991) ("[T]he general rule in North Carolina is that absent 'constitutional re-

straint, questions as to public policy are for legislative determination.' " (quoting *Gardner v. N.C. State Bar*, 316 N.C. 285, 293 (1986))).

III. Conclusion

¶ 17 In this juvenile matter, the trial court had exclusive, original jurisdiction over the termination of parental rights case regarding Nancy pursuant to the UCCJEA and N.C.G.S. § 7B-1101. Therefore, we affirm the trial court's order terminating respondent-mother's parental rights to Nancy.

AFFIRMED.

IN THE MATTER OF Q.P.W.

No. 475A19

Filed 12 March 2021

Termination of Parental Rights—grounds for termination—willful failure to make reasonable progress—lack of participation in case plan

The trial court properly terminated respondent-mother's parental rights on the basis of willful failure to make reasonable progress where the findings established that respondent, whose pregnancy at thirteen resulted from a crime perpetrated against her and who was placed in foster care with her baby until aging out when she reached the age of majority, discontinued participation in and failed to comply with multiple aspects of her case plan despite having the ability to comply. The case plan had a sufficient nexus to the reason the child was removed from respondent's care because it included activities designed to foster stability and the acquisition of sufficient parenting skills.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 16 September 2019 by Judge Tonia A. Cutchin in District Court, Guilford County. Heard in the Supreme Court on 13 January 2021.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Health and Human Services.

IN RE Q.P.W.

[376 N.C. 738, 2021-NCSC-12]

Christopher S. Edwards, *for appellee Guardian ad Litem.*

Wendy C. Sotolongo, *Parent Defender*, *by Annick I. Lenoir-Peek*, *Deputy Parent Defender*, *for respondent-appellant mother.*

HUDSON, Justice.

¶ 1 Respondent-mother appeals from the trial court's orders terminating her parental rights to Q.P.W. (Quentin).[1] After careful review, we affirm.

I. Factual and Procedural History

¶ 2 Respondent-mother was the victim of a crime that left her pregnant at the age of thirteen. Respondent-mother was later placed in the custody of Guilford County Department of Social Services (DSS) pursuant to a juvenile dependency petition. Quentin was born to respondent-mother on 8 March 2014. Shortly after he was born, respondent-mother left Quentin in the hospital for two days without informing hospital staff that she was leaving.

¶ 3 On 20 May 2014, Quentin was adjudicated to be a dependent juvenile after the trial court found that respondent-mother was too young to provide proper care for herself and Quentin, that respondent-mother had left Quentin in the hospital, and that respondent-mother was in DSS custody herself. Respondent-mother and Quentin were placed in the same foster home and remained in a joint placement, with only brief interruptions, from May 2014 to November 2017.

¶ 4 Respondent-mother entered into a case plan with DSS on 5 June 2014. Pursuant to her case plan at that time, respondent-mother was required to attend school, complete parenting education and training, attend Quentin's medical appointments, abide by the rules of her placement to avoid disruption, and participate in individual therapy. Quentin's primary permanent plan at that time was reunification. Initially, respondent-mother engaged in her case plan by attending school, participating in therapy, participating in parent education programs, and attending medical appointments with her son.

¶ 5 However, respondent-mother also disobeyed the rules of her placements and ran away from her placements causing several disruptions to her joint placement with Quentin from 2014 to 2016. Eventually,

1. A pseudonym is used in this opinion to protect the juvenile's identity and for ease of reading.

respondent-mother refused to participate in additional parenting classes, stopped attending school, stopped participating in therapy, and continued to disrupt her placement.

¶ 6 On 2 June 2017, the trial court entered an order warning respondent-mother that her failure to comply with her case plan could result in a change to Quentin's primary permanent plan. By then, Quentin had been in over twelve placements.

¶ 7 Respondent-mother turned eighteen in November 2017 and was no longer eligible to continue placement with DSS because she was neither working nor attending school. As a result, her joint placement with Quentin was disrupted. From November 2017 through August 2018, respondent-mother had some contact with Quentin. On 10 August 2018, respondent-mother had her last visit with Quentin, and she failed to confirm a single subsequent visit as required by her case plan.

¶ 8 On 30 August 2018, DSS updated respondent-mother's case plan and identified areas for improvement including obtaining employment, improving her parenting skills, and obtaining stable housing. In October 2018, DSS identified respondent-mother's failure to address her mental health issues, her lack of stable housing, her failure to consistently visit with Quentin, her failure to comply with the recommendations from her parenting evaluation, and her failure to address her parenting deficits by completing parenting classes as barriers to achieving reunification.

¶ 9 On 16 November 2018, the trial court noted that respondent-mother had failed to comply with requests for drug screenings, was not in appropriate housing, had failed to show up to work the previous week, had not attended any of Quentin's medical appointments since the last court date, had failed to attend therapy since 1 August 2018, and she had missed 21 visits with Quentin. The trial court found that respondent-mother was not actively participating in or cooperating with her case plan and found that she was not making adequate progress.

¶ 10 On 23 January 2019, the trial court terminated respondent-mother's visits with Quentin and named several barriers to reunification including respondent-mother's failure to participate in parenting classes, complete a psychological assessment and address her mental health needs, find safe and appropriate housing, and visit Quentin consistently. The primary plan for Quentin was changed to adoption. On 24 May 2019, the trial court found that respondent-mother was still not in compliance with the housing, parenting, and substance abuse portions of her case plan, and was not making adequate progress within a reasonable period of time.

¶ 11 In April 2019 DSS petitioned the trial court to terminate respondent-mother's parental rights (TPR petition) alleging that termination was appropriate under N.C.G.S. § 7B-1111(a)(1), (2), (3), (6), and (7). A hearing on the TPR petition was held on 13 and 14 August 2019. On 16 September 2019 the trial court entered an order terminating respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1), (2), (3), (6), and (7) (TPR order). Respondent-mother filed a notice of appeal on 18 September 2019.

II. Standard of Review

¶ 12 We have previously explained the standard of review for termination of parental rights appeals as follows:

> Proceedings to terminate parental rights consist of an adjudicatory stage and a dispositional stage. At the adjudicatory stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence that one or more grounds for termination exist under section 7B-1111(a) of the North Carolina General Statutes. We review a trial court's adjudication under N.C.G.S. § 7B-1109 to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. The trial court's conclusions of law are reviewable de novo on appeal.

In re K.H., 375 N.C. 610, 612 (2020) (cleaned up).

III. Analysis

¶ 13 In this case, the trial court determined that grounds existed to terminate respondent-mother's parental rights based on neglect, willful failure to make reasonable progress, willful failure to pay a reasonable portion of her child's cost of care, dependency, and willful abandonment. N.C.G.S. § 7B-1111(a)(1)–(3), (6)–(7) (2019). Respondent mother has not contested any findings of fact,[2] and thus, they are binding on appeal. *In re T.N.H.*, 372 N.C. 403, 407 (2019) ("Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal.").

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2. Respondent-mother discusses findings 19 and 26 in her brief, but her only argument is that these findings include irrelevant information. She makes no argument that these findings are not supported by clear, cogent, and convincing evidence. Furthermore, we do not rely on either of these findings in reaching our disposition.

¶ 14 We begin our review of the TPR order to determine whether the trial court's findings of fact support its conclusion that there were grounds to terminate respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2), which provides as follows:

> The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

N.C.G.S. § 7B-1111(a)(2).

¶ 15 We have previously explained that:

> [t]ermination under this ground requires the trial court to perform a two-step analysis where it must determine by clear, cogent, and convincing evidence whether (1) a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and (2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

In re Z.A.M., 374 N.C. 88, 95–96 (2020).

¶ 16 First, we review whether the findings support the conclusion that Quentin had been willfully left in foster care or placement outside the home for more than twelve months. "[T]he twelve-month period begins when a child is left in foster care or placement outside the home pursuant to a court order, and ends when the motion or petition for termination of parental rights is filed." *In re K.H.*, 375 N.C. at 613 (quoting *In re J.G.B.*, 177 N.C. App. 375, 383 (2006)). Here, DSS filed its TPR petition in April 2019. Therefore, the relevant twelve-month period is from April 2018 to April 2019.

¶ 17 The trial court made the following relevant findings of fact:

> 14. . . . [Respondent-mother] reached the age of majority on November 30, 2017. . . .

> . . .
>
> c. . . . [Respondent-mother] left her placement . . . after reaching the age of majority. . . .
>
> . . .
>
> 25. . . .
>
> a. The juvenile has been placed in foster care continuously since March 19, 2014.

These findings demonstrate that Quentin was in foster care and was not sharing a placement with his mother beginning in December 2017—more than twelve months before DSS filed the TPR petition.

¶ 18 Respondent-mother's willfulness can be established by evidence that she possessed the ability to make reasonable progress but was unwilling to make an effort. *In re Baker*, 158 N.C. App. 491, 494 (2003). The following portions of finding of fact 14 are relevant to respondent-mother's willfulness:

> b. . . . [Respondent-mother] was asked to continue parenting education, to address her decision making. Parenting education was offered to [respondent-mother], but she chose not to attend any parenting classes. [Respondent-mother] was referred to PATE on March 31, 2017[.] . . . To date, [respondent-mother] has only completed one PATE class and has not made any contact with the facilitator to reengage in the program.
>
> . . .
>
> [Respondent-mother] refused to participate in a psychological evaluation and has indicated that she is tired of completing tasks for [DSS].
>
> . . .
>
> . . . Since reaching the age of majority on November 30, 2017, [respondent-mother] has not attended any medical appointments for the juvenile. . . . [Respondent-mother] has missed all her visits with the juvenile since August 10, 2018, and has not contacted [DSS] to inquire about reinstating visitation.

> c. . . . [Respondent-mother] was advised that Section 8 had openings . . . by [DSS] and [respondent-mother] was urged to go apply for the opening immediately. Despite being given this resource, [respondent-mother] moved out of her grandmother's home and is currently renting a room [in Greensboro]. . . . To-date [sic], [respondent-mother] has failed to demonstrate any stability with regard to her living situation, and she is not in compliance with this component of her case plan.
>
> d. . . . To date, [respondent-mother] has not completed a substance abuse assessment.

¶ 19 We determine that these findings support a conclusion of willfulness. Therefore, the findings of fact in the TPR order support the conclusion that respondent-mother willfully left Quentin in foster care or placement outside the home for over twelve months prior to April 2019.

¶ 20 Next, we review whether the trial court's findings of fact support its conclusion that respondent-mother has not made reasonable progress to correct the conditions which led to the removal of Quentin. Regarding the conditions that led to the removal of the juvenile, the trial court made the following finding of fact:

> The conditions that led to the juvenile coming into custody include [respondent-mother's] inability to provide basic needs for herself and the juvenile due to [respondent-mother's] status as a minor child in the custody of [DSS]; [respondent-mother's] inability to provide the required medical care for the juvenile; lack of an appropriate adult caregiver for the juvenile; [respondent-mother] leaving the juvenile at the hospital for two days without anyone to make decisions for the juvenile and paternity had not been established.

Respondent-mother argues that the conditions that led to Quentin's removal were all attributable to her own minor status. She argues that the requirements of her case plan did not have a sufficient nexus to that condition. We disagree.

¶ 21 Our Court has previously explained that our appellate case law

> reflects a consistent judicial recognition that parental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination

> exist pursuant to N.C.G.S. § 7B–1111(a)(2) even when there is no direct and immediate relationship between the conditions addressed in the case plan and the circumstances that led to the initial governmental intervention into the family's life, as long as the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home. The adoption of a contrary approach would amount to turning a blind eye to the practical reality that a child's removal from the parental home is rarely the result of a single, specific incident and is, instead, typically caused by the confluence of multiple factors, some of which are immediately apparent and some of which only become apparent in light of further investigation.

In re B.O.A., 372 N.C. 372, 384–85 (2019).

¶ 22 Here, DSS modified respondent-mother's case plan and reviewed it several times to adjust for her changing circumstances as more information came to light about the barriers to reunification. The case plan requirements were tied to respondent-mother's need to demonstrate maturity and stability. For example, in order to care for Quentin, respondent-mother needed to learn parenting skills, demonstrate a commitment to Quentin on a sustained basis, and find stable housing and employment. We conclude that the case plan requirements were properly tied to alleviating the conditions which directly or indirectly contributed to the problematic circumstances that led to Quentin's removal—namely, respondent-mother's immaturity and instability.

¶ 23 Regarding respondent-mother's failure to make reasonable progress, the trial court made the following relevant findings of fact:

> 13. [Respondent-mother] has had the opportunity to correct the conditions that led to the juvenile's removal from the home, including but not limited to being offered and entering into, a service agreement with [DSS]. [DSS] identified needs arising out of the conditions that led to the removal of the juvenile and developed a service agreement to assist [respondent-mother] in addressing those needs.

14. [Respondent-mother] . . . entered into the case plan on June 5, 2014. On March 26, 2018, . . . [respondent-mother's] case plan was updated. . . .The service agreement was reviewed on August 30, 2018, November 13, 2018, and February 11, 2019. . . .

. . . .

b. Parenting Skills/Mental Health—[Respondent-mother] has made minimal progress on the parenting component of her case plan. . . . [Respondent-mother] completed the parenting program at [her placement] in September 2014. Because [respondent-mother] continued to take the juvenile on unauthorized overnight stays with adults who were not authorized by [DSS], [respondent-mother] was asked to continue parenting education, to address her decision making. Parenting education was offered to [respondent-mother], but she chose not to attend any parenting classes. [Respondent-mother] was referred to PATE on March 31, 2017[.] . . . To date, [respondent-mother] has only completed one PATE class and has not made any contact with the facilitator to reengage in the program.

[Respondent-mother] completed a parenting assessment with Dr. McColloch on June 15, 2017. Dr. McColloch recommended that [respondent-mother] participate in a psychological evaluation, trauma focused therapy, individual counseling, and parenting classes. . . . [Respondent-mother] last attended therapy on August 1, 2018. . . . [Respondent-mother] refused to participate in a psychological evaluation and has indicated that she is tired of completing tasks for [DSS].

. . . .

. . . Since reaching the age of majority on November 30, 2017, [respondent-mother] has not attended any medical appointments for the juvenile. When [respondent-mother] and the juvenile were no longer placed together, . . .

[respondent-mother] was . . . allowed to have supervised visits with the juvenile at the foster home with the permission of the juvenile's foster parent. On October 17, 2018, due to [respondent-mother] missing twenty-one (21) visits with the juvenile, visitation between [respondent-mother] and the juvenile was reduced to one day per week for one hour. [Respondent-mother] subsequently failed to attend any of her scheduled visits with the juvenile, and her visits were suspended on January 9, 2019. [Respondent-mother] has missed all her visits with the juvenile since August 10, 2018, and has not contacted [DSS] to inquire about reinstating visitation. [Respondent-mother] is not in compliance with the parenting component of her case plan.

c. Placement/Housing—At the commencement of the underlying case, [respondent-mother's] only requirement under this component of her case plan was to comply with the rules and policies of her placement. . . . When [respondent-mother] has [sic] aged out of foster care the placement component of her case plan has [sic] changed to a requirement that [respondent-mother] obtain and maintain stable housing suitable for her and the juvenile. [Respondent-mother] has not made any progress on this component of her case plan. . . . On March 8, 2018, [respondent-mother] reported that she had her own apartment, however, the lease she provided on April 5, 2018 stated that the lease term ended on April 1, 2018. On July 26, 2018, [respondent-mother] again reported that she had her own two-bedroom apartment paying $375.00 per month in rent. [Respondent-mother] went on to state that she was sharing the apartment with her sister but since her sister moved out, the rent was taking up her entire check. On August 10, 2018, [respondent-mother] reported that she was living with her mother because her apartment complex made her move out due to safety concerns. [Respondent-mother] explained that

a domestic violence incident occurred between her and her ex-boyfriend, and the ex-boyfriend trashed her apartment. . . . On September 18, 2018, [respondent-mother] reported that she was living with her grandmother. [Respondent-mother] was advised that Section 8 had openings . . . by [DSS] and [respondent-mother] was urged to go apply for the opening immediately. Despite being given this resource, [respondent-mother] moved out of her grandmother's home and is currently renting a room [in Greensboro]. . . . To-date [sic], [respondent-mother] has failed to demonstrate any stability with regard to her living situation, and she is not in compliance with this component of her case plan. [Respondent-mother] entered into a Voluntary Placement Agreement on August 9, 2018. . . .

When [respondent-mother] entered into the Voluntary Placement Agreement she was residing . . . in her own apartment, but she moved out due to safety concerns with her ex-boyfriend. On August 30, 2018 [respondent-mother] reported that she was living with a friend [in Greensboro]. On September 18, 2018 [respondent-mother] reported that she was staying with her grandmother and great grandmother. . . . She advised Social Worker Young and Social Worker Stewart that she could not stay with her friend anymore. [Respondent-mother] was advised that all moves need to be reported in order to get approval. On November 16, 2018 Social Worker Stewart met with [respondent-mother] who stated that things weren't going well and that she needed to be out of her grandmother's home by the end of the month. Ms. Stewart provided [respondent-mother] with housing resources. [Respondent-mother] moved [to another house]. She was renting a room in this house with several others. She was paying $250 per month for rent and was responsible for the light bill. On January 11, 2019 SW Stewart spoke with [respondent-mother] who stated

that she had to leave her previous placement and was now living with her father because she has no place else to go. She was advised that her VPA will be terminated because she was living with her father and that they would meet the next week to get VPA termination papers signed. On January 22, 2019 SW Stewart spoke with [respondent-mother] who stated that she was now living with a friend [in Greensboro]. As of March 18, 2019, [respondent-mother] continue [sic] to reside at [that] address. She stated that she had put in an application for housing [elsewhere], however she still has an outstanding balance of $1000.00 on her housing record. [Respondent-mother] did advise [DSS] that she is currently living at another address but failed to provide the actual address.

d. Substance Abuse—[Respondent-mother] has not made any progress in addressing her substance abuse needs. . . . On October 10, 2018, Social Worker Young referred [respondent-mother] for a substance abuse assessment. . . . To date, [respondent-mother] has not completed a substance abuse assessment. On August 31, 2018, [respondent-mother] was asked to comply with a drug screen by no later than September 4, 2018. [Respondent-mother] did not comply. [Respondent-mother] was also asked to submit to a drug screen on September 18, 2018, and she did not comply. On October 17, 2018, [respondent-mother] was ordered by the court to submit to a drug screen by the end of the day. [Respondent-mother] submitted to a drug screen on October 18, 2018 and tested positive for marijuana. On November 13, 2018, the assigned social worker requested that [respondent-mother] submit to a random drug screen, and [respondent-mother] did not comply. As of the filing of the petition, [respondent-mother] has only submitted to one drug screen which was positive for marijuana. [Respondent-mother] is not in compliance with the substance abuse component of her case plan.

. . . .

25. . . .

. . . .

> b. The lack of reasonable progress under the circumstances is not due solely to the poverty of [respondent-mother] . . . but is the direct result of [her] failure to address the conditions that led to the removal of the juvenile, including [respondent-mother's] failure to maintain stable housing, failure to attend parenting classes, failure to cooperate with drug screens, [and] failure to attend visits . . . .

We conclude that these findings support the trial court's conclusion that respondent-mother failed to make reasonable progress under the circumstances to correct the conditions which led to Quentin's removal.[3]

IV. Conclusion

¶ 24 We conclude that the trial court properly found that grounds existed to terminate respondent-mother's parental rights under N.C.G.S. § 7B-1111(a)(2). The trial court's conclusion that one statutory ground for termination existed is sufficient in and of itself to support termination of respondent-mother's parental rights. *In re E.H.P.*, 372 N.C. 388, 395 (2019). Therefore, we need not address respondent-mother's arguments regarding N.C.G.S. § 7B-1111(a)(1), (3), (6), and (7). Furthermore, respondent-mother does not challenge the trial court's conclusion that termination of her parental rights was in Quentin's best interests. *See* N.C.G.S. § 7B-1110(a) (2019). Accordingly, we affirm the trial court's order terminating respondent-mother's parental rights.

AFFIRMED.

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3. Respondent-mother argues that she has made reasonable progress, pointing to her participation in a DSS program for people transitioning out of foster care. However, her participation in that program alone is not sufficient to prevent or negate the conclusion that she has failed to make reasonable progress.

Justice EARLS dissenting.

¶ 25 The result of the majority's decision today is that a nineteen-year-old mother who became pregnant when she was sexually assaulted as a thirteen-year-old girl will permanently and unnecessarily lose her right to maintain any relationship with her child. The trial court's findings of fact do not support the conclusion that petitioner has met its burden of "proving by clear, cogent, and convincing evidence the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re K.D.C.*, 375 N.C. 784, 788 (2020) (cleaned up). This decision is not compelled by North Carolina law and illustrates this Court's continued refusal to accord sufficient respect to a parent's fundamental constitutional-liberty interest in raising their child. Accordingly, I respectfully dissent.

I. Factual Background

¶ 26 The circumstances underlying the present case are highly distressing. Respondent's own mother was convicted of aiding and abetting in the sexual assault perpetrated by a twenty-year-old man which led to respondent's pregnancy. After the assault, respondent was first placed with her grandmother, who quickly realized that she was unable to provide respondent with adequate care. On 5 March 2014, respondent was adjudicated to be a dependent juvenile and placed into the custody of the Guilford County Department of Social Services (DSS). Three days later, respondent gave birth to her son, Quentin. Twelve days after Quentin was born, he was also adjudicated to be a dependent juvenile due to respondent's "inability to care for herself, much less an infant child."

¶ 27 Initially, respondent and Quentin were placed together in a foster home. Respondent entered into a case plan on 5 June 2014. Although respondent occasionally exhibited disruptive or inappropriate behaviors while in foster care, she substantially complied with her case plan and made continuous progress towards reunification over the next four years, despite experiencing frequent instability as she was moved between numerous foster care placements. There is no evidence in the record that respondent ever abused Quentin, nor is there evidence that her behaviors ever exposed Quentin to a significant risk of harm. Respondent aged out of the foster care system when she turned eighteen on 30 November 2017. Less than two years later, the trial court terminated her parental rights to Quentin.

II. Willful Failure to Make Reasonable Progress Under the Circumstances: N.C.G.S. § 7B-1111(a)(2)

¶ 28 In affirming the trial court's order terminating respondent's parental rights on the grounds that she has willfully failed to make reasonable progress towards correcting the conditions that led to Quentin's removal, the majority ignores the myriad constraints on respondent's ability to comply with her case plan imposed by respondent's circumstances. This unwillingness to examine the realities of respondent's situation—particularly her age and her recent experience attempting to transition out of the foster care system—is inconsistent with the "ongoing examination of the circumstances" we have previously deemed appropriate in assessing a respondent-parent's reasonable progress under N.C.G.S. § 7B-1111(a)(2). *In re B.O.A.*, 372 N.C. 372, 382 (2019). Accordingly, I disagree with the majority's approach and would instead hold that the trial court was required to consider respondent's holistic circumstances in assessing both the willfulness of her conduct and the reasonableness of the progress she made towards correcting the conditions that led to Quentin's removal.

¶ 29 Pursuant to N.C.G.S. § 7B-1111(a)(2), a court may terminate a respondent-parent's parental rights when the parent has "willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2) (2019). We have previously explained that "[w]illfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re S.M.*, 375 N.C. 673, 685 (2020) (quoting *In re McMillon*, 143 N.C. App. 402, 410, *disc. review denied*, 354 N.C. 218 (2001)); *see also In re Matherly*, 149 N.C. App. 452, 455 (2002) ("Evidence showing a parents' ability, or capacity to acquire the ability, to overcome factors which resulted in their children being placed in foster care must be apparent for willfulness to attach."). A trial court cannot fulfill its obligation to assess willfulness when it blinds itself to important context. The trial court must consider that context even if some of the relevant events occurred before the respondent-parent reached the age of majority. In this case, respondent's experiences both within and immediately upon leaving the foster care system are relevant in assessing the willfulness of the conduct which forms the basis of DSS's termination petition. *See In re Pierce*, 356 N.C. 68, 75 n.1 (2002) ("[T]here is no specified time frame that limits the admission of relevant evidence pertaining to a parent's 'reasonable progress' or lack thereof.").

¶ 30 For four years after giving birth to Quentin at the age of fourteen, respondent continued making progress towards reunification with her son to the repeated satisfaction of the trial court. She continued making progress even while she was moved across multiple placements and while dealing with all of the ordinary challenges of adolescence, compounded by the fact that she was a minor parent who was herself in DSS custody. Throughout this difficult period, respondent remained committed to learning to parent Quentin. She undeniably developed a meaningful bond with her child. Her persistence in the face of tremendous adversity suggests that her conduct which forms the basis of the underlying termination petition—conduct which occurred during a short period of time immediately after the respondent reached the age of majority and while she was attempting to make the difficult transition from foster care to independent living—reflected difficulties inherent in her unique circumstances which would be resolved in time, rather than a willful failure to make reasonable progress within the meaning of N.C.G.S. § 7B-1111(a)(2).[1] *Cf. Lecky v. Reed*, 20 Va. App. 306, 312 (1995) (holding that termination of minor parent's parental rights was warranted because "[n]othing in this record attributes mother's parental deficiencies to her age or suggests that the mere passage of time would resolve her difficulties").

¶ 31 The trial court's and the majority's steadfast refusal to fully consider respondent's circumstances is also inconsistent with the realities of adolescent development. Although our legal system often draws a sharp distinction between "minors" and "adults," this binary does not account for the fact that "psychological, social, and economic forces have shifted the way that people experience their late teens and early twenties." Clare Ryan, *The Law of Emerging Adults*, 97 Wash. U. L. Rev. 1131, 1147 (2020). Scientific research has demonstrated that "the years from the late teens to the early twenties constitute a transitional period that bridges adolescence and mature adulthood" where "[d]evelopment is gradual, and the psychological boundaries between adolescence and adulthood are fuzzy." Elizabeth S. Scott et al., *Young Adulthood As a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 645 (2016). The Court of Appeals has held that if a respondent-parent has not yet turned eighteen when DSS

1. It is notable that in regard to respondent's final foster care placement before reaching the age of majority, the trial court found that respondent "did very well in her placement with [the foster parent] as [the foster parent] provided strong support and guidance for respondent to learn parenting skills." Respondent only left this placement when she aged out of the foster care system upon turning eighteen.

files its termination petition, the trial court is required to "make specific findings of fact showing that a minor parent's age-related limitations as to willfulness have been adequately considered." *In re Matherly*, 149 N.C. App. at 455. I agree with the Court of Appeals and would hold trial courts to the same requirement when the respondent-parent is a young adult, especially when, as here, many of the pertinent events occurred prior to the parent reaching the age of majority.[2]

¶ 32 We need not and should not adopt the fictitious presumption that everything respondent did after she turned eighteen was willful. Instead, we should examine her circumstances and capacities holistically, acknowledging "[r]ecent research in neuroscience and developmental psychology [which] indicates that individuals between the ages of 18 and 21 share many of the[ ] same characteristics" as minors. *Pike v. Gross*, 936 F.3d 372, 385 (6th Cir. 2019) (Stranch, J., concurring), *cert. denied*, 207 L. Ed. 2d 171 (U.S. 2020). This research has particular implications for children in foster care who must immediately attempt to live independently at age eighteen. "It is now well established among social scientists that young adults who emancipate from foster care, when compared to their peers, are far more likely to suffer from homelessness, unemployment, unplanned pregnancy, lack of health care, and incarceration, among other problems." Bruce A. Boyer, *Foster Care Reentry Laws: Mending the Safety Net for Emerging Adults in the Transition to Independence*, 88 Temp. L. Rev. 837, 837 (2016). As Boyer explains:

> Both social scientists and neurologists now recognize that true "adult" functioning, measured in terms of cognitive, behavioral, and social maturity, is not achieved for the majority of emerging adults until well into the third decade of life. During this transitional phase, while most young people begin the process of separating from their families, few do so precipitously or without setbacks. Studies generally place the median age at which adolescents first leave home in the early twenties, and many of those adolescents

2. Regardless, the trial court made numerous factual findings regarding incidents which occurred prior to respondent reaching the age of majority, including factual findings regarding her purported disruption of foster care placements. The trial court relied on these factual findings in arriving at its ultimate conclusion that respondent had willfully failed to make reasonable progress to correct the conditions that led to Quentin's removal. However, a legitimate question arises in this case of whether respondent's conduct relating to correcting those conditions was willful during the period that she was in foster care. The trial court's factual findings do not address that question.

> who leave home for the first time between the ages of eighteen and twenty-four return to live in their parental households at some time thereafter, even if only for a short time. One recent study found that approximately 55% of young men and 46% of young women between eighteen and twenty-four years old were living at home with one or both of their parents. Other studies have concluded that the average age at which children in the general population finally depart the home is twenty-eight. The staging of the transition to independence is particularly indispensable for youth from less well-off families seeking to balance work, school, and the achievement of the credentials needed to sustain independence.

Id. at 840–41 (footnotes omitted). The failure to examine respondent's progress in light of this context is a legal error because it reflects a failure to properly apply the statutory mandate to consider respondent's reasonable progress "under the circumstances." N.C.G.S. § 7B-1111(a)(2).

¶ 33 Therefore, in this case, the trial court's findings do not support the conclusion that respondent "had the ability to show reasonable progress, but was unwilling to make the effort." *In re S.M.*, 375 N.C. at 685 (quoting *In re McMillon*, 143 N.C. App. at 410). The evidence instead only indicates that respondent failed to make more progress than she did due to her limited capacities as a very young parent who was attempting to live independently for the first time, without the benefit of adequate financial resources or a support network. Although the state maintains a substantial interest in the welfare of all children in North Carolina, including those born to minor parents, consideration of a young parent's circumstances is consistent with the Juvenile Code's goals of protecting juveniles "by means that respect both the right to family autonomy and the juveniles' needs" while "preventing the unnecessary or inappropriate separation of juveniles from their parents." N.C.G.S. § 7B-100(3)–(4) (2019).

¶ 34 Additionally, the majority misses the mark in summarily disregarding respondent's "participation in a DSS program for people transitioning out of foster care." Although respondent acknowledges that she did not fully comply with her case plan after reaching the age of majority, she argues that her engagement with the NC LINKS program—which provides services to young adults exiting the foster care system to help them attain education, employment, health, and housing stability—is relevant in assessing whether she made reasonable progress towards

correcting the conditions which led to Quentin's removal. In this case, as the majority notes, the requirements of respondent's case plan "were tied to [her] need to demonstrate maturity and stability." Certainly, respondent's participation in a program designed to assist young adults in achieving positive life outcomes is a possible indicator of her increased maturity. Because participation in the NC LINKS program is entirely optional, respondent's choice to seek out additional support could reflect an awareness of her own limitations and a recognition that she needed help in order to adequately care for herself and her son. Further, if respondent's participation in the NC LINKS program helped her advance her education, obtain employment and housing, and improve her mental and physical health, then she would have made substantial progress towards addressing the material conditions which rendered her unable to parent Quentin.

¶ 35 We have never held that a respondent-parent's compliance, or lack thereof, with a DSS case plan is dispositive in determining whether the requirements of N.C.G.S. § 7B-1111(a)(2) have been met. This statutory ground does not permit termination of parental rights merely on the basis that a respondent-parent has failed to comply with his or her case plan. *In re E.C.*, 375 N.C. 581, 585 (2020) ("A trial court should refrain from finding that a parent has failed to make reasonable progress in correcting the conditions that led to the children's removal 'simply because of his or her failure to fully satisfy all elements of the case plan goals.' " (quoting *In re B.O.A.*, 372 N.C. at 385)). Rather, it permits termination only when a parent has failed to make "reasonable progress under the circumstances" towards "correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2). A parent's compliance with a case plan is often evidence that he or she has made reasonable progress under the circumstances because case plans are typically developed to address the specific conditions which led to a child's removal. *See In re J.S.*, 374 N.C. 811, 815–16 (2020) ("[I]n order for a respondent's noncompliance with her case plan to support the termination of her parental rights, there must be a nexus between the components of the court-approved case plan with which the respondent failed to comply and the conditions which led to the child's removal from the parental home." (cleaned up)). However, it is possible for a parent to make reasonable progress towards addressing the substantive conditions which led to a child's removal from the parental home in a manner other than the one specified in a DSS-approved case plan. *See*, *e.g.*, *In re K.D.C.*, 375 N.C. at 792 (holding that petitioner had failed to prove grounds existed under N.C.G.S. § 7B-1111(a)(2) where "respondent-mother failed to complete a parenting class as required by her case plan,

. . . [but] completed a 'Mothering' class, which appears to be at least a plausible attempt by respondent-mother to complete her case plan and to improve her parenting skills"). Accordingly, the trial court erred in failing to consider respondent's participation in the NC LINKS program as probative evidence of her progress towards addressing the conditions that led to Quentin's removal. If respondent was able to address the substantive barriers preventing her from caring for Quentin through her participation in the NC LINKS program, then N.C.G.S. § 7B-1111(a)(2) does not supply a ground for terminating her parental rights.

¶ 36 Finally, the trial court erred in failing to assess whether respondent's inability to meet the requirements of her case plan stemmed from her poverty, rather than her willful conduct. *See In re M.A.*, 374 N.C. 865, 881 (2020) ("[P]arental rights are not subject to termination in the event that [a parent's] inability to care for her children rested solely upon poverty-related considerations . . . ."). The trial court's bare assertion that "[t]he lack of reasonable progress under the circumstances is not due solely to the poverty of [respondent], but is the direct result of [her] failure to address the conditions that led to the removal of the juvenile," is puzzling given the evidence that respondent's lack of financial resources caused her to be unable to meet the conditions of her case plan. For example, the trial court notes that respondent "had put in an application for housing" but that "she still ha[d] an outstanding balance of $1000.00 on her housing record." The record discloses that respondent made numerous efforts to obtain housing after reaching the age of majority. Thus, there is evidence in the record indicating that respondent's poverty, rather than a lack of effort, directly caused her continued inability to maintain stable housing. The trial court's conclusory finding that respondent's lack of progress was not due to poverty is insufficient to support the legal conclusion that respondent had the actual ability to comply with the conditions imposed by her case plan. *Cf. In re McMillon*, 143 N.C. App. at 412 (affirming order terminating parental rights despite respondent's claim that he was impoverished because "[t]he components of the DSS plan did not require material resources"); *In re A.W.*, 237 N.C. App. 209, 217 (2014) (affirming order terminating parental rights when "there was a sufficient basis in the record for terminating the Father's parental rights that had nothing to do with poverty").

III. Other Grounds

¶ 37 Having wrongfully affirmed the portion of the trial court's order concluding that respondent willfully failed to make reasonable progress within the meaning of N.C.G.S. § 7B-1111(a)(2), the majority does not address any of the other grounds for terminating respondent's parental

rights adjudicated by the trial court. With regard to these other grounds, I would also hold that the trial court's conclusions are not supported by clear, cogent, and convincing evidence.

¶ 38 First, there is insufficient evidence in the record to support the conclusion that grounds exist to terminate respondent's parental rights on the basis of neglect. The trial court's sole conclusion of law supporting termination pursuant to N.C.G.S. § 7B-1111(a)(1) is that respondent was presently neglecting Quentin based on her failure to comply with her case plan. However, respondent's failure to comply with her case plan cannot establish ongoing neglect in this case because respondent has not had custody of her son for many years. Because there is insufficient evidence that Quentin was a neglected child within the meaning of N.C.G.S. § 7B-101(15), petitioner must prove that respondent previously neglected Quentin and that she is likely to do so again in the future. *In re R.L.D.*, 375 N.C. 838, 841 n.3 (2020). The only evidence of prior neglect that petitioner can point to is respondent's conduct in the immediate aftermath of giving birth to Quentin as a fourteen-year-old, when she left Quentin in the hospital for two days. There is no evidence that Quentin was in any way harmed by respondent's brief absence. Accordingly, I would hold that the record does not support the conclusion that respondent's parental rights may be terminated under N.C.G.S. § 7B-1111(a)(1).

¶ 39 Second, the evidence presented at trial does not support the conclusion that respondent willfully failed to pay a reasonable portion of the cost of caring for Quentin pursuant to N.C.G.S. § 7B-1111(a)(3). The evidence indicates that respondent made three child support payments during the six months preceding the filing of the termination petition. The evidence also indicates that the total amount paid by respondent was less than the total amount she owed during this period. This Court has not addressed whether the ground provided for in N.C.G.S. § 7B-1111(a)(3) is automatically triggered whenever a parent fails to pay the full amount of a valid child support obligation. Regardless, the evidence establishes that respondent did not fail to pay a reasonable portion of the cost of care "for a *continuous period of six months* immediately preceding the filling of the petition" because she paid the full amount of child support owed for a monthly period on at least one occasion during these six months. N.C.G.S. § 7B-1111(a)(3) (emphasis added). Accordingly, I would hold that N.C.G.S. § 7B-1111(a)(3) does not support the termination of respondent's parental rights.

¶ 40 Third, the record evidence plainly does not support the conclusion that respondent is incapable of caring for Quentin within the meaning of N.C.G.S. § 7B-1111(a)(6). According to the trial court, this ground for

termination has been met because respondent once tested positive for marijuana. However, as Quentin's guardian *ad litem* rightly conceded in its brief, evidence that a parent uses drugs is insufficient to prove that the parent is incapable of caring for his or her child absent a finding that the parent's drug use will "prevent the parent from providing [the child with] proper care and supervision." *In re D.T.N.A.*, 250 N.C. App. 582, 585 (2016). The record is bereft of any evidence suggesting that respondent's purported substance abuse problem caused her to be "incapable of providing for the proper care and supervision of" Quentin. N.C.G.S. § 7B-1111(a)(6). Thus, the trial court erred in concluding that the requirements of N.C.G.S. § 7B-1111(a)(6) had been met.

¶ 41 Finally, the record does not support the conclusion that respondent willfully abandoned Quentin within the meaning of N.C.G.S. § 7B-1111(a)(7). In order to establish willful abandonment, there must be evidence establishing that respondent evinced a "purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to [the child]." *In re A.G.D.*, 374 N.C. 317, 319 (2020) (alteration in original) (quoting *In re N.D.A.*, 373 N.C. 71, 79 (2019)). Here, respondent made multiple child support payments in the six months immediately preceding the filing of the termination petition. In addition, she enrolled in the NC LINKS program, purportedly in an effort to address the deficiencies which prevented her from providing for Quentin as his parent. These actions are inconsistent with the conclusion that respondent "deliberately eschewed . . . her parental responsibilities in their entirety." *In re E.B.*, 375 N.C. 310, 318 (2020). Accordingly, I would hold that petitioner has not met its burden of proving that respondent willfully abandoned Quentin pursuant to N.C.G.S. § 7B-1111(a)(7).

IV. Conclusion

¶ 42 Simply put, neither the termination statutes nor our precedents endorse the blinkered approach the majority adopts in reviewing the trial court's order terminating respondent's parental rights. The majority's analysis entirely ignores the likelihood that respondent's behavior in the year subsequent to reaching the age of majority was substantially influenced by the conditions she lived in during the preceding years when she was in DSS custody. To the extent that respondent may have lacked the resources or capacity to parent Quentin immediately upon turning eighteen, then DSS itself bears a substantial share of the responsibility as her caregiver. The outcome of the majority's decision unfairly punishes a young mother who has exhibited remarkable fortitude in striving

to raise her child under difficult circumstances. Accordingly, I would vacate the trial court's order terminating respondent's parental rights and remand for further factfinding which considers all of the relevant evidence, including her circumstances, financial resources, and participation in the NC LINKS program, in determining whether she willfully failed to make reasonable progress in correcting the conditions which led to Quentin's removal.

IN THE MATTER OF Z.J.W.

No. 178A20

Filed 12 March 2021

1. Termination of Parental Rights—adjudicatory findings of fact—sufficiency of evidence—improperly based on dispositional evidence

Where several of the trial court's findings of fact, made in the adjudication phase of a termination of parental rights hearing, lacked evidentiary support or were improperly based on testimony from the dispositional phase, the Supreme Court disregarded those portions of the findings made in error when evaluating the trial court's determination that respondent-father's parental rights to his daughter should be terminated on the basis of neglect and willful abandonment.

2. Termination of Parental Rights—grounds for termination—willful abandonment—sufficiency of findings

In a termination of parental rights proceeding, the trial court's conclusion that respondent-father willfully abandoned his daughter was reversed where the unchallenged findings established that respondent made child support payments, sent emails to the relative caring for his daughter, and completed certain aspects of his case plan during the determinative six-month period prior to the filing of the termination petition. Respondent's failure to visit with his daughter was not voluntary where a prior order precluded visitation absent a recommendation from the child's therapist, which had not been given.

3. Termination of Parental Rights—grounds for termination—neglect—insufficient findings—evidence from which determination could be made

IN RE Z.J.W.

[376 N.C. 760, 2021-NCSC-13]

The trial court's determination that respondent-father's parental rights to his daughter were subject to termination on the basis of neglect was vacated. The court's conclusion that respondent neglected his child by abandonment was not supported by its findings, which established that respondent paid child support, attended hearings, emailed his daughter's caregiver, and complied with his case plan requirements. Although the court also concluded that grounds for neglect existed based on a prior adjudication of neglect and a likelihood of future neglect, the court's findings did not address the possibility of a repetition of neglect, despite record evidence from which sufficient findings could be made. The matter was remanded for entry of a new order addressing future neglect and best interests.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 23 September 2019 by Judge Elizabeth Freshwater-Smith in District Court, Nash County. Heard in the Supreme Court on 17 February 2021.

Jayne B. Norwood for petitioner-appellee Nash County Department of Social Services.

Poyner Spruill LLP, by Caroline P. Mackie, for appellee Guardian ad Litem.

Garron T. Michael for respondent-appellant father.

ERVIN, Justice.

¶ 1 Respondent-father Scott A. appeals from a trial court order terminating his parental rights in his minor child Z.J.W.[1] After careful consideration of respondent-father's challenges to the trial court's termination order in light of the record and the applicable law, we reverse the trial court's order, in part; vacate the trial court's order, in part; and remand this case to the District Court, Nash County, for further proceedings not inconsistent with this opinion.

¶ 2 Jill was born in August 2008 to respondent-father and the mother, Amy T.[2] The parents, who were never married and whose relationship

1. Z.J.W. will be referred to throughout the remainder of this opinion as "Jill," which is a pseudonym used for ease of reading and to protect the identity of the juvenile.

2. Although the trial court terminated the mother's parental rights in Jill in the order that is before us in this case, she did not seek appellate review of the trial court's decision and is not a party to the proceedings on appeal.

was marred by incidents of domestic violence, also had a son,[3] who was born in October 2006. As a result of the level of conflict between the parents, the mother would routinely retreat to Nash County, where a number of the members of her family lived, during difficult times. Eventually, the mother left respondent-father and Steven in Buncombe County and moved to Nash County with Jill. Respondent-father had no further contact with Jill for many years after her departure for Nash County.

¶ 3 The mother married another man after relocating to Nash County. On 29 January 2015, allegations of neglect relating to Jill were made to the Nash County Department of Social Services. During the ensuing investigation, the mother's husband admitted that he had had sexual fantasies involving Jill. After DSS provided assistance to respondent-mother and her husband, the investigation into the neglect allegations relating to Jill was closed on 11 August 2015.

¶ 4 On 25 June 2017, the Nash County DSS received a child protective services report relating to an incident of domestic violence involving the mother and her husband. In the course of the resulting investigation, the mother reported that her husband had raped her earlier in the evening, that he had previously committed acts of sexual abuse against Jill, and that she had allowed the husband to continue to live in the family home with Jill despite her knowledge of his conduct. In addition, the husband admitted that he had sexually abused Jill on several occasions. As a result, the mother and the husband were arrested and charged with the commission of several criminal offenses while Jill was placed with her maternal aunt.

¶ 5 On 14 July 2017, a social worker employed by the Nash County DSS contacted respondent-father and informed him about Jill's situation. At that time, respondent-father stated that he could not remember the last time that he had seen Jill. Although he claimed that he had spoken with Jill over the phone since the last time that he had seen her, respondent-father could not provide the date upon which this conversation had occurred. Respondent-father did not, at any point during this conversation, question the social worker about Jill's well-being or where she was living. In spite of the fact that the social worker provided respondent-father with her own contact information, he did not make any further effort to communicate with the social worker.

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3. The parents' son will be referred to throughout the remainder of this opinion as "Steven," which is a pseudonym used for ease of reading and to protect the juvenile's privacy.

¶ 6 In October 2017, the Buncombe County Department of Social Services filed a petition alleging that Steven was an abused, neglected, and dependent juvenile and obtained the entry of an order placing him in nonsecure custody. In its petition, the Buncombe County DSS alleged that it had received a child protective services report on 9 December 2016 asserting that respondent-father had been involved in a physical altercation with his own mother in Steven's presence. On 29 March 2018, Judge Susan M. Dotson-Smith entered an order finding Steven to be a neglected and dependent juvenile. On 12 June 2018, Judge Ward D. Scott entered a dispositional order placing Steven in the custody of the Buncombe County DSS and ordering respondent-father to submit to random drug screens, obtain a psychosexual evaluation, and complete a parenting class.

¶ 7 On 10 January 2018, the Nash DSS filed a petition alleging that Jill was an abused and neglected juvenile. In its petition, the Nash County DSS alleged, among other things, that the husband had admitted to having sexually abused Jill and that the mother had, despite her knowledge of the husband's fantasies about having sexual contact with Jill, enabled the husband's abuse of Jill by burning Jill's diary, in which Jill described the mistreatment that she had experienced, and continuing to live with the husband despite her knowledge of his conduct.

¶ 8 After a hearing held on 7 June 2018, Judge Wayne S. Boyette entered an order on 27 July 2018 finding Jill to be an abused and neglected juvenile. In his order, Judge Boyette found that, while respondent-father did not have a relationship with Jill and had not seen her in over six years, he had expressed a desire to have custody of her. Judge Boyette placed Jill in the custody of the Nash County DSS, sanctioned a permanent plan of reunification with a concurrent plan of adoption, and prohibited visitation between respondent-father and Jill "until [such visitation was] recommended by [Jill's] therapist." Finally, Judge Boyette ordered respondent-father "to work with [the Buncombe County DSS] and complete their court ordered recommendations and service plan." As of October 2018, Judge Dotson-Smith had determined that respondent-father had "completed all recommendations" imposed by the District Court and the Buncombe County DSS.

¶ 9 On 20 February 2019, the Nash County DSS filed a motion to terminate respondent-father's parental rights in Jill. In its termination petition, the Nash County DSS alleged that Jill was an abused and neglected juvenile and that there was a reasonable probability that she would experience abuse and neglect in the future in the event that she was to be returned to respondent-father's care, *see* N.C.G.S. § 7B-1111(a)(1)

(2019), and that respondent-father had willfully abandoned Jill, *see* N.C.G.S. § 7B-1111(a)(7) (2019).

¶ 10 On 5 March 2019, Judge Pell C. Cooper entered a permanency planning order that changed the primary permanent plan for Jill to adoption with a secondary plan of reunification. Following a hearing held on 7 March 2019, at which respondent-father was, for the first time, physically present, Judge Anthony W. Brown entered a permanency planning order on 15 April 2019. In his order, Judge Brown found that respondent-father had sent a few e-mails to the maternal aunt, with whom Jill continued to be placed, and that respondent-father was financially able to parent Jill. In addition, Judge Brown ordered the Nash County DSS to "inform the therapist to contemplate the issue of visitation by [respondent-father] with [Jill]."

¶ 11 As the result of a hearing held on 4 April 2019, Judge Cooper entered a permanency planning order on 15 May 2019 in which he permitted respondent-father to initiate contact with Jill by writing her a letter to be screened by the Nash County DSS and the guardian ad litem before it could be presented to Jill. In addition, Judge Cooper ordered respondent-father to actively participate in all Child and Family Team meetings and to appear at all hearings that were held for the purpose of considering his situation with respect to Jill.

¶ 12 After a hearing held on 13 June 2019 which respondent-father attended telephonically, the trial court entered a permanency planning order on 23 July 2019. In its order, the trial court found that Jill had been receiving therapy from Annie Shaw since March 2018 for the purpose of addressing concerns arising from the sexual abuse that she had experienced at the hands of the mother's husband. However, Ms. Shaw did not believe that it was her role to make a recommendation concerning the issue of whether respondent-father should visit with Jill and stated that she "had never intended to do so." Instead, Ms. Shaw had only intended to assist Jill in preparing for such a visit in the event that one was to occur and declined to express an opinion concerning whether it would be "harmful or helpful" for Jill to visit with respondent-father. The trial court found, on the other hand, that the Nash County DSS and counsel for the parties had believed that Ms. Shaw would make a recommendation concerning the issue of visitation and had acted in accordance with that belief.

¶ 13 The issues raised by the termination motion came on for hearing before the trial court on 25 June 2019 and 25 July 2019. On 23 September 2019, the trial court entered an order concluding that both grounds for

termination alleged in the termination motion existed and that it would be in Jill's best interests for respondent-father's parental rights to be terminated. As a result, the trial court terminated respondent-father's parental rights in Jill. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent-father noted an appeal to this Court from the trial court's termination order.

¶ 14 In seeking relief from the trial court's termination order before this Court, respondent-father argues that the trial court erred by determining that his parental rights in Jill were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1), and willful abandonment, N.C.G.S. § 7B-1111(a)(7). According to well-established North Carolina law, trial courts utilize a two-step process in determining whether a parent's parental rights in a child should be terminated that consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more of the grounds for termination delineated in N.C.G.S. § 7B-1111(a). N.C.G.S. § 7B-1109(e)–(f) (2019). This Court reviews a trial court's adjudication decision in order "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111 (1984) (citing *In re Moore*, 306 N.C. 394, 404 (1982)). "If [the trial court] determines that one or more grounds [for termination] listed in section 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842 (2016) (citing *In re Young*, 346 N.C. 244, 247 (1997); N.C.G.S. § 7B-1110).

¶ 15 In support of its adjudication decision, the trial court found as a fact that:

> 7. The Court takes judicial notice of the court order in the underlying action adjudicating [Jill] as an abused and neglected juvenile[.]
>
> . . . .
>
> 9. The relationship between [the parents] was problematic and [the mother] frequently left the home and came to Nash County to be with her family. . . . [The parents] moved to Buncombe County where [Jill] was born. While living in Buncombe County, they each sought and obtained Domestic Violence Protection orders [(DVPO)] on each other.

10. After [the mother] left [respondent-father] for the final time in 2010, she returned to live with family in Nash County. [The mother] left with [Jill] and [Steven] remained with [respondent-father]. In Nash County[, the mother] obtained a DVPO against [respondent-father]. As a part of the DVPO order [respondent-father] was allowed to have supervised visitation at the Nashville Police Department. [Respondent-father] did not attend the DVPO hearing, nor did he ever exercise his visitation with [Jill]. [Respondent-father] has not seen [Jill] since she and her mother left Buncombe County in 2010. Although he believed they were in Nash County, [respondent-father] made no known efforts to find [Jill] or her mother. [The mother] changed her phone number and [respondent-father] stated he had no way to contact her as her family reportedly told him they did not know where [the mother] and [Jill] were located. [The maternal aunt] says she was never contacted by [respondent-father] until he was provided with the email address of [Jill's] placement by the Department in 2018. [Respondent-father] knew where [the mother's] mother resided in Nash County having visited [the mother] there previously. [The mother's] mother and family continue to reside in the same homes they lived in at the time of the visits by [respondent-father].

. . . .

12. In 2017, [respondent-father] was made aware that there was a child protective services investigation in Nash County involving [Jill]. Due to confidentiality he was not given specific details. However, [respondent-father] admits that although knowing what he did know, he still made no effort to contact [the mother's] relatives in Nash County to check on his daughter nor did he inquire about her well-being with the Nash County social worker.

13. Nash County social worker, Roxanne Hill, contacted [respondent-father] by phone on July 14, 2017 informing him of the child protective services investigation involving [Jill]. During that conversation [respondent-father] was unable to recall when he had last seen [Jill] but [h]e had spoken with her but could not remember when that had transpired. He stated he was focused on [Steven] and had no time for anything else, stating [Steven] is a "hand full". He did not ask about [Jill's] well-being or where she was living, although that information was available to him at the time.

14. At the time of the Nash County investigation with [Jill], [Buncombe DSS] had an open investigation with [respondent-father] concerning [Steven]. . . . [Steven] was adjudicated neglected and dependent in Buncombe County on February 22, 2018 and placed in the custody of Buncombe County.

15. Prior to being removed from his father, [Steven] did not attend school. [Respondent-father] attempted to home school [Steven] but never completed the required documents regarding attendance for [Steven] to receive credit. When [Steven] entered foster care and was enrolled in public schools, he was found to be behind academically. His grades and academic progress improved while he was in foster care.

. . . .

18. [Respondent-father] stated he began attending therapy at Family Preservation a week after [Steven] was removed from his care. Jane Jones, Social Worker with Family Preservation Services worked with [respondent-father] from November 9, 2017 until October 2018 when he was no longer eligible for their services due to a change in their mandate for services. On June 6, 2019, [h]e returned to Family Preservation and continues to be seen. Ms. Jones had no knowledge of the issues regarding his involvement with

Buncombe County and did not inquire. She did attend two [CFT] meetings at Buncombe [DSS] and believes he completed the goals set for him.
. . .

. . . .

20. [Respondent-father] has never been employed for more than a few weeks at a time. He was diagnosed with Crohn's Disease at age 13 and was approved for disability in 2002. [Respondent-father] receives $770.00 monthly in disability of which $50.00 is deducted for child support for [Jill] and $350.00 in Food and Nutrition benefits. [Respondent-father] never voluntarily paid child support and payments did not begin until January 4, 2019 from his social security benefits. He struggles to provide for himself and [Steven] and according to [respondent-father] his sister assists him financially when he needs help. At times, he cannot pay his rent. He does not have a driver's license and he has not had a motor vehicle in over ten years.

21. [Respondent-father] did not attend any hearings regarding [Jill] until after [DSS] filed the [m]otion to terminate his parental rights on February 20, 2019. He participated by phone for two hearings and only attended five. Two of which were hearings on the [m]otion to terminate his parental rights.

22. [Respondent-father] attended court hearings regarding [Steven] in Buncombe County but did not initially comply with their case plan. The Court ordered that he submit to a Psychosexual Evaluation which he did not do in a timely manner. The therapist attended a hearing in Buncombe County to request additional information that she did not receive from [respondent-father] so that the evaluation could be completed.

23. The plan in Buncombe County was completed by [respondent-father] and as his plan in Nash

County was to complete the Buncombe County plan, the Nash County plan was also completed.

23.[4] There were Domestic Violence orders involving [respondent-father] and his mother . . . in Buncombe County. Due to the volatile relationship and verbal altercations in the presence of [Steven,] [respondent-father's] mother was not to be present in the home[.] In October of 2018, [respondent-father] was hospitalized and had surgery. Upon his discharge from the hospital, [his mother] moved into [his] home to care for him in violation of the Buncombe [DSS] plan. . . .

24. [Respondent-father] states he had no one else who could or would assist him and his condition was such that he was unable to care for himself. He states he has no friends or any support system that could have helped him during his recovery.

25. [Respondent-father] was contacted by Foster Care Supervisor, Stephanie Grischow on a regular basis to keep him informed about [Jill]. Ms. Grischow initiated the contacts between [respondent-father] and herself. She often left messages for him to return her call. It would require multiple messages from Ms. Grischow before her calls would be returned. [Respondent-father] missed three consecutive meetings. Ms. Grischow contacted him encouraging him to attend and participate in the meetings. He participated in some Child and Family Team Meetings by phone.

26. On July 26, 2018 [respondent-father] was provided the email address of [the maternal aunt] so that he could contact her and inquire about [Jill] and her wellbeing. Again on August 27, 2018 and September 18, 2018 he was given the email address because he said he had lost the address. The first email to [the maternal aunt] was sent September 18, 2018. There was a total of twelve emails in fourteen months: November

4. The trial court's order had two findings of fact numbered 23.

9, 2018, December 19, 2018, December 27, 2018, February 22, 2019, February 26, 2019, March 3, 2019, March 21, 2019, April 20, 2019, May 7, 2019, and May 22, 2019. [The maternal aunt] responded to all the emails received. [Respondent-father] at times sent pictures of clothing to [the maternal aunt] asking for [Jill's] size and whether [Jill] would like them. He never sent anything. He has not sent her cards or gifts for her birthdays or holidays since she moved to Nash County in 2010. [The mother] denies blocking [respondent-father] from Facebook.

27. . . . [Respondent-father] made no effort to locate his daughter or inquire of her maternal family about her well-being or whereabouts since [respondent-mother] and [Jill] left his home in 2010. By his own statements, [respondent-father] did not make efforts as he had his hands full with [Steven]. He was provided [the maternal aunt's] e-mail address and did not even utilize the email to contact [the maternal aunt] for two months after having the address as he lost it twice. And even then, [respondent-father] only sent twelve emails in over a year's time. [Jill] was 9 years old, before [respondent-father's] paternity was established and it was only done . . . at the request and effort of [Nash DSS]. [Respondent-father] stated he was not a legal expert and did not know how to go about establishing he was her father. Yet paternity of [Steven] was established by Buncombe County over six months prior to the testing for [Jill] and he did not inquire about testing for [Jill] even after becoming aware of the process. . . .

. . . .

30. [Jill] is in therapy to address the trauma of her sexual abuse. Due to scheduling conflicts with the previous therapist, Annie Shaw, and travel issues, it was in [Jill's] best interest to change therapist[s].

31. While under Ms. Shaw's care, [respondent-father] was allowed to write [Jill] a letter. The letter was reviewed by [Nash DSS]. Ms. Shaw read the letter to [Jill] in a therapy session. Ms. Shaw assisted [Jill] in processing her feelings after hearing the letter. Previously, [Jill] had expressed interest in the possibility of seeing her father and asking him why he had not been in her life for seven years. After hearing the letter, she no longer wanted to see him stating the letter made her feel "icky" and that it made her think of the "other one", referring to [her stepfather]. [Respondent-father] has written a second letter which has been given to [Jill's] current therapist, but [Jill] has not yet seen the letter.

32. All parties thought [Ms.] Shaw would be providing a recommendation to the Court regarding visitation by [respondent-father]. When Ms. Shaw testified in court on June 13, 2019, she stated "it was not, nor was it ever her role to make a recommendation regarding the father's visitation[.]" Ms. Shaw only intended to prepare [Jill] for a visit if it were to be ordered by the Court.

33. [Respondent-father] through his inaction for most of [Jill's] life prior to and including the six months immediately preceding the filing of the Motion to terminate parental rights, has displayed a willful neglect and refusal to perform the natural and legal obligations of parental care and support. He has withheld his presence, his love, his care. Further, he has failed to afford himself of the opportunities to display filial affection in such a manner that demonstrates he has relinquished all parental claims. Therefore, he has neglected and abandoned [Jill].

34. In light of [respondent-father's] nearly complete absence from [Jill's] life prior to the filing of the Motion to terminate parental rights, it is probable that neglect would continue if she were returned to his care.

> 35. [Respondent-father] had the ability to achieve contact with [Jill] irrespective of his financial and social resources.

¶ 16 **[1]** As an initial matter, respondent-father challenges the sufficiency of the evidentiary support for several of the trial court's findings of fact. First, respondent-father contends that the portions of Finding of Fact No. 10 stating that the mother had left him "for the final time in 2010" and that he had not exercised the right to participate in supervised visitation with Jill as permitted by the Nash County DVPO order lack sufficient record support. A careful review of the record persuades us respondent-father's contention has merit given that nothing in the record provides support for the specific factual statements that respondent-father has contested. As a result, we will disregard the relevant portions of Finding of Fact No. 10 and those portions of Finding of Fact Nos. 26 and 27 that state that the mother left respondent-father in 2010, rather than 2011, in determining the extent to which the trial court's findings of fact provide sufficient support for its determination that respondent-father's parental rights in Jill were subject to termination on the basis of neglect and willful abandonment. *See In re N.G.*, 374 N.C. 891, 901 (2020) (disregarding findings of fact that were not supported by sufficient record evidence).

¶ 17 Secondly, respondent-father challenges the sufficiency of the evidentiary support for those portions of Finding of Fact Nos. 10 and 27 that state that he made no known efforts to locate the mother or Jill or to inquire of members of the mother's family concerning Jill's location or well-being since the mother left Buncombe County with Jill. At the termination hearing, respondent-father testified that he had contacted the mother's family following her departure from Buncombe County with Jill and had been told that they did not know where the mother was and that respondent-mother had changed her phone number and blocked his ability to send Facebook messages to her. Although the trial court was not required to deem respondent-father's testimony to be credible, *see In re D.L.W.*, 368 N.C. 835, 843 (2016), it appears that the trial court predicated the challenged portions of its findings of fact upon testimony presented by the maternal aunt at the dispositional phase of the proceeding to the effect that respondent-father had not made any contact with the mother's family until he had been provided with her e-mail address by the Nash County DSS in 2018. In the event that the trial court relied upon this dispositional evidence as support for its adjudicatory finding that respondent-father had not made any efforts to locate the mother or Jill since their departure from Buncombe County, we agree with longstanding Court of Appeals precedent that it was error

to do so. *See In re Mashburn*, 162 N.C. App. 386, 396 (2004) (noting that a trial court should not consider testimony received at the dispositional phase of a termination proceeding in making adjudicatory findings of fact). As a result, we hold that the relevant portions of Finding of Fact Nos. 10 and 27 should not be considered in evaluating the validity of respondent-father's challenges to the trial court's adjudicatory decisions.

¶ 18 Similarly, respondent-father contends that the portion of Finding of Fact No. 15 stating that Steven had been "behind academically" at the time that he entered foster care and enrolled in public school was not supported by the record evidence. However, a 12 June 2018 dispositional order entered in the Buncombe County proceeding regarding Steven that was admitted into evidence at the termination hearing reflects that, while Steven had been "doing well integrating into the 4th grade," he was "on a first grade level in math" and had "advanced approximately two years in his math skills since being placed in his foster home five months ago." As a result, we hold that the challenged portion of Finding of Fact No. 15 has sufficient evidentiary support.

¶ 19 Moreover, respondent-father argues that the portion of Finding of Fact No. 18 indicating that "Ms. Jones[, a social worker with Family Preservation Services,] had no knowledge of the issues regarding his involvement with Buncombe County and did not inquire[ ]" into that subject mischaracterizes her testimony and contradicts the remainder of that finding, which states that Ms. Jones had attended two Child Family Team meetings at Buncombe DSS and "believes he completed the goals set for him." A careful review of the record satisfies us that Finding of Fact No. 18 does contain the internal inconsistency described in respondent-father's brief and conflicts with Ms. Jones' testimony at the termination hearing, which reflects an adequate understanding of the nature and extent of respondent-father's involvement with the Buncombe County DSS. More specifically, Ms. Jones' testimony reflects that she was familiar with the goals set out in respondent-father's Buncombe County case plan and indicates that respondent-father had addressed domestic violence and substance abuse issues in the course of complying with the relevant plan requirements. For that reason, we will disregard the trial court's statement in Finding of Fact No. 18 that Ms. Jones lacked knowledge of the issues that were addressed during respondent-father's period of involvement with the Buncombe County DSS in determining the validity of the trial court's adjudicatory decision. *See In re N.G.*, 374 N.C. at 901.

¶ 20 Respondent-father also challenges the portion of Finding of Fact No. 21 which provides that he "did not attend any hearings regarding

[Jill] until after the Nash County [DSS] filed the [m]otion to terminate his parental rights on February 20, 2019[ ]" as not supported by the evidence. A careful review of the record clearly indicates respondent-father participated in the hearing concerning the underlying juvenile petition that was on held on 7 June 2018 by telephone. As a result, we will disregard the challenged portion of Finding of Fact No. 21 in evaluating the correctness of the trial court's adjudicatory determinations. *See id.*

¶ 21 Next, respondent-father contends the trial court's statement in Finding of Fact No. 22 that he "did not initially comply" with his Buncombe County case plan conflicts with the record evidence. As the initial dispositional order entered in the Buncombe County proceeding on 12 June 2018 reflects, respondent-father was ordered to submit to random drug screens, participate in a psychosexual evaluation, and complete a parenting class in order to be reunited with Steven. However, the trial court determined in Finding of Fact No. 22, which has not been challenged as lacking in sufficient record support, that respondent-father did not complete the required psychosexual evaluation in a timely manner. *In re Z.L.W.*, 372 N.C. 432, 437 (2019) (stating that unchallenged findings are deemed to have sufficient record support and are binding for purposes of appellate review). In addition, while respondent-father testified at the termination hearing that he began participating in his psychosexual evaluation as soon as he was ordered to do so, the therapist who conducted the evaluation had expressed concern about the extent to which respondent-father was "being forthright with regard to her evaluation," a development that resulted in the holding of additional hearings "to decide how best to handle" the situation and a request on the part of the therapist to be allowed to review additional records. As a result, we hold that the trial court was entitled to infer from this evidence that respondent-father had initially failed to comply with his Buncombe County case plan. *See In re D.L.W.*, 368 N.C. at 843 (stating that the trial judge has the responsibility for considering the evidence, evaluating the credibility of the witnesses, and making any reasonable inferences that can be drawn from the record evidence).

¶ 22 In addition, respondent-father argues that the trial court erred by stating in Finding of Fact No. 24 that he "ha[d] no friends or any support system that could have helped him during his recovery" from surgery. According to respondent-father, his original plan following his discharge from the hospital in 2018 was to go to Virginia and stay with his sister. In support of this assertion, respondent-father relies upon testimony that his sister provided at the dispositional phase of the proceeding; however, as we have previously stated, such testimony is insufficient to

support an adjudicatory finding. *See In re Mashburn*, 162 N.C. App. 396. On the other hand, respondent-father testified at the adjudicatory hearing that he had allowed his mother to enter his home following the surgical procedure that was performed upon him because "I didn't know anybody else that would look after me and help me with my recovery[.]" In light of this testimony, we hold that the record contains sufficient evidentiary support for the trial court's finding that respondent-father had stated he had no one else other than his mother to assist him during his convalescence following surgery.

¶ 23 In his penultimate challenge to the trial court's findings of fact, respondent-father argues that the portion of Finding of Fact No. 25 stating that he had "missed three consecutive [Child Family Team] meetings" lacked sufficient evidentiary support. As the record reflects, a foster care supervisor employed by the Nash County DSS testified that respondent-father had participated by telephone in two of the four Child Family Team meetings held in connection with the underlying juvenile proceeding by phone. More specifically, the foster care supervisor testified that respondent-father had participated in a Child Family Team meeting by phone on 26 July 2018, was absent from a Child Family Team meeting that was held on 23 October 2018, participated in a Child Family Team meeting by phone on 24 January 2019, and was absent from a Child Family Team meeting that was held on 23 April 2019. As a result, given that the record provides no support for the trial court's finding that respondent-father had missed three consecutive Child Family Team meetings, we will disregard this portion of Finding of Fact No. 25 in determining whether the trial court properly determined that respondent-father's parental rights in Jill were subject to termination on the basis of neglect and willful abandonment. *In re N.G.*, 374 N.C. at 901.

¶ 24 Finally, respondent-father contends that Finding of Fact Nos. 33 through 38 constitute "ultimate facts bordering on conclusions of law." Although the trial court labeled the relevant portions of its termination order as findings of fact rather than conclusions of law, its determinations that respondent-father had "displayed a willful neglect," "relinquished all parental claims," "neglected and abandoned [Jill]," and "neglect would [probably] continue if [Jill] were returned to [respondent-father's] care" involve the application of legal principles to the facts rather than factual findings. Given that "findings of fact which are essentially conclusions of law will be treated as such on appeal," *State v. Sparks*, 362 N.C. 181, 185 (2008) (cleaned up), we will treat the challenged portions of Finding of Fact Nos. 33 through 38 in that manner in evaluating the validity of respondent-father's remaining challenges to the trial court's adjudicatory decision.

¶ 25 **[2]** In challenging the trial court's determination that grounds for terminating his parental rights in Jill existed, respondent-father begins by arguing that the trial court's findings of fact did not support its conclusion that his parental rights in Jill were subject to termination on the grounds of willful abandonment. The termination of a parent's parental rights in a child on the basis of abandonment pursuant to N.C.G.S. § 7B-1111(a)(7) requires proof that "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition[.]" N.C.G.S. § 7B-1111(a)(7) (2019). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. 244, 251 (1997) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 275 (1986)); *see also Pratt v. Bishop*, 257 N.C. 486, 502 (1962) (stating that "[a]bandonment requires a willful intent to escape parental responsibility and conduct in effectuation of such intent"). In light of that fact, this Court has stated that, "if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt*, 257 N.C. at 501. "Although the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re N.D.A.*, 373 N.C. 71, 77 (2019) (quoting *In re D.E.M.*, 257 N.C. App. 618, 619 (2018)).

¶ 26 In view of the fact that the motion to terminate respondent-father's parental rights in Jill was filed on 20 February 2019, the determinative six-month period ran from 20 August 2018 through 20 February 2019. In arguing that the trial court erred by determining that his parental rights in Jill were subject to termination on the basis of willful abandonment, respondent-father notes that he was precluded from having any contact with Jill during the relevant period of time, that he fully complied with the case plan that was established in Buncombe County and adopted in Nash County, and that he never demonstrated that he willfully intended to forego all of his parental duties or to relinquish his parental claims to Jill.

¶ 27 The trial court's unchallenged findings of fact indicate that respondent-father made child support payments during the relevant six-month period beginning on 4 January 2019. In addition, the trial court found that respondent-father sent e-mails to the maternal aunt with whom Jill had been placed for the purpose of inquiring about Jill's well-

being on 18 September 2018, 9 November 2018, 19 December 2018, and 27 December 2018. Finally, the trial court found that respondent-father had attended a Child Family Team meeting and completed the requirements of his case plan during the relevant six-month period. As a result, rather than reflecting a willful withholding of his parental love and affection from Jill, the trial court's findings establish that respondent-father took a number of affirmative actions, including sending e-mails to the maternal aunt, attending a Child Family Team meeting, and satisfying the requirements of his case plan during the relevant six-month period in an attempt to show his love, concern, and affection for Jill.

¶ 28 Admittedly, respondent-father did not visit with Jill at any time during the relevant six-month period. However, the order adjudicating Jill to be an abused and neglected juvenile entered by Judge Boyette precluded visitation between respondent-father and Jill until the occurrence of such visits was recommended by Ms. Shaw. Subsequently, unchallenged testimony from a foster care supervisor employed by the Nash County DSS indicates that respondent-father wished to be allowed to visit with Jill and contacted Ms. Shaw for that purpose on at least two occasions. Although the trial court's unchallenged findings of fact indicate that all parties believed that Ms. Shaw would make a recommendation regarding the extent to which visitation between respondent-father and Jill would be appropriate, Ms. Shaw testified on 13 June 2019 that "it was not, nor was it ever her role to make a recommendation regarding the father's visitation" and that she never intended to do anything other than prepare Jill for a visit with respondent-father in the event that such visits were allowed to take place. Since all of the parties, including respondent-father, were expecting a recommendation from Ms. Shaw concerning the extent, if any, to which respondent-father should be permitted to visit with Jill before such visits would be allowed, his failure to have personal contact with Jill during the relevant six-month period was neither voluntary nor attributable to any failure on his part to seek to visit with Jill. As a result, the trial court erred to the extent that it determined that respondent-father's parental rights in Jill were subject to termination on the basis of willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7) due to the absence of visits between respondent-father and Jill. *Cf. In re T.C.B.*, 166 N.C. App. 482, 486–87 (2004) (holding that the trial court's conclusion that the parent's parental rights were subject to termination on the basis of abandonment was not supported by the trial court's visitation-related findings given the fact that the respondent's attorney had instructed him to avoid contact with the child and the fact that a subsequent protection plan prohibited visitation between the respondent and the child).

¶ 29 Although respondent-father could, of course, have done more than he did in order to exhibit his concern for Jill, the steps that he did take as reflected in the trial court's findings of fact suffice to preclude a finding that his parental rights were subject to termination on the basis of willful abandonment. Simply put, the trial court's findings of fact do not "support a conclusion that respondent-father completely withheld his love, affection, and parental concern for the" child, thereby "rendering his parental rights in [the child]" subject to termination" for abandonment. *In re A.G.D.*, 374 N.C. 317, 325 (2020). As a result, we hold that the trial court's determination that respondent-father's parental rights in Jill were subject to termination on the basis of abandonment must be reversed.

¶ 30 **[3]** Finally, respondent-father argues that the trial court erred by concluding that his parental rights in Jill were subject to termination based upon neglect. A trial court may terminate a parent's parental rights in the event that the parent has neglected the juvenile. N.C.G.S. § 7B-1111(a)(1) (2019). A "neglected juvenile" is defined as "[a]ny juvenile . . . whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; . . . or who lives in an environment injurious to the juvenile's welfare[.]" N.C.G.S. § 7B-101(15) (2019). "In deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child 'at the time of the termination proceeding.' " *In re N.D.A.*, 373 N.C. at 80.

> When it cannot be shown that the parent is neglecting his or her child at the time of the termination hearing because "the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent."

In re Z.A.M., 374 N.C. 88, 95 (2020) (quoting *In re D.L.W.*, 368 N.C. at 843 (2016))[5] *see also In re N.D.A.*, 373 N.C. at 80.

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5. As this Court noted in *In re R.L.D.*, 375 N.C. 838, 841 n.3 (2020), "a showing of past neglect is [not] necessary in order to terminate parental right [on the basis of neglect] in every case." On the contrary, we pointed out in that decision that N.C.G.S. § 7B-101(15) "does not require a showing of past neglect if the petitioner can show current neglect." *Id.* However, given that the record before the Court in this case does contain a finding of past neglect, the analysis set out in the text is appropriate for use in evaluating the validity of respondent-father's challenge to the trial court's determination that his parental rights in Jill were subject to termination on the basis of neglect.

¶ 31 As an initial matter, we note that this Court has held that

> [a] trial court is entitled to terminate a parent's parental rights in a child for neglect based upon abandonment pursuant to N.C.G.S. § 7B-1111(a)(1) in the event that the trial court finds that the parent's conduct demonstrates a "wil[l]ful neglect and refusal to perform the natural and legal obligations of parental care and support."

In re N.D.A., 373 N.C. at 81 (quoting *Pratt*, 257 N.C. at 501). In order to conclude that "neglect by abandonment" is present, the trial court's findings must reflect "that the parent has engaged in conduct 'which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child' as of the time of the termination hearing," *id.* at 81, with the trial court being required to consider the parent's conduct over an extended period of time continuing up to and including the time at which the termination hearing is being held. *Id.* at 81–82.

¶ 32 The trial court appears to have incorporated a "neglect by abandonment" theory in Finding of Fact No. 33, which states that respondent-father had, for "most of [Jill's] life prior to and including the six months immediately preceding the filing of the [m]otion to terminate parental rights," "displayed a willful neglect and refusal to perform the natural and legal obligations of parental care and support" by "with[o]ld[ing] his presence, his love, [and] his care" and by "fail[ing] to afford himself of the opportunities to display filial affection" so as to neglect Jill. However, the trial court's findings of fact reflect that respondent-father began paying child support on 4 January 2019, that he attended some of the hearings that were held in the underlying juvenile proceeding, that he satisfied the requirements set out in the case plan that was adopted by the Buncombe County DSS and the Nash County DSS, that he participated in some Child Family Team meetings, that he sent twelve e-mails to the maternal aunt with whom Jill was residing for the purpose of keeping informed about Jill's situation, and that he wrote two letters to Jill. Although respondent-father did not ever visit with Jill, his failure to do so cannot be directly attributed to any failure on his part to seek the right to participate in such visits for the reasons set out in greater detail earlier in this opinion. As a result, given that the trial court's findings of fact fail to establish that respondent-father "manifest[ed] a willful determination to forego all parental duties" with respect to Jill, *In re N.D.A.*, 373 N.C. at 81, and, in fact, supported the opposite conclusion, the trial court erred to the extent that it determined that respondent-

father's parental rights in Jill were subject to termination on the basis of a "neglect by abandonment" theory.

¶ 33 A determination that respondent-father did not neglect Jill on the basis of abandonment does not, however, end our inquiry concerning the viability of the trial court's conclusion that respondent-father's parental rights in Jill were subject to termination on the basis of neglect. Instead, we note that the trial court also appears to have found the existence of the neglect ground for termination on the basis of a prior finding of neglect and the likelihood of future neglect as well given its decision to "take[ ] judicial notice of the court order in the underlying action adjudicating the child as an abused and neglected juvenile" and given its finding that, "[i]n light of [respondent-father's] nearly complete absence from [Jill's] life prior to the filing of the [m]otion to terminate parental rights, it is probable that neglect would continue if she were returned to his care." As a result, we must evaluate the extent, if any, to which the trial court's findings of fact support its determination that respondent-father's parental rights in Jill were subject to termination on the basis of the "prior neglect and likelihood of a repetition of neglect."

¶ 34 As we have already noted, in the event that there has been a previous finding of neglect and the juvenile has not resided in the parental residence for an extended period of time, the principal issue that the trial court is required to consider in determining whether the parent's parental rights in the child are subject to termination on the grounds of neglect is the likelihood that the juvenile would experience a repetition of the neglect to which he or she had previously been subjected in the event that he or she was returned to the parent's care based upon an analysis of the record evidence concerning the situation leading up to and existing at the time of the termination hearing. *In re N.D.A.*, 370 N.C. at 80. Although the trial court appears to have attempted to utilize this analytical rubric in the termination order, its finding that a repetition of neglect was likely in the event that Jill was returned to respondent-father's care rests solely upon respondent-father's "nearly complete absence from [Jill's] life prior to the filing of the [m]otion to terminate parental rights." In view of the fact that the trial court clearly failed to consider any of the evidence concerning events that had occurred prior to the filing of the termination motion other than respondent-father's lengthy absence from Jill's life or any of the evidence concerning events that occurred subsequent to the filing of the termination motion in determining the likelihood that the neglect to which Jill had been subjected would be repeated in the event that she was placed in respondent-father's care, the trial court's findings of fact do not suffice to support a determination that respondent-father's parental rights in Jill were sub-

ject to termination on the basis of "prior neglect and likelihood of a repetition of neglect" theory.

¶ 35 On the other hand, however, the record contains evidence from which a proper repetition of neglect finding could be made in the event that the trial court deemed that evidence to be credible. Among other things, the trial court's other findings of fact reflect that respondent-father "made no effort to locate his daughter or inquire of her maternal family about her well-being" for a substantial period of time after the mother and Jill left Buncombe County, that respondent-father failed to make any effort to locate Jill because "he had his hands full with Steven, that Steven had been adjudicated to be a neglected and dependent juvenile in Buncombe County based upon events that occurred while he was in respondent-father's custody, that respondent-father had failed to complete the psychosexual evaluation that he was ordered to receive in Buncombe County in a timely manner, that respondent-father did not initially comply with his Buncombe County case plan, that respondent-father made no attempt to establish his paternity of Jill until the Nash County DSS arranged for the performance of the necessary test, that it was difficult for employees of the Nash County DSS to reach respondent-father, and that respondent-father was slow in making contact with the maternal aunt after being provided with her e-mail address. In addition, the record contains evidence that, while not fully reflected in the trial court's findings of fact, tends to show that respondent-father exhibited boundary-related limitations in attempting to care for Steven and that Steven exposed himself to Jill during a sibling visit Thus, since we believe that the record contains evidence from which the trial court could, if it elected to do so, find that a repetition of neglect would be probable in the event that Jill was returned to respondent-father's care, we conclude that the portion of the trial court's order determining that respondent-father's parental rights in Jill were subject to termination on the basis of neglect lack sufficient support in the trial court's findings of fact; that the relevant portion of the trial court's order should be vacated; and that this case should be remanded to the District Court, Nash County, for the entry of a new order concerning the extent, if any, to which respondent-father's parental rights in Jill are subject to termination on the basis of neglect and, if so, whether it would be in Jill's best interests for respondent-father's parental rights to be terminated.[6]

6. In view of our determination that the trial court's findings fail to support its conclusion that respondent-father's parental rights in Jill were subject to termination on the basis of any of the grounds for termination set forth in N.C.G.S. § 7B-1111(a), we need not address respondent-father's challenge to the trial court's determination that the termination of his parental rights would be in Jill's best interests.

¶ 36 Thus, for the reasons set forth above, we conclude that the trial court's determination that respondent-father's parental rights in Jill were subject to termination on the basis of abandonment and neglect by abandonment lacked sufficient support in the trial court's findings of fact and that the trial court's determination that respondent-father's parental rights in Jill were subject to termination on the basis of prior neglect and the likelihood of a repetition of neglect rested upon a misapplication of the applicable law. As a result, the trial court's termination order is reversed, in part, and vacated, in part, and this case is remanded to the District Court, Nash County, for further proceedings not inconsistent with this opinion, including the entry of a new termination order containing proper findings of fact and conclusions of law concerning the extent to which respondent-father's parental rights in Jill were subject to termination on the basis of prior neglect coupled with the likelihood of a repetition of neglect and whether the termination of respondent-father's parental rights would be in Jill's best interests.

REVERSED, IN PART; VACATED AND REMANDED, IN PART.

JVC ENTERPRISES, LLC, AS SUCCESSOR BY MERGER TO GEOSAM CAPITAL US, LLC; CONCORD APARTMENTS, LLC; AND THE VILLAS OF WINECOFF, LLC F/K/A THE VILLAS AT WINECOFF, LLC

v.

CITY OF CONCORD

No. 31PA20

Filed 12 March 2021

Cities and Towns—city's authority to levy fees—session law amending city's charter—plain language analysis

In a case involving a challenge by residential subdivision developers (plaintiffs) to defendant-city's authority to levy water and wastewater connection fees for services to be furnished, the plain language of a session law amending the city's charter—which superseded prior session laws that had given a city board the authority to assess fees and charges for services and facilities to be furnished—stated that all powers of the board "shall become powers and duties of the City." This language was unambiguous and transferred the powers held by the board (including the authority to levy water and sewer fees for services to be furnished) to the city, and the

simultaneous dissolution of the board by the same session law did not affect the transfer of the board's powers. Therefore, the trial court properly granted summary judgment to the city where there was no genuine issue of material fact regarding the city's authority to charge the challenged fees.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 269 N.C. App. 13 (2019), reversing and remanding an order entered on 10 October 2018 by Judge Joseph N. Crosswhite in Superior Court, Cabarrus County, granting summary judgment in favor of the City and dismissing all of plaintiffs' claims. Heard in the Supreme Court on 12 January 2021.

Scarborough, Scarborough, & Trilling PLLC, by James E. Scarborough, John Scarborough and Madeline J. Trilling; and Ferguson, Hayes, Hawkins & DeMay, PLLC, by James R. DeMay, for plaintiff-appellees.

Hamilton Stephens Steele & Martin, PLLC, by Keith J. Merritt and Rebecca K. Cheney, for defendant-appellant.

HUDSON, Justice.

¶ 1 Here we must decide whether a series of local acts gives the City of Concord the authority to levy water and wastewater connection fees against plaintiff developers for services to be furnished. We hold that the language of these acts is clear and unambiguous in granting this authority to the City of Concord. Accordingly, we reverse the decision of the Court of Appeals and affirm the trial court's order granting summary judgment to the City and dismissing plaintiffs' claims with prejudice.

I. Factual and Procedural History

¶ 2 In 2004, the City of Concord adopted an ordinance requiring developers of residential subdivisions to pay fees for water and wastewater service before a subdivision plat would be accepted for recordation. The ordinance was updated in 2016 such that fees are now due "at the time" of acquiring a permit.

¶ 3 Plaintiffs are developers who constructed subdivisions within the City of Concord prior to 2016 and paid water and wastewater connection fees to the City prior to development as required by the pre-2016 ordinance. Plaintiffs sued the City on 11 September 2017 seeking a declaratory judgment that these fees were ultra vires and seeking damages

in the amount of fees paid to the City in connection with their developments. Plaintiffs contend that the fees are illegal because the City lacks authority to collect fees prior to furnishing water and sewer services to plaintiffs' subdivisions.

¶ 4 On 17 September 2018 the City moved for partial summary judgment, arguing that its authority to charge water and sewer fees for services "to be furnished" is specifically set forth in the City's Charter. In support of its motion, the City relied on a series of local acts amending, revising, or consolidating the City's Charter between 1959 and 1986. An Act Amending the Charter of the Board of Light and Water Commissioners of the City of Concord, ch. 66, 1959 N.C. Sess. Laws 43 (1959 Act); An Act to Revise and Consolidate the Charter of the City of Concord and to Repeal Prior Local Acts, ch. 744, 1977 N.C. Sess. Laws 970 (1977 Act); An Act to Revise and Consolidate the Charter of the City of Concord and to Repeal Prior Local Acts, ch. 861, § 1, 1985 N.C. Sess. Laws 112 (1986) (1986 Act).[1]

¶ 5 The 1959 Act authorized the Board of Light and Water Commissioners of the City of Concord (the Board) "[t]o fix and collect rates, fees and charges for the use of and for the services and facilities furnished or to be furnished in the form of electrical and water service." 1959 N.C. Sess. Laws at 43, § 1.[2] The 1977 Act revised and consolidated the City's Charter and continued the existence of the Board and its powers. 1977 N.C. Sess. Laws at 971, 973–75, 979–82, §§ 1, 5–6. Finally, the 1986 Act consolidated the City's Charter, dissolved the Board, provided that "[a]ll powers and duties of said Board shall become powers and duties of the City of Concord[,]" and repealed all but two sections of the 1977 Act. 1985 N.C. Sess. Laws at 118–119, §§ 2, 6.

¶ 6 The trial court granted summary judgment for the City on 10 October 2018 dismissing plaintiffs' claims with prejudice. Plaintiffs appealed to the Court of Appeals.[3]

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1. 1985 N.C. Sess. Laws 112 will be referred to as the 1986 Act, since it was enacted and became effective in 1986.

2. An earlier law allowed the Board to levy prospective fees for sewer. An Act to Amend the Charter of the Board of Light and Water Commissioners of the City of Concord, ch. 1180, 1955 N.C. Sess. Laws 1176, 1176 (1955).

3. In resolving this case, the trial court ruled both that the ordinance at issue was consistent with session law and that a particular session law was constitutional. The City also cross-appealed, arguing that the constitutionality of the session law was not properly alleged in plaintiffs' complaint. Beyond reversing the Court of Appeals decision regarding

¶ 7 The Court of Appeals concluded that there were two reasonable interpretations of the City's Charter as amended by the 1986 Act. *JVC Enterprises, LLC v. City of Concord*, 269 N.C. App. 13, 19 (2019). The court went on to conclude that it was compelled by the canon of constitutional avoidance to adopt plaintiff's interpretation that "the 1986 Act eliminated the Board, revoked the power to levy prospective fees" and "vested the City with the ability to levy water and sewer fees consistent with the General Enterprise Statutes." *Id.* at 22. The Court of Appeals ultimately reversed the trial court's grant of summary judgment. *Id.* at 23. The City filed a petition for discretionary review, which we allowed on 1 April 2020.

II. Standard of Review

¶ 8 We review de novo an appeal of a summary judgment order. *In re Will of Jones*, 362 N.C. 569, 573 (2008). "A ruling on a motion for summary judgment must consider the evidence in the light most favorable to the non-movant, drawing all inferences in the non-movant's favor." *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018). "[W]hen the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law," we will affirm an order granting summary judgment to that party. *In re Will of Jones*, 362 N.C. at 573. Likewise, "[w]e review matters of statutory interpretation de novo[.]" *Quality Built Homes Inc. v. Town of Carthage*, 369 N.C. 15, 18 (2016) (citing *In re Ernst & Young, LLP*, 363 N.C. 612, 616 (2009)).

III. Analysis

¶ 9 Here, we review the 1986 Act which amended the Charter for the City of Concord to determine whether the City has the authority to collect water and sewer fees for services "to be furnished." If the City has this authority, then the trial court's grant of summary judgment should be affirmed; if not, we must affirm the Court of Appeals.

¶ 10 "Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144 (1992). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614 (2005). "[H]owever, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative in-

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the meaning of the statute, we decline to address the statute's constitutionality under Article II Section 24 because it was not properly raised by the plaintiffs in their complaint.

tent." *In re Ernst & Young, LLP*, 363 N.C. 612, 616 (2009). Canons of statutory interpretation are only employed "[i]f the language of the statute is ambiguous or lacks precision, or is fairly susceptible of two or more meanings[.]" *Abernethy v. Bd. of Comm'rs*, 169 N.C. 631, 636 (1915).

¶ 11 Section 2 of the 1986 Act provides:

> The Board of Light and Water Commissioners for the City of Concord shall be dissolved. All powers and duties of said Board shall become powers and duties of the City of Concord. All real and personal property and all assets owned by the Board of Light and Water Commissioners shall be held under the name and ownership of the City of Concord.

1985 N.C. Sess. Laws at 118, § 2.

¶ 12 Section 6 provides:

> The following act is repealed: Chapter 744, Session Laws of 1977, except for Sections 5 and 6 of that act.

1985 N.C. Sess. Laws at 119, § 6.

¶ 13 We find no ambiguity or contradiction in this language. By its plain language Section 2 dissolves the Board of Light and Water and transfers all the powers and duties of the Board to the City. We determine that the language is plain and unambiguous and that "shall become" effectively transferred the powers and duties of the Board to the City. As the trial court stated, "[t]he General Assembly was not required to use the word 'transfer' in order to transfer the powers of the Board."

¶ 14 Section 6 then repeals the bulk of the prior City Charter ensuring that there is only one active Charter for the City at a time. Nothing in Section 6 contradicts the language of Section 2 or renders Section 2 ambiguous. Because this language is clear and unambiguous, we "eschew statutory construction in favor of giving the words their plain and definite meaning." *Beck*, 359 N.C. at 614.[4]

¶ 15 The Court of Appeals concluded in its opinion below that the language of the 1986 Act is ambiguous because it "ostensibly both eliminates *and* transfers the powers of the Board afforded by the 1977 Charter." *JVC Enters.*, 269 N.C. App. at 18 (emphasis in original). Plaintiffs have

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4. The parties also discuss 1985 N.C. Sess. Laws. at 118–19, § 4 at length, each party arguing that it bolsters their interpretation of the 1986 Act. Section 4 does not affect our disposition of the issues and therefore we need not address it.

argued that powers and duties cannot be repealed by Section 6 and transferred by Section 2 at the same time. Therefore, plaintiffs urge us to interpret the relevant sections to mean that the powers and duties of the Board are not transferred to the City, but instead that upon the dissolution of the Board, the City retained only the powers granted to it under the Public Enterprise Statutes. We conclude this is not a reasonable reading of the statutory language.

¶ 16 The first sentence of Section 2 dissolves the Board of Light and Water. Had the General Assembly stopped there, the City would only have its general powers under the Public Enterprise Statutes in operating the water and sewer systems formerly belonging to the Board. But the General Assembly elected to do more than just dissolve the Board. It went on to specify that all the powers and duties of the Board "shall become" powers and duties of the City. It would be unreasonable to read this second sentence of Section 2 as meaning that the Board's powers and duties vanish into the powers and duties already held by the City. Such a reading is flawed because it would render the second sentence a meaningless reiteration of the first sentence. *See Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556 (1981) ("It is well established that a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage.").[5]

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5. Plaintiffs also argue that under *Clayton v. Liggett & Myers Tobacco Co.*, 225 N.C. 563 (1945), for defendant's view to be correct we must determine that the 1986 Act contains an express grant of authority to the City to charge fees for services to be furnished. We disagree. The Court in *Clayton* stated:

> [I]t is a general principle of law that municipal corporations are creatures of the legislature of the State, and that they possess and can exercise only such powers as are granted in express words, or those necessarily or fairly implied in or incident to the powers expressly conferred, or those essential to the accomplishment of the declared objects and purposes of the corporation.

225 N.C. at 566. Here, the legislature specifically stated that the powers and duties of the Board shall become those of the City, and thus if the City acts under any of those powers and duties, then it has not acted beyond the scope of authority granted to it by the legislature. The power to charge fees for services to be furnished is "necessarily or fairly implied in or incident to the powers expressly conferred" by the transfer of the Board's powers to the City. *Id.*

Furthermore, the General Assembly has more recently enacted N.C.G.S. § 160A-4 which provides:

¶ 17 Because we conclude that the language is plain and unambiguous, we need not address the arguments regarding constitutional avoidance, which, as a canon of interpretation, is only employed when there are two or more reasonable meanings of the statutory language at issue. *See Abernethy*, 169 N.C. at 636.

IV. Conclusion

¶ 18 We conclude the 1986 Act transfers the Board's authority to collect water and sewer fees for services "to be furnished" to the City, and thus, there is no genuine issue as to any material fact with respect to the City's legislative authority to charge these fees to plaintiffs for their developments. Therefore, the City is entitled to partial summary judgment as a matter of law. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

Justice BERGER did not participate in the consideration or decision of this case.

> [P]rovisions . . . of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect: Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State.

N.C.G.S. § 160A-4 (2019). Thus, the legislature did not have to specifically name each power and duty of the Board in order to transfer those powers and duties to the City.

LAUZIERE v. STANLEY MARTIN CMTYS., LLC

[376 N.C. 789, 2021-NCSC-15]

PAMELA LAUZIERE, EMPLOYEE
v.
STANLEY MARTIN COMMUNITIES, LLC, EMPLOYER, AND AMERICAN ZURICH INSURANCE COMPANY, CARRIER

No. 259A20

Filed 12 March 2021

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 844 S.E.2d 9 (N.C. Ct. App. 2020), reversing and remanding an opinion and award filed on 22 May 2018 by the North Carolina Industrial Commission. Heard in the Supreme Court on 16 February 2021.

Lennon, Camak & Bertics, PLLC, by S. Neal Camak and Michael W. Bertics, for plaintiff-appellee.

Lewis & Roberts, P.L.L.C., by Bryan L. Cantley and Mallory E. Lidaka, for defendant-appellants.

PER CURIAM.

¶ 1 The Court of Appeals shall remand to the full Commission for further consideration in accordance with 11 N.C. Admin. Code 23A.0704 (2020). The full Commission shall review the award and as it deems necessary, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award.

AFFIRMED.

Justice BERGER did not participate in the consideration or decision of this case.

RALEIGH HOUSING AUTHORITY
v.
PATRICIA WINSTON

No. 385PA19

Filed 12 March 2021

Landlord and Tenant—public housing—notice of lease termination—federal requirement to state specific grounds

In a summary ejectment case, plaintiff public housing authority's notice of lease termination to defendant tenant failed to "state specific grounds for termination," pursuant to 24 C.F.R. § 966.4 (l)(3)(ii), where the notice quoted the lease provision defendant allegedly violated but neither identified specific conduct by defendant that violated the provision nor clearly identified the factors forming the basis for terminating the lease. Consequently, the Supreme Court reversed the Court of Appeals' decision holding that the notice complied with federal regulations.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 267 N.C. App. 419 (2019), affirming an order entered on 26 June 2018 by Judge Michael Denning in District Court, Wake County. Heard in the Supreme Court on 12 January 2021.

The Francis Law Firm, PLLC, by Ruth Sheehan and Charles T. Francis and Alan D. Woodlief, Jr., for plaintiff-appellee.

Robinson, Bradshaw & Hinson, P.A., by Erik R. Zimmerman and Ethan R. White; and Legal Aid of North Carolina, Inc., by Andrew Cogdell, Celia Pistolis, Darren Chester, Daniel J. Dore, and Thomas Holderness, for defendant-appellant.

Jack Holtzman, Emily Turner, Elizabeth Myerholtz, Lisa Grafstein, and Lisa Nesbitt for Disability Rights North Carolina, North Carolina Justice Center, North Carolina Housing Coalition, North Carolina Coalition to End Homelessness, North Carolina Coalition Against Domestic Violence, amici curiae.

BARRINGER, Justice.

¶ 1 This case presents us with the question of whether a notice of lease termination provided to a tenant of public housing "state[d] specific

grounds for termination." 24 C.F.R. § 966.4(*l*)(3)(ii) (2019).[1] Plaintiff Raleigh Housing Authority (RHA) provided a notice of lease termination to defendant Patricia Winston (Winston) that notified her of RHA's intent to terminate her lease due to "Inappropriate Conduct – Multiple Complaints" and quoted provision 9(F) of the lease agreement. Because the notice of lease termination failed to provide Winston with the factors necessary for her to be on notice of RHA's justification for the termination of her lease on this record, we reverse the decision of the Court of Appeals.

I. Background

¶ 2 RHA filed a complaint in summary ejectment against Winston on 13 April 2018 in District Court, Wake County. RHA's complaint alleged that the lease period had ended, and Winston was holding over after the end of the lease. In her answer, Winston denied these allegations and raised as a defense that the notice of lease termination "d[id] not state with specificity defendant's alleged 'Inappropriate Conduct' " and "violates federal lease notice requirements" citing 24 C.F.R. § 966.4(*l*)(3)(ii). The lease agreement between Winston and RHA stated that "[t]he notice of termination to the Resident shall state reason(s) for the termination." Following a summary ejectment trial in April 2018 and a hearing on RHA's motion for eviction on 25 June 2018,[2] the trial court entered an order allowing immediate possession of the apartment to RHA. In the order allowing immediate possession, the trial court made the following findings of fact:[3]

> 3. On April 17, 2017 [t]he Defendant entered into a renewable twelve-month lease ("Lease") with the Plaintiff for a one-bedroom apartment (Apartment #206) at 150 Gas Light Creek Court, Raleigh, N.C. 27601.

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1. While Winston cites court decisions from other jurisdictions addressing other regulations under Title 24, "Housing and Urban Development," Winston has not argued that any regulation addressing written notice applies other than 24 C.F.R.§ 966.4(*l*)(3)(ii) (2019).

2. The trial court's order allowing immediate possession indicates that the trial court is addressing RHA's motion for eviction. However, the trial court stated at the hearing that the trial court was hearing an appeal of a summary ejectment.

3. Winston has not challenged any of the trial court's findings of fact on appeal to this Court. The trial court's findings of fact are therefore binding on appeal. *See, e.g.*, *Mussa v. Palmer-Mussa*, 366 N.C. 185, 191 (2012).

4. Between October 2017 and November 2017, Plaintiff received three (3) written complaints from other tenants in the apartment complex about noise disturbances coming from Defendant's apartment[.]

5. After the first written complaint[,] Plaintiff issued the Defendant a written warning indicating to the Defendant that a complaint had been filed against her for noise disturbance.

6. On or about December 1, 2017, after receiving a third written complaint from a tenant in the apartment complex, Plaintiff sent a letter to Defendant indicating that her lease would be terminated on December 31, 2017 as a result of violating Paragraph 9(f) of the Lease.

7. Violating Paragraph 9(f) is a material breach of the Lease.

8. After issuing the lease termination notice, Plaintiff had an informal meeting with the Defendant to discuss why her lease was being terminated.

9. Plaintiff rescinded the lease termination letter after the informal meeting, as the Defendant made the Plaintiff aware that Defendant had been a victim of domestic violence.

10. The [c]ourt takes judicial notice of the North Carolina Court Information System Electronic-Filing for Domestic violence complaints and notes that on December 5th, 2017, *after* RHA had hand delivered and sent via Certified mail return receipt requested the first notice of Lease Termination to the Defendant, Defendant file[d] for an Ex Parte Domestic Violence Protective Order (DVPO) against [another individual].

11. Defendant's request for an Ex-Parte DVPO was DENIED on December 5th, 2017, and, notable her reasons for requesting the order were:

> He deserve [sic] my neighbor my landlord was going to put me out because she didn't want here and I didn't want he there but if he keep coming I we have to leave.

> 12. Defendant did not obtain a DVPO against [the other individual] until the return hearing on December 18th, at that hearing [the other individual] was not present and the Defendant's allegations had changed substantially:
>
> > defendant repeatedly screams profanity at plaintiff and threatens to assault her; repeatedly verbal abuse for 17 years has caused her substantial emotional distress[.]
>
> 13. At the time of the first warning Defendant indicated to Plaintiff that she intended to get a no trespass order against [the other individual].
>
> 14. On or about February 5, 2018, the Plaintiff received another noise complaint against the Defendant.
>
> 15. On or about February 13, 2018, the Plaintiff issued a second notice of lease termination to the [Defendant].
>
> 16. On or about February 17, 2018, the Defendant wrote a memo to the Plaintiff acknowledging the noise disturbances and alleging that the disturbances were a result of [the other individual's] three friends.
>
> 17. Just after receiving the 2nd notice to terminate her lease, Defendant sent a letter to the RHA indicating she intended to get a no trespass order for the other three friends of [the other individual]. Defendant has neither received a no trespass order for any of the individuals nor has she made any affirmative efforts to do so.
>
> 18. Per the Defendant's rights, she had a grievance hearing on or about March 6, 2018 with an independent third party. The grievance hearing affirmed the Plaintiff's decision to terminate the Defendant's lease.

¶ 3 From these facts, the trial court concluded that "[d]efendant has . . . been given adequate notice of her violations of Paragraph 9(f) of the Lease."

¶ 4 The Court of Appeals concluded that the trial court did not err by reaching this conclusion. *Raleigh Hous. Auth. v. Winston*, 267 N.C. App.

419, 424 (2019). The Court of Appeals held that "the Notice of Lease Termination to Defendant was in compliance with the governing federal regulation" because it "identified—and quoted—the specific provision serving as the basis for Defendant's lease termination." *Id.*

¶ 5 Winston sought discretionary review in this Court, asking this Court to consider "[w]hether a reference to a provision of a lease alone satisfies a public housing authority's obligation under federal law to 'state specific grounds' for terminating the lease." Winston also sought discretionary review concerning the business records exception to hearsay. This Court allowed the petition for discretionary review on both issues presented. We reverse the decision of the Court of Appeals on the first issue presented and remand to the trial court for dismissal. Accordingly, we decline to address the evidentiary issue concerning the business records exception and express no opinion concerning the manner in which the Court of Appeals resolved that issue.

II. Standard of Review

¶ 6 "In federally subsidized housing cases, the court decides whether applicable rules and regulations have been followed, and whether termination of the lease is permissible." *E. Carolina Reg'l Hous. Auth. v. Lofton*, 238 N.C. App. 42, 46 (2014) (quoting *Charlotte Hous. Auth. v. Patterson*, 120 N.C. App. 552, 555 (1995)), *aff'd as modified*, 369 N.C. 8 (2016). The construction of an administrative regulation is a question of law. *United States v. Moriello*, 980 F.3d 924, 930 (4th Cir. 2020). "On appeal, '[c]onclusions of law drawn by the trial court from its findings of fact are reviewable *de novo*.' " *In re Estate of Skinner*, 370 N.C. 126, 140 (2017) (alteration in original) (quoting *In re Foreclosure of Bass*, 366 N.C. 464, 467 (2013)); *see also Moriello*, 980 F.3d at 930.

III. Analysis

¶ 7 At issue in this case is the construction of the term "specific grounds" in 24 C.F.R. § 966.4(*l*)(3)(ii). Section 966.4 of Title 24 of the Code of Federal Regulations states:

> § 966.4 Lease requirements.
>
> A lease shall be entered into between the PHA and each tenant of a dwelling unit which shall contain the provisions described hereinafter.
>
> . . . .
>
> (l) *Termination of tenancy and eviction—*

. . . .

(3) *Lease termination notice.*

. . . .

(ii) The notice of lease termination to the tenant shall state specific grounds for termination, and shall inform the tenant of the tenant's right to make such reply as the tenant may wish. The notice shall also inform the tenant of the right (pursuant to § 966.4(m)) to examine PHA documents directly relevant to the termination or eviction. When the PHA is required to afford the tenant the opportunity for a grievance hearing, the notice shall also inform the tenant of the tenant's right to request a hearing in accordance with the PHA's grievance procedure.

24 C.F.R. § 966.4.

¶ 8 "In resolving issues of statutory construction, we look first to the language of the statute itself." *Walker v. Bd. of Trs. of the N.C. Loc. Gov'tal Emps.' Ret. Sys.*, 348 N.C. 63, 65 (1998) (quoting *Hieb v. Lowery*, 344 N.C. 403, 409 (1996)); *see also Radford*, 734 F.3d at 293 (citing *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 204 (2011)). When the term in the statute is unambiguous, the term "should be understood in accordance with its plain meaning." *Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 20 (2017); *see also Moriello*, 980 F.3d at 934 ("If the language of the regulation 'has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written.' " (quoting *Gilbert v. Residential Funding LLC*, 678 F.3d 271, 276 (4th Cir. 2012)). To determine the plain meaning, this Court has looked to dictionaries as a guide. *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258 (2016).

¶ 9 In 24 C.F.R. § 966.4(*l*)(3)(ii), the adjective "specific" modifies the noun "grounds." "Grounds" is defined as "factors forming a basis for action or the justification for a belief." *Grounds*, *New Oxford American Dictionary* (3rd ed. 2010); *see also Ground*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2007) (defining "ground" as "a basis for belief, action, or argument"); *Ground*, *Black's Law Dictionary* (11th ed. 2019) (defining "ground" as "[t]he reason or point that something (as a legal claim or argument) relies on for validity"). Meanwhile, "specific" is defined as "clearly defined or identified." *Specific*, *New Oxford American Dictionary* (3rd ed. 2010); *see also Specific*, *Merriam-*

Webster's Collegiate Dictionary (11th ed. 2007) (defining "specific" as "free from ambiguity").

¶ 10 The plain meaning of "specific grounds" therefore requires RHA to clearly identify the factors forming the basis for termination of the lease. Applying the unambiguous plain meaning of "specific grounds" leads us to conclude that RHA failed to comply with 24 C.F.R. § 966.4(*l*)(3)(ii).

¶ 11 The relevant portion of the notice of termination states:

> **You are hereby notified that the Housing Authority intends to terminate your Lease to the premises at 150-206 Gas Light Creek Court under the provisions in your Lease Agreement and pursuant to Raleigh Housing Authority's Grievance Procedure due to the following:**
>
> **Inappropriate Conduct – Multiple Complaints**
>
> **9. OBLIGATIONS OF RESIDENT**
> **F. To conduct himself/herself and cause other persons who are on the premises with the Resident's consent to conduct themselves in a manner which will not disturb the neighbors' peaceful enjoyment of their accommodations.**

¶ 12 As evidenced above, the notice of termination identifies provision 9(F) of the lease agreement, providing the contractual basis for termination of the lease. However, the notice of termination lacks any reference to specific conduct by Winston. RHA contends the "language [in the notice of termination] put . . . Winston on notice that her alleged lease violation was based on disturbing her neighbors." Yet, a tenant's disturbance of her neighbors encompasses a broad range of conduct, may involve the tenant or other persons on the premises, and, as relevant to this case, may include conduct for which the landlord may not evict the tenant as a matter of law. Specifically, as part of the Violence Against Women Act, ch. 322, 108 Stat. 1902 (1994), Congress has prohibited covered housing programs from terminating participation in or evicting a tenant from housing "on the basis that the . . . tenant is or has been a victim of domestic violence, dating violence, sexual assault, or stalking," 34 U.S.C. § 12491(b)(1), and mandates that

> [a]n incident of actual or threatened domestic violence, dating violence, sexual assault, or stalking shall not be construed as—
>
> (A) a serious or repeated violation of a lease for housing assisted under a covered housing program by the victim or threatened victim of such incident; or

> (B) good cause for terminating the assistance, tenancy, or occupancy rights to housing assisted under a covered housing program of the victim or threatened victim of such incident.

34 U.S.C. § 12491(b)(2); *see also* N.C.G.S. § 42-42.2 (2019) (prohibiting termination of tenancy or "retaliat[ion] in the rental of a dwelling based substantially on: (i) the tenant, applicant, or a household member's status as a victim of domestic violence, sexual assault, or stalking"). The additional statement in the notice of termination—"Inappropriate Conduct – Multiple Complaints"—is similarly broad and vague and subject to the same concerns as provision 9(F) of the lease agreement.

¶ 13 As a whole, the notice of termination is indeterminate. Winston cannot determine from the notice of termination how RHA contends she breached provision 9(F) of the lease agreement, and none of the trial court's factual findings support a conclusion otherwise. In the notice of termination, RHA failed to clearly identify the factors forming the basis for termination of the lease—the specific grounds for termination. Winston lacked adequate notice of the basis for the termination of lease.

IV. Conclusion

¶ 14 We reverse the decision of the Court of Appeals. In this case, the identification and quotation of the specific provision serving as the basis for the landlord's lease termination does not comply with 24 C.F.R. § 966.4(*l*)(3)(ii) because the factors forming the basis for termination of the lease cannot be discerned. While a quotation of the violated lease provisions in certain factual circumstances may provide "specific grounds for termination," *cf. Roanoke Chowan Reg'l Hous. Auth. v. Vaughan*, 81 N.C. App. 354, 358 (1986) (holding that the notice of termination provided the specific grounds for termination even though it incorrectly cited Section 7 of the lease agreement because the statement—"by allowing individuals not named on the lease to reside in your apartment"—"put defendants on notice regarding the specific lease provision deemed to have been violated"), this issue and such a notice is not before us. We hold that on this record, the notice of termination was fatally deficient. Accordingly, we reverse the Court of Appeals' decision concerning compliance with 24 C.F.R. § 966.4(*l*)(3)(ii) and remand to the Court of Appeals for remand to the trial court for dismissal consistent with this opinion.

REVERSED AND REMANDED.

RED VALVE, INC. v. TITAN VALVE, INC.

[376 N.C. 798, 2021-NCSC-17]

RED VALVE, INC., AND HILLENBRAND, INC.
v.
TITAN VALVE, INC., BEN PAYNE, FABIAN AEDO ORTIZ, AND JOHN DOES 1–10

No. 22A20

Filed 12 March 2021

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order and opinion on plaintiffs' verified motion for order to show cause and second motion for sanctions and contempt entered on 3 September 2019 and an order and opinion on plaintiffs' petition for reasonable expenses resulting from plaintiffs' second motion for sanctions entered on 5 September 2019 by Judge Louis A. Bledsoe III, Chief Special Superior Court Judge for Complex Business Cases, in Superior Court, Mecklenburg County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 16 February 2021.

Nelson Mullins Riley & Scarborough LLP, by Benjamin S. Chesson, David N. Allen, and Anna C. Majestro, for plaintiff-appellees.

Bell, Davis & Pitt, PA., by Joshua B. Durham and Edward B. Davis, for defendant-appellants.

PER CURIAM.

AFFIRMED.[1]

1. The order and opinion of the North Carolina Business Court entered on 3 September 2019, 2019 NCBC 56, is available at https://www.nccourts.gov/assets/documents/opinions/2019_NCBC_56.pdf, and the order and opinion of the North Carolina Business Court entered on 5 September 2019, 2019 NCBC 57, is available at https://www.nccourts.gov/assets/documents/opinions/2019_NCBC_57.pdf.

STATE v. CORBETT

[376 N.C. 799, 2021-NCSC-18]

STATE OF NORTH CAROLINA
v.
MOLLY MARTENS CORBETT AND THOMAS MICHAEL MARTENS

No. 73A20

Filed 12 March 2021

1. Evidence—hearsay—child witnesses—medical treatment exception—indices of reliability

In a prosecution of a father and his daughter who were accused of killing the daughter's husband during an altercation, the trial court erred by excluding statements made by the victim's two children during medical evaluations conducted a few days after the victim was killed. Objective circumstances, including that trained professionals explained to the children the importance of being truthful and that the evaluation was conducted in close proximity in time and space to a physical examination by a doctor, sufficiently demonstrated that the statements were made for the purpose of obtaining a medical diagnosis and met the reliability standards required by Evidence Rule 803(4).

2. Evidence—hearsay—child witnesses—residual hearsay exception—guarantees of trustworthiness

In a prosecution of a father and his daughter who were accused of killing the daughter's husband during an altercation, the trial court abused its discretion by excluding statements from the victim's two children made to a social worker because its findings—that the children did not have personal knowledge of their statements, that the children lacked motivation for telling the truth, and that the statements were specifically recanted—were overly broad and not fully supported by the evidence. Neither these findings, nor the record evidence, supported the court's conclusion that the children's statements were not sufficiently trustworthy to be admitted under the residual hearsay exception in Evidence Rule 803(4).

3. Appeal and Error—preservation of issues—expert testimony—adequacy of objections—by operation of law

In a prosecution of a father and his daughter who were accused of killing the daughter's husband during an altercation, a challenge to a portion of expert testimony on bloodstain patterns (spatters which were never tested to confirm they were the victim's blood) was properly preserved for appellate review. Despite defendants'

failure to object to the challenged portion, their objections to the expert's report containing the same conclusions and other portions of the expert testimony were sufficient to preserve the issue for review. Further, the issue was preserved by operation of law pursuant to N.C.G.S. § 15A-1446(d)(10) where the Court of Appeals determined that the blood spatter evidence was improperly admitted and that issue was not appealed to the Supreme Court.

4. Evidence—murder trial—one defendant's testimony—co-defendant's out-of-court statement—non-hearsay

In a prosecution of a father and his daughter who were accused of killing the daughter's husband during an altercation, the trial court erred by excluding testimony by the father that he heard his daughter say "Don't hurt my dad" during the altercation, because the statement did not constitute hearsay where it was offered not to prove the truth of the matter asserted, but to illustrate the father's state of mind, and was relevant to whether his subjective fear of the victim was reasonable for purposes of his claims of self-defense and defense of another.

5. Homicide—evidentiary errors—prejudice—new trial

In a prosecution of a father and his daughter for the unlawful killing of the daughter's husband during an altercation, where the trial court committed multiple evidentiary errors, defendants were entitled to a new trial because they were deprived of an opportunity to fully present their claims of self-defense and defense of another. Defendants were primarily prejudiced by the court's exclusion of statements made by the victim's children, which would have corroborated defendants' version of events and provided context, and there was a reasonable possibility that the admission of those statements would have resulted in a different outcome at trial.

Justice BERGER dissenting.

Chief Justice NEWBY and Justice BARRINGER join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 269 N.C. App. 509 (2020), reversing judgments entered on 9 August 2017 by Judge W. David Lee in Superior Court, Davidson County, and remanding for a new trial. Heard in the Supreme Court on 11 January 2021.

STATE v. CORBETT

[376 N.C. 799, 2021-NCSC-18]

Joshua H. Stein, Attorney General, by Jonathan P. Babb and L. Michael Dodd, Special Deputy Attorneys General, for the State-appellant.

Tharrington Smith, L.L.P., by Douglas E. Kingsbery, for defendant-appellee Molly Martens Corbett.

Dudley A. Witt, David B. Freedman, and Jones P. Byrd, Jr. for defendant-appellee Thomas Michael Martens.

EARLS, Justice.

¶ 1 In the early morning hours of 2 August 2015, a Davidson County 911 operator received a call regarding an incident at 160 Panther Creek Court. The caller, Thomas Martens (Tom), reported that his son-in-law, Jason Corbett (Jason), "got in a fight" with his daughter, Molly Martens Corbett (Molly), and that he had found Jason "choking my daughter. He said, 'I'm going to kill her.' " Tom told the dispatcher that he had hit Jason in the head with a baseball bat. Jason was "in bad shape. We need help. . . . He, he's bleeding all over, and I, I may have killed him." The 911 operator instructed Tom and Molly to perform CPR while emergency medical technicians (EMTs) were dispatched to the home. When they got there, the EMTs found Molly performing chest compressions on Jason in the master bedroom, but Jason did not survive. Law enforcement officers who arrived shortly thereafter found Molly "very obviously in shock." She told the officers she had been choked.

¶ 2 Subsequently, Molly and Tom were charged with and ultimately convicted of second-degree murder for the homicide of Jason. From their first call to 911 through the trial, Molly and Tom did not deny that they had killed Jason. Instead, they maintained that they had lawfully used deadly force to defend themselves while under the reasonable apprehension that they were facing an imminent threat of deadly harm during a violent altercation initiated by Jason. On appeal, a divided panel of the Court of Appeals vacated Molly's and Tom's convictions and ordered a new trial. *State v. Corbett*, 269 N.C. App. 509, 512, *writ allowed*, 373 N.C. 580, *and writ dismissed*, 375 N.C. 276 (2020).

¶ 3 The jury in this case did not have to determine who killed Jason. Instead, they had to decide to believe either Tom's testimony that Jason was threatening to kill Molly and was in the process of choking her to death, or to believe the State's theory that Tom and Molly were the aggressors in the altercation and killed Jason without justification. After

careful review, we agree with the majority below that the trial court committed prejudicial error in excluding evidence that went to the heart of defendants' self-defense claims. The trial court's errors in excluding certain evidence deprived defendants of the full opportunity to put the jury in their position at the time they used deadly force. In turn, this deprived the jury of evidence necessary to fairly determine whether Tom and Molly used deadly force at a moment when they were actually and reasonably fearful for their lives. Accordingly, we affirm the decision of the Court of Appeals and remand to the trial court for a new trial.

I. Background

¶ 4 Jason was a citizen and resident of the Republic of Ireland. He had two children, Jack and Sarah, with his first wife, Margaret. Margaret died unexpectedly in 2006, from what the Irish authorities determined to be complications of an asthma attack, just eleven weeks after giving birth to Sarah. In late 2007 or early 2008, Jason hired Molly to work as an au pair in his home in Ireland. The two later began a romantic relationship. In 2011, Jason, Molly, Jack, and Sarah moved to Davidson County, North Carolina, after Jason transferred to an office his employer had recently opened in the United States. Jason and Molly married that same year.

A. The Altercation

¶ 5 At around 8:30 p.m. on 1 August 2015, Molly's parents, Tom and Sharon Martens, who lived in Tennessee, arrived at the Corbett's home in Davidson County for a visit. Tom—a retired FBI agent and former attorney—brought an aluminum baseball bat and a tennis racket as gifts for Jack. According to Tom's testimony, Jason had been drinking beer with his neighbor but was pleasant and social during the evening. Jack, who had been at a party at a friend's house, returned home around 11:00 p.m. Because it was late, Tom decided to wait until the following morning to give Jack the bat and tennis racket. Tom and Sharon went to sleep in the guest bedroom, located on the floor below the master bedroom where Jason and Molly typically slept.

¶ 6 Tom testified that in the middle of the night, he was awakened by the sound of thumping on the floor above him, followed by "a scream and loud voices." He thought "it sounded bad . . . like a matter of urgency." He grabbed the baseball bat and ran upstairs toward the source of the noises, which he determined was the master bedroom. Inside the bedroom, Tom encountered Jason and Molly facing each other. Jason's hands were around Molly's neck. Tom testified that he told Jason to let Molly go, to which Jason replied, "I'm going to kill her." Tom again asked Jason to let Molly go, to which Jason again replied, "I'm going to kill

her." Jason then "reversed himself so that he had [Molly's] neck in the crook of his right arm" and started dragging Molly toward the bathroom.

¶ 7 According to Tom, he feared that if Jason reached the bathroom with Molly, Jason would close the door and kill her. In an effort to impede Jason, Tom swung the baseball bat at "the back of the two of them glued together." However, the initial blow apparently had no effect on Jason. From Tom's perspective, it only "further enraged" him. Tom continued striking Jason "to distract him because he now had Molly in a very tight chokehold" and "she was no longer wiggling." Tom was unable to prevent Jason from reaching the bathroom. However, after following Jason into the bathroom, Tom struck Jason in the head with the bat. In response, Jason charged out of the bathroom and back toward the master bedroom, pushing Molly in front of him. Tom continued to swing the baseball bat at Jason to try to separate him from Molly. Eventually, Molly slipped out of Jason's arms, but Jason was able to wrestle the bat out of Tom's grasp. Tom, who had lost his glasses and was pushed to the floor in the struggle, testified that he heard Molly yell "[d]on't hurt my dad," although this portion of his testimony was stricken upon the State's objection. In a written statement admitted into evidence at the trial, Molly maintained that at some point after Jason took the bat from Tom, she "tried to hit [Jason] with a brick (garden décor) I had on my nightstand."

¶ 8 When Tom regained his footing, he saw Molly trapped between Jason and the bedroom wall. He claimed that he was physically weakened and in fear for both his daughter's life and his own. Jason was twenty-six years younger than Tom and outweighed him by more than 100 pounds. Tom testified the following:

> A. . . . I'm on the other side of the room at the end of the bed. And things look pretty bleak. He's got the bat. He's in a . . . good athletic position. He has his weight down on the balls of his feet. He's kind of looking between me and Molly. And so I decided . . . to rush him and try to get ahold of the bat.
>
> . . . .
>
> A. . . . [A]s desperate as it seemed, it seemed like the only thing to do. And so I rush him and I do get both hands on the bat (demonstrating). Now there are four hands on the bat. And we are struggling over control of the bat. And this is not—this is not good for me. He's bigger and stronger and younger.

. . . .

A. . . . I try to hit him this way with the end of the bat. I try to hit him with this end of the bat. I don't know. I'm trying to hit him with anything I can (demonstrating) and I win. I get control of the bat. He loses his grip. And I hit him. And—

Q. Why did you hit him?

A. Because I don't want him to take the bat away from me and kill me. I mean—just because he lost control of the bat doesn't mean this is over. This was far from over. And so I still think that, you know, he has the advantage even though—'cause I know what I'm feeling like. I'm shaking. I'm not doing good now. And so I hit him. And I hit him until he goes down. And then I step away.

Q. Do you know how many times you hit him?

A. I don't.

Q. And why did you continue to hit him after the first hit?

A. I hit him until I thought that he could not kill me. I thought that he was—I mean, he said he was going to kill Molly. I certainly felt he would kill me. I felt both of our lives were in danger. I did the best I could.

Tom gathered his thoughts and told Molly "we need to call 911." Both Tom and Molly were themselves "in pretty bad shape," but Molly eventually brought Tom a phone, and they called 911.

B. The Investigation

¶ 9 The first EMT to arrive at the scene found Jason on the floor of the master bedroom. He noticed a baseball bat and a brick paver near Jason's body. There was "blood all over the floor and the walls." The EMT could not locate a pulse. When the EMT tried to lift Jason's chin for intubation, the fingers on the EMT's left hand "went inside [Jason's] skull," and he realized that "there was severe heavy trauma to the back of the head." Other EMTs who attempted to revive Jason testified that his body "felt cool" when they arrived and that they observed dried blood. The forensic pathologist who conducted Jason's autopsy concluded that

he had died from "multiple blunt force injuries" which included "ten different areas of impact on the head, at least two of which had features suggesting repeated blows indicating a minimum of 12 different blows to the head." According to the forensic pathologist, the "degree of skull fractures . . . are the types of injuries that we may see in falls from great heights or in car crashes under other circumstances."

¶ 10 Corporal Clayton Stewart Daggenhart of the Davidson County Sheriff's Office arrived at the scene at 3:16 a.m. At trial, he testified that he found a naked white male lying on his back in the master bedroom with "several areas of blood next to him that appeared to be puddled." There were significant amounts of blood on the bedroom wall. Corporal Daggenhart also observed a "brick stone or paving stone and a baseball bat" near the body. A photograph of the brick paver revealed hair "scattered throughout" the markings on its surface. After exiting the bedroom, Corporal Daggenhart encountered Tom and Molly. He did not notice anything "remarkable" about either defendant, other than that Molly had blood on the top of her head. He asked Tom and Molly to exit the house, and then went to Jack's and Sarah's bedrooms to wake the children and escort them outside.

¶ 11 Deputy David Dillard of the Davidson County Sheriff's Office was tasked with observing Molly while law enforcement officers were investigating inside the home. He testified that he noticed dried blood on her forehead and face but no obvious injuries. According to Deputy Dillard, Molly "was making crying noises but I didn't see any visible tears. She was also rubbing her neck." Another officer who photographed Molly in order to document her physical condition testified that she was "continually tugg[ing] and pull[ing] on her neck with her hand." At some point, EMTs who came to check on Molly found her curled up in a fetal position on the grass. They noticed that her neck was red.

¶ 12 When ruling on whether to admit the children's statements at issue in this case, Molly's interview from early that morning at the Davidson County Sheriff's Office was before the trial court. In the videotaped interview, Molly told the investigators that Jason had been experiencing anger issues which, in recent months, had gotten progressively worse. She stated that Jason had been verbally and physically abusive toward her on numerous occasions and that his outbursts were often triggered by seemingly trivial matters.[1] Molly told investigators that earlier that

1. Jason's medical records, which were unsealed and admitted as evidence at trial, revealed that a couple of weeks prior to his death, Jason had complained to his doctor about feeling "angry lately for no reason."

evening, Jason had become angry at her after being awakened by his daughter, Sarah, who had entered their bedroom after becoming frightened by the designs on her bedsheets. Molly alleged that when she tried to defend Sarah's behavior by pointing out that she was only seven years old, Jason told Molly to "shut up" and began choking her.

¶ 13 Also before the trial court was the fact that at the urgent request of the Davidson County Sheriff's Office, a social worker from the Union County Department of Social Services (DSS) had interviewed Jack, Sarah, and Molly on the day after Jason's death, 3 August 2015. The social worker's arrival was unannounced. Molly was not home when the social worker separately interviewed Jack and Sarah. The social worker's notes reflect that Jack disclosed that "[Jason] gets mad at [Molly] for no good reason" and that "[Jason] curses [Molly]." He also disclosed that "[Jason's anger] can be for anything, such as leaving a light on." Sarah disclosed that "[Jason] is angry on a regular basis," that "seemingly innocuous things . . . set him off," and that "she has seen Jason pull Molly's hair." After Molly returned home, she told the social worker that Jason frequently became angry at both her and the children and that the children would "lie [to Jason] almost daily trying to protect her for fear of what their father may do."

¶ 14 Three days later, on 6 August 2015, Davidson County DSS and the Davidson County Sheriff's Office arranged for Jack and Sarah to complete a child medical evaluation at Dragonfly House, an accredited child advocacy center in Mocksville, North Carolina. The purpose of the child medical evaluation was to determine whether Jack and Sarah had witnessed domestic violence or experienced child abuse and, if necessary, to diagnose the children as victims of child abuse and develop an appropriate treatment plan. Molly's mother, Sharon, drove Jack and Sarah to Dragonfly House immediately following Jason's funeral. At Dragonfly House, Jack and Sarah were seen by a child advocate, a forensic interviewer, and a pediatrician. Jack told the forensic interviewer that his parents "didn't get along very well. . . . My dad got mad about bills, leaving lights on, um, and it he (sic) just got very mad at simple things." He stated that Jason "physically and verbally hurt my mom," that he had witnessed Jason "punching, hitting, [and] pushing" Molly "[o]nce or twice," and that he had noticed Jason "[g]etting madder . . . he's been cussing and screaming a lot more, getting a lot angrier" over the preceding months. Jack told the interviewer that in the event of a really bad emergency, which he defined as "[h]itting or cussing that would be going on and on and on without stopping for an hour or two, maybe more," the kids knew to call their maternal grandparents and say

a "key word" which would summon the grandparents to their home and then hang up the phone. Jack's "key word" was "Galaxy." Sarah's was "Peacock." In response to a question asked at the request of law enforcement, Jack explained that the reason the décor paver was in his parents' bedroom was because "we were going to paint it so it would look pretty, and that—it was in my mom's room, because it was raining earlier, and we already—we were going to paint it. We didn't want it getting all wet. So we brought it inside, and my mom put it at her desk."

¶ 15 During her forensic interview, Sarah also stated that she knew to call her grandma in the event of an emergency and "just say Peacock and hang up the phone, and she would come over to our house." She told the interviewer that Jason "gets really angry" at Molly "for like ridiculous reasons." She described how she would "go downstairs to my parents' bedroom" if she woke up after having a nightmare, but that whenever she went to get Molly, she "tried to go [into the bedroom] as quiet as possible, because my dad—I do not want my dad to wake up, because that's not a good thing. Because he just gets very, very, angry." She further explained that "what caused my dad being really mad" the night of the altercation was that "my mom kept on coming upstairs because I—like I have fairies on my bed, and I really got scared of those things, because they look like there are spiders and lizards on my bed. So that's why my mom had to keep on coming up [to my room]. I couldn't fall asleep until my mom put another sheet on my bed, and then my dad got mad.

¶ 16 Jack and Sarah were both diagnosed as victims of child abuse and recommended to receive treatment and mental health services. By court order in a separate contested custody proceeding, Jack and Sarah were subsequently placed in the custody of Jason's sister and her husband (Mr. and Mrs. Lynch) in Ireland.

C. The Trial

¶ 17 On 18 December 2015, Tom and Molly were indicted for second-degree murder and voluntary manslaughter. Both defendants pleaded not guilty. Because Jack and Sarah were residing in Ireland and unavailable to testify at trial, Molly filed a pre-trial motion seeking to admit the children's statements to the DSS social worker and their statements at Dragonfly House into evidence. The State objected and moved to have all of the children's statements excluded. During a pre-trial hearing, the State submitted to the trial court a video and transcript of Jack being interviewed via Skype from Mr. and Mrs. Lynch's home in Ireland and various unauthenticated materials the children had purportedly written after returning to Ireland. The interview was conducted on 27 May

2016 by an assistant district attorney (ADA) from the Davidson County District Attorney's Office. During the interview, Jack told the ADA that "I didn't tell the truth at Dragonfly" or when he spoke with DSS. He claimed that Molly coerced the children into lying by telling them that Mr. and Mrs. Lynch would obtain custody and take them back to Ireland, where she would never see them again, unless they told investigators "that our dad was abusive and . . . that he was very mean to Molly." Jack also claimed that Molly had physically abused him. When the ADA asked why he was "telling the truth today" after lying previously, Jack replied "[b]ecause I just want the truth. And I found out what happened to my dad, and I want justice to be served." The trial court ruled that Jack's and Sarah's statements to the DSS social worker and at Dragonfly House were inadmissible hearsay and denied defendants' motion to admit the children's statements into evidence.

¶ 18 Tom and Molly were tried jointly in the Superior Court, Davidson County. The State's case centered on the forensic evidence—which established that Jason had been killed by repeated blows to the head from either the aluminum baseball bat or the brick paver—and testimony from the EMTs and law enforcement officers who were present at the home on the night of Jason's death. In addition, the State presented expert testimony from Stuart H. James, an expert in bloodstain pattern analysis. James testified that based on his review of the photographs and videos taken at the scene of the crime, as well as the physical evidence collected by law enforcement, the bloodstain patterns he examined were "consistent with impacts to the head of [Jason] as he was descending to the floor with his head contacting the south wall in the areas of the impact." According to James, small blood spatters on the boxer shorts Tom was wearing during the altercation were "impact spatters . . . consistent with the wearer of these boxer shorts in proximity to the victim Jason Corbett when blows were struck to his head" and that blood spatters found on the underside of Tom's boxer shorts "were consistent with the wearer of the shorts close to and above the source of the spattered blood." He also testified that blood spatters on Molly's pajama bottoms indicated that she was near Jason when his head was struck as he was descending to the floor.

¶ 19 Tom and Molly claimed self-defense. Molly did not testify or present evidence. With defendants' consent, the State introduced into evidence the written statement that Molly gave to law enforcement officers in the hours after Jason's death. Tom took the stand and called one character witness. During his testimony, Tom shared his version of the altercation leading to Jason's death, as recounted above. The trial court sustained

the State's objection to the portion of Tom's testimony in which he recalled hearing Molly yell "[d]on't hurt my dad." Tom admitted that he had previously made disparaging comments about Jason to a coworker after an incident involving a party Jason attended at Tom's home.

¶ 20 On 9 August 2017, the jury returned verdicts finding both defendants guilty of second-degree murder. The defendants were each sentenced to a term of 240 to 300 months imprisonment. They gave oral notice of appeal in open court.[2]

D. The Court of Appeals' Decision

¶ 21 Although defendants raised thirteen issues on appeal, the Court of Appeals described the ultimate question at trial as "deceptively simple, boiling down to whether Defendants lawfully used deadly force to defend themselves and each other during the tragic altercation with Jason." *Corbett*, 269 N.C. App. at 512. Relevant for the purposes of our review, defendants challenged (1) the trial court's exclusion of Jack's and Sarah's statements to DSS and at Dragonfly House, (2) the trial court's admission of a portion of James's expert testimony based upon his examination of the blood spatters found on Tom's boxer shorts and Molly's pajama bottoms; and (3) the trial court's exclusion of Tom's testimony that he heard Molly yell "[d]on't hurt my dad." *Id.* at 582. A majority of the Court of Appeals concluded that (1) Jack's and Sarah's statements were admissible hearsay under both N.C.G.S. § 8C-1, Rule 803(4) and Rule 803(24); (2) James's testimony regarding the boxer shorts and pajama bottoms was inadmissible expert testimony because it did not meet the requirements of N.C.G.S. § 8C-1, Rule 702(a); and (3) Tom's stricken testimony that he heard Molly say "[d]on't hurt my dad" was "either non-hearsay, or alternatively, admissible hearsay." *Id.* at 560. Judge Collins concurred in part and dissented in part with regard to the majority's resolution of the defendants' evidentiary challenges, arguing that the trial court did not prejudicially err.[3] Upon close examination of the record, we affirm the decision of the Court of Appeals.

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2. Defendants also filed a Motion for Appropriate Relief (MAR) on 16 August 2017 and a supplemental MAR on 25 August 2017 alleging juror misconduct and other violations of their constitutional rights. The trial court denied the MARs without conducting an evidentiary hearing, and the Court of Appeals affirmed. *State v. Corbett*, 269 N.C. App. 509, 521 (2020). Those issues are not before us because they were not a basis for the dissenting opinion below. *See* N.C. R. App. P., Rule 16(b).

3. The Court of Appeals also held that the trial court erroneously instructed the jury on the aggressor doctrine with regard to Tom. Because we agree with the Court of Appeals that the trial court's evidentiary errors were prejudicial, we do not need to reach the question of whether the trial court erred by giving the aggressor-doctrine instruction.

II. Evidentiary Errors

A. Jack's and Sarah's Statements

¶ 22 At trial, parties are generally permitted to present evidence to the jury that is relevant and admissible, subject to the limitations of N.C.G.S. § 8C-1, Rule 403. *See*, *e.g.*, *State v. McElrath*, 322 N.C. 1, 13 (1988) ("Relevant evidence, as a general matter, is considered to be admissible."). "Evidence is relevant if it has any logical tendency to prove a fact in issue." *State v. Goodson*, 313 N.C. 318, 320 (1985). Portions of Jack's and Sarah's statements to the DSS investigator and at Dragonfly House were plainly relevant to defendants' case for at least three reasons. First, Jack's and Sarah's disclosures regarding the nature of their parents' relationship presented circumstantial evidence tending to support defendants' account of the altercation which resulted in Jason's death. Second, Jack's statement to the forensic investigator providing an innocent explanation for the presence of the brick paver tended to corroborate Molly's written statement, introduced by the State and admitted into evidence, that she "tried to hit [Jason] with a brick (garden décor) I had on my nightstand." Conversely, it tended to detract from the State's argument that Molly's account was not credible because, as the prosecutor argued, "there is nothing else having to do with landscaping or gardening or building walls inside that bedroom." Third, Sarah's statement explaining her nightmare tended to support Molly's claim that Sarah's arrival in the master bedroom angered Jason and precipitated the altercation.

¶ 23 Although relevant, Jack's and Sarah's statements were out-of-court statements offered for the truth of their content, making them hearsay. N.C.G.S. § 8C-1, Rule 801(c) (2019). (" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."), "Hearsay is not admissible except as provided by statute or the Rules of Evidence." *State v. Hinnant*, 351 N.C. 277, 283 (2000). The Court of Appeals held that the trial court erred by failing to admit Jack's and Sarah's statements at Dragonfly House pursuant to Rule 803(4)—the medical diagnosis or treatment exception—and their statements at Dragonfly House and to DSS pursuant to Rule 803(24)—the residual exception. After careful consideration, we substantially agree with the reasoning and conclusions of the majority below concerning Rule 803(4) with regard to the statements given at Dragonfly House and concerning Rule 803(24) with regard to their statements to the social worker at their uncle's house. We first address the exception to the hearsay rule for statements made for the purpose of medical diagnosis or treatment.[4]

4. The trial court's written order refers only to Rule 803, but the defendants moved for admission of the statements under both Rule 803 and Rule 804.

1. The Medical Diagnosis or Treatment Exception

¶ 24 **[1]** Defendants argue that Jack's and Sarah's statements at Dragonfly House were admissible under Rule 803(4) because they were made for the purpose of diagnosing the children as victims of child abuse. Pursuant to Rule 803(4), "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof" are admissible as hearsay "insofar as [the statements are] reasonably pertinent to diagnosis or treatment. N.C.G.S. § 8C-1, Rule 803(4) (2019). We have interpreted Rule 803(4) to "require[ ] a two-part inquiry: (1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *Hinnant*, 351 N.C. at 284.[5] A trial court's determination that an out-of-court statement is inadmissible under Rule 803(4) is reviewed de novo. *State v. Norman*, 196 N.C. App. 779, 783 (2009) (citing *Hinnant*, 351 N.C. at 284).[6]

¶ 25 The conceptual foundation of Rule 803(4) is "the rationale that statements made for purposes of medical diagnosis or treatment are inherently trustworthy and reliable because of the patient's strong

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5. The majority below reversed the trial court's order finding that the statements were not pertinent to medical diagnosis or treatment, but the dissenting judge expressly declined to address this holding. Before this Court, the State does not argue that the statements Jack or Sarah made at Dragonfly House are inadmissible under the second prong of the *Hinnant* test. Accordingly, the State has abandoned any argument that Jack's and Sarah's statements should be excluded as not reasonably pertinent to their medical diagnosis or treatment. *See* N.C. R. App. P. 28(b)(6); *State v. Augustine*, 359 N.C. 709, 738 (2005) ("Because defendant presents no argument and cites no authority in support of these contentions, they are deemed abandoned.").

6. In disputing the appropriateness of reviewing the trial court's admissibility determination de novo, the dissent claims that because our case law regarding this issue is "non-existent, we can look to the federal rules for guidance." In fact, we do have case law on point regarding this issue that we should follow or expressly overrule for good cause, not ignore. Although this Court has not previously explicitly elaborated at length the standard of review which governs a challenge to a trial court's determination regarding the admissibility of hearsay under Rule 803(4), our numerous opinions interpreting Rule 803(4) establish that the Court has routinely reviewed these decisions de novo without affording deference to the trial court's determination. *See, e.g.*, *Hinnant*, 351 N.C. at 285; *State v. Jones*, 339 N.C. 114, 146 (1994); *State v. Stafford*, 317 N.C. 568, 571 (1986). In addition, although decisions of the Court of Appeals are not binding on this Court, the fact that the Court of Appeals has interpreted our precedents as making clear that the admissibility of hearsay under Rule 803(4) is reviewed de novo further confirms that there exists settled precedent in the State of North Carolina, notwithstanding decisions of the federal courts which may have arrived at different conclusions.

motivation to be truthful." *Hinnant*, 351 N.C. at 284. At its core, the exception is predicated on the presumptive trustworthiness of a declarant who "is motivated to describe accurately his or her symptoms and their source" in order to obtain a proper diagnosis and appropriate treatment. *Id.* at 285, (quoting *R.S. v. Knighton*, 125 N.J. 79, 85 (1991)). However, in some circumstances, the subjective motivation of a declarant may be difficult to ascertain. In *Hinnant*, we noted "the difficulty of determining whether a [child] declarant understood the purpose of his or her statements." *Id.* at 287. Even in a setting where it would be obvious to an adult declarant, a child declarant may be confused or unclear about precisely why certain questions are being asked. In contrast to an adult, a child is unlikely to be able to independently and affirmatively seek out medical treatment or even know when medical treatment may be necessary. In addition, professionals who are responsible for the well-being of children may, understandably, tailor their approach to eliciting sensitive health information to account for a child's unique perceptions and vulnerabilities.

¶ 26 Given these challenges, some jurisdictions have been reluctant to apply Rule 803(4) to admit hearsay statements given by child declarants. North Carolina has charted a different course. This Court has instead sought to adhere to "the common law rationale underlying Rule 803(4)" in cases involving child declarants by closely analyzing the "objective record evidence to determine whether the declarant had the proper treatment motive." *Id.*; *see also State v. Stafford*, 317 N.C. 568, 574 (1986). Rather than a bright-line rule, we have instructed trial courts to "consider all objective circumstances of record surrounding [the] declarant's statements in determining whether he or she possessed the requisite intent under Rule 803(4)." *Hinnant*, 351 N.C. at 288. Accordingly, in determining the admissibility of Jack's and Sarah's statements, we look primarily to "objective circumstances" in deciding whether or not the children possessed the requisite "motivation to provide truthful information" which assures the reliability of otherwise inadmissible hearsay. *Id.* at 288 (quoting *United States v. Barrett*, 8 F.3d 1296, 1300 (8th Cir. 1993)).

¶ 27 The first prong of the *Hinnant* test requires us to examine the specific context in which Jack's and Sarah's statements were made. As the majority below correctly noted, our analysis is not limited to any one specific factor, and no specific factor is dispositive. *Corbett*, 269 N.C. App. at 530–31. However, we find the following three factors articulated in *Hinnant* to be most probative in determining the reliability of the children's statements: (1) whether "some adult explained to the child the need for treatment and the importance of truthfulness"; (2) "with whom, and under what circumstances, the declarant was speaking"; and

(3) "the surrounding circumstances, including the setting of the interview and the nature of the questioning." *Hinnant*, 351 N.C. at 287–88. In the present case, our analysis of each of these three factors strongly supports admitting the statements Jack and Sarah made during their interviews at Dragonfly House.

¶ 28 First, the intake procedure at Dragonfly House included a thorough, age-appropriate explanation of the overarching medical purpose of the children's visit. Unlike in *Hinnant*, where neither the interviewer "[n]or anyone else explained to [the child] the medical purpose of the interview or the importance of truthful answers," both were explained in significant detail to Jack and Sarah. *Id.* at 289–90. When the children arrived at Dragonfly House, a child advocate explained the child medical evaluation process "at their level" to "make[ ] sure that they understand and . . . know what to expect" during their "forensic interview and medical exam." The children were informed that while they are being interviewed by a forensic interviewer, their "caregiver will be talking with our doctor. Our doctor will be asking questions about your health throughout your whole life." The forensic interviewer then provided Jack and Sarah with examples of the types of questions they would be expected to answer and a detailed description of the medical examination they would undergo immediately after the interview. The forensic interviewer testified that before beginning any interview, she articulates the following three ground rules that the children must understand and adhere to, each of which emphasizes the importance of truthfulness:

> [The] rules are to—do you know the difference between a truth and a lie? We get them to establish they know the difference. The second rule is if I make a mistake, you can correct me to let them know while I'm an adult, you can tell me I'm wrong. If I ask you a question that you don't know the answer to, it's okay to say you don't know. We don't want you to guess at anything.

To reinforce the importance of telling the truth, the child advocate will "show them the cameras and show them the rules and tell them where they are being recorded" before they "start the actual interview process." The intake procedure and the structure of the children's entire visit to Dragonfly House are designed to help the treating physician "find out the truth regardless of what that is," in order to help the organization fulfill its "primary purpose" of serving "the physical and mental wellbeing of the child." The reliability of the children's testimony is enhanced by Dragonfly House's adherence to procedures that experts in child

psychology rely upon to determine if children can distinguish between truth and fiction and provide truthful statements. *See State v. Thornton*, 158 N.C. App. 645, 650 (2003) (finding the fact that "[t]he Center [for Child and Family Health in Durham] utilizes a team approach to the diagnosis and treatment of sexually abused children" supported admissibility).

¶ 29 Second, the children were interviewed by a trained professional specifically employed to elicit truthful information from children suspected to have recently experienced child abuse. Although it is true that Jack and Sarah did not make the statements at issue directly to a medical doctor, statements "need not have been made to a physician" to be admitted under Rule 803(4). *State v. Smith*, 315 N.C. 76, 84 (1985) (quoting the official commentary to Rule 803(4)). Instead, we examine the role of the person to whom the child declarant makes the statements, that person's relationship (if any) to the child's treating physician, and the way in which that person's function has been communicated to the child in order to ascertain whether the statements are "inherently trustworthy and reliable" based upon the declarant's "interest in telling or relaying to medical personnel as accurately as possible the cause for the patient's condition." *Id.*

¶ 30 The objective circumstances of Jack's and Sarah's interviews demonstrate they likely understood that the information they provided would be used for their diagnosis and treatment. Prior to Jack's and Sarah's forensic interviews, the child advocate made clear to the children that the forensic interview and medical examination were both necessary components of the child medical evaluation. The interviewer told the children that their interviews were being recorded and that other members of Dragonfly House's "multi-disciplinary team"—which includes a physician—might review them. Immediately after finishing the interviews, the forensic interviewer "discuss[ed] that information that [she] had gathered" with the treating physician, for the purpose of "aid[ing] [the physician] in her physical exam of the children . . . so she can perform that physical exam best for that child." Further, the physician's anticipated, customary, and actual use of the information gleaned from the forensic interviews in diagnosing and treating Jack and Sarah is an objective indicator of the reliability of their statements.

¶ 31 In addition, we agree with the Court of Appeals that the "child-friendly atmosphere and the separation of the examination rooms do not indicate that the children's statements during the interviews were not intended for medical purposes." *Corbett*, 269 N.C. App. at 534. The reason Dragonfly House utilizes a child-friendly approach in conducting child medical evaluations is because research demonstrates that it

is the best way to obtain reliable information from children who may have recently experienced abuse.[7] With an adult patient, it is reasonable to expect that a medical professional would elicit the kind of substantive information Jack and Sarah provided to the forensic interviewer. An adult would typically complete a form in the waiting room or disclose the information directly to a nurse or physician in the examination room. But Dragonfly House, in accordance with state policy and national best practices, has determined that such an approach would be ill-suited to the sensitive task of obtaining this information from children. Indeed, the stated purpose of relying upon a forensic interviewer is to ensure that the interview is "done by someone who is trained to talk to children in a non-leading manner in a format that is approved on a national level while being recorded." Dragonfly House needs reliable information in order to serve its primary purpose of serving the well-being of children. They utilize this method of evaluating children to increase the likelihood that the information the physician receives will be reliable. Based on existing best practices developed by medical professionals treating child abuse victims, their approach supports, rather than detracts from, the reliability of Jack's and Sarah's statements. *See State v. Shore*, 258 N.C. App. 660, 676 (2018) (statements obtained by forensic examiner at child advocacy center deploying best practices in interviewing children sufficiently reliable to form basis of expert witness's testimony).

¶ 32 Finally, the "setting" of Jack's and Sarah's interviews and the "nature of the questioning" by the forensic interviewer both support defendants' argument that the children's statements were reliable and therefore admissible as an exception to the hearsay rule under Rule 803(4). The forensic interview took place "one room down and across the hall" from the room where the children were physically examined by the treating physician. The physical examination immediately followed the forensic interview. Thus, the interview was both spatially and temporally proximate to Jack's and Sarah's interactions with the physician—the children were told in advance to expect, and did indeed experience, "a seamless

7. The executive director of Dragonfly House testified that they conduct child medical evaluations while utilizing procedures approved by the North Carolina Department of Health and Human Services, based on a program established by the University of North Carolina at Chapel Hill. In addition, as an accredited children's advocacy center, Dragonfly House must "meet the accreditation standards and guidelines set forth by the National Children's Alliance," a national professional membership organization which develops best practices to "support child abuse victims" by "help[ing] children and families heal in a comprehensive, seamless way so no future is out of reach." *See* National Children's Alliance, *Our Story*, https://www.nationalchildrensalliance.org/our-story (last visited Feb. 28, 2021).

transition from the forensic interview into the physical exam." This is a strong objective indicator that the children understood the forensic interview and the physical examination as two aspects of a single, integrated process—their child medical evaluations—rather than discrete, unrelated events. *See State v. Lewis*, 172 N.C. App. 97, 104 (2005) (finding probative of reliability the fact that "[t]he interviews took place . . . immediately prior to an examination by a doctor."); *Thornton*, 158 N.C. App. at 650 (finding probative of reliability the fact that "[b]oth the physical examination and the initial interview were conducted on [the same day]").

¶ 33 In addition, the protocol used by the forensic interviewer, which is based on a "national model" that "all [forensic interviewers] have to follow," prohibits the kind of questioning that might give cause to doubt the reliability of the children's answers. The interviewer is not permitted to "ask leading questions or suggest answers or suggest topics to the children" and instead relies upon "open-ended" questions designed to allow the children to freely share their own narrative. This style of interview stands in stark contrast to the circumstances in *Hinnant*, where this Court held inadmissible statements obtained through an "entire interview [which] consisted of a series of leading questions, whereby [the interviewer] systematically pointed to the anatomically correct dolls and asked whether anyone had or had not performed various acts with [the child]." *Hinnant*, 351 N.C. at 290. *Cf. Thornton*, 158 N.C. App. at 651 (concluding that statements elicited by an interviewer who asked the child "very general questions about her home life, and 'very general and nonleading' questions about any touching that may have occurred" were admissible).

¶ 34 The State does not meaningfully dispute that the objective circumstances of Jack's and Sarah's interviews at Dragonfly House "indicate that the children understood that the purpose of the interviews was to obtain medical diagnosis or treatment." *Corbett*, 269 N.C. App. at 532. In its brief, the State assures this Court that, as a general matter, it believes that statements made during interviews conducted at a child advocacy center like Dragonfly House should be admitted under Rule 803(4). The State expressly disclaims the argument that "there was any error with the questions asked by [Dragonfly House] or the procedures used in the [ ] interviews in this case, all of which was proper." Instead, the State argues that this case is different because when asked by the interviewer to "[t]ell me why you're here," Sarah responded "[b]ecause my dad died," and Jack responded, "my dad died, and people are trying—my aunt and uncle from my dad's side are trying to take away—take me away from

my mom." In the State's view, those answers explicitly demonstrate that the children did not understand their interviews to be for the purpose of medical diagnosis, and therefore, the rationale that statements made for the purpose of medical diagnosis are likely to be reliable does not apply.

¶ 35 The problem with this argument is that the standard under Rule 803(4), developed in our case law and interpreted in the context of assessing statements made by child patients, does not look to whether the child has explained the purpose of the interview to the interviewer in any particular manner. Instead, we ask whether the interviewer explained to the child the importance of being truthful and whether the interview occurred in circumstances which indicate that "the child understood the [witness'] role in order to trigger the motivation to provide truthful information." *Hinnant*, 351 N.C. at 288 (alteration in original) (quoting *Barrett*, 8 F.3d at 1300). Indeed, the children's own statements at other points in the interview dispel the notion that that they failed to grasp the importance of being truthful. Sarah told the forensic interviewer that "everybody's like just say what's the truth. . . . And my mom just says, tell the truth, Sarah. That's all she says." Jack told the interviewer that when he learned he was being taken to Dragonfly House, he was "nervous at first, but then . . . my grandma and mom said everything's going to be fine. You're just going to ask me some questions, and they wanted me to tell the truth." The State's narrow argument otherwise stands in significant tension with its typical position when litigating criminal prosecutions which rely on child declarants. *See Corbett*, 269 N.C. App. at 537 ("Most often it is the State seeking [the] admission" of "this type of evidence in cases involving children"). As one law enforcement officer testified at trial, he had brought "[o]ver 500" children to Dragonfly House for treatment since it opened in 2010, and he agreed that these types of forensic interviews were extremely helpful in the prosecution of individuals.

¶ 36 Here, the Court of Appeals correctly concluded that Jack's and Sarah's statements in response to the question asking why they were at Dragonfly House do not change the outcome of the analysis under the first prong of the *Hinnant* test. Jack's and Sarah's answers were not inconsistent with an understanding of the overarching medical purpose of their visit to Dragonfly House and the need for them to be truthful. In their answers, Jack and Sarah properly identified the event which triggered their referral to Dragonfly House to be treated for possible physical and psychological trauma. If the event triggering Jack and Sarah's visit to Dragonfly House had been a car accident and they had responded to the question "why are you here" with the statement "I am here because I was in a car accident," this answer would not be proof that the children

did not understand that they were receiving medical treatment. It would prove only that they had a basic understanding of cause and effect. The same is true here. The violent death of their father at the hands of the people they considered their mother and grandfather was relevant to their need for medical evaluation. Their diagnosis and treatment for the condition of experiencing child abuse illustrate that for Jack and Sarah, the circumstances of their father's death and their medical needs were intertwined. Similarly, Jack's awareness that the outcome of his medical examination might have implications for his custody situation—a proposition which is likely true anytime a child is examined at Dragonfly House—is not evidence that he did not understand the medical purpose of his visit or the need to be truthful.

¶ 37 As described above, the basic premise of *Hinnant* is that given the inherent difficulties in ascertaining a child declarant's subjective motivations—and the child's comparative lack of agency in seeking out medical treatment and lack of understanding of when medical treatment is necessary relative to an adult—a trial court "should consider *all objective circumstances of record* surrounding [a] declarant's statements in determining whether he or she possessed the requisite intent under Rule 803(4)." *Hinnant*, 351 N.C. at 288 (emphasis added). As the Court of Appeals correctly held in an earlier case, it is highly probative of Jack's and Sarah's motivations for truthfulness that they were interviewed in private, that they discussed sensitive topics in a "comfortable and 'safe' environment," and that the interviewer "did not use leading questions" or "ask [the child] many specific questions" while " 'adher[ing] to the protocol' established by . . . a 'licensed and accredited child advocacy center.' " *In re M.A.E.*, 242 N.C. App. 312, 321–22 (2015). The objective circumstances of the interview at Dragonfly House indicate that Jack's and Sarah's statements were made for the purpose of obtaining medical diagnosis or treatment and were reliable.

¶ 38 It would turn *Hinnant* on its head to disregard the "objective circumstances of record," which overwhelmingly point toward admitting the children's statements, and instead base our decision on a child's single response of ambiguous significance to a question posed early in the interview process. We hold that defendants have met their burden of "affirmatively establish[ing] that the declarant[s] had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment." *Hinnant*, 351 N.C. at 287. Accordingly, we affirm the Court of Appeals' holding that the trial court erred by ruling that Jack's and Sarah's statements regarding Jason and Molly's relationship and the children's statements regarding their own relationships with Jason and Molly were inadmissible.

2. Residual Hearsay Exception

¶ 39 **[2]** In addition to challenging the Court of Appeals' conclusion that Jack's and Sarah's statements at Dragonfly House were admissible under Rule 803(4), the State argues that the majority below erred in holding that the children's statements to the DSS social worker and at Dragonfly House were both admissible under Rule 803(24).[8] Because we agree with the Court of Appeals that the trial court erroneously excluded the children's statements at Dragonfly House under the medical diagnosis or treatment exception, we now consider whether the children's statements to the DSS social worker were admissible under Rule 803(24). We hold that the trial court abused its discretion in failing to admit Jack's and Sarah's statements to the DSS social worker under the residual exception to the hearsay rule because the trial court's conclusions of law rested on unsupported factual findings and because those conclusions cannot otherwise be supported by the record evidence.

¶ 40 The "residual exception" provides that a hearsay statement "not specifically covered by any of the" other enumerated exceptions is admissible if it possesses "equivalent circumstantial guarantees of trustworthiness." N.C.G.S. § 8C-1, Rule 803(24) (2019). A statement possesses "circumstantial guarantees of trustworthiness" if

> the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Id. A trial court's determination as to the admissibility of hearsay statements pursuant to Rule 803(24) is reviewed for abuse of discretion. *See State v. Smith*, 315 N.C. 76, 97 (1985).

¶ 41 In order to facilitate effective judicial review of a decision to admit or exclude statements under the residual exception, a trial court must "make adequate findings of fact and conclusions of law sufficient to allow a reviewing court to determine whether the trial court abused its

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8. Because Rule 803(24), the residual hearsay exception, applies only if a hearsay statement is not specifically covered by another exception to the hearsay rule, there is no need to consider whether the children's statements made at Dragonfly House are also admissible under this exception. *See* N.C.G.S. § 8C-1, Rule 803(24) (2019).

discretion in making its ruling." *State v. Sargeant*, 365 N.C. 58, 65 (2011). These findings must address

> (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (6) whether the interests of justice will be best served by admission.

State v. Valentine, 357 N.C. 512, 518 (2003). We have deemed the third factor, the trustworthiness of the statement, to be the "most significant requirement." *Smith*, 315 N.C. at 93. When assessing trustworthiness, a trial court considers the following, non-exhaustive set of factors: "(1) assurances of the declarant's personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination." *State v. Triplett*, 316 N.C. 1, 10–11 (1986).[9]

¶ 42 In the present case, the trial court made findings of fact which track all four of these factors before concluding that "[t]he proffered statements do not have circumstantial guarantees of trustworthiness." However, upon close examination of the record, we agree with the Court of Appeals that these findings were fundamentally flawed. "If the trial court . . . makes erroneous findings, we review the record in its entirety to determine whether that record supports the trial court's conclusion concerning the admissibility of a statement under a residual hearsay exception." *Sargeant*, 365 N.C. at 65. Thus, after identifying the trial court's erroneous findings, we independently examine the record to determine if the trial court's ultimate conclusion regarding the admissibility of evidence under the residual exception can be supported. We hold that the trial court's conclusion that the statements lacked trustworthiness is not and cannot be supported by the evidence in the record.

¶ 43 First, the trial court determined that it was "not assured of the personal knowledge of the declarants as to the underlying events described" based on its factual finding that "both children identified the

9. There is no dispute regarding the fourth factor of the *Triplett* test, the "practical availability" of the children at trial, as the children were living with their paternal aunt and uncle in Ireland and had not returned to the United States to testify.

source of their knowledge being nothing more than statements of [Molly] and [Molly's] mother. The declarations contain no reference to seeing, hearing or perceiving anything about the events described except these statements of others." This conclusion is not supported by the text of the DSS social worker's record of the interviews with Jack and Sarah. At least some of the relevant and material statements proffered by defendants were based on the children's firsthand knowledge of incidents they contemporaneously saw, heard, or perceived. For example, Jack told the DSS social worker that "his dad curses his mom; he stated that he has seen his dad a few times hit his mom with his fist anywhere on her body that he can." He stated that both he and his sister "tried to stop the fighting by yelling at his parents asking them to stop and by trying to push them apart." Sarah told the DSS social worker that her "dad fights her mom" and "she gets in trouble because her dad gets angry at her for saying [to] stop [fighting]" but that "she doesn't say stop to her mom because her mom is not doing anything wrong she is just [standing] up for herself." She stated that "her dad is angry on a regular basis . . . if you leave a light on he gets angry, or if you leave a door open or do not walk the dog her father gets angry and . . . they (her mother and father) go into their room." She stated that "she saw her dad smack her mom across the face with an open hand," so she "ran into the bathroom [with Jack] and brushed [her] teeth and pretended that [she] did not see it."

¶ 44 To be sure, in response to some questions, Jack and Sarah disclosed that the information they were conveying was communicated to them by Molly. The trial court's conclusion that the children's statements lacked trustworthiness also rested on its unsupported determination that it was "not assured of the children's motivation to speak the truth, but instead finds the children were motivated, in the near immediate aftermath of the death of their father, to preserve a custody environment with the only mother-figure they could remember having known during their lives." In assessing a declarant's motivation for truthfulness, "the issue is not whether [the declarant's] statement is objectively accurate; the determinative question is whether [the declarant] was motivated to speak truthfully when" the statement was made. *Sargeant*, 365 N.C. at 66. The inquiry does not require defendants to prove that every statement made by Jack and Sarah was truthful. Instead, it requires the trial court to determine if the declarants had "reason to lie" or "would have benefitted from altering the[ir] story." *Valentine*, 357 N.C. at 519.

¶ 45 In lieu of direct evidence, the State emphasizes that Jack and Sarah desired to remain in Molly's care and were aware that their custody may be at issue in the aftermath of their father's death. In essence, the State

asks us to presume Jack's and Sarah's motivations to lie because they expressed a desire to remain with their sole surviving caregiver and perceived that their family circumstances might change in the aftermath of a violent altercation which resulted in the death of their only then-living biological parent. We have never held that only children who do not like their parents or who are blind to the potential consequences of a destabilizing family crisis possess a motivation for truthfulness, and we reject the invitation to do so here.

¶ 46 Of course, a trial court does not abuse its discretion when in an exercise of that discretion it assigns different weight to different pieces of evidence in arriving at a determinative legal conclusion. When examining the trial court's order, we do not "reweigh the evidence and make our own factual findings on appeal, a task for which an appellate court like this one is not well suited." *State v. Rodriguez*, 371 N.C. 295, 319 (2018). Even if the record contains significant evidence that the children possessed a motivation for truthfulness, we would be compelled to affirm the trial court's order if there were evidence in the record "tending to support a contrary determination." *Id.* In this case, however, the record is bereft of evidence supporting the trial court's conclusion that the children lacked a motivation for truthfulness.

¶ 47 Finally, we conclude that the trial court's finding that Jack's and Sarah's statements "were specifically recanted and disavowed" is unsupported by the record. The children's subsequent statements calling into question the reliability of their statements to the DSS social worker and at Dragonfly House are not evidence that all of their statements lacked trustworthiness. The primary basis for the trial court's finding that the statements were recanted was the Skype interview with Jack conducted by the ADA, during which Jack stated that he "told the person who was interviewing [him (the DSS social worker and Dragonfly House forensic interviewer)] exactly what [Molly] told me to say." In addition, the trial court found that Sarah "recanted her statements in diary entries made after her return to Ireland." We do not dispute the trial court's authority to rely upon these sources of evidence in making a threshold determination as to the admissibility of Jack's and Sarah's statements under the residual exception.[10] However, this evidence in no way calls into question all of the statements the children made which were relevant and probative to defendants' self-defense claims.

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10. In justifying its conclusion that the trial court erred by failing to admit Jack's and Sarah's statements under the residual exception, the majority below stated that "it is unclear from finding of fact #22 why the trial court deemed the 'diary entries' or the circumstances of Jack's Skype interview with a member of the district attorney's office to

¶ 48 In his Skype interview, Jack stated that while in the car on the way to Dragonfly House, Molly "started making up little stories about my dad, saying that he was abusive. And then she started crying, and she said if you don't tell the truth, we'll never, ever see you again. If you don't tell this, we'll never see you again." When the ADA asked Jack to clarify what he meant by "this," Jack responded "[l]ike what she was telling us to say. She was telling us to say that our dad was abusive and saying that he was very mean to Molly." When asked if he could share "any more of the stories [Molly] told you to tell," Jack replied, "[n]o." There is some reason to doubt that this exchange occurred as Jack recalled it, given that the testimony of the staff at Dragonfly House establishes that Molly did not accompany Jack and Sarah to that interview. Regardless, even if this exchange did occur, it occurred *after* Jack and Sarah were interviewed by the DSS social worker on 3 August 2015. Notably, the DSS social worker's visit was unannounced and Molly was not present at the time. Jack's recantation was limited in nature—at most, he recanted his previous claims that Jason was abusive toward Molly and the children—not a specific disavowal of every statement he had made during his DSS interview. Accordingly, the record cannot support the trial court's conclusion that Jack and Sarah "specifically recanted and disavowed" all of the relevant, probative statements they made to the DSS social worker.

¶ 49 The trial court's ultimate conclusion that Jack's and Sarah's statements to the DSS social worker were not trustworthy was "made on the basis of inaccurate and incomplete findings of fact used to reach unsupported conclusions of law." *Sargeant*, 365 N.C. at 67. After close examination of the record, it is apparent that this conclusion is "not supported by competent evidence in the record." *Id.* at 65. Having determined that defendants have met their threshold requirement of proving the trustworthiness of the proffered statements, we conclude that the other factors enumerated in *Valentine* also support admitting Jack's and Sarah's statements under the residual exception. The proponents gave

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be more trustworthy than either of the objective and impartial interviews at issue here." *Corbett*, 269 N.C. App. at 545. There may have been valid reasons for questioning the reliability of Jack's and Sarah's post-trial recantations. Notably, Jack's statement contained allegations that were internally inconsistent or flatly contradicted by the evidentiary record, and Sarah's diary entries were not authenticated. In addition, Jack explicitly stated that the reason he was recanting his prior statements was because he "found out what happened to my dad" after having begun living with Jason's sister in Ireland. Nevertheless, we agree with the State that the trial court was entitled to consider Jack's Skype interview and Sarah's diary entries, regardless of whether either would ultimately have been deemed admissible evidence, in making a preliminary determination regarding the admissibility of the Dragonfly House interview and DSS interview. *See* N.C.G.S. § 8C-1, Rule 104(a).

proper notice. The substance of Jack's and Sarah's statements were not adequately covered by any other source of evidence. For reasons more fully explained in the section of this opinion examining prejudice, Jack's and Sarah's statements were material and probative and their admission serves the interests of justice by enabling Tom and Molly to present an adequate defense. Accordingly, we conclude that it was an abuse of discretion for the trial court to exclude the statements that Jack and Sarah made in their interviews with the DSS social worker under the residual exception to the hearsay rule contained in Rule 803(24).

3. The Expert's Bloodstain Pattern Analysis

¶ 50 **[3]** During its case-in-chief, the State presented testimony from Stuart H. James, qualified as an expert in bloodstain pattern analysis, who offered his opinion about the location of Tom, Molly, and Jason at various points during the altercation. Most significantly, James testified that in his opinion the bloodstain patterns located on Tom's and Molly's clothing suggested that one or both of them struck Jason in the head as he was descending toward the floor and struck Jason from above while his head was near the floor. The trial court determined that James's testimony was admissible under Rule 702(a). The Court of Appeals reversed, and the State appealed.

¶ 51 To admit expert opinion testimony under Rule 702(a), a trial court must conduct a three-step inquiry to determine (1) whether the expert is qualified, (2) whether the testimony is relevant, and (3) whether the testimony is reliable. *State v. McGrady*, 368 N.C. 880, 892 (2016). As defined by Rule 702(a), expert opinion testimony is reliable

> if all of the following apply: (1) The testimony is based upon sufficient facts or data. (2) The testimony is the product of reliable principles and methods. (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C.G.S. § 8C-1, Rule 702(a) (2019). In assessing reliability, the trial court considers the five non-exhaustive factors articulated by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), as well as "other factors that may help assess reliability given 'the nature of the issue, the expert's particular expertise, and the subject of his testimony.' " *McGrady*, 368 N.C. at 891 (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999)). A trial court's ruling as to the admissibility of proffered expert testimony "will not be reversed on appeal absent a showing of abuse of discretion." *SciGrip, Inc. v. Osae*, 373 N.C. 409, 418 (2020) (citing *McGrady*, 368 N.C. at 893).

¶ 52 Before this Court, the parties' sole dispute centers on one portion of James's testimony: his testimony that was based upon purported blood spatters found on the underside of Tom's boxer shorts and at the bottom of Molly's pajama pants. The majority below held that because these purported blood spatters were never tested to confirm that they were in fact Jason's blood, in violation of the protocol set out in a "peer-reviewed treatise" that James himself co-authored, *Corbett*, 269 N.C. App. at 554, James's conclusions based on these particular spatters were "based upon insufficient facts and data, and accordingly, could not have been the product of reliable principles and methods applied reliably to the facts of this case," *id.* at 558. By contrast, the dissenting judge would have held that defendants waived their challenge to James's testimony regarding the untested blood spatters by "fail[ing] to object to the testimony when it was elicited by the State at trial." *Id.* at 609 (Collins, J., concurring in part and dissenting in part).

¶ 53 The dissenting judge did not address the majority's conclusions that (1) admission of the disputed testimony was erroneous and (2) the trial court's erroneous admission of this testimony prejudiced defendants. *Corbett*, 269 N.C. App. at 609 ("As Defendants did not object when the State elicited the testimony before the jury, Defendants failed to preserve the alleged error for appellate review."). Nor did the State seek discretionary review of these issues. Accordingly, we must restrict our review of the decision below to the sole issue that divided the majority and the dissent, whether or not defendants preserved their challenge to James's testimony. *See State v. Rankin*, 371 N.C. 885, 895 (2018) (when a case "is before this Court based on a dissent in the Court of Appeals . . . the scope of review is limited to those questions on which there was division in the intermediate appellate court, and this Court's review is properly limited to the single issue addressed in the [Court of Appeals] dissent" (cleaned up) (alteration in original)).

¶ 54 "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion." N.C. R. App. P. 10(a)(1). "To be timely, an objection to the admission of evidence must be made at the time it is actually introduced at trial." *State v. Ray*, 364 N.C. 272, 277 (2010) (cleaned up). It is correct that although defendants objected to the introduction of the portion of James's expert report addressing the untested blood spatters, defendants failed to again object[11] when James testified at trial that

11. There is no indication in the record that defendants' counsel ever requested a continuing objection to the testimony at issue, which is one way that a party may preserve an objection for appellate review. *See, e.g.*, *State v. Crawford*, 344 N.C. 65, 76 (1996)

> [w]ith respect to *the small spatters on the front underside of the left leg of the* [*boxer*] *shorts*, these were consistent with the wearer of the shorts close to and above the source of the spattered blood. To what extent, I can't really say. In order for the stains to get to that location on the inside of the leg, they would have to be traveling, you know, at least somewhat upward in order to do that. My conclusion there was the source of the impact spatters is most likely the head of Jason Corbett while it was close to the floor in the bedroom.

However, we agree with the Court of Appeals that defendants did not waive their objection to the admissibility of James's testimony regarding these blood spatters. The record establishes that "[d]efendants did, in fact, timely object, and did so on multiple occasions before the jury throughout James's testimony." *Corbett*, 269 N.C. App. at 551. They "immediately objected when the State proffered James's 'Supplementary Report of Bloodstain Pattern Analysis' containing his comments and conclusions concerning, *inter alia*, Tom's boxer shorts and Molly's pajamas, which were the subject of Defendants' objections during voir dire." *Id.* The defendants then renewed their objections prior to James's second day of direct examination. *Id.* Thus, we are persuaded that "[d]efendants properly objected and preserved this issue for appeal." *Id.*

¶ 55 Regardless, we would also hold that defendants' objection to the admissibility of this evidence was preserved by operation of law. "In N.C.G.S. § 15A-1446(d) (2017), the General Assembly enumerated a list of issues it deems appealable without preservation in the trial court." *State v. Meadows*, 371 N.C. 742, 747–48 (2018). Pursuant to N.C.G.S. § 15A-1446(d)(10), notwithstanding a party's failure to object to the admission of evidence at some point at trial, a party may challenge "[s]ubsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning." N.C.G.S. § 15A-1446(d)(10) (2019).[12] Defendants objected to testimony based

("Defense counsel then asked the trial court to permit a 'continuing objection to any of the testimony here offered.' The trial court granted defendant's continuing objection to all of the victim's hearsay statements." (citing N.C.G.S. § 15A-1446(d)(10) (1993); *Duke Power Co. v. Winebarger*, 300 N.C. 57 (1980) (authorizing the use of a continuing objection to a line of questions on the same subject to preserve the objection)).

12. In prior cases, we have held some subsections of N.C.G.S. § 15A-1446(d) unconstitutional as violating this Court's exclusive rulemaking authority. *See State v. Meadows*,

on the purported blood spatters on Tom's boxer shorts and Molly's pajama pants on numerous occasions. Because the dissenting judge did not dispute the majority's conclusion that the blood spatter evidence was erroneously admitted into evidence and because the State did not seek discretionary review of this issue which was not set forth in the opinion of the dissenting judge, the law of the case is that the trial court improperly overruled defendants' objection to this portion of the blood spatter testimony. *See Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 105 (2000) (when "defendant did not seek, and this Court did not grant, discretionary review of . . . two issues . . . those issues are not before this Court; and the determination of the Court of Appeals becomes the law of the case as to those issues"). Accordingly, we affirm the Court of Appeals' holding that the objection was preserved at trial and further by operation of N.C.G.S. § 15A-1446(d)(10), the only issue that is properly before this Court.[13]

4. Tom's Testimony Regarding Molly's Statement "Don't Hurt My Dad"

¶ 56 **[4]** At trial, Tom testified that after he had been shoved to the ground in the midst of the altercation with Jason, he heard Molly yell "[d]on't hurt my dad." The State objected to this testimony. The trial court sustained the objection, told the jury to disregard it, and struck this portion of Tom's testimony from the record. On appeal, the majority below concluded that "[t]he trial court erroneously sustained the State's objection to Tom's testimony because Molly's out-of-court statement was either non-hearsay, or alternatively, admissible hearsay." *Corbett*, 269 N.C. App. at 560. We agree with the Court of Appeals that Molly's statement was admissible because it was relevant non-hearsay.

¶ 57 As explained above, an out-of-court statement introduced to prove the truth of the matter asserted is only admissible if it falls within an

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371 N.C. 742, 748 n.2 (2018) (describing cases holding N.C.G.S. § 15A-1446(d)(5), (6), and (13) unconstitutional). However, we have never held N.C.G.S. § 15A-1446(d)(10) unconstitutional. Because the provision does not "conflict[ ] with specific provisions of our appellate rules rather than the general rule stated in Rule of Appellate Procedure 10(a)," it "operates as a 'rule or law' under Rule 10(a)(1), which permits review of this issue." *State v. Mumford*, 364 N.C. 394, 403 (2010).

13. The dissent claims that our consideration of N.C.G.S. § 15A-1446(d)(10) is inappropriate because the parties did not directly argue that their objection to the bloodstain analysis was preserved by operation of the statute. To the extent that the briefing before this Court is deficient on this point, it is possibly because the State failed to argue that defendants had not preserved their objection to the bloodstain analysis at the Court of Appeals.

enumerated hearsay exception. However, "[a]s has been stated by this Court on numerous occasions . . . , whenever an extrajudicial statement is offered for a purpose other than proving the truth of the matter asserted, it is not hearsay." *State v. Maynard*, 311 N.C. 1, 15 (1984); *see also State v. Kirkman*, 293 N.C. 447, 455 (1977) ("The Hearsay Rule does not preclude a witness from testifying as to a statement made by another person when the purpose of the evidence is not to show the truth of such statement . . . ."). Read in context, it is clear that Tom testified about Molly's statement not to prove that Jason was actually about to harm him but to support his contention that he was, at that moment, subjectively fearful for his and his daughter's lives. His perception of Molly's statement was relevant regardless of the statement's actual "truth or falsity." *Valentine*, 357 N.C. at 524.[14] It was relevant because Tom testified that he heard Molly speak it, which tended to support his claim that he "reasonably believe[d]" that his use of deadly force was "necessary to defend himself . . . or another against [another's] imminent use of unlawful force" which he reasonably believed would have resulted in "imminent death or great bodily harm to himself . . . or another." N.C.G.S. § 14-51.3(a) (2019).

¶ 58 Tom's testimony bolstered his claim that he was subjectively fearful and that his fear was reasonable, based in part upon his hearing of Molly's statement. Thus, his testimony was admissible for the appropriate non-hearsay purpose of "establish[ing] the state of mind of another person hearing the statement" or to "show the presence . . . of an emotion which would naturally result from hearing the statement." *State v. Grier*, 51 N.C. App. 209, 214 (1981). While this portion of Tom's testimony may have been self-serving, it was for the jury to decide "[t]he weight . . . to give the[ ] statement[ ] in deciding the issue of defendant's guilt or innocence depend[ing] upon" their assessment of Tom's credibility. *Valentine*, 357 N.C. at 524–25. Accordingly, we

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14. In fact, Tom's testimony was relevant regardless of whether or not Molly actually made this statement or any statement. What matters for the purpose of assessing Tom's subjective mental state is what Tom thought he heard. It would not matter if Molly had actually said "[d]on't look so sad." If what Tom heard in that moment was that he was about to be hurt, it is relevant to whether he "believed it was necessary to kill the deceased in order to save [him]self from death or great bodily harm, and if defendant's belief was reasonable in that *the circumstances as they appeared to* [*Tom*] *at the time* were sufficient to create such a belief in the mind of a person of ordinary firmness." *State v. Norris*, 303 N.C. 526, 530 (1981) (emphasis added). Thus, neither what Molly said nor whether she actually said anything matters for the purpose of this testimony. Rather, Tom is entitled to testify to his subjective belief at the time and what circumstances led him to have that belief.

affirm the Court of Appeals' holding that the trial court erred by sustaining the State's objection to this portion of Tom's testimony.[15]

III. Prejudice

¶ 59 **[5]** Having concluded that the trial court erred by excluding Jack's and Sarah's statements, by striking a portion of Tom's testimony, and by admitting certain expert witness testimony concerning alleged blood spatters on Tom's and Molly's clothing, we must determine whether defendants were prejudiced thereby. "To establish prejudice based on evidentiary rulings, defendant bears the burden of showing that a reasonable possibility exists that, absent the error, a different result would have been reached." *State v. Lynch*, 340 N.C. 435, 458 (1995); *see also* N.C.G.S. § 15A-1443 (2019). An evidentiary error may be prejudicial on its own, but "should this Court conclude that no single error identified [at trial] was prejudicial, the cumulative effect of the errors nevertheless [may be] sufficiently prejudicial to require a new trial." *State v. Wilkerson*, 363 N.C. 382, 426 (2009). A new trial is warranted if the errors, either individually or "taken as a whole, deprived defendant of his due process right to a fair trial free from prejudicial error." *State v. Canady*, 355 N.C. 242, 254 (2002). Thus, even if we conclude that one evidentiary error, standing alone, is not itself prejudicial, we are still required to consider whether that error contributed to prejudice in the aggregate.

¶ 60 Here, the trial court's erroneous exclusion of Jack's and Sarah's testimony meaningfully deprived defendants of the opportunity to support their self-defense claim in several ways. This error was prejudicial for three reasons.

¶ 61 First, Jack's statement explaining the presence of the brick paver would have provided a non-culpable justification for why one of the defendants possessed one of the alleged murder weapons. We agree with the majority below that the State "benefited from the unexplained presence of one of two potential murder weapons in the master bedroom, and in fact, raised this very question during its opening statement." *Corbett*, 269 N.C. App. at 577 (emphasis omitted). Absent explanation, Molly's possession of the alleged murder weapon at the scene of the killing—a place where her possession of the murder weapon would

15. In the alternative, we agree with defendants that the statement, if hearsay, fell within the "excited utterance" exception to the hearsay rule, which provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible. N.C.G.S. § 8C-1, Rule 803(2) (2019).

otherwise have been highly unusual—naturally gave rise to the inference that Molly did not act in self-defense.

¶ 62 Second, Sarah's statement describing her nightmare and her entry into the master bedroom provided compelling firsthand evidence supporting defendants' account of how the altercation began. Her statement confirmed that the altercation had a precipitating cause besides the actions of either defendant and that Jason was angry when the altercation began.

¶ 63 Third, we agree with the Court of Appeals that Jack's and Sarah's statements regarding Jason's worsening anger and their characterization of Jason and Molly's relationship "would have corroborated and provided significant context for the written statement that Molly provided at the Davidson County Sheriff's Office on 2 August 2015." *Corbett*, 269 N.C. App. at 578. The jury would have been presented with evidence which filled crucial gaps in Molly's statement, most notably why she had a brick paver within arm's reach in her bedroom and why she felt the need to use it under the circumstances as she perceived them.

¶ 64 Without evidence supporting their account of the circumstances leading up to the tragic events of 2 August 2015, it was easier for the jury to conclude that Tom and Molly had invented their story in an effort to cover up their crime and falsely assert that they acted in self-defense. There is a reasonable possibility that the outcome would have been different if the jury had been presented with admissible evidence providing a non-culpable justification for Molly's possession of a possible murder weapon, the brick paver; offering a corroborative description of why the altercation began, because Jason was angry at being awoken by Sarah, which placed Molly in the position of a victim from the outset and evidence of important relevant information about the nature of Jason and Molly's relationship in the weeks and months leading up to this incident. Indeed, as the Court of Appeals recounted, the jury foreman explained that "how and why the paver made it into the home was the #1 question that was talked about when deliberations started.' " *Corbett*, 269 N.C. App. at 578 (cleaned up) (emphasis omitted). Further, Jack's and Sarah's testimony also would have corroborated Jason's medical records, which contained his admission that he had been feeling "more stressed and angry lately for no reason." This corroborative evidence would have provided important context to the jury as it considered how the altercation began, what state of mind Molly possessed during the altercation, and whether that state of mind is reasonable. A different outcome might reasonably have occurred at trial had the jury been provided with evidence tending to show that Jason was frequently angry and experiencing

increased anger over recent months and that Jason and Molly had been awakened that night in a manner known previously to have caused discord in their relationship.

¶ 65 On the other hand, the trial court's erroneous exclusion of Tom's testimony regarding his perception of Molly's statement "[d]on't hurt my dad" was not by itself sufficiently prejudicial to either Tom or Molly as to warrant a new trial. This testimony undoubtedly supported defendants' self-defense claim, in that it tended to corroborate Tom's testimony that he was subjectively fearful during the altercation and that his fear was reasonable. However, in this case, the prejudicial impact of excluding Tom's testimony was limited because this testimony was largely duplicative of other testimony that was admitted into evidence tending to establish his state of mind. Apart from the stricken testimony, Tom was permitted to testify at length and in significant detail about the circumstances of the altercation. Just before the stricken testimony, he stated "if I can get any more afraid, that was it. I can't see [Jason]. It's dark in the bedroom. I'm thinking the next thing is going to be a bat in the back of the head." He also testified that around the time he heard Molly yell, Jason shoved him to the ground, he lost his glasses, and he saw Molly trapped between Jason and the wall with Jason appearing poised to strike Molly with the baseball bat. This testimony amply supported Tom's claim that he was fearful and that his fear was reasonable. Although we cannot say the trial court's exclusion of his testimony had no effect on the jury's deliberations, this error standing alone was not significant enough to establish prejudice sufficient to warrant a new trial. However, we still consider this error in combination with other evidentiary errors that occurred during the trial to determine if the errors, in the aggregate, were prejudicial.

¶ 66 In that regard, it is significant that the trial court's errors in excluding evidence offered by defendants limited defendants in their ability to counter the State's contention that they did not act in self-defense. In order to convict a defendant of second-degree murder in the presence of evidence of heat of passion or self-defense, "the [S]tate must prove beyond a reasonable doubt that defendant did not act in heat of passion and in self-defense in order to prove the existence of malice and unlawfulness, respectively." *State v. Marley*, 321 N.C. 415, 420 (1988). Evidence which tended to show that defendants both subjectively feared imminent death or substantial bodily harm and that their fear was reasonable at the time they used deadly force was extremely salient to the resolution of this question. *See, e.g.*, *State v. Williams*, 342 N.C. 869, 872–73 (1996) (describing the subjective and objective components of

the defense of perfect self-defense). In addition, as the Court of Appeals explained, the erroneous admission of the blood-spatter testimony also undercut defendants' self-defense argument by "bolstering the State's claim that Jason was struck after and while he was down and defenseless." *Corbett*, 269 N.C. App. at 559.[16] In the present case, these errors together imposed a significant constraint on defendants' efforts to establish a crucial fact: namely, their state of mind at the time of the events in question based on all of the circumstances known to them.

¶ 67 We have long held that when a defendant has claimed self-defense, "a jury should, as far as is possible, be placed in defendant's situation and possess the same knowledge of danger and the same necessity for action, in order to decide if defendant acted under reasonable apprehension of danger to his person or his life." *State v. Johnson*, 270 N.C. 215, 219 (1967). In this case, "[i]f defendant[s] had been able to present the excluded testimony, [they] might have been able to convince the jury that [they used deadly force] while under a reasonable belief that it was necessary to do so in order to save [themselves] from death or great bodily harm." *State v. Webster*, 324 N.C. 385, 393 (1989). "Thus, there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial." *Id.* Accordingly, we affirm the decision of the Court of Appeals concluding that the trial court committed prejudicial evidentiary errors.

IV. Conclusion

¶ 68 The events of 2 August 2015 which led to Jason Corbett's untimely death were tragic. Our system of laws assigns to the jury in this case the onerous responsibility of examining the evidence and determining if Tom Martens and Molly Corbett were guilty of second-degree murder or if the homicide was justified self-defense necessary to save them from serious bodily harm or death. However, it is the responsibility of the courts, including this Court, to ensure that both the State and criminal defendants are afforded the opportunity to fully and fairly present their cases. Here, Tom's and Molly's sole defense to the charges levelled against them was that their use of deadly force was legally justified. By erroneously excluding admissible testimony which was relevant to the central question presented to the jury, the trial court impermissibly constrained defendants' ability to mount their defense. On these facts, we

16. Additionally, because the only issue before us on the issue of the expert's bloodstain testimony was whether the objection was properly preserved, and by statute we necessarily must conclude that it was, the Court of Appeals ruling that the testimony was improperly admitted and prejudicial stands as an alternative ground requiring a new trial.

conclude that "[a]s a matter of fundamental fairness, the exclusion of [Jack's and Sarah's] statement[s] deprived the jury of evidence that was relevant and material to its role as finder of fact." *Sargeant*, 365 N.C. at 68. Similarly, the jury was erroneously instructed to disregard testimony supporting the conclusion that Tom was fearful of being seriously injured or killed. Therefore, we agree with the majority below that "this is the rare case in which certain evidentiary errors, alone and in the aggregate, were so prejudicial as to inhibit Defendants' ability to present a full and meaningful defense." *Corbett*, 269 N.C. App. at 512. Accordingly, we affirm.

AFFIRMED.

Justice BERGER dissenting.

¶ 69 The analysis by the majority contains three fundamental flaws. Concerning preservation, the majority creates an argument for defendants. In addition, throughout the opinion, the majority reweighs the evidence. Finally, and perhaps most remarkably, the majority engages in a de novo analysis of issues which should be reviewed for an abuse of discretion. Because defendants "receive[d] 'a fair trial, free of prejudicial error,' " *State v. Malachi*, 371 N.C. 719, 733, 821 S.E.2d 407, 418 (2018) (quoting *State v. Ligon*, 332 N.C. 224, 243, 420 S.E.2d 136, 147 (1992)), the trial court's judgments should be affirmed. Therefore, I respectfully dissent.

I. Preservation

¶ 70 Rules concerning preservation not only establish a framework for appellate review but also provide parties and trial courts with the opportunity to clarify arguments, frame issues, and correct errors at trial. As a matter of judicial economy, the trial court can ask for additional arguments from the parties, sustain objections, and give necessary curative instructions during trial, allowing for a better understanding of the arguments and issues presented in the case. *See State v. Oliver*, 309 N.C. 326, 334, 307 S.E.2d 304, 311 (1983) ("Rule 10 functions as an important vehicle to insure that errors are not 'built into' the record, thereby causing unnecessary appellate review."). This allows trial courts to correct errors on the front end, rather than engaging in needless after-the-fact appeals. *See generally State v. Bursell*, 372 N.C. 196, 199, 827 S.E.2d 302, 305 (2019) ("[Rule 10] prevents unnecessary retrials by calling possible error to the attention of the trial court so that the presiding judge may take corrective action if it is required.").

¶ 71 "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion . . . ." N.C. R. App. P. Rule 10(a)(1). "To be timely, an objection to the admission of evidence must be made 'at the time it is actually introduced at trial.' " *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (quoting *State v. Thibodeaux*, 352 N.C. 570, 581, 532 S.E.2d 797, 806 (2000)). "[T]he Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

¶ 72 Defendants' argument regarding the evidence of the blood stain on defendant Martens's boxer shorts was not preserved. The parties did not argue in their briefs or at oral argument that N.C.G.S. § 15A-1446(d)(10) was the vehicle through which this issue was preserved. Moreover, neither the Court of Appeals majority, nor the dissent, referenced this statute. However, the majority finds preservation by operation of N.C.G.S. § 15A-1446(d)(10).

¶ 73 It is troubling that the majority impermissibly creates an argument for defendants given the lack of briefing and argument by the parties. It is particularly troubling that the majority does so utilizing a statute that this Court has, in part, declared unconstitutional where it conflicts with our appellate rules. *See State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010) (stating that provisions of subsection 15A–1446(d) have been declared unconstitutional where those provisions "conflicted with specific provisions of our appellate rules rather than the general rule stated in Rule of Appellate Procedure 10(a)").

¶ 74 During voir dire, defendants objected to the reliability of the conclusion of the State's blood spatter expert, Stuart James, that the stains on defendant Martens's boxer shorts were impact blood spatter arising from blunt force strikes to Jason's head while he was on the ground. The trial court overruled defendants' objections.

¶ 75 At trial, Stuart James testified without objection as follows:

> With respect to the small spatters on the front underside of the left leg of the shorts, these were consistent with the wearer of the shorts close to and above the source of the spattered blood. To what extent, I can't really say. In order for the stains to get to that location on the inside of the leg, they would have to be traveling, you know, at least somewhat upward in order to do that. My conclusion there was the source

> of the impact spatters is most likely the head of Jason Corbett while it was close to the floor in the bedroom.

¶ 76 Defendants failed to renew their objections to this testimony at trial, and the majority acknowledges that "[t]here is no indication in the record that defendants' counsel ever requested a continuing objection to the testimony at issue . . . ." As defendants did not object when the State elicited the testimony before the jury, defendants failed to preserve the alleged error for appellate review. *See State v. Snead*, 368 N.C. 811, 816, 783 S.E.2d 733, 737 (2016) ("An objection made 'only during a hearing out of the jury's presence prior to the actual introduction of the testimony' is insufficient." (quoting *Ray*, 364 N.C. at 277, 697 S.E.2d at 322)).

¶ 77 In relying on N.C.G.S. § 15A-1446(d)(10), the majority impermissibly creates an avenue for preservation that was not addressed, briefed, or argued. The majority's argument is a departure from our Rule 10 jurisprudence, and rests on questionable constitutional grounds.

¶ 78 Moreover, defendants were not prejudiced by the admission of testimony concerning one drop of untested blood due to the extensive amount of blood and blood spatter evidence that was admitted without objection. The State introduced without objection additional blood spatter evidence that Jason was struck when his head was close to the ground. Regarding the blood stains on the walls, Stuart James testified without objection that "the[ ] patterns are consistent with impacts to the head of [Jason] as he was descending to the floor[,]" that some of the impacts were "24 to 28 inches above the floor . . . [i]t went from five feet down to 24 to 28 inches[,]" and that the other impacts were "[a]pproximately 5 to 16 inches [from the floor] . . . [s]o that's what I meant by descending succession of impacts." Stuart James further testified that there were "impact spatters on the underside of the folded-back quilt" on the bottom of the bed in the master bedroom.

¶ 79 Additionally, defendant Martens testified, "[a]nd so I hit [Jason]. And I hit him until he goes down. And then I step away. . . . I hit him until I thought that he could not kill me." To this point, Stuart James's testimony corroborates defendant Martens's testimony when he stated, "[a]nd if you would take those [untested stains] away, it really doesn't change much of my opinion. It is still impact spatter with the wearer of the shorts in proximity with the source of the blood."

¶ 80 Defendants' failure to object may have been a trial strategy. Defendants may not have wanted to draw additional attention to the overwhelming amount of blood and blood-related evidence associated with Jason's brutal death. Whatever their reason, given the admission

of other blood evidence showing that Jason was struck while close to or near the ground, defendants certainly were not prejudiced by the admission of the blood spatter testimony relating to defendant Martens's boxer shorts.

II. Hearsay Statements

¶ 81 This Court has recognized that, "[t]he competency, admissibility, and sufficiency of the evidence is a matter for the [trial] court to determine." *In re Lucks*, 369 N.C. 222, 228, 794 S.E.2d 501, 506 (2016) (second alteration in original) (quoting *Queen City Coach Co. v. Lee*, 218 N.C. 320, 323, 11 S.E.2d 341, 343 (1940)). Because our case law regarding the standard of review applicable to a ruling on whether evidence is admissible under Rule 803(4) is nonexistent, we can look to the federal rules for guidance. *See State v. Wilson*, 322 N.C. 117, 132, 367 S.E.2d 589, 598 (1988) ("Since the case law concerning collateral statements under this rule of evidence in this State is negligible, we shall look to the federal courts for guidance on this point in interpreting its federal counterpart.").[1] Rule 803(4) of the North Carolina Rules of Evidence is

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1. Federal courts also recognize that evidentiary rules and those regarding hearsay are typically reviewed for abuse of discretion. *See*, *e.g.*, *United States v. Earth*, 984 F.3d 1289, 1294 (8th Cir. 2021) ("We review a district court's rulings regarding the admission of hearsay evidence for an abuse of discretion."); *United States v. Lovato*, 950 F.3d 1337, 1341 (10th Cir. 2020) ("We review the district court's evidentiary rulings for an abuse of discretion, considering the record as a whole. Because hearsay determinations are particularly fact and case specific, we afford heightened deference to the district court when evaluating hearsay objections."(citations omitted)); *United States v. Slatten*, 865 F.3d 767, 805 (D.C. Cir. 2017) ("Ordinarily, the Court reviews the exclusion of a hearsay statement under the abuse of discretion standard."); *United States v. Ferrell*, 816 F.3d 433, 438 (7th Cir. 2015) ("To reverse a district court's decision on the admissibility of hearsay statements, we must conclude that the district court abused its discretion."); *United States v. Amador-Huggins*, 799 F.3d 124, 132 (1st Cir. 2015) ("The parties agree that our review of how the district court applied the hearsay rules to these facts is for abuse of discretion."); *United States v. Cole*, 631 F.3d 146, 153 (4th Cir. 2011) ("We review a trial court's rulings on the admissibility of evidence for abuse of discretion, and we will only overturn an evidentiary ruling that is 'arbitrary and irrational.' "); *United States v. Santos*, 589 F.3d 759, 763 (5th Cir. 2009) ("We review evidentiary rulings for abuse of discretion."); *United States v. Price*, 458 F.3d 202, 205 (3d Cir. 2006) ("Whether a statement is hearsay is a legal question subject to plenary review. If the district court correctly classifies a statement as hearsay, its application of the relevant hearsay exceptions is subject to review for abuse of discretion." (citations omitted)); *United States v. Brown*, 441 F.3d 1330, 1359 (11th Cir. 2006) ("We review a district court's hearsay ruling for abuse of discretion."); *United States v. Wright*, 343 F.3d 849, 865 (6th Cir. 2003) ("All evidentiary rulings, including hearsay, are reviewed for abuse of discretion."); *United States v. Shryock*, 342 F.3d 948, 981 (9th Cir. 2003) ("We review for an abuse of discretion the district court's evidentiary rulings during trial, including the exclusion of evidence under the hearsay rule."); *United States v. Forrester*, 60 F.3d 52, 59 (2d Cir. 1995) ("[A]n application of the rules concerning hearsay is reviewed for the abuse of discretion.").

similar to its federal counterpart. *Compare* N.C.G.S. § 8C-1, Rule 803(4) (2019), *with* Fed. R. Evid. 803(4). *See Roberts v. Hollocher*, 664 F.2d 200, 204 (8th Cir. 1981) (Federal Rule of Evidence 803(4) excepts from the hearsay rule "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment").

¶ 82 The majority relies on *State v. Norman*, 196 N.C. App. 779, 783, 675 S.E.2d 395, 399 (2009), for the proposition that a ruling on whether evidence is admissible under Rule 803(4) is reviewed de novo. However, *Norman* is not binding precedent on this Court. *See N. Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co.*, 311 N.C. 62, 76, 316 S.E.2d 256, 265 (1984) ("This Court is not bound by precedents established by the Court of Appeals."). The *Norman* decision rests on a questionable interpretation of the standard of review utilized by this Court in *Hinnant*. A review of *Hinnant* shows that this Court did not state the standard it used to review the Rule 803(4) issues before it. Because this Court has never expressly established a standard of review under Rule 803(4), the plethora of federal hearsay jurisprudence is more persuasive than a single statement in *Norman*.[2] Accordingly, review of the admissibility of evidence under Rule 803(4) should be for an abuse of discretion.

¶ 83 Rule 803(4) excepts from the general rule against hearsay

> [s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

N.C.G.S. § 8C-1, Rule 803(4). "This exception to the hearsay doctrine was created because of a 'patient's strong motivation to be truthful' when making statements for the purposes of medical diagnosis or treatment."

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2. The majority further cites to *State v. Jones*, 339 N.C. 114, 146 (1994) and *State v. Stafford*, 317 N.C. 568, 571 (1986) for the proposition that this Court routinely reviews Rule 803(4) determinations de novo. This Court has never expressly stated the standard of review used to analyze Rule 803(4) issues. The majority acknowledges that this Court has never "explicitly elaborated at length" our standard of review under 803(4). After review of the cases cited by the majority, it cannot be said that "our opinions interpreting Rule 803(4) establish that the Court has routinely reviewed these decisions de novo . . . ."

State v. Lewis, 172 N.C. App. 97, 103, 616 S.E.2d 1, 4–5 (2005) (citing N.C.G.S. § 8C-1, Rule 803(4) official commentary (2003)).

> Rule 803(4) requires a two-part inquiry: (1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment.

Hinnant, 351 N.C. at 284, 523 S.E.2d at 667. "[T]he proponent of Rule 803(4) testimony must affirmatively establish that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment." *Id.* at 287, 523 S.E.2d at 669. To determine whether a child's statements are admissible under this exception, "the trial court should consider all objective circumstances of record surrounding [the] declarant's statements in determining whether he or she possessed the requisite intent under Rule 803(4)." *Id.* at 288, 523 S.E.2d at 670.

¶ 84 At trial, Brandi Reagan, executive director of the Dragonfly House, explained that when a child arrives at the Dragonfly House for an appointment, the child is met by a child advocate who "talks with th[e] nonoffending caregiver and the child about . . . people they are going to meet, every service they are going to receive[,] and what would happen at the end of the appointment." Heydy Day, the child advocate in this case, testified, "I start off talking to the child and the caregiver saying, 'you will be talking with one of my friends today,' whether that's our interviewer Kim or interviewer Brandi, you will be talking to that lady." She testified that she would tell the children, "Once you finish talking with Miss Kim or Miss Brandi and the doctor finishes talking with the caregiver, then the doctor will call you back to do a head to toe check-up of you." Additionally, Reagan testified that interviews at the Dragonfly House took place in bedrooms to create a "child-friendly" interview room, rather than in the medical examination room.

¶ 85 When asked if he knew why he was at the Dragonfly House, Jack responded that he was there because "people are trying" to take him away from his mom. When asked who told him that, he responded "[m]y mom." When Sarah was asked if she knew why she was at the Dragonfly House, she responded, "[b]ecause my dad died."

¶ 86 The trial court determined the statements at issue did not qualify as statements for the purposes of the medical diagnosis or treatment exception because the trial court found that the children thought the interview was about custody. The trial court made appropriate findings

of fact and weighed factors when it determined that the circumstances surrounding the interviews did not indicate that either child understood that the interviews were for the purpose of medical diagnosis or treatment. The declarants stated that they were present at the Dragonfly House either because their dad died or because of some issue relating to custody. The children did not respond with an answer focusing on their physical or emotional well-being. Based on these statements, the trial court reasonably concluded that the statements were not made for the purpose of medical diagnosis or treatment. *See Hinnant*, 351 N.C. at 284, 523 S.E.2d at 667–68.

¶ 87 It is important to acknowledge that the trial court could have admitted the children's statements into evidence. While reasonable minds can differ on the admissibility of this evidence, we cannot say that the trial court abused its discretion. "The purpose of standards of review is to focus reviewing courts upon their proper role when passing on the conduct of other decision-makers. Standards of review are thus an elemental expression of judicial restraint, which, in their deferential varieties, safeguard the superior vantage points of those entrusted with primary decisional responsibility." *Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 320–21 (4th Cir. 2008). The majority's de novo review does away with the fundamental safeguards that are available to all litigants when the primary decisional responsibility of the trial court is respected and maintained. *See United States v. Charboneau*, 914 F.3d 906, 912 (4th Cir. 2019). Our inquiry should be limited to whether the trial court's decision to exclude the statements was "manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Based upon the record in this case, the trial court did not abuse its discretion when it excluded the children's statements under Rule 803(4).

¶ 88 Similarly, the trial court did not abuse its discretion when it determined that the children's statements did not meet the requirements of the residual hearsay exception.

¶ 89 The residual hearsay exception is disfavored and should be invoked "very rarely, and only in exceptional circumstances." *State v. Smith*, 315 N.C. 76, 91 n.4, 337 S.E.2d 833, 844 n.4 (1985) (citation omitted). A trial court's determination of whether to admit statements under Rule 803(24) is reviewed for an abuse of discretion. *Id.* at 97, 337 S.E.2d at 847. As stated above, "[a] trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White*, 312 N.C. at 777, 324 S.E.2d at 833.

¶ 90 The trial court "must enter appropriate statements, rationale, or findings of fact and conclusions of law . . . in the record to support [its]

discretionary decision[,]" *Smith*, 315 N.C. at 97, 337 S.E.2d at 847, to allow "a reviewing court to determine whether the trial court abused its discretion in making its ruling," *State v. Sargeant*, 365 N.C. 58, 65, 707 S.E.2d 192, 196 (2011). Moreover, "evidence proffered for admission pursuant to . . . Rule 803(24) . . . must be carefully scrutinized by the trial judge within the framework of the rule's requirements." *Smith*, 315 N.C. at 92, 337 S.E.2d at 844.

> Under either of the two residual exceptions to the hearsay rule, the trial court must determine the following: (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (6) whether the interests of justice will be best served by admission.

State v. Valentine, 357 N.C. 512, 518, 591 S.E.2d 846, 852 (2003) (citation omitted). The sole issue here concerns whether the children's statements were trustworthy.

¶ 91 In determining whether a statement under Rule 803(24) is "trustworthy," this Court has identified the following factors to consider:

> (1) assurance of personal knowledge of the declarant of the underlying event; (2) the declarant's motivation to speak the truth or otherwise; (3) whether the declarant ever recanted the testimony; and (4) the practical availability of the declarant at trial for meaningful cross-examination.

Smith, 315 N.C. at 93–94, 337 S.E.2d at 845 (citations omitted). "[I]f the trial judge examines the circumstances and determines that the proffered testimony does not meet the trustworthiness requirement, his inquiry must cease upon his entry into the record of his findings and conclusions, and the testimony may not be admitted pursuant to Rule 803(24)." *Id.* at 94, 337 S.E.2d at 845.

¶ 92 The trial court made the following relevant findings of fact relating to the children's statements:

> 15. The children's statements did not describe actual knowledge of the events surrounding the homicide of Jason Corbett. Jack identified the source of the

> information in his statements by saying "my mom told me" and "she (defendant Molly Corbett) told us." Sarah similarly described the source of her knowledge, saying the [sic] her grandmother "told [me] first and then her mother [told me]." When speaking of her "grandmother," Sarah was referring to the mother of defendant Molly Corbett and the wife of defendant Thomas Martens.
>
> . . . .
>
> 20. The statements of the children which the defense proffers were not made out of the personal knowledge of the declarant children but are instead double hearsay[3] declarations of the defendant Molly Corbett and her mother.
>
> 21. These same statements were not made at a time when the children were motivated to speak the truth but were rather motivated to affect future custody arrangements—specifically the children feared that they were going to be "taken away from their mother" and removed to another country by their father's relatives.
>
> 22. The statements of the children that are offered by the defense as pertinent to the relationship between Molly Corbett and Jason Corbett have been specifically recanted. Sarah Corbett, the younger of the two children, recanted her statements in diary entries made after her return to Ireland. Jack Corbett recanted his statements in diary entries and during a recorded interview with members of the District Attorney's Office.

¶ 93 With regard to finding of fact 15, that the statements did not describe the homicide, there is no evidence that the children witnessed the

3. The majority does not address the issue of double hearsay. In addition, the majority gives no direction to the trial court on which statements are admissible and which are not. Furthermore, the majority does not address the trial court's discretion to exclude this evidence under Rule 403 regardless of its admissibility under Rule 803(24). *See* N.C.G.S. § 8C-1, Rule 403 (2019) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

homicide of Jason. Jack was asleep that night and did not wake up until law enforcement came into his room, and Sarah was documented saying that "at night she was sleeping and an officer came upstairs around 4 AM and took her downstairs to her grandma." Her mom told her that someone got hurt and later told her that her dad died.

¶ 94 As to finding of fact 20, that the statements were not made with personal knowledge, the Dragonfly House's Medical Services Log for Sarah states that "Sarah does not disclose witnessing [domestic violence]." When asked if Sarah saw Jason hurt Molly, Sarah said, "No, not really ever, but one time I saw him step on her foot." Reagan followed up by asking, "So when you said that he would fight with her and he would hurt her, you said you didn't really see it, how would you know about it?" Sarah responded, "Because, um, my mom told me." Further, the DSS social worker's notes stated, "Sarah states her father screams and yells and states when her mom and dad goes into the room her dad hurts her mom. She stated her mom told her."

¶ 95 When Reagan asked Jack, "How did your dad die?" Jack responded:

> Okay. Well, my sister had a nightmare about insect crawling—she had fairy blankets and insects all over her bed. That was a nightmare, though. And my dad got very mad, and he was screaming at our mom, and my mom screamed, and my grandpa came up and started to hit him with a bat. And then my dad grabbed hold of the bat—grabbed—held the bat and hit my grandpa with the bat, until my mom put a—put—we were going to paint a brick that was in there, like a cinder block, and it hit his temple, right here, and he died.

When Reagan asked, "now you said your sister had a nightmare. How did you know that?" Jack responded, "My parents—my mom told me." When asked to recount details about Jason's behavior, Jack admitted he "[didn't] actually remember[,]" or stated that he knew because his mom or grandma told him. Lastly, Reagan asked, "[a]nd just to make sure I understand, how did you find out that your mom hit [your dad] with a brick and your grandpa hit him with a bat?" Jack responded, "She told me."

¶ 96 The record demonstrates that there was evidence to support the trial court's findings of fact 15 and 20 because the children's statements were not made with "actual knowledge of the events surrounding the homicide of Jason" and "were not made out of the personal knowledge of the declarant children." Moreover, finding of fact 21 was supported by

Sarah's exchange at Dragonfly House. When Sarah was asked, "Tell me why you're here today[,]" she responded, "Because my dad died." Sarah stated, "I actually heard people talk about my aunt trying to come get us, trying to come get me and my brother. Like, and she (indiscernible) right now and (indiscernible). And that's why at the funeral, I had to (indiscernible) my mother—my mom's hand the whole time." In addition, Jack stated, "my dad died, and people are trying—my aunt and uncle from my dad's side are trying to take away—take me away from my mom. And—that's why I'm here. My mom's trying to get custody over us."

¶ 97 Further, finding of fact 22, that the statements were recanted, is supported by Jack's Skype interview from Ireland and copies of diary entries written by Sarah and Jack. Jack recanted his earlier statements and stated, "I didn't tell the truth at Dragonfly. I didn't tell the truth [during the DSS Interview]." Sarah's diary entries include statements that defendant Corbett had instructed the children to say that Jason hit and yelled at defendant Corbett and that defendant Corbett told Sarah that Jason had killed Sarah's mom by putting a pillow over her mouth. This evidence supports the trial court's determination that the children's statements concerning the relationship between defendant Corbett and Jason had "been specifically recanted."

¶ 98 Given the findings of fact, the trial court's conclusion that "[t]he proffered statements do not have circumstantial guarantees of trustworthiness" was not an abuse of discretion. In addition, under Rule 104(a) the trial court was entitled to consider the children's recantations in determining whether to admit the children's statements into evidence under the residual hearsay exception. *See* N.C.G.S. § 8C-1, Rule 104(a) (2019) ("Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . ."). Further, the majority acknowledged the trial court's gatekeeping function stating, "the trial court was entitled to consider Jack's Skype interview and Sarah's diary entries, regardless of whether either would ultimately have been deemed admissible evidence, in making a preliminary determination regarding the admissibility of the Dragonfly House interview and DSS interviews." Here, the trial court entered "appropriate statements, rationale, or findings of fact and conclusions of law [ ] in the record to support his discretionary decision[.]" *Smith*, 315 N.C. at 97, 337 S.E.2d at 847.

¶ 99 There is support in the record for the trial court's determination that the statements "were not made at a time when the children were motivated to speak the truth but were rather motivated to affect future custody arrangements." Therefore, the trial court's determination that the

children's statements were not admissible under the residual exception was not "manifestly unsupported by reason." *White*, 312 N.C. at 777, 324 S.E.2d at 833.

¶ 100 Even if we assume the trial court erred when it excluded the children's statements, defendants have not shown that they were prejudiced. It is uncontroverted that defendants killed Jason. The question for the jury was whether defendants' killing of Jason was justified.

¶ 101 The autopsy report stated that Jason died of blunt force trauma to the head. Jason sustained "[e]xtensive skull fractures" from "multiple blunt force impact sites of the head." According to the medical examiner, Jason's injuries "included ten different areas of impact on the head, at least two of which had features suggesting repeated blows indicating a minimum of 12 different blows to the head." The medical examiner testified that an injury on the right side of Jason's head was caused by an object with a sharp edge not consistent with a baseball bat. In addition, Jason had a broken nose and blunt force injuries to his torso, left hand, and legs.

¶ 102 Defendant Martens testified that he first "hit [Jason] in the head, the back of the head with the baseball bat," but the blow did not stop Jason. Defendant Martens then "tried to hit [Jason] as many times as [he] could to distract [Jason]" in the hallway. According to defendant Martens, he had struck Jason at least two times in the back of the head with the aluminum baseball bat at this point in the altercation. After coming back down the hallway, Jason and defendant Martens struggled over the bat. Jason obtained control of the bat and pushed defendant Martens over the bed and onto the floor. Defendant Martens eventually regained control of the bat and struck Jason again. Defendant Martens then testified, "just because [Jason] lost control of the bat doesn't mean this is over. This was far from over. . . . And so I still think that, you know, he has the advantage even though—'cause I know what I'm feeling like. I'm shaking. I'm not doing good now. And so I hit him. And I hit him until he goes down." Defendant Martens admitted that he beat Jason with the aluminum bat until he was no longer moving.

¶ 103 Defendant Martens gave a statement to authorities and testified that he had no knowledge of the brick paver or that the brick paver was used to kill Jason. However, the State's evidence showed that defendant Corbett provided a statement to detectives admitting that she struck Jason with the brick paver. The brick paver had hair fragments and blood stains which were consistent with multiple impacts to Jason's head. Based on defendant Martens's testimony and defendant Corbett's

statement to law enforcement, defendant Corbett could not have struck Jason with the brick paver until after she broke away from his initial assault.

¶ 104 The jury heard this evidence, and defendants had the opportunity to argue this evidence and the issue of self-defense to the jury. Even assuming the children's statements were admissible, defendants have failed to show how these statements have any bearing on whether they were justified in killing Jason. While the children's statements highlight past incidents of alleged domestic abuse, the jury heard defendant Martens's testimony that Jason was abusing defendant Corbett that night in the bedroom. The jury was also able to consider defendant Corbett's statement to law enforcement that Jason was choking her before defendant Martens hit Jason with the aluminum baseball bat.

¶ 105 At the same time, the jury heard evidence that Jason's body "felt cool" and there was "dry blood on him" indicating he had been there for some time before paramedics arrived. The jury also heard evidence that the blood spatter indicated that Jason was struck at or near the ground; that defendant Martens "hit [Jason] until he went down"; and that neither defendant had any visible injuries. Further, an aggressor instruction was given as to defendant Martens. The jury had the opportunity to compare defendants' statements, and the testimony of defendant Martens, with the physical evidence surrounding Jason's death. *See State v. Patterson*, 335 N.C. 437, 451, 439 S.E.2d 578, 586 (1994) (finding that despite the defendant's contention that he killed the victim accidentally, "[f]rom [the physical] evidence, the jury could reasonably infer that defendant intentionally pointed the shotgun at [the victim] at close range and intentionally pulled the trigger"). Any purported errors relating to the trial court's decision to exclude the children's statements as evidence did not deprive defendants of a fair hearing on the issue of self-defense.

¶ 106 Moreover, the children's statements and subsequent recantations were not relevant to defendant Martens's state of mind. *See State v. Smith*, 337 N.C. 658, 447 S.E.2d 376 (1994) (finding evidence of prior violence not admissible because there was no evidence defendant had knowledge of prior violent behavior). Defendant Martens testified that he was unaware of any acts of violence between Jason and defendant Corbett.

¶ 107 The evidence against defendants in this case was overwhelming. Each defendant had the opportunity to argue and present their arguments of self-defense to the jury. Neither defendant has established the possibility of a different result. *See* N.C.G.S. § 15A-1443(a) (2019) ("A defendant is prejudiced . . . when there is a reasonable possibility that, had

the error in question not been committed, a different result would have been reached . . . ."). Therefore, the decision of the trial court should be affirmed.

Chief Justice NEWBY and Justice BARRINGER join in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
MARDI JEAN DITENHAFER

No. 126A18-2

Filed 12 March 2021

Obstruction of Justice—felony obstruction of justice—deceit and intent to defraud—sufficiency of the evidence

In a case involving the sexual abuse of a child by the child's adoptive father where defendant (the child's mother) engaged in acts to obstruct the abuse investigation by denying investigators access to the child, the record contained sufficient evidence of deceit and intent to defraud to support defendant's conviction of felonious obstruction of justice. The evidence, in the light most favorable to the State, showed defendant knew the child's accusations against her husband were probably true—and later discovered him having sex with the child— and had motives other than a desire for truthfulness in seeking to interfere with the investigation.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 840 S.E.2d 850 (N.C. Ct. App. 2020), finding no error in a judgment entered on 1 June 2015 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Supreme Court on 11 January 2021.

Joshua H. Stein, Attorney General, by Sherri Horner Lawrence, Special Deputy Attorney General, for the State-appellee.

Jarvis John Edgerton, IV, for defendant-appellant.

ERVIN, Justice.

¶ 1 The issue before us in this case involves the sufficiency of the evidence to support defendant Mardi Jean Ditenhafer's conviction for felonious obstruction of justice based upon her actions in allegedly interfering with the ability of law enforcement officers and social workers to have access to her daughter, who had been sexually abused by defendant's husband. After careful consideration of defendant's challenge to the Court of Appeals' decision, we hold that the record contains sufficient evidence that defendant acted with deceit and intent to defraud to support her conviction for felonious obstruction of justice and affirm the decision of the Court of Appeals.

I. Factual Background

A. Substantive Facts

¶ 2 Defendant is the mother of Jane and the wife of William Ditenhafer, who is Jane's adopted father.[1] After reaching middle school, Jane developed mental health and self-esteem-related problems and began to engage in self-harming-related activities. According to Jane, defendant would become angry about her self-harming activities, claiming that she was acting as she was in order to get "attention" and to "fit in" and that Jane needed to stop what she was doing. Jane claimed to be afraid of Mr. Ditenhafer because of his anger, his tendency to yell at her, and the spankings that he would administer for the purpose of disciplining her when she got in trouble. Upon discovering that Jane had sent suggestive photos of herself to a middle school boy, defendant and Mr. Ditenhafer became very angry with Jane and prohibited her from using electronic devices. Around the same time, Mr. Ditenhafer, with defendant's knowledge, began giving Jane full-body massages to "help [her] self-esteem."

¶ 3 After giving Jane a massage in 2013, Mr. Ditenhafer told Jane to come into the living room. Once she had complied with that instruction, Mr. Ditenhafer informed Jane that he had discovered that she had sent additional suggestive photographs to the boy who had received the earlier images. According to Jane, Mr. Ditenhafer claimed to have been "turned on" by these photos and told Jane that they "could either show [defendant] these photos" or she could "help him with his . . . boner." At that point, Jane started crying because, "if [defendant] saw these [images] again, she would call the police and I would get in trouble and I would get sent to jail," and did as Mr. Ditenhafer had instructed her to do.

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1. "Jane" and "John" are pseudonyms that are employed in order to protect the children's identities and for ease of reading.

¶ 4 Subsequently, Mr. Ditenhafer began to pressure Jane to engage in sexual acts with him on a regular basis. Over time, the abuse that Mr. Ditenhafer inflicted upon Jane became more serious, with such abusive episodes occurring "at least two times a week" when defendant was not in the home and progressing to the point that Mr. Ditenhafer had Jane engage in oral and vaginal sex acts with him. Jane claimed that Mr. Ditenhafer told her not to tell anyone about the abuse or he would make her sound like a "crazy lying teenager." Jane refrained from telling defendant about the abuse that she was suffering at the hands of her adoptive father because she "didn't think [defendant] would believe [her] and [defendant] would get angry at [her] for making up a lie."

¶ 5 In the spring of 2013, when Jane was in the ninth grade, she visited an aunt, who was the sister of her biological father, in Arizona. During that visit, Jane informed her aunt that Mr. Ditenhafer had been sexually abusing her. At that point, Jane and her aunt called defendant for the purpose of telling defendant about the abuse that Jane had experienced. Defendant reacted to the information that Jane and her aunt had provided by becoming angry with Jane.

¶ 6 The aunt reported Jane's accusations against Mr. Ditenhafer to law enforcement officers in Arizona. The Arizona officers, in turn, contacted Detective Stan Doremus of the Wake County Sheriff's Office, who initiated an investigation into Jane's allegations. Jane testified that, upon her return to North Carolina, defendant picked her up from the airport and told her that defendant did not believe Jane's accusations; that Jane "needed to tell the truth and recant and not — and not lie anymore because it was going to tear apart the family and it was just going to end horribly"; and "that [Jane] didn't need to do this."

¶ 7 After learning of Jane's accusations against Mr. Ditenhafer, Susan Dekarske, a social worker employed by the Child Protective Services Department of Wake County Human Services, interviewed defendant and Mr. Ditenhafer, both of whom denied Jane's accusations. Even so, Mr. Ditenhafter agreed to move out of the family home and to refrain from communicating with Jane during the pendency of the investigation.

¶ 8 On 11 April 2013 Jane and defendant met with Detective Doremus and Ms. Dekarske at the family home. After Ms. Dekarske asked to speak with her privately, Jane told Ms. Dekarske about several instances of sexual abuse that she had suffered at the hands of Mr. Ditenhafer, the fact that defendant urged Jane to recant her accusations against her adoptive father, and the fact that defendant had blamed Jane for destroying the family given that Mr. Ditenhafer "would get 15 years in prison, that [defendant] would also lose her job and that [John] would

lose his dad, [and] they will lose the house." On 22 May 2013, Detective Doremus and Ms. Dekarske went to Jane's school for the purpose of speaking with her privately in light of their understanding that defendant had been pressuring Jane to deny the truthfulness of her claims against Mr. Ditenhafer.

¶ 9 On 21 June 2013, Detective Doremus and Ms. Dekarske again met with defendant and Jane at the family home. During the course of this meeting, defendant "had her hand on [Jane]'s thigh virtually the whole time" and "was answering the questions for [Jane]." When Detective Doremus asked defendant whether she thought that Jane's accusations against Mr. Ditenhafer were true, defendant, who appeared to be shocked, responded by stating that "there is some truth to everything that [Jane] says but not all of it is true." In addition, defendant told Ms. Dekarske that she and Jane had been working to improve their ability to communicate with each other and that, while defendant believed a portion of what Jane had been saying, she "did not believe it was" Mr. Ditenhafer who had abused Jane. After Detective Doremus and Ms. Dekarske asked if they could speak with Jane privately, defendant responded that she was not comfortable with allowing Jane to be alone with Detective Doremus and declined to allow this request.

¶ 10 Detective Doremus and Ms. Dekarske met with Jane in private again on 11 July 2013. Detective Doremus recalled that, as soon as she entered the meeting room, Jane "became upset and said that the only reason that [defendant] let her talk with us alone is because [Jane was] supposed to recant" and that, upon making this statement, Jane "started to cry, [and] said she was not going to recant to us because she was telling the truth." As the meeting progressed, defendant sent text messages to Jane asking how the meeting was going, interrupted the meeting by entering the room in which the interview was taking place, and appeared angry when Detective Doremus informed her that Jane had not recanted her accusations against her adoptive father. After Detective Doremus showed defendant a stack of sexually explicit e-mails that Mr. Ditenhafer had sent to Jane, defendant "looked at one page [of the e-mails], . . . flipped over to another page, and then left" with Jane in a "[h]urried, angry, rushed" manner.

¶ 11 As the investigation continued, defendant remained angry with Jane and continued to pressure her to recant. At one point, defendant threatened to take Jane to a psychiatric hospital because Jane was "crazy." When asked about the nature of the comments that defendant had made to her during this period of time, Jane testified that

> [defendant] would tell me I was manipulative and crazy and how I needed to tell the truth because I was tearing apart her family and destroying her family and that [Mr. Ditenhafer] was going to go to jail because of my lies and [my younger brother] was going to turn into a drug addict and drop out of high school and that I was, like, ruining, like, our family. And this one time she also called me a manipulative bitch.

In addition, defendant forbade Jane from visiting or talking with her Arizona relatives until she told them that she had falsely accused Mr. Ditenhafer of sexually abusing her. Defendant also informed Jane that a family trip to Disneyland was "not going to happen because we're going to lose our money and we're going to lose our stuff and the animals" and that, on the other hand, if Jane recanted her allegations against Mr. Ditenhafer, the family could still go to Disneyland. Finally, defendant told Jane that defendant might have breast cancer and that Jane needed to stop lying about the way in which her adoptive father had treated her because those lies were causing defendant to experience stress.

¶ 12 The conduct in which defendant engaged and Jane's fear that she would lose her relationship with her younger brother finally caused Jane to recant her accusations against Mr. Ditenhafer in early August 2013. On 5 August 2013, as Ms. Dekarske was preparing to leave after meeting with Jane and defendant at the family home, Jane ran outside and told Ms. Dekarske that she needed to tell her something. Then, in a manner that Ms. Dekarske described as "robotic" and "rehearsed," Jane stated, "I just want to let you know I am recanting my story and I'm making it all up." As Ms. Dekarske looked back towards the house, she saw defendant watching from the window, so she decided to end the conversation and discuss the subject with Jane at a later time.

¶ 13 On 7 August 2013, Jane called Detective Doremus and told him, while defendant listened, that she wished to recant her accusations against Mr. Ditenhafer. In addition, Jane sent an e-mail to Detective Doremus for the purpose of telling him that she wished to recant, with defendant having "prompted [Jane] on what to write."

¶ 14 On 29 August 2013, Detective Doremus went to Jane's school for the purpose of meeting with Jane. As she entered the room in which the meeting was to take place, Jane appeared to be nervous and told Detective Doremus that "I'm not supposed to talk to you." In response, Detective Doremus informed Jane that, while he believed that her allegations against her adoptive father were true, the Wake

County Sheriff's Office had ended its investigation and Mr. Ditenhafer would not be prosecuted for sexually abusing her.

¶ 15 Mr. Ditenhafer moved back into the family home around Thanksgiving and resumed his practice of sexually abusing Jane while defendant was absent from the house. On 5 February 2014, defendant entered the bedroom that she shared with Mr. Ditenhafter and observed Mr. Ditenhafer engaging in vaginal intercourse with Jane. As Jane retreated into the adjacent bathroom, defendant angrily yelled "What's going on? What is this?" While Jane stood crying in the bathroom, defendant asked Jane whether this was her "first time." Although Jane contemplated telling defendant that Mr. Ditenhafer had habitually abused her for the past several years, she told defendant instead that "my boyfriend and I have done it before."

¶ 16 Later that day, defendant drove Jane to a McDonald's at which defendant planned to retrieve a cell phone that Detective Doremus had examined during the investigation of Jane's earlier accusations against Mr. Ditenhafer. At that time, Jane told defendant that she had been telling the truth about Mr. Ditenhafer's conduct and that he had continued to sexually abuse her. In response, defendant stated that "I'm not sure if I believe you or not, but I just—I need to handle this first" before exiting the vehicle to obtain the cell phone from Detective Doremus. Defendant did not report what she had witnessed to Detective Doremus and refused to allow Jane to speak with him. In addition, defendant directed Jane to refrain from telling anyone else about what Mr. Ditenhafer had been doing to her "[b]ecause it was family business" and instructed Jane to help her discard the sheets and bedding upon which the abuse had occurred.

¶ 17 On 16 March 2014, defendant called Mr. Ditenhafer's brother and told him that she had walked in upon an act of sexual abuse involving Mr. Ditenhafer and Jane. After receiving this information, which he found to be shocking, the brother-in-law continued to communicate with defendant over the course of the next several weeks for the purpose of helping defendant determine how she should protect herself and the children. Although the brother-in-law initially thought that defendant would act in the children's best interest, she informed him a few weeks after their initial conversation that she intended to refrain from "involv[ing] anyone else or the authorities because that would cost them more money and time" and because "[w]e don't need anymore [sic] drama." At this point, the brother-in-law notified Child Protective Services about the sexual abuse that Mr. Ditenhafer had perpetrated upon Jane, resulting in the initiation of a new investigation by that agency.

¶ 18 On 29 April 2014, Robin Seymore, a Wake County Human Services employee, went to Jane's school for the purpose of interviewing Jane. Jane appeared anxious during her conversation with Ms. Seymore, denied that Mr. Ditenhafer had ever abused her, and called defendant to let her know that Ms. Seymore was there asking questions. After the end of her conversation with Jane, Ms. Seymore went to John's school in order to interview him. Within five minutes after Ms. Seymore's discussion with John had begun, defendant burst into the room in which the interview was being conducted, grabbed John, and told Ms. Seymore, "[a]bsolutely not. You're not going to talk to him. You are not going to talk to him. This is not happening." After making this series of statements, defendant told Ms. Seymore that "I have nothing to say to you" before leaving the interview room with John.

¶ 19 On 30 April 2014, Ms. Seymore went to the family home for the purpose of interviewing defendant. In spite of the fact that rain was pouring down and thunder could be heard, defendant told Ms. Seymore, "[y]ou're not coming into the house" and insisted that they talk outside. In the course of the ensuing conversation, defendant stated that Mr. Ditenhafer had stopped living in the family home during the preceding February while insisting that his departure "had nothing to do with the children or [Jane]" and suggested that his absence stemmed from the fact that "they had marital problems." In addition, defendant stated that her husband had decided to refrain from entering the house anymore in order to "avoid any more lies from [Jane]." After Ms. Seymore left the family home following her conversation with defendant, she and her supervisor decided to seek the entry of an order taking Jane into the nonsecure custody of Wake County Human Services.

¶ 20 On 1 May 2014, Detective Doremus and other law enforcement officers came to the family home for the purpose of placing defendant under arrest and taking Jane into the custody of the Wake County Department of Human Services. After their arrival, the officers observed defendant driving towards the residence. Upon discovering that Detective Doremus and the other officers were present, defendant backed up, turned around, and began to drive away. After the officers followed defendant and activated their emergency lights, defendant, who had Jane and John in the vehicle with her, pulled over on the side of the road, rolled up the windows, locked the doors, and phoned her attorney while ignoring the officers' requests that she exit from her vehicle. As she sat in the car with the children, defendant told Jane, "[d]on't say anything. Don't get out of the car . . . If they try and take you away, [Jane], don't go. Refuse to go. . . . Run down the street. Just don't go." Eventually, defendant complied with the officers' requests and was placed under arrest.

B. Procedural History

¶ 21 On 20 May 2014, the Wake County grand jury returned a bill of indictment charging defendant with one count of felonious obstruction of justice and one count of accessory after the fact to sexual activity by a substitute parent. On 9 September 2014, the Wake County grand jury returned a superseding indictment charging defendant with being an accessory after the fact to sexual activity by a substitute parent based upon an event that allegedly occurred on or about 5 February 2014. On 10 March 2015, the Wake County grand jury returned another superseding indictment charging defendant with two counts of felonious obstruction of justice, with one count alleging that defendant had obstructed justice by encouraging Jane to recant her allegations of sexual abuse against Mr. Ditenhafer on or about the period from 11 July 2013 to 1 September 2013 and with the second count alleging that defendant had obstructed justice by denying employees of the Wake County Sheriff's Office and the Wake County Department of Human Services access to Jane on or about the period from 11 July 2013 to 1 September 2013.

¶ 22 The charges against defendant came on for trial before the trial court and a jury at the 25 May 2015 criminal session of the Superior Court, Wake County. At the close of the State's evidence, defendant, who did not offer evidence on her own behalf, unsuccessfully moved to dismiss all three of the charges that had been lodged against her for insufficiency of the evidence and on the basis of "a variance between the crime alleged in the indictment and any crime for which the State's evidence may have been sufficient to warrant submission to the jury[.]" On 1 June 2015, the jury returned verdicts convicting defendant of felonious obstruction of justice by encouraging Jane to recant the allegations of sexual abuse that she had made against Mr. Ditenhafer, felonious obstruction of justice based upon her actions in denying employees of the Wake County Sheriff's Office and the Wake County Department of Human Services access to Jane, and accessory after the fact to sexual activity by a substitute parent. Based upon the jury's verdicts, the trial court entered a judgment sentencing defendant to a term of six to seventeen months imprisonment based upon the first of her two convictions for felonious obstruction of justice, a judgment sentencing defendant to a consecutive term of six to seventeen months imprisonment based upon her second conviction for felonious obstruction of justice, and a judgment sentencing defendant to a consecutive term of thirteen to twenty-five months imprisonment based upon her conviction for accessory after the fact to sexual activity by a substitute parent. Defendant noted an appeal to the Court of Appeals from the trial court's judgments.

¶ 23 In seeking relief from the trial court's judgments before the Court of Appeals, defendant argued that the trial court had erred by denying her motions to dismiss all three of the charges that had been lodged against her for insufficiency of the evidence and by "failing to limit Defendant's culpable conduct in its jury instruction for accessory after the fact to her failure to report abuse." *State v. Ditenhafer*, 258 N.C. App. 537, 547 (2018), *aff'd in part and rev'd in part*, 373 N.C. 116 (2019). In a divided decision, the Court of Appeals found no error in the trial court's judgment relating to the first of defendant's obstruction of justice convictions, which rested upon defendant's conduct in encouraging Jane to recant her accusations against Mr. Ditenhafer, on the grounds that the record contained sufficient evidence to support defendant's conviction. *Id.* at 547–49. On the other hand, the Court of Appeals overturned the trial court's judgment relating to the second of defendant's obstruction of justice convictions, which rested upon defendant's conduct in precluding investigating officials from having access to Jane, on the grounds that the record did not contain sufficient evidence to support that conviction. *Id.* at 550–51. Finally, the Court of Appeals reversed the judgment that the trial court had entered based upon defendant's conviction for accessory after the fact to sexual activity by a substitute parent on the grounds the indictment that had been returned against defendant "fail[e]d to allege any criminal conduct" and, instead, sought to hold defendant liable for an omission unrelated to the performance of any criminal act. *Id.* at 551–53. The State noted an appeal to this Court from the Court of Appeals' decision relating to defendant's conviction for accessory after the fact to sexual activity by a substitute parent based upon a dissenting opinion by Judge Inman and this Court granted the State's request for discretionary review with respect to the issue of whether the record contained sufficient evidence to support defendant's conviction for the felonious obstruction of justice charge relating to defendant's actions in precluding investigating officials from having access to Jane.

¶ 24 On 1 November 2019, this Court filed an opinion in which it affirmed the Court of Appeals' decision to reverse defendant's conviction for accessory after the fact to sexual activity by a substitute parent. *State v. Ditenhafer*, 373 N.C. 116, 129 (2019). In addition, we overturned the Court of Appeals determination that the trial court had erred by denying defendant's motion to dismiss the charge that defendant had feloniously obstructed justice by denying investigating officials access to Jane for insufficiency of the evidence on the grounds that the record contained sufficient evidence "to persuade a rational juror that defendant denied officers and social workers access to Jane." *Id.* at 129 (cleaned up). In support of this conclusion, we pointed to the presence of evidence tend-

ing to show that defendant had "talked over Jane during several interviews . . . in such a manner that Jane was precluded from answering the questions," that defendant had "interrupted an interview . . . by constantly sending Jane text messages and by abruptly removing Jane from the interview," and that defendant "successfully induced Jane to refuse to speak with investigating officers and social workers" on multiple occasions. *Id.* at 128. As a result, we remanded this case to the Court of Appeals for the limited purpose of determining "whether there [was] sufficient evidence to enhance the charge of obstruction of justice for denying access to Jane from a misdemeanor to a felony under N.C.G.S. § 14-3(b)." *Id.* at 129.

¶ 25 On remand from this Court, the Court of Appeals held that there was sufficient record evidence to support defendant's conviction for felonious, as compared to misdemeanor, obstruction of justice on the grounds that defendant had precluded investigating officials from having access to Jane. *State v. Ditenhafer*, 840 S.E.2d 850, 855 (N.C. Ct. App. 2020) (holding that "the State [had] introduced evidence, taken in the light most favorable to it, that [d]efendant acted with deceit and the intent to defraud"). In support of its determination that defendant's actions had involved deceit and the existence of an intent to defraud, the Court of Appeals pointed to the fact that defendant "did not permit [Jane] to answer questions and answered for her in one interview, sent text messages and physically interrupted another interview, and sought to constantly influence [Jane]'s statements in those interviews by verbally abusing and punishing [Jane] for the statements she was making." *Id.* at 856. In addition, the Court of Appeals noted the presence of evidence tending to show that defendant had "instructed [Jane] not to speak with investigators and directed investigators not to speak with [Jane] in private, ensuring that the daughter did not have the opportunity to give investigators truthful statements regarding the abuse" and that "[d]efendant [had] controlled the narrative by coaching [Jane] on what to say, listening on the line when [Jane] recanted her story to Detective Doremus, and prompting [Jane] on what to write in the [e-mail] in which [Jane] recanted her story." *Id.* (cleaned up). In dissenting from the majority's decision, Judge Tyson stated that the presence of deceit and an intent to defraud "is not what the indictment alleges nor what the State's evidence shows" and asserted that, on the contrary, the record evidence demonstrated that "[d]efendant presented her daughter and allowed access every time upon request," with this fact tending to negate any contention that defendant acted with deceit and intent to defraud. *Id.* at 858 (Tyson, J., dissenting). Defendant noted an appeal to this Court from the Court of Appeals' decision based upon Judge Tyson's dissent.

II. Substantive Legal Analysis

¶ 26 In seeking to persuade us to overturn the Court of Appeals' decision, defendant argues that the record is devoid of substantial evidence tending to show that she acted with either deceit or the intent to defraud in the course of denying investigating officials access to Jane. According to defendant, the record evidence uniformly demonstrates that, during the time period set out in the relevant count of the indictment, she did not believe Jane's accusations against Mr. Ditenhafer. In addition, defendant contends that, in light of the fact that she did not believe Jane's accusations against her husband, her attempt to induce Jane to recant her accusations against Mr. Ditenhafter amounted to an effort to persuade Jane to tell the truth "even if [she was] ultimately wrong about what the truth was." In support of this argument, defendant directs our attention to what she describes as the expressions of shock that defendant made when she interrupted Mr. Ditenhafer's abuse of Jane in February 2014. As a result, defendant maintains that her "actions during the relevant period were not intended to deceive; but, instead, were intended to protect [Mr. Ditenhafer] from what [defendant] incorrectly believed was a false accusation."

¶ 27 In seeking to persuade us to refrain from disturbing the Court of Appeals' decision, the State argues that "the Court of Appeals majority properly followed this Court's directive and determined that the State presented sufficient evidence to support defendant's felony obstruction of justice charge for denying access to the minor sexual abuse victim, Jane." After acknowledging defendant's claim that "she believed Jane was abused by someone other than [Mr. Ditenhafer]," the State points out that defendant "inconsistently took many steps to intervene in and frustrate law enforcement and [social services]' investigations into the sexual abuse." In essence, the State argues that, "[h]ad defendant indeed committed her acts during the investigation as Jane's concerned biological mother free of any intent to deceive or defraud, defendant would have cooperated with any investigation of Jane's reported sexual abuse" while, instead, defendant "did everything other than cooperate with the investigation" in order "to maintain her belief of a happy life with [Mr. Ditenhafer]." The State further argues that "[d]efendant's intent to deceive and defraud is further revealed by her failure to report or even acknowledge the sexual abuse after directly witnessing it firsthand." As a result, the State argues that "[d]efendant's many actions of pressuring Jane to recant during the indictment period and witnessing the sexual abuse firsthand after the indictment period both show defendant's overall mental attitude towards Jane's sexual abuse allegations and defen-

dant's selfish persistent desire to protect [her husband] and what she believed to be her good life" and permitted the jury to infer "her intent . . . from the circumstances and her actions throughout the investigation."

¶ 28 In deciding whether to grant or deny a motion to dismiss for insufficiency of the evidence, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Crockett*, 368 N.C. 717, 720 (2016) (quoting *State v. Hill*, 365 N.C. 273, 275 (2011)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Stone*, 323 N.C. 447, 451 (1988) (quoting *State v. Smith*, 300 N.C. 71, 78–79 (1980)). Put another way, substantial evidence is that which is "necessary to persuade a rational juror to accept a conclusion." *Crockett*, 368 N.C. at 720 (quoting *Hill*, 365 N.C. at 275). In determining whether the record contains sufficient evidence to support the submission of the issue of defendant's guilt of a criminal offense to the jury, the trial court must consider the evidence "in the light most favorable to the State," with the State being "entitled to every reasonable intendment and every reasonable inference to be drawn therefrom," *State v. Powell*, 299 N.C. 95, 99 (1980), and with "contradictions and discrepancies [being] for the jury to resolve" instead of "warrant[ing] dismissal," *State v. Winkler*, 368 N.C. 572, 574 (2015) (quoting *Powell*, 299 N.C. at 99). For that reason, "[t]he evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury." *Stone*, 323 N.C. at 452 (citing *State v. Jones*, 303 N.C. 500, 504 (1981)). In view of the fact that determining whether the record contains sufficient evidence to support the defendant's guilt of a criminal offense requires resolution of "a question of law," *Crockett*, 368 N.C. at 720, this Court reviews challenges to the sufficiency of the evidence to support the jury's decision to convict the defendant of committing a crime using a de novo standard of review, *State v. Melton*, 371 N.C. 750, 756 (2018) (citing *State v. Chekanow*, 370 N.C. 488, 492 (2018)).

¶ 29 At the time that this case was initially before the Court, we held, among other things, that the record contained sufficient evidence to support the submission of the issue of defendant's guilt of obstruction of justice based upon an allegation that defendant had denied investigating officials access to Jane to the jury. *Ditenhafer*, 373 N.C. at 128–29. As a result, the sole issue before the Court of Appeals on remand was whether the record contained sufficient evidence to support defendant's guilt of felonious, rather than misdemeanor, obstruction of justice on the basis of N.C.G.S. § 14-3(b), *id.* at 129, which provides that, "[i]f a misdemeanor as to which no specific punishment is prescribed be infa-

mous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony," N.C.G.S. § 14-3(b) (2019). As the Court of Appeals has correctly held, a defendant commits felonious, as compared to misdemeanor, obstruction of justice in the event that he or she "(1) unlawfully and willfully (2) obstruct[s] justice by providing false statements to law enforcement officers investigating [a crime] (3) with deceit and intent to defraud." *State v. Cousin*, 233 N.C. App. 523, 531 (2014). After considering the evidence in the light most favorable to the State, as we are required to do in accordance with the applicable standard of review, we hold that the record contains sufficient evidence to support a jury determination that defendant acted with deceit and an intent to defraud when she denied investigating officials access to Jane.

¶ 30 At trial, the State asserted that defendant sought to deprive investigating officials of meaningful access to Jane in order to preclude her from accusing Mr. Ditenhafer of sexually abusing her. In support of this assertion, the State elicited evidence concerning numerous incidents that occurred during the time period specified in the relevant indictment count. For example, the State presented evidence that defendant answered questions for Jane during meetings with investigators in order to preclude Jane from answering the questions that were posed to her in a truthful manner. In addition, defendant told investigating officials that they were not allowed to speak with Jane privately and instructed Jane to recant the truthful accusations that she had made against Mr. Ditenhafer. On one occasion, defendant interrupted a private meeting between Jane and the investigating officials and removed Jane from the meeting. In the same vein, the record contains evidence tending to show that defendant drafted an e-mail which appeared to state that Jane's accusations against defendant were false and required Jane to send that e-mail to investigating officials. As a result, the record contains evidence tending to show that, in addition to simply precluding investigating officials from having access to Jane, defendant actively encouraged Jane to make what everyone now acknowledges to have been false statements exonerating Mr. Ditenhafer from criminal liability for his sexual abuse of Jane.

¶ 31 Admittedly, the mere existence of evidence tending to show the nature of defendant's obstructive activities does not suffice to show that she acted with the deceit and intent to defraud necessary to support her conviction for felonious, as compared to misdemeanor, obstruction of justice. In addition to containing evidence recounting defendant's obstructive activities, the record is also replete with evidence tending to suggest that, instead of being engaged in a disinterested search for the

truth, defendant knew that Jane's accusations against her husband were likely to be true and had motives other than a desire for truthfulness in seeking to interfere with the investigation into the validity of Jane's accusations against Mr. Ditenhafer. For example, during an early stage in the investigation, defendant acknowledged to investigating officials that Jane had probably been abused and that some, but not all, of Jane's accusations were truthful. In light of this admission, the jury could reasonably have concluded that defendant did, in fact, know that something had happened to Jane and that her accusations rested upon something more than a mere fabrication. Similarly, defendant's knowledge that Mr. Ditenhafer had begun giving full-body massages to Jane sufficed to put defendant on notice that the nature of the interactions between Jane and her adoptive father, at an absolute minimum, posed a risk of harm to Jane. In addition, defendant continued her obstructive conduct after being shown inappropriate e-mails that Mr. Ditenhafer had sent to Jane. Finally, defendant's repeated statements that Jane's accusations risked the destruction of the existing family structure and harm to other members of the family provided ample support for a jury finding that defendant's conduct was motivated by a desire to preserve the existing family structure, from which she clearly believed that she derived benefits, rather than an attempt to dissuade Jane from making false accusations against Mr. Ditenhafer.

¶ 32 The inference that defendant was acting with deceit and an intent to defraud that the jury was entitled to draw based upon the evidence of defendant's conduct during the period of time specified in the relevant count of the indictment is substantially bolstered by the evidence concerning defendant's conduct in the aftermath of her discovery in September 2014 that Mr. Ditenhafer was, in fact, sexually abusing Jane.[2] In spite of the fact that she now had conclusive proof that Jane's accusations against Mr. Ditenhafer were true, defendant continued to attempt to protect her husband from the consequences of his actions. For example, the record reflects that defendant appeared to be more concerned about issues relating to Jane's chastity than about the impact of Mr. Ditenhafer's abusive conduct upon her daughter. In addition, defendant destroyed the bedding upon which the sexual abuse had occurred. On the same day upon which defendant obtained confirmation that Jane's

2. Assuming, without deciding, that evidence concerning defendant's conduct outside the time period specified in the relevant count of the indictment is not admissible as substantive evidence of defendant's guilt of obstruction of justice, we see no reason why that conduct is not relevant to the issue of the intent with which defendant acted when she obstructed investigating officials' access to Jane during the relevant time period.

accusations against Mr. Ditenhafer were true, defendant failed to report the adoptive father's conduct to Detective Doremus during a meeting held for the purpose of retrieving Jane's cell phone and refused to allow Jane to speak with Detective Doremus. After acknowledging the abuse that Mr. Ditenhafer had inflicted upon Jane, defendant told her brother-in-law that she had talked to a lawyer and a therapist and that both of them had advised her to refrain from involving anyone else because "[w]e don't need anymore [sic] drama" and because the making of such a report would "cost them more money and time." Finally, when law enforcement officers came to the family home for the purpose of arresting defendant and taking Jane into nonsecure custody, defendant attempted to escape while instructing Jane to "[r]efuse to go" with the officers and to "[r]un down the street" instead. As a result, the extensive evidence of defendant's efforts to protect Mr. Ditenhafer from the consequences of his actions after her discovery that Jane's accusations of sexual abuse were true coupled with the statements that defendant made to the brother-in-law provides substantial additional support for the State's contention that, rather than simply trying to ensure that investigating officials were not misled by Jane's false accusations against Mr. Ditenhafer, defendant acted with deceit and an intent to defraud.

¶ 33 As a result, for all of these reasons, we hold that the record evidence, when taken in the light most favorable to the State, provides more than sufficient support for a jury finding that defendant precluded investigating officials from having access to Jane with deceit and the intent to defraud. Although defendant does, of course, take a contrary position and although the record does not contain any evidence tending to show that defendant actually admitted that she had obstructed the State's attempts to investigate Jane's accusations against Mr. Ditenhafer for nefarious reasons, the absence of such direct evidence concerning defendant's mental state does not, of course, preclude the State from attempting to establish defendant's guilt through the use of inferences derived from circumstantial evidence. On the contrary, the presence of evidence tending to show defendant's persistent refusal to acknowledge the truthfulness of Jane's accusations against Mr. Ditenhafer in the face of Jane's assertions that she was telling the truth, defendant's knowledge of what appear to have been inappropriate interactions between Mr. Ditenhafer and Jane, defendant's refusal to credit or even review evidence tending to bolster the credibility of Jane's accusations against Mr. Ditenhafer, and the fact that defendant appears to have been acting on the basis of motives other than a disinterested search for truth during the offense date range specified in the relevant count of the in-

dictment suffices, standing alone, to support a reasonable inference that defendant acted with deceit and an intent to defraud rather than in the course of a permissible attempt to exercise her constitutional rights as Jane's parent. And, when one considers the record evidence concerning defendant's conduct after discovering Mr. Ditenhafer in the very act of abusing Jane, the evidence that defendant precluded investigating officials from having access to Jane deceitfully and with an intent to defraud seems even more compelling. Thus, for all of these reasons, we have no hesitation in concluding that the Court of Appeals did not err by upholding defendant's conviction for felonious obstruction of justice based upon defendant's interference with investigating officials' access to Jane.

III. Conclusion

¶ 34 A careful review of the evidence presented for the jury's consideration persuades us that the record, when viewed in the light most favorable to the State, contains substantial evidence tending to show that defendant had acted with deceit and an intent to defraud at the time that she obstructed justice by denying officers of the Wake County Sheriff's Office and Wake County Department of Human Services employees access to Jane during their investigation of Jane's allegations against Mr. Ditenhafer. As a result, the Court of Appeals' decision to find no error in the trial court's judgment based upon defendant's conviction for felonious obstruction of justice arising from the denial of access to Jane is affirmed.

AFFIRMED.

STATE v. FULLER

[376 N.C.862, 2021-NCSC-20]

STATE OF NORTH CAROLINA
v.
RYAN KIRK FULLER

No. 447A19

Filed 12 March 2021

Sexual Offenders—secret peeping—sex offender registration—danger to the community

After defendant's conviction for felony secret peeping, the trial court did not err in finding as an ultimate fact that defendant was a danger to the community and ordering him to register as a sex offender where the evidentiary facts showed defendant took advantage of a close personal relationship, used a sophisticated scheme to avoid detection, deployed a hidden camera and obtained images of the victim over an extended period of time, repeatedly invaded the victim's privacy, caused significant and long lasting emotional harm to the victim, and could easily commit similar crimes in the future.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 268 N.C. App. 240 (2019), affirming an order entered on 23 October 2018 by Judge A. Graham Shirley in Superior Court, Wake County. Heard in the Supreme Court on 11 January 2021.

Joshua H. Stein, *Attorney General*, *by Ryan Y. Park*, *Solicitor General*, *and Caryn Devins Strickland*, *Solicitor General Fellow*, *for the State-appellee.*

Glenn Gerding, *Appellate Defender*, *by Andrew DeSimone*, *Assistant Appellate Defender*, *for defendant-appellant.*

BERGER, Justice.

¶ 1 On October 23, 2018, defendant Ryan Kirk Fuller pleaded guilty to secret peeping pursuant to N.C.G.S. § 14-202(d). The trial court placed defendant on supervised probation and ordered him to register as a sex offender under N.C.G.S. § 14-202(*l*). Defendant appealed the order of sex offender registration, and the Court of Appeals affirmed the trial court's order. Defendant appeals.

I. Factual and Procedural Background

¶ 2 In August 2018, defendant lived with the Smith[1] family, whom he had known for over ten years, in their home in Apex, North Carolina. On August 17, 2018, Mr. Smith was watching television in his living room. Mr. Smith stepped outside to smoke a cigarette, and when he returned inside, Mr. Smith saw an image on his television of his wife undressing. Mrs. Smith was not home at the time, and the image was not from a live feed. Mr. Smith saw defendant, and he noticed defendant watching the video which contained the image of Mrs. Smith. Mr. Smith demanded that defendant leave the house and immediately reported the incident to the Apex Police Department.

¶ 3 Officers later spoke with defendant and obtained consent to search his computer. The search of defendant's laptop computer, cell phone, and external hard drives revealed that defendant had saved images and videos of Mrs. Smith in various states of undress from June 2018 to August 2018. Officers were able to determine that defendant had deployed a camera in the Smith's home to obtain photographs and videos of Mrs. Smith. Defendant moved the device between the Smiths' bedroom and bathroom. When questioned by officers, defendant waived his *Miranda* rights and admitted to deploying the camera and possessing images of Mrs. Smith. Defendant stated that he installed the camera because "he had developed feelings for [Mrs. Smith] at some point in the course of their friendship."

¶ 4 On September 11, 2018, defendant was indicted on three counts of secret peeping. On October 23, 2018, defendant pleaded guilty to one count of felony secret peeping pursuant to a plea arrangement with the State. The parties agreed that defendant would receive a suspended sentence and be placed on supervised probation for a period of twenty-four months. In addition, defendant was required to submit to a "mental health evaluation specific to sex offenders and comply with recommended treatment." The issue of sex offender registration was to be determined by the trial court. The plea was accepted by the trial court, and a hearing was then held to determine whether defendant would be required to register as a sex offender. Based upon the arguments of the parties, the trial court ordered defendant to register as a sex offender for thirty years. The trial court did not consider a Static-99 assessment when it determined that sex offender registration was appropriate.

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1. Due to the sensitive nature of this case, pseudonyms will be used.

¶ 5 On October 30, 2018, defendant filed written notice of appeal. In an opinion filed November 5, 2019, the Court of Appeals affirmed the trial court's order requiring defendant to register as a sex offender because the trial court's finding that defendant was a "danger to the community" was supported by competent evidence. *State v. Fuller*, 268 N.C. App. 240, 245, 835 S.E.2d 53, 56 (2019). The dissenting judge argued that there was insufficient evidence supporting the trial court's finding that defendant was a "danger to the community." *Id.* at 250, 835 S.E.2d at 59 (Brook, J., dissenting). Specifically, the dissenting judge contended that the State could not show defendant was a "danger to the community" because the State failed to present evidence that defendant was likely to reoffend pursuant to *State v. Pell*, 211 N.C. App. 376, 712 S.E.2d 189 (2011), and *State v. Guerrette*, No. COA18-24, 2018 WL 4702230 (N.C. Ct. App. Oct. 2, 2018) (unpublished). *Id.* at 252–53, 835 S.E.2d at 61.

¶ 6 Defendant argues that the Court of Appeals erred when it affirmed the trial court's order which required defendant to register as a sex offender based on the finding that he was a "danger to the community." We disagree.

II. Standard of Review

¶ 7 The determination of whether an individual "is a danger to the community" under N.C.G.S. § 14-202(l) is an ultimate fact to be found by the trial court. "There are two kinds of facts: Ultimate facts, and evidentiary facts." *Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951).

> Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law.

Id. at 472, 67 S.E.2d at 645 (citations omitted).

¶ 8 A trial court's finding of an ultimate fact is conclusive on appeal if the evidentiary facts reasonably support the trial court's ultimate finding. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 343, 218 S.E.2d 368, 372 (1975); *see also Sherrill v. Boyce*, 265 N.C. 560, 560, 144 S.E.2d 596,

597 (1965) (per curiam); *State Tr. Co. v. M & J Fin. Corp.*, 238 N.C. 478, 484, 78 S.E.2d 327, 332 (1953). Thus, we must uphold the sex offender registration order if there are evidentiary facts that could reasonably support the trial court's determination that defendant "is a danger to the community."

¶ 9 Moreover, because this is the first opportunity for this Court to address sex offender registration pursuant to N.C.G.S. § 14-202(*l*), we interpret that statute de novo. *See City of Asheville v. Frost*, 370 N.C. 590, 591, 811 S.E.2d 560, 561 (2018) ("We review questions of statutory interpretation de novo.").

III. Analysis

¶ 10 Generally, sex offender registration is required upon a defendant's conviction of a reportable sex offense. *See* N.C.G.S. § 14-208.7(a) (2019) ("A person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides."); N.C.G.S. § 14-208.6(4)(a) (2019) (defining what constitutes a reportable conviction); N.C.G.S. § 14-208.6(5) (2019) (defining what constitutes a sexually violent offense).

¶ 11 However, even though the crime of secret peeping is a sex offense, registration based upon a conviction for committing that offense is dependent upon additional considerations by the trial court. *See generally* N.C.G.S. § 14-202(d), (*l*). Following a conviction for secret peeping pursuant to N.C.G.S. § 14-202(d), the trial court

> shall consider whether the person is a danger to the community and whether requiring the person to register as a sex offender pursuant to Article 27A of this Chapter would further the purposes of that Article as stated in G.S. 14-208.5. If the sentencing court rules that the person is a danger to the community and that the person shall register, then an order shall be entered requiring the person to register.

N.C.G.S. § 14-202(*l*) (2019). Thus, a defendant convicted of secret peeping under N.C.G.S. § 14-202(d) is required to register as a sex offender only when the trial court, after considering the purposes of the Sex Offender and Public Protection Registration Programs, determines that a defendant "is a danger to the community."

¶ 12 Section 14-208.5 sets forth the purposes of the Sex Offender and Public Protection Registration Programs as follows:

> The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest.
>
> The General Assembly also recognizes that persons who commit certain other types of offenses against minors, such as kidnapping, pose significant and unacceptable threats to the public safety and welfare of the children in this State and that the protection of those children is of great governmental interest. Further, the General Assembly recognizes that law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders who commit sex offenses or certain offenses against minors are impaired by the lack of information available to law enforcement agencies about convicted offenders who live within the agency's jurisdiction. Release of information about these offenders will further the governmental interests of public safety so long as the information released is rationally related to the furtherance of those goals.
>
> Therefore, it is the purpose of this Article to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article.

N.C.G.S. § 14-208.5 (2019).

¶ 13 By the plain language of this section, our Legislature has determined that law enforcement agencies and the public need additional information about sex offenders because of the risks these individuals pose to communities and children. *See Smith v. Doe*, 538 U.S. 84, 93 (2003) ("[A]n imposition of restrictive measures on sex offenders adjudged to be dangerous is 'a legitimate nonpunitive governmental objective and has been historically so regarded.' " (quoting *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997)).

¶ 14 On appeal, defendant argues that the Court of Appeals erred when it affirmed the trial court's order of sex offender registration because the record failed to show that defendant was likely to commit sex offenses in the future. Further, defendant asserts that the trial court was required to consider a Static-99 assessment before ordering him to register as a sex offender. However, neither a Static-99 assessment, nor considerations of likelihood of recidivism, are dispositive on the issue of whether a defendant "is a danger to the community."

¶ 15 The phrase "is a danger to the community" is not defined by N.C.G.S. § 14-202(*l*). In addition, the Legislature did not specify a time period for the determination of whether a defendant constitutes a "danger to the community."

> A statute is an act of the Legislature as an organized body. . . . It must speak for and be construed by itself . . . . Otherwise each individual might attribute to it a different meaning, and thus the legislative will and meaning be lost sight of. Whatever may be the views and purposes of those who procure the enactment of a statute, the Legislature contemplates that its intention shall be ascertained from its words as embodied in it. And courts are not at liberty to accept the understanding of any individual as to the legislative intent.

Abernethy v. Bd. of Comm'rs of Pitt Cnty., 169 N.C. 631, 639–40, 86 S.E. 577, 582 (1915) (citation and quotation marks omitted). It is well-established that the "[o]rdinary rules of grammar apply when ascertaining the meaning of a statute, and the meaning must be construed according to the context and approved usage of the language." *Dunn v. Pac. Emps. Ins. Co.*, 332 N.C. 129, 134, 418 S.E.2d 645, 648 (1992).

¶ 16 The term "is" has been defined as the "third person singular, present tense of be." *Is*, Webster's II New College Dictionary (3d ed. 2005). Therefore, the determination of whether a defendant "is a danger to the community" necessarily requires a trial court to consider whether the defendant currently constitutes a danger to the community. Further, this Court has previously indicated that the term "is" may be read more broadly to encompass a time period greater than the present. *See Ex parte Barnes*, 212 N.C. 735, 738, 194 S.E. 499, 501 (1938) ("Where a statute is expressed in general terms and in words of the present tense, it will as a general rule be construed to apply not only to things and conditions existing at its passage, but will also be given a prospective interpretation, by which it will apply to such as come into existence thereafter." (citation and quotation marks omitted)).

¶ 17 In addition, we may look to other similar statutes to help define terms. *See In re Banks*, 295 N.C. 236, 239–40, 244 S.E.2d 386, 389 (1978) ("[T]he legislative intent . . . is to be ascertained by appropriate means and *indicia* . . . such as . . . previous interpretations of the same or similar statutes." (cleaned up)).

¶ 18 The Legislature has used similar language in the context of involuntary commitments. Individuals who are determined to be "dangerous[ ] to self . . . or others" are subject to involuntary commitment orders. *See* N.C.G.S. § 122C-263(c)(2), (d)(2) (2019); N.C.G.S. § 122C-268(j) (2019). Finding that an individual is a danger to himself or others involves considerations of conduct "[w]ithin the relevant past" and "a reasonable probability of [similar conduct] within the near future." N.C.G.S § 122C-3(11)(a), (b) (2019).

¶ 19 Thus, in finding that a defendant "is a danger to the community" under N.C.G.S. § 14-202(*l*), a trial court may consider whether the defendant currently constitutes a "danger to the community" such that registration is appropriate. In addition, a finding that defendant "is a danger to the community" may also be satisfied upon a showing that, based upon the defendant's conduct within the relevant past, there is a reasonable probability of similar conduct by the defendant in the near future.[2] A determination that a defendant "is a danger to the community" is not based solely upon the consideration of a singular fact or predictive analysis. Rather, a trial court reaches such a finding through considering and weighing all of the evidence. *See Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968) (stating that ultimate findings are "conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary").

¶ 20 Here, the trial court found the following evidentiary facts on the record:

> In this particular case it seems that there were recordings made over a long period of time. The fact that he only used one device as opposed to two and to move it place to place is to me more concerning than if he had had two devices, because he had . . .

2. Here, defendant was not incarcerated upon his plea of guilty to secret peeping pursuant to N.C.G.S. § 14-202(d). Rather, he was placed on supervised probation for a period of twenty-four months. When a convicted sex offender is not incarcerated but is instead placed on probation, registration may be a necessary additional tool to protect communities. *See* N.C.G.S. § 14-208.5 (2019). In these cases, a trial court's consideration of whether a sex offender currently constitutes a danger to the community may be a more relevant inquiry than that of prospective harm.

> to do an intentional act. You know, the statement that this occurred because he was having feelings for the victim, . . . and the setup was apparently much more sophisticated than [*Guerrette*] where someone was just in a woman's bathroom with a cell phone. By having this secret device, moving . . . the secret device from room to room, the manner in which it was stored, and the fact . . . th[at] . . . anybody could get anything on the internet, so it would make it easy for him to buy similar devices off the internet . . . just make[s] it easier for him to buy these devices off the internet, [the c]ourt finds that he would be a danger to the community . . . .

¶ 21 In affirming the trial court, the Court of Appeals focused on the following evidentiary facts: (1) defendant's willingness to take advantage of a close, personal relationship; (2) defendant's use and execution of a sophisticated scheme intended to avoid detection; (3) the extended period of time that defendant deployed the hidden camera and obtained images of the victim; (4) defendant's ability and decision to repeatedly invade the victim's privacy; (5) defendant's ability and willingness to cause significant and lasting emotional harm to his victim; (6) the ease with which defendant could commit similar crimes again in the future; and (7) defendant's lack of remorse.[3] *Fuller*, 268 N.C. App. at 243–44, 835 S.E.2d at 56. We hold that these facts, without taking the unsupported statement that defendant lacked remorse into account, suffice to establish defendant's status as a "danger to the community."

¶ 22 Because the evidentiary facts reasonably support the trial court's ultimate fact that defendant "is a danger to the community," we uphold the trial court's sex offender registration order and affirm the decision of the Court of Appeals.

AFFIRMED.

Justice EARLS dissenting.

¶ 23 The question in this case is whether a defendant may be considered a "danger to the community" and subject to registration as a sex offender solely on the basis of having committed a certain crime. There are some

3. There is no evidence in the record that defendant lacked remorse.

crimes for which this is the case by virtue of the statutory scheme established by the General Assembly. N.C.G.S. § 14-208.6(4)(a) (2019) (requiring registration for persons convicted of sexually violent offenses and offenses against children). In contrast, the crime committed by Mr. Fuller, however repugnant and violative it may have been, is not one of those crimes. The majority divorces the registration requirement from the inquiry into whether the defendant is likely to reoffend, holding that the trial court may order registration even where there is no evidence that the defendant is likely to recidivate. This is contrary to our own precedent. *See State v. Abshire*, 363 N.C. 322, 323 (2009) ("In response to the threat to public safety posed by the recidivist tendencies of convicted sex offenders, 'North Carolina, like every other state in the nation, enacted a sex offender registration program to protect the public.' "), *superseded by statute*, An Act to Protect North Carolina's Children/Sex Offender Law Changes, S.L. 2006-247, § 8(a), 2005 N.C. Sess. Laws 1065, 1070–71, *as recognized in State v. Barnett*, 368 N.C. 710 (2016). Further, the majority's decision could be interpreted to give trial courts unfettered license to order registration for all offenders, regardless of whether there is any indication that they are likely to pose a danger to the community, undermining the purposes of the program. This goes too far and is contrary to the will of the General Assembly. As a result, I respectfully dissent.

¶ 24 Mr. Fuller pleaded guilty to secret peeping in violation of N.C.G.S. § 14-202(d). The trial court sentenced Mr. Fuller to six to seventeen months' imprisonment. The trial court suspended Mr. Fuller's sentence of incarceration and instead imposed twenty-four months of supervised probation. The trial court also ordered Mr. Fuller to register as a sex offender for a period of thirty years.

¶ 25 There are a number of crimes which require automatic registration as a sex offender. For example, a sex offense against a minor is a reportable offense requiring registration as a sex offender. *See* N.C.G.S. § 14-208.6(4)(a). The same is true for a sexually violent offense. *Id.* However, secret peeping is not one of the offenses for which the General Assembly requires registration automatically upon conviction. Instead, when a person is convicted of secret peeping pursuant to subsection 14-202(d), the trial court is required to consider (1) "whether the person is a danger to the community" and (2) "whether requiring the person to register as a sex offender . . . would further the purposes" of the sex offender registration program. N.C.G.S. § 14-202(*l*) (2019). For Mr. Fuller's crime, the trial court orders registration as a sex offender if both conditions are satisfied. *Id.*

¶ 26 The General Assembly does not define the phrase "danger to the community" in the statute. *See* N.C.G.S. § 14-202; N.C.G.S. § 14-208.6. Nor has this Court interpreted section 14-202 to give meaning to the phrase "danger to the community." As a result, the phrase's meaning is a question of statutory construction. "The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute. In seeking to discover this intent, the court should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Stevenson v. Durham*, 281 N.C. 300, 303 (1972). Here, the statute's purpose indicates that a person presents a danger to the community if that person is likely to reoffend.

¶ 27 The registration program exists "to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies," to promote the exchange of offender information among law enforcement agencies, and to provide access to information about sex offenders to others. N.C.G.S. § 14-208.5 (2019). The program's statement of purpose provides that "sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest." *Id.* As a result, while subsection 14-202(*l*) does not define "danger to the community," the statute's purpose statement indicates that the legislature intended to require registration for persons who are likely to recidivate. *See id.* (statute's purpose statement recognizing risk of recidivation); *see also Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 215 (1990) ("The intent of the legislature controls the interpretation of a statute.").

¶ 28 The majority here does not define "danger to the community," choosing instead to investigate the meaning of the word "is." However, the majority's focus on the word "is" does not change the intent of the General Assembly, nor does it have any relevance to this case. No party has suggested an alternate meaning of the word "is." Nor has any party argued that in this case the trial court must determine whether the defendant, while unable to reoffend now, will, at some point in the future, develop the capacity to become a recidivist. Instead, consistent with the stated intent of the General Assembly in the statute itself and the unvarying conclusions of our appellate courts for the past ten years, the trial court's task is to determine, at the time of the hearing, whether the defendant is likely to recidivate. N.C.G.S. § 14-208.5 (stating intent of General Assembly); *State v. Pell*, 211 N.C. App. 376, 379 (2011) ("When examining the purposes of the sex offender registration statute, it is

clear that 'danger to the community' refers to those sex offenders who pose a risk of engaging in sex offenses following release from incarceration or commitment."); *see State v. Guerrette*, No. COA18-24, 2018 WL 4702230, at *2 (N.C. Ct. App. Oct. 2, 2018) (unpublished) (stating that the phrase "danger to the community" refers to sex offenders who pose a risk of reoffending); *State v. Mastor*, 243 N.C. App. 476, 483 (2015) (same); *accord Abshire*, 363 N.C. at 323 ("In response to the threat to public safety posed by the recidivist tendencies of convicted sex offenders, 'North Carolina, like every other state in the nation, enacted a sex offender registration program to protect the public.' "); *State v. Fuller*, 268 N.C. App. 240, 243 n.4 (2019) ("[T]he trial court's findings must demonstrate that the level of risk is such that there is a reasonable likelihood that the defendant in question will recidivate.").

¶ 29 It is true that this is a forward-looking inquiry. But that is what the General Assembly intended. *See* N.C.G.S. § 14-202(*l*) (stating that a trial court shall order registration as a sex offender after considering whether registration "would further the purposes" stated in N.C.G.S. § 14-208.5); N.C.G.S. § 14-208.5 (statement of purpose for registration program recognizing need for protecting the public against recidivation by sex offenders) Indeed, it is difficult to imagine what "danger to the community" an offender could pose other than that danger which is represented by the risk of reoffending. While the majority concludes that the General Assembly's use of the word "is" means that the trial court may consider whether the defendant "currently" represents a danger, that conclusion does not change the meaning of "danger to the community"—that the defendant is likely to reoffend.

¶ 30 Application of these principles to the facts of this case demonstrates that the trial court erred. The question before the trial court was whether Mr. Fuller was a danger to the community. *See* N.C.G.S. § 14-202(*l*). As the majority notes, this is an ultimate finding, which is "a conclusion of law or at least a determination of a mixed question of law and fact." *In re K.R.C.*, 374 N.C. 849, 858 (2020) (quoting *In re N.D.A.*, 373 N.C. 71, 76 (2019)). Such a finding is to be distinguished from "the findings of primary, evidentiary, or circumstantial facts." *In re N.D.A.*, 373 N.C. at 76 (quoting *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937)); *see also Woodard v. Mordecai*, 234 N.C. 463, 472 (1951) ("An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts."). As a result, we review the trial court's findings of evidentiary facts to determine whether they "support [the trial court's] ultimate findings of fact and conclusions of law." *In re N.G.*, 374 N.C. 891, 906–07 (2020).

¶ 31 It appears that the majority agrees with this standard of review, as it states that the decision below should be affirmed if the trial court's findings of evidentiary fact support the trial court's ultimate finding. The majority's insertion of the words "could reasonably" has the potential to confuse litigants, but does not change the existing standard. While a reader could misinterpret the majority's formulation of the standard to suggest that a trial court's ultimate finding will be upheld if the evidence *might* support the ultimate finding, such an interpretation is not supported by our precedent. A trial court's ultimate finding is either supported or unsupported. *See In re N.D.A.*, 373 N.C. at 77 (stating that both findings of ultimate fact and conclusions of law "must have sufficient support in the trial court's factual findings"). A reviewing court will not speculate or make inferences to supplement the record when the trial court's evidentiary factual findings are lacking. *See*, *e.g.*, *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402 (1977) (stating that evidentiary findings "are conclusive on appeal if supported by any competent evidence" but that, for ultimate findings of fact, "this Court may review the record to determine if the findings and conclusions are supported by sufficient evidence"); *see also In re N.D.A.*, 373 N.C. at 78 (concluding that evidentiary fact findings were insufficient to support an ultimate finding where the evidentiary findings did not "adequately address" a required aspect of the ultimate finding); *State v. White*, 300 N.C. 494, 503–504 (1980) (observing, in the context of permissive presumptions, that there must be a " 'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed" to comport with due process) (quoting *Cnty. Ct. v. Allen*, 442 U.S. 140, 142 (1979)).

¶ 32 In the instant case, the trial court gave the following reasoning for its order:

> In this particular case it seems that there were recordings made over a long period of time. The fact that he only used one device as opposed to two and to move it place to place is to me more concerning than if he had had two devices, because he had to make—each time he had to move the device, he had to do an intentional act. You know, the statement that this occurred because he was having feelings for the victim, the—and the setup was apparently much more sophisticated than [*Guerrette*] where someone was just in a woman's bathroom with a cell phone. By having this secret device, moving—moving the secret device from room to room, the manner in which it

> was stored, and the fact of the—as you said, anybody could get anything on the internet, so it would make it easy for him to buy similar devices off the internet once he's—just make it easier for him to buy these devices off the internet, [the c]ourt finds that he would be a danger to the community and the purpose of the Registry Act would be served by requiring him to register for a period of 30 years.

¶ 33 The only fact identified by the trial court that reasonably relates to a risk of reoffending is the trial court's observation that the defendant purchased a recording device from the internet, and that he could easily do so again. However, the General Assembly did not intend that any sex offense committed with a device purchased from the internet would result in registration as a sex offender. *See* N.C.G.S. § 14-202(f) (criminalizing secret peeping by use of "any device that can be used to create a photographic image"); N.C.G.S. § 14-202(*l*) (stating that such an offense is reportable only if the trial court finds that the defendant is a danger to the community). Moreover, the trial court's logic here is merely a tautology. To say that defendant poses a risk of reoffending because he could again purchase a recording device off the internet amounts to saying he poses a risk of reoffending because he could reoffend. Instead, the trial court needed to examine the factors that typically indicate an individual is more likely to reoffend and determine which of those are true of this defendant. Absent such an inquiry, the trial court failed to comply with the statute. The trial court did not make sufficient evidentiary findings to support its ultimate finding that Mr. Fuller was a danger to the community.

¶ 34 The trial court's suggestion that a risk assessment would have been irrelevant is further evidence of the trial court's legal mistake, and underscores the trial court's failure to consider Mr. Fuller's likelihood of reoffending. After the trial court ordered Mr. Fuller to register, Mr. Fuller's defense counsel requested a continuance in order to obtain a Static-99 risk assessment. The trial court denied the request, pointing out that such a request would normally come before, not after, the trial court's ruling. The trial court was likely well within its discretion in denying such an untimely request. *See, e.g.*, *State v. Branch*, 306 N.C. 101, 104 (1982) ("A motion for continuance, even when filed in a timely manner pursuant to G.S. 15A-952, is ordinarily addressed to the sound discretion of the trial judge whose ruling thereon is not subject to review absent an abuse of such discretion."). However, when making its ruling the trial court stated that the court has "had people who score low on the Static

99 all the time and are placed on the sex offender registry. So my ruling stands as it is." This statement, suggesting that the results of a risk assessment would have been irrelevant to the trial court's inquiry into dangerousness, was wrong. In the absence of any other record evidence indicating Mr. Fuller's likelihood to commit another sex offense, such an objective assessment would have been of some assistance to the trial court as it fulfilled its statutory duty to determine whether Mr. Fuller was a danger to the community. *See* N.C.G.S. § 14-202(*l*). The assessment may not be dispositive or the only permissible type of evaluation—nothing in the statute mandates its use. However, the trial court must have some basis on which to determine that a defendant is likely to reoffend, which would mean that the defendant poses a danger to the community. For this type of offense, the mere fact that he committed the crime is not sufficient to establish that he is a danger to the community. A basis for that conclusion does not appear in the record in this case.

¶ 35 The majority reaches the opposite result, concluding that the Court of Appeals did not err because it focused on the facts that Mr. Fuller took advantage of a close relationship, hid his activity from the victim and her husband, and recorded the victim over an extended period of time. However, none of these facts pertains to the likelihood of a defendant to reoffend. The majority also refers to "the ease with which defendant could commit similar crimes again in the future." However, the only fact identified by the trial court on this point is that the defendant could purchase a device off the internet. As explained above, this does not provide sufficient support for a finding that a defendant is a danger to the community. Finally, the majority identifies a number of facts which do not appear in the trial court's rationale, including "defendant's 'ability and willingness to cause significant and lasting emotional harm to his victim" and "defendant's lack of remorse." However, it is the job of the trial court, not the appellate court, to make factual findings. *See*, *e.g.*, *State v. Hyman*, 371 N.C. 363, 386 n.8 (2018) ("[T]he trial judge, rather than an appellate court, is responsible for resolving factual disputes in the record given the trial judge's superior opportunity to make such determinations."); *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 63 (1986) ("Fact finding is not a function of our appellate courts."). Further, this last "fact" has the distinction of being unsupported by the record in addition to not being found by the trial court. The State's recitation of the facts, provided during the plea colloquy, indicates that Mr. Fuller "was cooperative in the investigation" and "provide[d] a full statement to law enforcement."

¶ 36 Importantly, the factors identified by the majority tell us that the defendant committed a crime. We knew that when the defendant was convicted. The purpose of the sex offender registry, however, is not to punish people who have committed crimes—it is to protect the public from harm. N.C.G.S. § 14-208.5; *State v. Bowditch*, 364 N.C. 335, 342 (2010) (citing *Smith v. Doe*, 538 U.S. 84, 93 (2003) for the proposition that "nonpunitive sex offender registration statutes were designed to protect the public from harm"). As a result, the inquiry must be based on whether the defendant is likely to harm the community through reoffending. This is the only way to make sense of the General Assembly's statement that it sought to further "law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders who commit sex offenses or certain offenses against minors." N.C.G.S. § 14-208.5. Unless Mr. Fuller is likely to commit another sex offense, registration does nothing to aid these law enforcement efforts.

¶ 37 The majority declines to explain how the evidentiary facts support the trial court's conclusion that Mr. Fuller was a danger to the community, warranting registration as a sex offender. This is perhaps unsurprising, given that the only relevant evidentiary fact found by the trial court does not support the trial court's ultimate determination. Instead, the majority affirms the decision of the Court of Appeals without any explanation of what it means to be a danger to the community, despite ten years of precedent which would suggest that the trial court's order should be reversed. This leaves the trial court's determination of whether a defendant should be required to register without any meaningful guideposts.

¶ 38 If the General Assembly had intended to impose registration as a sex offender for every person convicted of Mr. Fuller's crime, regardless of whether they were likely to reoffend, it could have done so. But it did not. N.C.G.S. § 14-202(*l*). Instead, the General Assembly vested trial courts with (1) the authority to impose registration if certain criteria are met, and (2) the obligation to consider those criteria and make findings accordingly. *Id.* That did not happen in this case. I would hold that the trial court failed to appropriately consider whether Mr. Fuller was likely to reoffend. As a result, I respectfully dissent.

BOST REALTY CO., INC.; GK HAMPDEN VILLAGE, LLP F/K/A GK HAMPDEN VILLAGE, LLC; TUCKER CHASE, LLC; TAYLOR MORRISON OF CAROLINAS, INC.; EASTWOOD CONSTRUCTION, LLC F/K/A EASTWOOD CONSTRUCTION CO., INC.; MTS CLT, LLC; PARK VIEW ESTATES, LLC; AND B&C LAND HOLDINGS, LLC	)	
v.	)	CABARRUS COUNTY
CITY OF CONCORD	)	

No. 32P20

ORDER

Upon consideration of the Petition for Discretionary Review filed by the defendant on the 21st day of January, 2020, the Court allows the defendant's Petition For Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of our decision in *JVC Enterprises, LLC, et al. v. City of Concord*, 2021-NCSC-14.

By order of this Court in Conference, this 10th day of March, 2021. Berger, J., recused.

s/Barringer, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of March, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
~~Assistant~~ Clerk

JOURNEY CAPITAL, LLC; LAURELDALE, LLC; PENDLETON/CONCORD PARTNERS, LLC; PRESPRO, LLC; AND SKYBROOK, LLC	)	
v.	)	CABARRUS COUNTY
CITY OF CONCORD	)	

No. 33P20

ORDER

Upon consideration of the Petition for Discretionary Review filed by the defendant on the 21st day of January, 2020, the Court allows the defendant's Petition For Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of our decision in *JVC Enterprises, LLC, et al. v. City of Concord*, 2021-NCSC-14.

By order of this Court in Conference, this 10th day of March, 2021. Berger, J., recused.

s/Barringer, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of March, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
~~Assistant~~ Clerk

I. BEVERLY LAKE, JOHN B. LEWIS, JR., EVERETTE M. LATTA, PORTER L. McATEER, ELIZABETH S. McATEER, ROBERT C. HANES, BLAIR J. CARPENTER, MARILYN L. FUTRELLE, FRANKLIN E. DAVIS, JAMES D. WILSON, BENJAMINE E. FOUNTAIN, JR., FAYE IRIS Y. FISHER, STEVE FRED BLANTON, HERBERT W. COOPER, ROBERT C. HAYES, JR., STEPHEN B. JONES, MARCELLUS BUCHANAN, DAVID B. BARNES, BARBARA J. CURRIE, CONNIE SAVELL, ROBERT B. KAISER, JOAN ATWELL, ALICE P. NOBLES, BRUCE B. JARVIS, ROXANNA J. EVANS, JEAN C. NARRON, AND ALL OTHERS SIMILARLY SITUATED	)	
v.	)	Gaston County
STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, A CORPORATION, FORMERLY KNOWN AS THE NORTH CAROLINA TEACHERS AND STATE EMPLOYEES' COMPREHENSIVE MAJOR MEDICAL PLAN, TEACHERS AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION, BOARD OF TRUSTEES OF THE TEACHERS AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE, JANET COWELL, IN HER OFFICIAL CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA, AND THE STATE OF NORTH CAROLINA	)	

No. 436PA13-4

ORDER

After reviewing the responses to the Disclosure Pursuant to Canon 3D of the Code of Judicial Conduct and other filings that have been made by the parties, the Court, acting on its own motion, requests the parties to submit on or before 12 February 2021 any additional comments that they wish the Court to consider concerning the issue of whether the Court should, in the exercise of its discretion, invoke the rule of necessity in order to reach the merits of this case.

By order of the Court in conference, this the 8th day of February 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of February 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk

M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

METRO DEVELOPMENT GROUP, LLC; NIBLOCK DEVELOPMENT CORP.; LENNAR CAROLINAS, LLC; SHEA HOMES, LLC; SHEA BUILDERS, LLC; SHEA REAL ESTATE INVESTMENTS, LLC; AND CRAFT DEVELOPMENT, LLC	)	
v.	)	CABARRUS COUNTY
CITY OF CONCORD	)	

No. 34P20

ORDER

Upon consideration of the Petition for Discretionary Review filed by the defendant on the 21st day of January, 2020, the Court allows the defendant's Petition For Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of our decision in *JVC Enterprises, LLC, et al. v. City of Concord*, 2021-NCSC-14.

By order of this Court in Conference, this 10th day of March, 2021. Berger, J., recused.

s/Barringer, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of March, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
~~Assistant~~ Clerk

LORETTA NOBEL	)	
	)	
v.	)	NEW HANOVER COUNTY
	)	
FOXMOOR GROUP, LLC,	)	
MARK GRIFFIS, AND	)	
DAVID ROBERTSON	)	

No. 337A20

ORDER

Having failed to show good cause as required by N.C. R. App. P. 27(c), Defendant-Appellees' 25 February 2021 Motion to Deem Brief as Timely Filed is denied. The Court, on its own motion, pursuant to N.C. R. App. P. 14(d)(2), will allow appellees to participate in oral argument.

By Order of the Court in Conference, this 10th day of March 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of March 2021.

AMY FUNDERBURK
Clerk of the Supreme Court

M.C. Hackney

s/Amy Funderburk
~~Assistant~~ Clerk

STATE v. BENNETT

[376 N.C. 883 (2021)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Sampson County
	)	
CORY DION BENNETT	)	

No. 406PA18

ORDER

The Court, on its own motion, acknowledges receipt of the order entered by Judge John E. Nobles, Jr., in Superior Court, Sampson County, on 9 February 2021 in accordance with the opinion filed in this case on 5 June 2020. According to that opinion, in the event that the trial court determined "on remand that defendant has failed to make the necessary showing of purposeful discrimination, the trial court shall make appropriate findings of fact and conclusions of law to be certified to this Court for any further proceedings that this Court determines to be appropriate." *State v. Bennett*, 374 N.C. 579, 603 (2020). In light of the filing of the trial court's findings and conclusions on remand, the parties are hereby ordered to submit within ten days from the entry of this order any filings setting out their positions concerning additional procedures, if any, that the Court should follow in this case.

By order of the Court in conference, this the 10th day of March 2021. Berger, J., recused.

s/Barringer, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of March 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk

M.C. Hackney
~~Assistant~~ Clerk, Supreme Court of
North Carolina

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

12 MARCH 2021

4P14-3	State v. Raymond Dakim Harris Joiner	1. Def's Pro Se Motion for PDR 2. Def's Pro Se Motion for Conditional Acceptance for Value	1. Dismissed 2. Dismissed
4P16-4	State v. Jamonte Dion Baker	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP20-449) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Ervin, J., recused** **Berger, J., recused**
4P21	State v. Diallo Dwayne Daniels	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-242) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
7P21	State v. Adell Grady	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1025)	Denied
8P21	State v. Raymond Dakim-Harris Joiner	Def's Pro Se Motion for PDR	Dismissed
9A21	In re L.M.M.	1. Petitioners' Motion to Dismiss Appeal 2. Petitioners' Motion for Sanctions Pursuant to Rule 25(B) 3. Petitioners' Motion for Sanctions Pursuant to Rule 34	1. Denied 2. 3.
10P21	State v. Megan Alicia Haynes	Def's PDR Under N.C.G.S. § 7A-31 (COA20-21)	Denied
16P21	State v. Elliot Lee Grimes	1. Def's Pro Se Petition for Writ of Habeas Corpus (COA20-244) 2. Def's Pro Se Motion for Certificate of Appealability 3. Def's Pro Se Motion for En Banc Consideration by Court of Appeals	1. Denied 2. Dismissed 3. Dismissed
17P21	State v. John David Wood	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA20-222)	Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

12 MARCH 2021

23A21	State v. Darrell Tristan Anderson	1. Def's Motion for Temporary Stay (COA19-841) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent	1. Allowed **01/19/2021** 2. Allowed **02/10/2021** 3. ---
25P21	State v. Eric Alexander Campbell	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1035)	Denied
27A21	State v. Michael Devon Tripp	1. State's Motion for Temporary Stay (COA18-1286) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/20/2021** 2. Allowed **02/04/2021** 3. ---
28A21	State v. Deshandra Vachelle Cobb	1. State's Motion for Temporary Stay (COA19-681) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/19/2021** 2. Allowed **02/09/2021** 3. ---
29A20	Stacy Griffin, Employee v. Absolute Fire Control, Employer, Everest National Ins. Co. & Gallagher Bassett Servs., Carrier	1. Defs' Notice of Appeal Based Upon a Dissent (COA19-461) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Conditional PDR Under N.C.G.S. § 7A-31 4. Defs' Petition for Writ of Certiorari to Review Decision of the COA 5. Defs' Motion for Daniel J. Burke to Withdraw as Counsel of Record	1. --- 2. Allowed **04/29/2020** 3. Allowed **04/29/2020** 4. Dismissed as moot 5. Allowed **12/29/2020** **Berger, J., recused**
30A21	State v. Robert Wayne Delau	1. State's Motion for Temporary Stay (COA19-1030) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/20/2021** 2. Allowed **02/05/2021** 3. ---

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32P20	Bost Realty Co., Inc.; GK Hampden Village, LLP f/k/a GK Hampden Village, LLC; Tucker Chase, LLC; Taylor Morrison of Carolinas, Inc.; Eastwood Construction, LLC f/k/a Eastwood Construction Co., Inc.; MTS CLT, LLC; Park View Estates, LLC; and B&C Land Holdings, LLC v. City of Concord	Def's PDR Under N.C.G.S. § 7A-31 (COA19-309)	Special Order **Berger, J., recused**
33P20	Journey Capital, LLC; Laureldale, LLC; Pendleton/ Concord Partners, LLC; Prespro, LLC; and Skybrook, LLC v. City of Concord	Def's PDR Under N.C.G.S. § 7A-31 (COA19-310)	Special Order **Berger, J., recused**
34P20	Metro Development Group, LLC; Niblock Development Corp.; Lennar Carolinas, LLC; Shea Homes, LLC; Shea Builders, LLC; Shea Real Estate Investments, LLC; and Craft Development, LLC v. City of Concord	Def's PDR Under N.C.G.S. § 7A-31 (COA19-311)	Special Order **Berger, J., recused**
35P21	In the Matter of A.J.L.H., C.A.L.W., M.J.L.H.	1. Respondent Appellee's (GAL) Motion to Withdraw and Substitute Counsel 2. Respondent Father's Motion to Dissolve the Temporary Stay	1. Allowed **02/17/2021** 2. Denied **02/17/2021**
40P21	Charlie L. Hardin v. Todd E. Ishee, et al.	Plt's Pro Se Motion for Review	Dismissed
41P17-7	Arthur O. Armstrong v. State of North Carolina, et al.	1. Plt's Pro Se Motion for Relief 2. Plt's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wilson County 3. Plt's Pro Se Petition for Writ of Certiorari 4. Plt's Pro Se Motion for Relief - Gross Negligence	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed

		5. Plt's Pro Se Motion for Relief - Conspiracy Complaint	5. Dismissed
		6. Plt's Pro Se Motion for Relief - Defamation of Character	6. Dismissed
		7. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	7. Dismissed
		8. Plt's Pro Se Motion for Relief - Gross Negligence Complaint	8. Dismissed
		9. Plt's Pro Se Motion for Relief - Professional Malpractice and Gross Negligence	9. Dismissed
		10. Plt's Pro Se Motion for Relief	10. Dismissed
		11. Plt's Pro Se Motion for Relief - Civil Rights Violation - Gross Negligence and Breach of Fiduciary Responsibility	11. Dismissed
		12. Plt's Pro Se Motion for Relief - Conspiracy Complaint	12. Dismissed
		13. Plt's Pro Se Motion for Relief	13. Dismissed
		14. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	14. Dismissed
		15. Plt's Pro Se Motion for Relief - Complaint	15. Dismissed
		16. Plt's Pro Se Motion for Relief - Professional Malpractice and Gross Negligence	16. Dismissed
		17. Plt's Pro Se Motion for Relief - Complaint Conspiracy	17. Dismissed
		18. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	18. Dismissed
		19. Plt's Pro Se Motion for Relief - Complaint Defamation of Character	19. Dismissed
		20. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	20. Dismissed
		21. Plt's Pro Se Motion for Relief - Breach of Written Contract & Conspiracy Complaint	21. Dismissed
		22. Plt's Pro Se Motion for Relief - Malicious Prosecution & Gross Negligence Complaint	22. Dismissed
		23. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	23. Dismissed
		24. Plt's Pro Se Motion for Relief - Defamation of Character	24. Dismissed

		25. Plt's Pro Se Motion for Relief - Unlawful Occupation	25. Dismissed
		26. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	26. Dismissed
		27. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	27. Dismissed
		28. Plt's Pro Se Motion for Relief - Legal Professional Malpractice and Gross Negligence Complaint	28. Dismissed
		29. Plt's Pro Se Motion for Relief - Complaint - Defamation of Character	29. Dismissed
		30. Plt's Pro Se Motion for Relief - Complaint - Defamation of Character	30. Dismissed
		31. Plt's Pro Se Motion for Relief - Complaint Defamation of Character	31. Dismissed
		32. Plt's Pro Se Motion for Relief - Conspiracy	32. Dismissed
		33. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	33. Dismissed
		34. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	34. Dismissed
		35. Plt's Pro Se Motion for Relief - Complaint	35. Dismissed
		36. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	36. Dismissed
		37. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence	37. Dismissed
		38. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	38. Dismissed
		39. Plt's Pro Se Motion for Relief - Complaint	39. Dismissed
		40. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	40. Dismissed
		41. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	41. Dismissed
		42. Plt's Pro Se Motion for Relief - Conspiracy Complaint	42. Dismissed
		43. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	43. Dismissed
		44. Plt's Pro Se Motion for Relief - Civil Rights Violations Complaint	44. Dismissed
		45. Plt's Pro Se Motion for Relief - Civil Rights Violations Complaint	45. Dismissed

		46. Plt's Pro Se Motion for Relief - Civil Rights Violations Complaint	46. Dismissed
		47. Plt's Pro Se Motion for Relief - Civil Rights Violations Complaint	47. Dismissed
		48. Plt's Pro Se Motion for Relief - Conspiracy Complaint	48. Dismissed
		49. Plt's Pro Se Motion for Relief - Gross Negligence Complaint	49. Dismissed
		50. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	50. Dismissed
		51. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	51. Dismissed
		52. Plt's Pro Se Motion for Relief - Harassment and Conspiracy Complaint	52. Dismissed
		53. Plt's Pro Se Motion for Relief - Civil Rights Violations Complaint	53. Dismissed
		54. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	54. Dismissed
		55. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	55. Dismissed
		56. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	56. Dismissed
		57. Plt's Pro Se Motion for Relief - Conspiracy Complaint	57. Dismissed
		58. Plt's Pro Se Motion for Relief - Breach of Written Contract and Conspiracy Complaint	58. Dismissed
		59. Plt's Pro Se Motion for Relief - Conspiracy Complaint	59. Dismissed
		60. Plt's Pro Se Motion for Relief - Conspiracy Complaint	60. Dismissed
		61. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	61. Dismissed
		62. Plt's Pro Se Motion for Relief - Civil Rights Violations Complaint	62. Dismissed
		63. Plt's Pro Se Motion for Relief - Conspiracy Complaint	63. Dismissed
		64. Plt's Pro Se Motion for Relief - Conspiracy Complaint	64. Dismissed
		65. Plt's Pro Se Motion for Relief - Conspiracy Complaint	65. Dismissed
		66. Plt's Pro Se Motion for Relief - Conspiracy Complaint	66. Dismissed

		67. Plt's Pro Se Motion for Relief - Civil Right Violations Complaint	67. Dismissed
		68. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	68. Dismissed
		69. Plt's Pro Se Motion for Relief - Civil Right Violations Complaint	69. Dismissed
		70. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	70. Dismissed
		71. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	71. Dismissed
		72. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	72. Dismissed
		73. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	73. Dismissed
		74. Plt's Pro Se Motion for Relief - Conspiracy Complaint	74. Dismissed
		75. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	75. Dismissed
		76. Plt's Pro Se Motion for Relief - Conspiracy Complaint	76. Dismissed
		77. Plt's Pro Se Motion for Relief - Gross Negligence Complaint	77. Dismissed
		78. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	78. Dismissed
		79. Plt's Pro Se Motion for Relief - Legal Professional Malpractice Complaint	79. Dismissed
		80. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	80. Dismissed
		81. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	81. Dismissed
		82. Plt's Pro Se Motion for Relief - Conspiracy Complaint	82. Dismissed
		83. Plt's Pro Se Motion for Relief - Conspiracy Complaint	83. Dismissed
		84. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	84. Dismissed
		85. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	85. Dismissed
		86. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	86. Dismissed

		87. Plt's Pro Se Motion for Relief - Gross Negligence Complaint	87. Dismissed
		88. Plt's Pro Se Motion for Relief - Conspiracy Complaint	88. Dismissed
		89. Plt's Pro Se Motion for Relief - Civil Rights Violation	89. Dismissed
		90. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	90. Dismissed
		91. Plt's Pro Se Motion for Relief - Conspiracy Complaint	91. Dismissed
		92. Plt's Pro Se Motion for Relief - Conspiracy Complaint	92. Dismissed
		93. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence	93. Dismissed
		94. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	94. Dismissed
		95. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	95. Dismissed
		96. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	96. Dismissed
		97. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	97. Dismissed
		98. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	98. Dismissed
		99. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	99. Dismissed
		100. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	100. Dismissed
		101. Plt's Pro Se Motion for Relief	101. Dismissed
		102. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	102. Dismissed
		103. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	103. Dismissed
		104. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	104. Dismissed
		105. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	105. Dismissed
		106. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	106. Dismissed
		107. Plt's Pro Se Motion for Relief - Malicious Prosecution - Gross Negligence Complaint	107. Dismissed

		108. Plt's Pro Se Motion for Relief - Gross Negligence Complaint	108. Dismissed
		109. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	109. Dismissed
		110. Plt's Pro Se Motion for Relief - Conspiracy Complaint	110. Dismissed
		111. Plt's Pro Se Motion for Relief - Conspiracy Complaint	111. Dismissed
		112. Plt's Pro Se Motion for Relief - Conspiracy Complaint	112. Dismissed
		113. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	113. Dismissed
		114. Plt's Pro Se Motion for Relief - Civil Rights Violations Complaint	114. Dismissed
		115. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	115. Dismissed
		116. Plt's Pro Se Motion for Relief - Complaint	116. Dismissed
		117. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	117. Dismissed
		118. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	118. Dismissed
		119. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	119. Dismissed
		120. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	120. Dismissed
		121. Plt's Pro Se Motion for Relief - Gross Negligence Complaint	121. Dismissed
		122. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	122. Dismissed
		123. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	123. Dismissed
		124. Plt's Pro Se Motion for Relief - Civil Rights Violations Complaint	124. Dismissed
		125. Plt's Pro Se Motion for Relief - Malicious Prosecution Complaint	125. Dismissed
		126. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	126. Dismissed
		127. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	127. Dismissed
		128. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	128. Dismissed

		129. Plt's Pro Se Motion for Relief - Complaint	129. Dismissed
		130. Plt's Pro Se Motion for Relief - Complaint - Malicious Prosecution and Gross Negligence	130. Dismissed
		131. Plt's Pro Se Motion for Relief - Conspiracy Complaint	131. Dismissed
		132. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	132. Dismissed
		133. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	133. Dismissed
		134. Plt's Pro Se Motion for Relief - Conspiracy Complaint	134. Dismissed
		135. Plt's Pro Se Motion for Relief - Conspiracy Complaint	135. Dismissed
		136. Plt's Pro Se Motion for Relief - Civil Rights Violations Complaint	136. Dismissed
		137. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	137. Dismissed
		138. Plt's Pro Se Motion for Relief - Civil Right Violations Complaint	138. Dismissed
		139. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	139. Dismissed
		140. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	140. Dismissed
		141. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	141. Dismissed
		142. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	142. Dismissed
		143. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	143. Dismissed
		144. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	144. Dismissed
		145. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	145. Dismissed
		146. Plt's Pro Se Motion for Relief - Complaint Conspiracy	146. Dismissed
		147. Plt's Pro Se Motion for Relief - Conspiracy Complaint	147. Dismissed
		148. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	148. Dismissed

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		149. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint 150. Plt's Pro Se Motion for Relief - Mail Fraud Civil Rights Violation Complaint	149. Dismissed 150. Dismissed
42P21	State v. Jasper R. Marshall, III	Def's Pro Se Motion for Relief	Dismissed
44P21	Reginald Anthony Falice v. State of North Carolina	Petitioner's Pro Se Motion for Demand for Certification	Dismissed
48A21	In the Matter of K.B. & G.B.	Respondent-Father's Motion to Amend the Record on Appeal	Allowed **03/04/2021**
52P21	State v. Lester Henry Kearney	1. Def's Pro Se Motion for Removal of District Attorney 2. Def's Pro Se Motion for Challenge to Arrest Warrant 3. Def's Pro Se Motion for Dismissal Due to Wrongful Arrest 4. Def's Pro Se Motion to Withdraw Counsel 5. Def's Pro Se Motion for Notice of the Invocation of Rights	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed
54A19-3	State v. Rogelio Albino Diaz-Tomas	The North Carolina Advocates for Justice's Motion for Leave to File Amicus Brief	Allowed **03/02/2021**
56PA20	Copeland v. Amward Homes of N.C., Inc., et al.	North Carolina Association of Defense Attorneys' Motion for Extension of Time to File Amicus Curiae Brief	Allowed **02/19/2021**
58P21	William S. Mills, as Guardian *ad litem* for Angelina DeBlasio v. The Durham Bulls Baseball Club, Inc.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-510) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
60P21	In the Matter of K.S.	1. Petitioner and Guardian *ad litem*'s Motion for Temporary Stay (COA20-271) 2. Petitioner and Guardian *ad litem*'s Petition for Writ of Supersedeas 3. Petitioner and Guardian *ad litem*'s PDR Under N.C.G.S. § 7A-31	1. Allowed **02/05/2021** 2. 3.
75P21	In the Matter of I.R.	Respondent-Parent's Motion for Notice of Appeal	Dismissed

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77P21	Nancy Ann Fuller v. Rafael E. Negron-Medina, M.D., in his individual and official capacity	1. Plt's Motion for Temporary Stay (COA19-492) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/12/2021** 2. 3.
78P21	State v. Jaciel Espino	1. Def's Pro Se Motion for PDR 2. Def's Pro Se Motion of Ineffective Assistance of Counsel	1. Dismissed 2. Dismissed without prejudice
79P19-3	William Paul James v. Rumana Rabbani	Plt's Pro Se Motion for Notice of Appeal (COAP19-156)	Dismissed
80P21	State v. Gary R. Hadden	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Gaston County (COAP20-587) 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed **02/22/2021** 2. Denied **02/22/2021**
81P21	State v. Steven Lynn Greer	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **02/22/2021**
86P21	Thomas M. Anderson, Perry Polsinelli, Dori Danielson, William Hannah, Deborah Hannah, Richard F. Hunter, Andrew Juby, Thomas T. Schreiber, Fred R. Yates and wife, Karon K. Yates, individually and on behalf of Mystic Lands Property Owners Association, a North Carolina Non-Profit Corporation v. Mystic Lands, Inc., a Florida Corporation and Ami Shinitzky	1. Defs' Motion for Temporary Stay (COA19-801) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Amend PDR Under N.C.G.S. § 7A-31	1. Allowed **02/26/2021** 2. 3. 4. Allowed **02/26/2021** **Berger, J., recused**
93P21	Wilmington Savings Fund Society, FSB, v. Theresa Hall, et al.	1. Def's Motion for Temporary Stay (COA20-176) 2. Def's Petition for Writ of Supersedeas	1. Allowed **03/08/2021** 2.

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131P16-16	State v. Somchai Noonsab	1. Def's Pro Se Motion for Objection to Court Orders 2. Def's Pro Se Motion to Compel to Produce Nov. 30, 2012 Records 3. Def's Pro Se Motion for False Imprisonment 4. Def's Pro Se Motion to Take Judicial Notice 5. Def's Pro Se Motion for Delivery of Transcripts 6. Def's Pro Se Motion for Subpoena *Duces Tecum*	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed
149P20	State v. James Edward Leaks	Def's PDR Under N.C.G.S. § 7A-31 (COA19-479)	Allowed
187PA20	State v. Shanna Cheyenne Shuler	State's Motion to Amend the Record on Appeal	Denied **02/08/2021**
201P20	State v. Johnathan Alexander Burton	Def's PDR Under N.C.G.S. § 7A-31 (COA19-246)	Denied
205P04-2	State v. Derrick Jovan McRae	1. Def's Petition for Writ of Certiorari to Review Order of the COA (COAP19-632) 2. Def's Motion to Incorporate Additional Authority in Petition	1. Dismissed 2. Allowed
208P14-2	Steele v. Mecklenburg County Senior Resident Judge, et al.	1. Petitioner's Pro Se Emergency Petition for Writ of Mandamus 2. Petitioner's Pro Se Petition in the Alternative for Writ of Habeas Corpus	1. Dismissed as moot **03/03/2021** 2. Denied **03/03/2021**
268P20	State v. William Bernicki	Def's PDR Under N.C.G.S. § 7A-31 (COA19-649)	Denied
270A18-2	State v. Thomas Earl Griffin	1. State's Motion for Temporary Stay (COA17-386-2) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/06/2020** 2. Allowed 3. Allowed
270P20	State v. Datorius Lane McLymore	1. Def's PDR Under N.C.G.S. § 7A-31 (COA19-428) 2. Def's Motion to Amend PDR	1. Allowed 2. Allowed **Berger, J., recused**
272A14	State v. Jonathan Douglas Richardson	Def's Motion to Bypass Court of Appeals	Allowed **02/24/2021**

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285P20	In the Matter of B.H.	Respondent's PDR Under N.C.G.S. § 7A-31 (COA19-411)	Denied
287P20	Topping v. Meyers, et al.	1. Defs' Notice of Appeal Based Upon a Constitutional Question (COA19-618) 2. Defs' PDR Under N.C.G.S. § 7A-31 3. Plt's Motion for Extension of Time to Respond to PDR and Notice of Appeal 4. Plt's Motion for Extension of Time to Respond to PDR and Notice of Appeal 5. Plt's Motion to Dismiss Appeal	1. --- 2. Denied 3. Denied **06/26/2020** 4. Allowed **07/01/2020** 5. Allowed **Berger, J., recused**
292A20	State v. Donald Eugene Hilton	Def's Motion to Deem Reply Brief Timely Filed (COA19-226)	Allowed **02/18/2021**
297PA16-2	In the Matter of the Adoption of C.H.M., a Minor Child	1. Petitioners' Petition for Writ of Mandamus (COA19-558) 2. Petitioners' Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31 3. Respondent's Notice of Substitution of Party 4. Respondent's Supplemental Motion to Dismiss Petition for Writ of Mandamus and Petition in the Alternative for Discretionary Review 5. Respondent's Motion to Supplement the Record Before this Court	1. Dismissed as moot 2. Dismissed as moot 3. --- 4. Dismissed as moot 5. Dismissed as moot
304P20-2	Clyde Junior Meris v. Guilford County Sheriffs' Department, et al.	Plt's Pro Se Motion to Appeal	Dismissed
306P18-4	Hunter F. Grodner v. Andrzej Grodner (now Andrew Grodner)	1. Def's Pro Se Motion to Clarify this Court's Order From 22 December 2020 2. Def's Pro Se Motion for Temporary Stay 3. Def's Pro Se Petition for Writ of Supersedeas 4. Def's Pro Se Motion for Expedited Review	1. Dismissed **03/10/2021** 2. Denied **03/10/2021** 3. Denied 4. Denied **03/10/2021**

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313P19	Brenda Fennell, Administratrix of the Estate of Claude McKinley Fennell v. East Carolina Health d/b/a Vidant Roanoke-Chowan Hospital, Darla K. Liles, M.D., and Vidant Medical Center	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA18-1096) 2. American Patient Rights Association's Motion for Leave to File Amicus Brief in Support of PDR 3. Def's (Darla K. Liles, M.D.) Motion to Strike Motion of American Patient Rights Association to File an Amicus Curiae Brief	1. Denied 2. Dismissed 3. Dismissed as moot
318P20-2	State v. Eric Pittman	1. Def's Pro Se Motion to Enforce International Law 2. Def's Pro Se Motion for Release 3. Def's Pro Se Motion for Letter of Rogatory	1. Dismissed 2. Denied 3. Dismissed
326P07-2	State v. Dwight McLean	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA19-904) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
331P20	Edward G. Connette, as Guardian *ad litem* for Amaya Gullatte, a Minor, and Andrea Hopper, individually and as parent of Amaya Gullatte, a Minor v. The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System, and/or The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center, and/or The Charlotte-Mecklenburg Hospital Authority d/b/a Levine Children's Hospital, and Gus C. Vansoestbergen, CRNA	Plts' PDR Under N.C.G.S. § 7A-31 (COA19-354)	Allowed **Ervin, J., recused** **Berger, J., recused**
337A20	Nobel v. Foxmoor Group, LLC, et al.	Defendants' Motion to Deem Brief as Timely Filed	Special Order

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360P20	State v. Thomas Allen Hunt	1. Def's PDR Under N.C.G.S. § 7A-31 (COA19-855) 2. State's Motion to Deem Response Timely Filed	1. Denied 2. Allowed
368A20	Reynolds American Inc. v. Third Motion Equities Master Fund Ltd, et al.	Plt's Motion to Reschedule Oral Argument Hearing	Allowed **03/09/2021**
374P15-2	State v. Matthew Ray Hooks	Def's Petition for Writ of Certiorari to Review Order of the COA (COAP20-522)	Dismissed
378P18-7	State v. Napier Sandford Fuller	Def's Pro Se PDR Prior to a Determination by the COA (COA21-9)	Dismissed
384P20	State v. Jeron Gavin French	Def's PDR Under N.C.G.S. § 7A-31 (COA19-997)	Denied **Berger, J., recused**
406PA18	State v. Cory Dion Bennett	Filing of Remand Order	Special Order **Berger, J., recused**
408P16-2	State v. Lowell Thomas Manring	1. Def's Pro Se Motion for PDR (COAP20-525) 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
422P20	The North Carolina State Bar v. Venus Y. Springs, Attorney	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA19-1120) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed **Berger, J., recused**
427PA17-2	State v. Jermaine Antwan Tart	Def's Pro Se Motion to Correct Sentence	Dismissed without prejudice
428P18-2	State v. Raymond Dakim Harris Joiner	1. Def's Pro Se Motion for PDR 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Motion for Conditional Acceptance for Value	1. Dismissed 2. Dismissed 3. Dismissed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

12 MARCH 2021

432P20	Wanda Campbell McLean, as administrator for the estate of Josephine Smith v. Katie Spaulding	Plt's PDR Under N.C.G.S. § 7A-31 (COA20-36)	Denied
436PA13-4	Lake, et al. v. State Health Plan for Teachers and State Employees, et al.	Disclosure Pursuant to Canon 3D of the Code of Judicial Conduct	Special Order **02/08/2021**
439P20	Brian Kent Brown and Brown Brothers Farms v. Between Dandelions, Inc., f/k/a Remodel Auction, Inc.	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1074)	Denied
442P20	State v. James Ryan Kelliher	1. Plt's Motion for Temporary Stay (COA19-530) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31 5. Def's Conditional PDR	1. Allowed **10/23/2020** 2. Allowed 3. Dismissed *ex mero motu* 4. Allowed 5. Allowed
443P20	State v. Marvin Hargrove, Jr.	Def's Pro Se Motion for PDR Under N.C.G.S. § 7A-31 (COAP20-422)	Dismissed
444P20	State v. Arkeem Nellon	1. Def's Pro Se Motion for Notice for Certiorari Appeal (COAP20-469) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Motion of Discovery 4. Def's Pro Se Motion for Production of Exculpatory Evidence 5. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Allowed
448P07-2	State v. Jacobie Quonzel Brockett	1. Def's Pro Se Motion for Order Directing Resentencing Hearing 2. Def's Pro Se Motion to Proceed Pro Se 3. Def's Pro Se Motion for Counsel to Withdraw and to Withdraw Documents, Motions, and Paperwork by Counsel	1. Dismissed without prejudice 2. Dismissed without prejudice 3. Dismissed without prejudice

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

12 MARCH 2021

452P20	State v. Masses Andrew Cain	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1095)	Denied
457P20	State v. Khalil Abdul Farook	1. State's Motion for Temporary Stay (COA19-444) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Lift Temporary Stay 5. Def's Motion to Expedite Appeal	1. Allowed **11/06/2020** 2. Allowed 3. Allowed 4. Dismissed as moot 5. Dismissed as moot
462P20	Helen Lynette Gibbs, Widow of David W. Gibbs, deceased Employee v. Roca's Welding, LLC, Employer, Builder's Mutual Insurance Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA20-121)	Denied **Berger, J., recused**
466P20	State v. John Brona Turner, III	Def's PDR Under N.C.G.S. § 7A-31 (COA19-897)	Denied **Berger, J., recused**
472P20-2	State v. Torrance D. Crouell, Sr.	Def's Pro Se Motion for Verified Complaint	Dismissed
478P20	State v. Michael Talley	1. Def's Pro Se Motion for Special Session of Superior Court 2. Def's Pro Se Motion for Subpoena 3. Def's Pro Se Motion for Willful Misconduct in office, Willful and Persistent Failure to Perform Duties, and Conduct Prejudicial to the Administration of Justice 4. Def's Pro Se Motion for Public Inspection of Facts	1. Denied 2. Dismissed 3. Dismissed 4. Dismissed
485PA19	State v. Cashaun K. Harvin	1. Def's Motion for Appropriate Relief (COA18-1240) 2. Def's Motion to Seal Motion for Appropriate Relief	1. 2. Allowed **03/08/2021**
485P20	State v. Tevin O'Brian Dalton	Def's PDR Under N.C.G.S. § 7A-31 (COA20-248)	Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

12 MARCH 2021

503P20	State v. Christopher Lee McPeters	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA19-687) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied **Berger, J., recused**
514P13-7	State v. Raymond Dakim Harris Joiner	1. Def's Pro Se Motion for PDR 2. Def's Pro Se Motion for Conditional Acceptance for Value	1. Dismissed 2. Dismissed
518P20	State v. Keyshawn Tyrone Matthews	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1168)	Denied
522P20	State v. Raymond Dakim-Harris Joiner	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-1112) 2. Def's Pro Se Motion for Conditional Acceptance for Value	1. Dismissed 2. Dismissed
523P06-7	Freeman Hankins, Sr. v. Brunswick County	Defendant's Pro Se Motion to Invoke Constitutional Rights	Dismissed
532P20	State v. Harvey Lee Essary, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA19-917)	Denied
536P20-2	State v. Siddhanth Sharma	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-591) 2. Def's Pro Se Motion to Add Addendum to PDR 3. Def's Pro Se Motion for Reconsideration	1. Denied 2. Allowed 3. Dismissed **Berger, J., recused**
548A04-3	State v. Vincent Lamont Harris	1. State's Motion for Temporary Stay (COA18-952) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/15/2021** 2. Allowed **02/04/2021** 3. --- **Berger, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

12 MARCH 2021

580P05-20	In re David Lee Smith	1. Def's Pro Se Motion for Court to Liberally Construe Pro Se Motion as an Application for Writ of Mandamus 2. Def's Pro Se Motion for Court to Allow Liberal Construction or Fair Opportunity to Amend Pro Se Petition 3. Def's Pro Se Motion for Application to Amend Pro Se Petition 4. Def's Pro Se Motion for PDR Under N.C.G.S. § 7A-31 5. Def's Pro Se Petition for Writ of Mandamus	1. Dismissed **02/25/2021** 2. Dismissed **02/25/2021** 3. Dismissed **02/25/2021** 4. Denied **02/25/2021** 5. Denied **02/25/2021** **Ervin, J., recused**

APPENDIXES

Investiture Ceremony

★★★

10:00 a.m.
January 6, 2021

★★★

Supreme Court of North Carolina

ORDER OF CEREMONY

★★★

Sounding of the Gavel
AMY FUNDERBURK
Clerk of Court
Supreme Court of North Carolina

Invocation
BISHOP PATRICK L. WOODEN, SR.
Pastor
Upper Room Church of God in Christ

Welcoming Remarks
THE HONORABLE ROBIN HUDSON
Senior Associate Justice
Supreme Court of North Carolina

Presentation of Commissions
THE HONORABLE JOSH STEIN
Attorney General
State of North Carolina

Administration of the Oath to Paul Newby
THE HONORABLE ROBIN HUDSON
Senior Associate Justice
Supreme Court of North Carolina

Remarks

THE HONORABLE PAUL NEWBY
Chief Justice
Supreme Court of North Carolina

Administration of the Oath to Phil Berger Jr.

THE HONORABLE PAUL NEWBY
Chief Justice
Supreme Court of North Carolina

Remarks

THE HONORABLE PHIL BERGER JR.
Associate Justice
Supreme Court of North Carolina

Administration of the Oath to Tamara Patterson Barringer

THE HONORABLE PAUL NEWBY
Chief Justice
Supreme Court of North Carolina

Remarks

THE HONORABLE
TAMARA PATTERSON BARRINGER
Associate Justice
Supreme Court of North Carolina

Benediction

BISHOP PATRICK L. WOODEN, SR.
Pastor
Upper Room Church of God in Christ

Adjournment of Court

AMY FUNDERBURK
Clerk of Court
Supreme Court of North Carolina

Supreme Court of North Carolina

WINTER TERM
2021

★★★

CHIEF JUSTICE
PAUL NEWBY

SENIOR ASSOCIATE JUSTICE
ROBIN HUDSON

ASSOCIATE JUSTICES
SAMUEL J. ERVIN IV
MICHAEL R. MORGAN
ANITA EARLS
PHIL BERGER JR.
TAMARA PATTERSON BARRINGER

Remarks by Senior Associate Justice Robin Hudson

Good morning. On behalf of the entire Court, I want to welcome each of you to this special ceremonial session of the Supreme Court of North Carolina. We are grateful to have you here virtually to celebrate the installation of our new Chief Justice, Paul Newby, and two newly elected Associate Justices, Phil Berger, Jr., and Tamara Barringer.

Our first order of celebration is the installation of our new Chief Justice. Such an event is always an historic occasion, and today it is notably so, because it occurs during a global pandemic. Because of related restrictions on in-person activities, we are celebrating with the assistance of video conferencing technology. In the 202-year history of our Court, only twenty-nine individuals have ever served as Chief Justice. Every Chief Justice of this Court, whether elected or appointed, has been a preeminent legal scholar, respected by his or her colleagues, and in those respects, Chief Justice-elect Newby is no different. But, none has been installed in quite this manner. Although we are fortunate that technology allows us to gather virtually by video, this is not the ideal ceremony. So, please know that when the pandemic has subsided so that it is safe to do so – hopefully later this year – our new Chief and new Associate Justices will have the opportunity to conduct in-person investitures in the courtroom, according to our tradition.

And, while we celebrate this installation as an important milestone in our state's history, it is also an opportunity to honor the distinguished legal career of our new Chief Justice. Chief Justice-elect Newby obtained his law degree in 1980 from the University of North Carolina School of Law, after earning his Bachelor's degree with high honors from Duke University, in 1977. He began his career as a lawyer, which included five years in private practice, and 19 as an Assistant United States Attorney for the Eastern District of North Carolina in Raleigh. While there, he played a key role in conducting an undercover sting operation that recovered North Carolina's original copy of the Bill of Rights, which had been stolen after the Civil War.

He brings more than forty years of legal and judicial experience to the office of Chief Justice. He was first elected to this Court in 2004, and was re-elected as an associate justice in 2012. Since January of 2017, he served as Senior Associate Justice. In 2020, he won the statewide election for Chief Justice.

Chief Justice-elect Newby's dedicated service to the judiciary and the community extends beyond the halls of justice. He proudly mentors young people, and has served as an elder and Sunday school teacher at Christ Baptist Church in Raleigh. He serves as an adjunct professor at

Campbell University School of Law, co-author of the North Carolina State Constitution (2d ed. 2013), co-chair of the Chief Justice's civic education initiative and Judicial Branch Speakers' Bureau, and as former chair of the Chief Justice's Commission on Professionalism. And he is also active in numerous bar organizations and civic groups where he has worked to promote the rule of law and the administration of justice, and received numerous honors and awards including the J. McNeill Smith Award and Citizen Lawyer recognition from the NC Bar Association, and the James Iredell Award and honorary doctor of laws from Southern Wesleyan University. He has been a tireless advocate for the importance of an independent judiciary and a fair judicial system. He is a dedicated public servant, an accomplished jurist, and a hard-working and generous colleague. It has been my honor to serve with him on the Court for the past fourteen years. Over an eventful fourteen years, I have collected a vast archive of tales of the adventures of my colleague, but I promised to stick to the script, so the stories will have to wait.

Chief Justice-elect Newby hails from Randolph County, attended public schools and is especially proud of his years with the Boy Scouts; he is an Eagle Scout and has received the national Distinguished Eagle Award. Most significantly, he has been married to Macon Tucker Newby since 1983, and they have four children.

It is my honor and pleasure, on behalf of the Court, to welcome you all to celebrate this tremendous occasion as we extend our congratulations to Chief Justice-elect Paul Newby.

We welcome those hardy few gathered here in the courtroom, as well as to the many others who have joined us today online. We hope to welcome many more guests later when we are able to proceed with our traditional in-person ceremonial installation ceremonies. On behalf of the Court and the new Chief Justice, we thank you for being with us today. (We thank our IT Director Fred Wood and this talented and tireless team for streaming this ceremonial session and making it possible for all of those who wished to attend to be a part of this special ceremony. It is not an exaggeration to say that over the last year we would have been lost without them, and we are endlessly grateful.)

There are not many dignitaries here today, because of these unusual circumstances. However, we are pleased to welcome the spouses of our Justices:

> Chief Justice-elect Newby's wife, Macon, who is with him in the courtroom;
>
> In addition, my husband, Victor Farah;

Justice Ervin's wife, Mary Ervin;

Justice Morgan's wife, Audrey Morgan; and

Justice Earls' husband, Charles Walton, are watching with us, and we welcome them.

Also in the building are Justice-elect Berger's wife Jodie Berger, and

Justice-elect Barringer's husband Brent Barringer are accompanying them today, and we welcome them.

We hope to be honored to have them and many others with us in person at a later date.

Remarks by Chief Justice Paul Newby

Thank you, Senior Associate Justice Hudson. You are so kind. Over the last fourteen years plus, I've been privileged to work with you. There is no one more conscientious or hardworking. I am delighted that you will be my Senior Associate Justice, and I thank you for administering my oath. I want to thank all my fellow justices for recognizing the special circumstances of this pandemic and for working with us with this virtual ceremony. I'm grateful that my colleagues appreciate the fact that these investitures are special occasions in the lives of each of us and that we will be able to do the in-person investitures after the COVID pandemic is over. I'll save my full remarks until then but that being said I am a recovering lawyer and there is a microphone in front of me, so I suppose I'll say a few words now.

In 2004, I began my remarks by saying that I was the turtle on a fencepost and when you're walking along, and you see that turtle on the fencepost, you know that turtle did not get there on its own, that there were a whole bunch of things that may have contributed to that turtle being up there. I want to begin by thanking God. I certainly appreciate and I am humbled that He would place this responsibility on me. I've got to express my gratitude to Macon, my life companion, my unceasing prayer warrior, my counselor, and my encourager. I am so grateful for her companionship through life, and I can never express enough how grateful I am for her. And I want to say that I am grateful for all my children from whom I've learned so much. I thank you for joining us today virtually, and I thank you for your prayers and encouragement. Each one of you has helped me in special ways throughout your lives. And, in this election cycle in particular, I'm grateful for Sarah and her tireless efforts. I'm also grateful for Sam and Peter and his wife, Kathryn, and for Ruth. They all contributed in their own way and for that I'm grateful. Thanks to my brother, Parks and his wife, Frances, and their son, John. Joining us virtually today is my almost 97-year-old mother. Mom—thanks for everything. Thank you for those prayers throughout my life and for raising me in a loving Christian home. I am so grateful for you. And I'm grateful that by God's grace you are with us today, even virtually. I need to express my gratitude to my dear friends, Kyle and Sarah Tucker, and David Osborne who have helped me for almost a decade. I must mention with gratitude my Court staff over the last sixteen years, all of whom have helped me as we sought to do justice in every case. I'm particularly grateful to my Chief of Staff, Liz Henderson, who's provided untold hours of help over the last ten years, and my Senior Law Clerk, Ragan Riddle Oakley, for her assistance. That being said, there are way too many folks over the last sixteen years that have helped me, helped Macon, and helped my family through this journey. I am grateful for your

prayers and your efforts, all that you've done, and I ask that you continue to pray for me. Yes, indeed, I am that turtle on a fencepost. Each of you has played a role in my being there and for that I am grateful. By God's grace I hope to fulfill your trust in me.

All of us approach life through our own life experiences, with that filter. I was born in Randolph County. I'm the only justice in the history of the state to have been born in Randolph County and now the only chief justice from Randolph County. I grew up in Jamestown. Mom was a schoolteacher, dad a Linotype operator. No lawyers in our family—I met my first lawyer through my Boy Scout experience. I did have the opportunity to work for Chief Justice Burger at the U.S. Supreme Court during the Bicentennial of our Declaration of Independence. That experience certainly helped direct my path on this course. As Senior Associate Justice Hudson mentioned, I have had a variety of legal experiences as a lawyer and now sixteen years on the Court. I have served with four chief justices and thirteen associate justices, not counting the two colleagues that will join us today. Through all these experiences, the lessons I have learned, and through the ongoing assistance and contributions of my colleagues on this Court and others throughout our legal and judicial system, I humbly undertake to lead this branch.

My polar star is our Constitution. It begins with "We the People." It's a social contract. As our Declaration of Independence reminds me, "We hold these truths to be self-evident," that all are created equal and endowed by our Creator, endowed by God, "with certain unalienable Rights"—life, liberty, pursuit of happiness—and that government is instituted among people to protect our fundamental rights and freedoms. As Lincoln famously said, we are a government of the people, and by the people, and for the people.

Justice Ervin would be very disappointed if I didn't mention the Magna Carta so, never wanting to disappoint him, I'll do that. Yes, so many of our constitutional principles date back to 1215 and the Magna Carta, particularly the ones that I will reference today, which are Article I, Section 18, the open courts provision, and Article I, Section 19, which is our law of the land provision. Both draw heavily from the Magna Carta.

Article I, Section 18, which is again emphasized by Article IV, Section 9 says the "courts shall be open" and that "justice shall be administered without favor, denial, or delay." Section 19 talks about our due process guarantee, as well as equal protection. That is a constitutional requirement; courts shall be open. Certainly, open courts, available for all citizens, is not a luxury. It's a mandate. Nonetheless, how do we operate in the midst of our global, and yes, local pandemic with regard to COVID? That is the great challenge of our times as we seek to protect

the public health of our courthouse personnel and fulfill our constitutional mandate.

As I said, access to justice through the courts is not a luxury; it is a mandate. I have communicated with the Governor because of this constitutional mandate, asking that he enhance the availability of the vaccine to the courthouse personnel who bravely, may I even say courageously, open the courts to fulfill our constitutional mandate. Because of this, I believe that all people in our local courthouses should have priority with regard to the vaccine. And I thank all of the local court officials, all the courthouse personnel, as I have interacted with them yesterday and today as we seek to jointly fulfill our constitutional mandate that the courts shall be open.

It's been my privilege over the last eight years to teach at Campbell Law School and I'm always so encouraged as I walk in that building with the reminder of Micah 6:8 that says, "And what does the Lord require of you but to do justice, and to love with kindness, and to walk humbly with your God?" Certainty, that is what I desire for myself and I ask for your prayers that I would be successful in doing so.

As an Eagle Scout I always strive to leave the campsite better than I found it. It is certainly my desire, and I know that of my colleagues and other leaders of the judicial branch to do that with our judicial system. I truly have been blessed to be a part of this. The goal of each one of these justices, as well as every official of our justice system, is equal justice for all. I so appreciate the sincere efforts of every one of our local judicial officials, our local courthouse staff, as well as the members of our appellate branch who truly desire equal justice for all. This goal can only be achieved by God's grace and with the help of all those who are with us today. And I ask that you continue to pray for my wisdom and the wisdom of our Court leadership that we truly, truly fulfill the ideal of equal justice for all. Thank you.

Remarks by Justice Phil Berger, Jr.

Mr. Chief Justice. Fellow Justices of the Supreme Court of North Carolina.

There are countless men and women who have guided my path, sacrificed, and played such an important role in my career and my life. Too many to name, but some deserve special recognition.

First, I would like to thank the people of North Carolina who have entrusted me with the great honor of serving on this Court. So many voters, volunteers, donors, and well-wishers made this moment possible, especially Sarah Newby with her work over the last - almost two years.

Certainly my parents, Phil and Pat Berger. They instilled small town values and a strong work-ethic in their children, and taught us that the American Dream is available to anyone in this country, no matter your background, no matter your zip code; even to a loom operator at Dan River Mills and a pressboard operator in a factory with the simple goal of going to law school.

I also want to thank my in-laws, Wayne and Johnette Church, who share a similar humble background.

My brother Kevin, a gifted public servant in his own right, is a county commissioner and attorney in Rockingham County. And, my sister Ashley, is an attorney here in Raleigh, and according to my mom, Ashley is smarter than her two boys.

Every story has a beginning. And the story of Phil Berger, Jr. could start any number of places, but it really begins in the small town of Eden, North Carolina.

As a kid, I was a decent student and a pretty good athlete. A bit of a late bloomer for both.

But during those formational and foundational years, there were so many great classmates and friends that I grew up with. And we grew up together, shared joy and sorrow, did all of the things stupid kids could do in the pre-cell phone days.

But, most importantly, we dreamed about impossible goals, hoped for amazing futures, and tried to figure out who we were and where we were going.

Teachers and guidance counselors were always there for us; trying to direct teenagers who knew everything.

Perhaps most important for me were my coaches and teammates. I would not be the person I am today without them.

Our coaches were giants. Amazing men that you didn't want to let down, and people we still admire and look up to today. My coaches reinforced the values taught at home; got more out of me than I thought possible; and pushed me to be better. Clayton Johnson, who died several years ago, Hal Capps, Steve Turman, Pete Cunningham, Greg Frey, Terry Widel, Jerry Ellis, Keith Dallas, Alan Ashkinazy, and so many more. I am so grateful for the time you invested in a kid who had more heart than talent.

From my time as District Attorney, I remember so many prosecutors and police officers, judges and jurors, magistrates and bail agents, and the members of our team who went about their business each day to protect communities, preserve innocence, and make our justice system the envy of the world, and the greatest vehicle for justice created by man.

Judge Fred Morrison and everyone at the Office of Administrative Hearings, who are just so special to me.

All of my law clerks and assistants, and the judges at the Court of Appeals. I tell people all the time, that's the best job I've ever had.

There are times in your life when you want to quit. Turning points. God places people in your life, or back in your life, at just the right time. For me, that person is Dallas Woodhouse. Dallas, I am forever grateful that you pestered me and basically forced me to run for the Court of Appeals 4 years ago. You believed in me, and if there is one person to credit, or to blame, for me sitting here today, it's Dallas Woodhouse.

But, at some point, it all comes back to family.

My kids, Philip and Will, who are better people, better students, and better athletes than I ever dreamed of being. They amaze me and make me smile.

Our dogs Maple and Mollie. The stars of my social media accounts.

Most importantly, my wife Jodie. They say beside every successful man is a wife who is surprised. Jodie and I met 28 years ago at UNC Wilmington. She is a great teacher in our schools, a wonderful mother, and my best friend.

And thank you to the wonderful people of Eden, for everything you have given to me. I hope that I continue to be a worthy ambassador for a town that means so much to my family and me. Becoming a justice on the Supreme Court is far beyond anything this kid from Eden ever dreamed.

In closing, I look forward to working with the members of this Court. I appreciate your warm welcome into this position, and want to thank our Clerk, Amy Funderburk for her work on our transition and pulling this together today. Also, the Marshals at the Court who keep us safe, and to Fred Wood and AOC, for making today run smoothly.

Mr. Chief Justice and colleagues, thank you for this opportunity. Thanks to all of you across North Carolina who are joining us today. May God continue to bless you, our Court, our State, and this great Nation.

Remarks by Justice Tamara Patterson Barringer

Mr. Chief Justice, members of the Court and citizens of North Carolina, I am so humbled and honored to serve as an Associate Justice of the North Carolina Supreme Court. Only in the United States could a girl from a small town in rural North Carolina, whose first home did not have indoor plumbing, who spent her first five years of her life in a single-wide trailer, be bestowed such an honor, privilege, and responsibility; and for that, I am so incredibly grateful. To that end, there are a few people I would like to recognize, and as Mr. Chief Justice said, there are so many that we would be here all day if I name them all but there are a few people I would like to speak about right now.

First of all, Mr. Chief Justice, thank you so much for your mentoring, your longtime friendship with myself and my husband, Brent, and our family. We certainly appreciate that.

Members of the Court, you have been so collegial, so welcoming to me, so much so that it has been surprising how wonderful you have been in just the few weeks that I have been on this journey to transition to the Court. Thank you.

I would also like to thank my staff. Pat Hansen, who is my very new Executive Assistant, and who has seen around corners that I can't see around yet, who has anticipated things that I don't even know to ask. She has been absolutely wonderful! So, Ms. Hansen, thank you so much. And also to my law clerks, Mary Ellen Goode and Isabella Hohler, and my intern-turned-incoming law clerk, Nathan Wilson. You are wonderful! You have worked tireless hours to help me prepare for oral arguments. You have challenged me in sharing your own well-reasoned thoughts and opinions. In just the few days since my swearing-in, I feel like we are truly becoming a team!

Going further back, I mentioned my background, and I could not have gotten here without a whole lot of folks who helped me, especially back in Cleveland County, Shelby, North Carolina. My public-school teachers who believed in me and worked with me and encouraged me all those years. My college professors – Barry Roberts, Richard Mann, my law school professors, Professors Tom Hazen and William Turnier – those teachers, those professors who were so critical in my personal and professional development, in my ability to be sitting here in front of you today. Thank you, gentlemen, I really, truly appreciate it.

My Girl Scout leaders – I'm a lifetime Girl Scout – in Girl Scouts is where I learned to lead. It's also where I learned to collaborate, and to appreciate and work with people from all walks of life, and so to my many Girl Scout leaders, I thank you.

My family – my mother, my father. My father, who is now in heaven, the late John Patterson, what a wonderful, caring, and loving man, 82nd Airborne, farmer, strong guy, wonderful, wonderful father. My mother, Sandra McKee Patterson, who is here today watching remotely. All the love and caring and good Christian upbringing they gave me – is just incredible. My sisters – Joy, Crystal and Wendy – we're all for one and one for all and have been from the very beginning.

Then of course, my immediate family now. My children -- they are just absolutely the light of my life: Jessica, John Charles and Emily, all of whom came to us through adoption, but just as strong as any other way. God definitely has a plan, Jeremiah 29:11. And very importantly, my husband Brent. He was my full-time law partner for 20 years; he's been my life partner for 38 years. He's strong. He's humble. He's very supportive and a very, very, very wonderful man, I'm so fortunate. I won the lottery when it comes to family all the way around.

To the citizens of North Carolina, thank you for giving me this opportunity to serve you, to serve the law, and to protect our Constitution.

In closing, I would like to share a story that has inspired me throughout my legal career and particularly now as a justice of the North Carolina Supreme Court. Many years ago, I had the opportunity to take my mother, father and sisters to Washington, D.C., to see all the different sights. They had never been there before, and it's really exciting to get to go and see it with your own eyes. We found ourselves in Archives one day and just happened to be there when almost no one else was there – so we split up and wandered around the building. I wandered back in front of the Constitution and Declaration of Independence – which were in big displays – and standing there was my father. I mentioned that my father was a farmer, 82nd Airborne, a very strong guy who I had never seen cry. When I looked over, I saw a big tear running down my father's face and I reached over to him and said, "Daddy! What's wrong?" I was concerned that he might be hurt. He waved me off and said, "No, no! I'm fine Tammy! Just all those years in the hot sun when I was behind that plow, following that mule, I never thought I would have the opportunity to stand in front of the documents that made this great country!" My memories of that day are seared into my brain. To see my hard-working father moved to tears over what to my young eyes were historical relics was a formative experience. That was the first moment that I was able to truly see that our Constitution and Declaration of Independence are just as powerful and meaningful today as they were the day they were written.

Ladies and gentlemen, members of the Court, Mr. Chief Justice, I've stuck to that belief. I'm humbled beyond words just to know that I have

the privilege to defend the Constitution, a document that was so important to my family, particularly my father, and I pledge to you I will do my best. So, thank you all so much and again, it is truly an honor to serve on this Court with you.

IN THE MATTER OF A PORTRAIT OF)
CHIEF JUSTICE THOMAS RUFFIN)

ADMINISTRATIVE ORDER

On 25 October 2018, this Court established an Advisory Commission on Portraits to consider matters related to portraits of former justices of the Supreme Court of North Carolina and directed the Commission to promulgate a report and recommendation to the Court. On 14 December 2020, the Commission published its report and recommendation.

Having considered the issues raised in the report and having thoroughly discussed the Commission's recommendations, and with gratitude to the members of the Commission for their diligence and their thoughtful work, the Court adopts the following recommendations of the Commission:

- The large portrait of Chief Justice Thomas Ruffin will be removed from the Supreme Court courtroom.
- A large seal of the Supreme Court will be hung in the space currently occupied by the Ruffin portrait.

By order of the Court, this the 22nd day of December, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 22nd day of December, 2020.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
~~Assistant~~ Clerk, Supreme Court of
North Carolina

AMENDMENT TO THE RULES AND REGULATIONS OF THE BOARD OF LAW EXAMINERS APPROVED BY THE NORTH CAROLINA STATE BAR COUNCIL

The following amendment to the rules and regulations of the Board of Law Examiners was approved by the North Carolina State Bar Council at its quarterly meeting on January 27, 2021.

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 Section .0900, Examinations, of the Rules Governing Admission to the Practice of Law, be amended as shown below (additions are underlined, deletions are interlined):

Rule .0902 Dates

The written bar examinations shall be held in ~~Wake County or adjoining counties~~ North Carolina in the months of February and July on the dates prescribed by the National Conference of Bar Examiners.

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the Board of Law Examiners was approved by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 2021.

Given over my hand and the Seal of the North Carolina State Bar, this the 27th day of January, 2021.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendment 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 is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 3rd day of February, 2021.

s/Paul Newby
Paul M. Newby, Chief Justice

On this date, the foregoing amendment to the Rules and Regulations of the Board of Law Examiners was entered upon the minutes of the Supreme Court. The amendment 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 3rd day of February, 2021.

s/Berger, J.
For the Court

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

CONSTITUTIONAL LAW—Continued

judgment on the pleadings with respect to plaintiffs' monopolization claim under Article I, Section 34 of the North Carolina Constitution. Plaintiffs' complaint, which alleged that the hospital authority had only a fifty percent share of the local market for acute inpatient hospital services and faced formidable competitors within that market, failed to allege that the hospital authority had the ability to control prices in that market. **DiCesare v. Charlotte-Mecklenburg Hosp. Auth., 63.**

North Carolina—standing—no "injury in fact" requirement—legal right arising from statute—In a case of first impression, the Supreme Court held that, unlike the federal constitution, the North Carolina Constitution does not impose an "injury in fact" requirement for standing, and therefore a committee to elect a political candidate had standing to seek statutory damages against a political action committee for running a television advertisement that allegedly violated a "stand by your ad" law, even though the candidate won his election. The Court further clarified that where a statute (such as the "stand by your ad" law) expressly confers a cause of action to a class of persons, entitling them to sue for infringement of a legal right arising from the statute, a plaintiff has standing to bring that cause of action so long as he or she belongs to that designated class of persons. **Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 558.**

Right to be present at criminal trial—waiver—voluntariness—suicide attempt—need for competency hearing—In a prosecution for felony embezzlement, where defendant attempted suicide before the fourth day of trial and was involuntarily committed, the trial court erred by failing to conduct a competency hearing to determine whether defendant had the mental capacity to voluntarily waive her constitutional right to be present at trial. Substantial evidence created a bona fide doubt as to defendant's competency where her medical records and recent psychiatric evaluations showed she suffered from depression, a long-term mood disorder requiring medication, and suicidal thoughts; she was assessed at a "high" risk level for suicide; and she required further treatment and immediate psychiatric stabilization after her suicide attempt. **State v. Sides, 449.**

Right to speedy trial—Barker balancing test—no prejudice from delay—A five-year delay between an indictment and trial (for a first-degree sex offense with a child and indecent liberties with a child) did not violate defendant's Sixth Amendment right to a speedy trial where the *Barker v. Wingo*, 407 U.S. 514 (1972), four-factor balancing test showed that although the length of delay was unreasonable, the reason for the delay was crowded court dockets rather than negligence or willfulness by the State, defendant waited nearly five years to assert his right to a speedy trial, and defendant failed to present evidence establishing any actual prejudice. **State v. Farmer, 407.**

State budget process—federal block grants—legislative appropriation—Where the state constitution grants to the General Assembly exclusive power over the state's expenditures, the General Assembly's appropriation of federal block grants as part of the state budget process was a proper exercise of its constitutional authority and was not a violation of the separation of powers provision in Art. I, Section 6. Contrary to the Governor's contention, the block grant funds were not "custodial funds" (as defined in the State Budget Act, Ch. 143C) exempt from legislative control and were subject to allocation by the legislature as part of the State treasury. **Cooper v. Berger, 22.**

TERMINATION OF PARENTAL RIGHTS—Continued

in the adjudication phase of a termination of parental rights hearing, lacked evidentiary support or were improperly based on testimony from the dispositional phase, the Supreme Court disregarded those portions of the findings made in error when evaluating the trial court's determination that respondent-father's parental rights to his daughter should be terminated on the basis of neglect and willful abandonment. **In re Z.J.W., 760.**

Appointed counsel—assistance from guardian ad litem—ineffective assistance of counsel claim—In a termination of parental rights case where the guardian ad litem participated in the hearing by questioning some witnesses and making arguments to the trial court, respondent's claim that she received ineffective assistance of counsel because her appointed counsel was not sufficiently involved with the proceeding was rejected because the record reflected that counsel was engaged throughout and utilized the assistance of the guardian ad litem to better serve respondent. Respondent's additional claim that the guardian ad litem was unprepared to assist her counsel was not supported by the record. **In re J.E.B., 629.**

Best interests of the child—findings of fact—evidentiary support—The trial court's finding of fact during the best interest determination of a termination of parental rights proceeding that children who are adopted often face harm was not supported by competent evidence and was prejudicial, warranting remand, because of the possibility it improperly influenced the trial court's best interest determination. **In re R.D., 244.**

Best interests of the child—multiple children—consideration of factors—for each child—The trial court did not abuse its discretion by determining that termination of a mother's parental rights was in the best interests of her five children, where the court made the required dispositional findings under N.C.G.S. § 7B-1110(a) with respect to each child and weighed the findings applicable to each child in making its best interests determinations. Further, the trial court's findings demonstrated that it considered the children's bonds with each other and with their mother and the fact that not all of the children had pre-adoptive placements. **In re J.J.H., 161.**

Best interests of the child—statutory factors—findings as to each factor—The trial court did not err when it failed to make explicit findings for each statutory factor listed in N.C.G.S. § 7B-1110(a) during a termination of parental rights proceeding because trial courts are not required to make specific findings as to each statutory factor and the trial court properly considered all factors and made written findings for those factors that were relevant. **In re R.D., 244.**

Competency of parent—guardian ad litem—Rule 17—duties of guardian ad litem—The trial court did not abuse its discretion by terminating respondent-father's parental rights where the performance of respondent's guardian ad litem was legally sufficient. There was no evidence that the guardian ad litem failed to meet or interact with respondent and there was no evidence of actions the guardian ad litem could have taken which would have increased the probability of a favorable ruling for respondent. **In re W.K., 269.**

Evidence—guardian ad litem report—right to confront and cross-examine guardian ad litem—During the disposition phase of a termination of parental rights proceeding, the trial court did not abuse its discretion by declining to subject the guardian ad litem, who also served as the attorney advocate, to cross-examination regarding the report she submitted because a disposition proceeding is not adversarial

TERMINATION OF PARENTAL RIGHTS—Continued

in nature, N.C.G.S. § 7B-1110(a) allows trial courts to consider hearsay evidence, and a potential ethical conflict existed pursuant to Rule 3.7 of the Rules of Professional Conduct. **In re R.D., 244.**

Grounds for termination—dependency—alternative child care arrangement—placement with legal guardian—The trial court improperly terminated a mother's parental rights on grounds of dependency (N.C.G.S. § 7B-1111(a)(6)) where it failed to make any findings of fact addressing whether the mother lacked an appropriate alternative child care arrangement. Moreover, the statutory requirements for establishing dependency as grounds for termination could not be met where the child had been placed with legal permanent guardians pursuant to a valid permanency planning order. **In re A.L.L., 99.**

Grounds for termination—dependency—sufficiency of findings—The trial court's findings were insufficient to support its conclusion that grounds existed to terminate respondent-father's parental rights to his child based on dependency where the sole finding related to dependency—stating that there was no proper plan of care for the child during an incident in which respondent experienced a medical issue—was not supported by the evidence. There were no findings, nor evidence presented, that respondent's health prevented him from providing proper care or supervision of the child. **In re C.L.H., 614.**

Grounds for termination—neglect—findings of fact—A trial court's uncontested findings of fact supported its conclusion that grounds existed to terminate respondent-mother's parental rights to her child based on neglect, where the findings not only demonstrated respondent's failure to adequately address the domestic violence and substance abuse issues that contributed to the child being adjudicated neglected and dependent but also indicated a likelihood of future neglect based on respondent's noncompliance with her case plan. Although portions of certain findings were unsupported by the evidence with regard to specific aspects of the case plan, any errors were harmless in light of the remaining supported findings. **In re S.R.F., 647.**

Grounds for termination—neglect—findings—evidentiary support—The trial court's unchallenged findings of fact were sufficient to support termination of respondent-father's parental rights on the ground of neglect given respondent's extensive history of substance abuse, failure to follow his case plan, and his lack of contact with his children over several years, and any of the challenged findings that were not supported by evidence had no impact on the trial court's ultimate determination that a ground for termination existed. I**n re W.K., 269.**

Grounds for termination—neglect—insufficient findings—evidence from which determination could be made—The trial court's determination that respondent-father's parental rights to his daughter were subject to termination on the basis of neglect was vacated. The court's conclusion that respondent neglected his child by abandonment was not supported by its findings, which established that respondent paid child support, attended hearings, emailed his daughter's caregiver, and complied with his case plan requirements. Although the court also concluded that grounds for neglect existed based on a prior adjudication of neglect and a likelihood of future neglect, the court's findings did not address the possibility of a repetition of neglect, despite record evidence from which sufficient findings could be made. The matter was remanded for entry of a new order addressing future neglect and best interests. **In re Z.J.W., 760.**

TERMINATION OF PARENTAL RIGHTS—Continued

Grounds for termination—neglect—sufficiency of findings—The trial court's findings were insufficient to support its conclusion that grounds existed to terminate respondent-father's parental rights to his child based on neglect where the sole finding—stating that the child was previously neglected due to lack of care when respondent experienced a medical issue—was not supported by the evidence. Further, the findings failed to address whether the child would be neglected in the future if returned to respondent's care. **In re C.L.H., 614.**

Grounds for termination—neglect—sufficiency of findings—support for legal conclusion—likelihood of future neglect—The trial court properly terminated a mother's rights in her five children on grounds of neglect where clear, cogent, and convincing evidence supported the court's findings of fact and where those findings supported its conclusion that a repetition of neglect was likely if the children were returned to the mother's care. Specifically, the mother failed to secure appropriate housing to accommodate the children's special needs, reacted inappropriately to stressful situations, downplayed her children's health and behavioral problems (including her eldest son's inappropriate sexual behavior), missed several scheduled visits with the children, and was incapable of managing the children's complicated schedules and taking them to school or medical appointments. **In re J.J.H., 161.**

Grounds for termination—willful abandonment—sufficiency of findings—In a termination of parental rights proceeding, the trial court's conclusion that respondent-father willfully abandoned his daughter was reversed where the unchallenged findings established that respondent made child support payments, sent emails to the relative caring for his daughter, and completed certain aspects of his case plan during the determinative six-month period prior to the filing of the termination petition. Respondent's failure to visit with his daughter was not voluntary where a prior order precluded visitation absent a recommendation from the child's therapist, which had not been given. **In re Z.J.W., 760.**

Grounds for termination—willful abandonment—willful intent—parent with severe mental health issues—The trial court improperly terminated a mother's parental rights on grounds of willful abandonment where the court failed to enter any factual findings or conclusions of law stating that the mother willfully abandoned her child, and where the record lacked clear, cogent, and convincing evidence of willful intent to forgo all parental duties and claims to the child. Rather, the evidence showed that the mother intended to parent her child but lacked full capacity to do so because of multiple severe mental illnesses. **In re A.L.L., 99.**

Grounds for termination—willful failure to make reasonable progress—lack of participation in case plan—The trial court properly terminated respondent-mother's parental rights on the basis of willful failure to make reasonable progress where the findings established that respondent, whose pregnancy at thirteen resulted from a crime perpetrated against her and who was placed in foster care with her baby until aging out when she reached the age of majority, discontinued participation in and failed to comply with multiple aspects of her case plan despite having the ability to comply. The case plan had a sufficient nexus to the reason the child was removed from respondent's care because it included activities designed to foster stability and the acquisition of sufficient parenting skills. **In re Q.P.W., 738.**

Grounds for termination—willful failure to pay child support—sufficiency of findings—In a termination of parental rights case, the trial court's findings were insufficient to support termination on the grounds of willful failure to pay child

TERMINATION OF PARENTAL RIGHTS—Continued

support where they failed to address whether an enforceable child support order was in place within one year prior to the termination petition being filed. The termination order was vacated and remanded for the trial court to exercise its discretion regarding the need for new evidence and to enter an order with findings and conclusions regarding the existence of a valid support order. **In re C.L.H., 614.**

Guardian ad litem participation in hearing—appointed counsel's duties— N.C.G.S. § 7B-1101.1(d)—Respondent mother received a fundamentally fair hearing in a termination of parental rights case even though her guardian ad litem cross-examined witnesses and made arguments to the court (which was at the express direction of, or in apparent coordination with, respondent's appointed counsel). There was no violation of N.C.G.S. § 7B-1101.1(d) where counsel's actions representing respondent throughout the proceeding did not demonstrate an abdication of his responsibilities and where the clear statutory language required only that the parent's counsel and guardian ad litem not be the same person and did not constitute a prohibition against the guardian ad litem from assisting counsel as he did here. **In re J.E.B., 629.**

Guardian ad litem—evidence—admissibility of report—During the disposition phase of a termination of parental rights proceeding, the trial court did not abuse its discretion by allowing the admission of the guardian ad litem's report because trial courts are allowed to consider any evidence that they deem to be relevant, reliable, and necessary without making specific findings as to admissibility during this stage of the proceeding. **In re R.D., 244.**

Jurisdiction—requirements—dependency proceeding in another county— Where a child's permanent legal guardians filed a termination of parental rights petition in the district court in the same county where the child resided with them, that district court had subject matter jurisdiction (pursuant to N.C.G.S. § 7B-1101) to enter an order terminating the mother's parental rights in the child, regardless of the fact that a district court in another county previously had entered an order establishing a permanent plan of guardianship in the child's dependency proceeding. **In re A.L.L., 99.**

No-merit brief—neglect—lifetime incarceration of father—In a termination of parental rights case where respondent-father was incarcerated for life without the possibility of parole for murder and for shooting a child, counsel for respondent filed a no-merit brief pursuant to Appellate Rule 3.1(e) which conceded that counsel could find no meritorious argument to challenge termination on the ground of neglect or the conclusion that termination was in the best interests of the child. After an independent review of the entire record, the Supreme Court affirmed the trial court's termination of respondent's parental rights. **In re S.F.D., 643.**

Parental right to counsel—withdrawal of counsel—pro se representation—inquiry by trial court—The trial court erred by allowing a mother's retained counsel to withdraw from representation in a termination of parental rights case without first conducting an inquiry into the circumstances surrounding counsel's motion to withdraw—for example, whether the mother had been served the withdrawal motion, whether counsel had informed the mother of his intent to withdraw, why the mother had asked him to withdraw, and whether the mother understood the implications of counsel withdrawing. The trial court then further erred by allowing the mother to represent herself at the termination hearing without first conducting